

The “Convention on the Law of the Non-navigational Uses of International Watercourses” (1997) and the Negotiations over Water Resources in Occupied Territories of Palestine.¹

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The conflict over water in the Middle-East has become an increasingly important issue on the international agenda since the middle of the last century. The shortage is increasingly acute because of the degradation of water resources, population growth, and because of a distribution based on power and not on the needs of the population. In the 1980s there were many warnings of war over water in the region. Now we know that they were wrong, although this does not make the shortage of fresh water any less important, since it has already become a question of survival in the Occupied Territories of Palestine.

The Middle East is one of the clearest examples of the conditioning factors that may lead to conflict over water resources. The climate is extremely harsh, with very low and variable levels of rainfall, and the sources are to be found in specific areas of the Lebanon, Syria and the West Bank, that supply Israel, Jordan and the Palestinian Occupied Territories with water.² However, the control of water resources and their consequent distribution and consumption, has been defined not so much in relation to the position of each actor in the basin, but rather by the structure of power in the system,³ with a clear predominance of Israel in the basin of the river Jordan and in the Palestinian aquifers.

In order to deal with the problems of shortage and of the potential conflict derived from a distribution based on power, an efficient management of water resources is required that is negotiated between all of the parties involved. The principles established by the Convention approved by the General Assembly of the United Nations in 1997⁴ will be discussed, since

¹ The article is based on the PhD thesis “Guerra y agua: objetivos y actitudes de los actores en el conflicto por Palestina” (“War and water: objectives and attitudes of actors in the conflict over Palestine”), by the author under the direction of Dr. Esther Barbé Izuel. The thesis in its entirety can be found at: <<http://www.tdx.cesca.es/TDCat-0221103-210631/#documents>>

² The term ‘Palestinian Occupied Territories’ will be used to refer to the Gaza Strip and the West Bank, with the latter including East Jerusalem. For a description of the river Jordan basin and the Palestinian aquifers, the documents of EXACT at <<http://exact-me.org/overview/toc.htm>> are recommended.

³ In this respect, it is not uncommon for certain authors to perceive the upper part of a basin as a position of control over resources (see for example Grasa, "Los conflictos 'verdes': su dimensión interna e internacional", 8 *Ecología Política* (1994) 32; Kukk and Deese, "At the Water's Edge. Regional Conflict and Cooperation over Fresh Water", 1 *UCLA Journal of International Law and Foreign Affairs. A Jurisprudential Assesment* (1996) 34). However, contradicting such authors, we see that the control of water is more closely related with the structure of power in each basin than with the geographic position: for example, the water of the Nile is controlled by Egypt, situated in the lower part of the basin and with no sources; a further example can be seen in the case of Israel that has controlled the water of the Jordan since 1948, although its dominant position in the upper basin was not achieved until 1967.

⁴ “Convention of Non-navigational Uses of International Water Courses” (GA Res. 51/229, 21st May 1997).

international law should be of great help both to deal with the conflict and to improve the efficiency of water management. The analysis of the agreement of 1995 between Israel and the PLO does not leave room for a great deal of optimism, since it has not been guided by the 1997 Convention, but rather by the balance of power. Such agreements have not sought a greater degree of efficiency in the management of water, nor to offer a response to the needs of the population, but rather formalise *de iure* a series of *fait accomplis* achieved by military force. Thus, a status quo favourable to Israel, the hegemonic party, has been established, which will only make the shortage and the conflict worse. However, this does not make the principles of the 1997 Convention less useful in the fight against shortage and to help lay the foundations for peace in the region, but rather turns them into an instrument to guide future negotiations.

The aim of successive Tel Aviv governments in the negotiations over water resources was to maintain control over water won in the wars of 1948 and 1967. The unequal relationship between the parties allowed the Israel governments to impose a series of *fait accomplis* and to maintain the favourable status quo.

The Palestinian approach to the conversations was based on a position of weakness and on the need to increase the supply of water for the population. However, in the case of the PLO, the objectives with respect to water remained the same. For this reason, the inferiority in the face of the power of the Israelis became apparent in the same way as in the political negotiations, postponing the attainment of such objectives until a solution had been reached on the permanent status of Palestine. Thus, the Palestinians were forced to renounce what was considered to be just and the rights that had been defended, in the name of pragmatism and in return for minor concessions. In the case of water, this was reflected in the renunciation of rights over water until agreement over the permanent status of Palestine was settled; in the acceptance that Israeli circumscription and that of the colonies would not be affected; and in the maintenance of Israeli control over Palestinian management of water resources even in those areas from which the Israeli army should have retreated according to the terms of the agreement of 1995.

The weakness of Palestinians is also reflected in the fact that the agreements reached do not follow the criteria laid down by the International Law Association in the Helsinki Rules or by the International Law Commission in the convention passed by the General Assembly in 1997. When Palestinians and Israelis negotiate the permanent status for water resources, then the extent of Israeli superiority will be able to be measured by the extent to which the principles of International Law have influence over the negotiating process. If such principles are taken into account, the outcome will be more acceptable for all and the perception that justice has been done greater.

The Law of the Non-navigational Uses of International Watercourses

The search for an efficient way of managing water and for a negotiated settlement to the problematic of the water of the river Jordan and of the aquifers of the West Bank and Gaza, inevitably depends on the creation of the necessary legal structures. The legal principles concerning the uses of water are well developed theoretically, but their application at the international level is still very precarious. Even today, the only general convention adopted on the subject is that of Geneva, in 1923, which refers to the harnessing of hydraulic power of interest to more than one state, and even then it has not been applied in practice, since only two of the states that have ratified the convention share watercourses.⁵ The United Nations General

⁵ M. Díez de Velasco, *Instituciones de Derecho Internacional Público*, Madrid, Tecnos (2003) 516.

Assembly adopted the “Convention on the Law of the Non-navigational Uses of International Watercourses”, after 27 years of work by the International Law Commission, which reflects the difficulties that the project encountered. However, the convention has not come into force, since according to article 36/1, it will only do so “on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary General of the United Nations”.⁶ In April 2006 only sixteen states had signed the Convention, and five more had acceded to it. Of these, only fourteen have deposited the instruments of ratification, acceptance, accession or approval.⁷

The legal regulation of international watercourses has taken place through bilateral or multilateral agreements specific to each case. The variety of possible uses and the lack of general rules led academic institutes and international governmental organisations to formulate general principles on the subject. The most developed contributions from a doctrinal point of view are the Helsinki Rules passed in 1966 by the International Law Association,⁸ that in 1986 in Seoul were widened to include the regulation of subterranean waters,⁹ and the convention passed by the UN General Assembly in 1997, although they fail to coincide on certain controversial aspects.¹⁰

⁶ Despite not entering into force, the convention is still an important reference in international public law. Rapporteur Stephen McCaffrey commented: "The 1997 United Nations convention on International Watercourses helps to clarify the basic, minimum standards governing the non-navigational uses of internationally shared fresh water resources. For the most part, it should be viewed not as an instrument that seeks to push the law beyond its present contours, but as one that reflects a general consensus as to the principles that are universally applicable in the field. It provides a starting point for the negotiation of agreements relating to specific watercourses, and, in the absence of any applicable agreement, sets basic parameters governing the conduct of states riparian to those watercourses. Even where there is an applicable agreement, the Convention may play an important role in the interpretation of that agreement, as in the Gabcíkovo-Nagymaros case. For these reasons, the success of the Convention does not seem to be dependent upon whether it enters into force. Its influence is more likely to derive from its status as the most authoritative statement of general principles and rules governing the non-navigational uses of international watercourses." (McCaffrey, "The contribution of the UN Convention on the law of the non-navigational uses of international watercourses", 1(3/4) *Int. J. Global Environmental Issues* (2001) 261.

⁷ Of the states of the Jordan river basin, Jordan signed the Convention on 17th April 1998 and ratified it on 22nd of June 1999; the Lebanon acceded on 25th of May, 1999; and Syria signed it on 11th of August 1997, ratifying it on 2nd April 1998, although with the usual reservations over whether ratification did not mean the recognition of Israel and the opening up of relations.

⁸ International Law Association, *The Helsinki Rules on the Uses of the Waters of International Rivers*, (Report of the 52d Conference, Helsinki 1966).

⁹ International Law Association, *The Seoul Rules on the Law of International Groundwater Resources* (Report of the sixty-second conference, Seoul, 1986). In general, it is accepted that the rules and principles established for surface watercourses can also be applied to groundwater resources (Barberis, "The Development of the International Law of Transboundary Groundwater", 31(1) *Natural Resources Journal*. (1991) 167). Dellapenna states that "Indeed, properly speaking, groundwater and surface water are not merely similar, they are in fact the same thing; groundwater and surface water are simply water moving in differing stages of the hydrologic cycle, and what is today one will tomorrow be the other" (Dellapenna, "The customary

The 1997 Convention and the Oslo B Agreement between Israel and the PLO

The first principle to be established, and the first point of controversy, refers to the shared property of co-riparian states. At the present time, the principle of absolute sovereignty defended by the Harmon Doctrine¹¹ seems to have been overtaken by other established principles such as the fair and reasonable utilization of water and the obligation not to harm the rights of the other co-riparian states. Related to this point is the debate concerning how far limited sovereignty extends, or rather, over the definition of what is understood by international river and by international watercourse.

There has been a clear evolution, both in doctrine and in conventional law, towards an increasingly global perspective of the geographic framework within which agreements are to be reached.¹² The most advanced perspectives from the fields of both law and the management of water resources defend a more global and integrated concept of river basin, that includes not only the watercourse, but also the entire hydrological cycle,¹³ within the global framework of the environment.¹⁴ Such opinions come up against the views of many states that, always reticent to see their sovereignty limited, fear that the concept of international basin may be come to include wide areas of their territory. In this respect, the position within the basin is also of importance. While tributary states higher up will seek a limited definition of the basin, and consequently an agreement of only limited reach, states located downstream will seek the greatest degree of protection possible with wide-ranging definitions of the basin and wide-reaching treaties.

The International Law Commission, more receptive to the pressure of states, resorted to the concept of "system":

"Article 2

(...) "Watercourse" means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;

international law of transboundary fresh waters", 1(3/4) *Int. J. Global Environmental Issues* (2001) 274).

¹⁰ An extensive commentary concerning the principles established by the project presented by the Commission of International Law to the UN General Assembly can be found in: A. Pigrau Solé, *Generalidad y particularismo en el derecho de los usos de los cursos de agua internacionales. En torno al proyecto de artículos de la Comisión de Derecho Internacional*, Barcelona, José María Bosch Editor S.A. (1994).

¹¹ Attorney General Harmon of the United States, responding to a Mexican protest over a diversion of the Rio Grande at the end of the 19th century, extended the principle of absolute sovereignty to include water courses. In subsequent treaties, the United States renounced the Harmon Doctrine.

¹² An analysis of the evolution of the concept of basin and its importance can be found in L. A. Teclaff, *The River Basin in History and Law*, The Hague, Martinus Nijhoff (1967).

¹³ Teclaff, "The International Law of the Hydrologic Cycle. Introduction", 31(1) *Natural Resources Journal*, (1991-a) 8. Teclaff, "Fiat or Custom: The Checkered Development of International Water Law", 31(1) *Natural Resources Journal*, (1991-b) 45, 72-73.

¹⁴ Reilly, "Generational Change in Environmental Law", 31(1) *Natural Resources Journal*, (1991) 5.

"International watercourse" means a watercourse, parts of which are situated in different States;

"Watercourse State" means a State Party to the present Convention in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organization, in the territory of one or more of whose Member States part of an international watercourse is situated (...).¹⁵

As can be seen, the International Law Commission limits its definition to only include a purely hydrographic system, although it does include the entire river basin.

The negotiation over water resources in the agreements of Oslo A (1993) and Oslo B (1995) between Israel and the PLO did not make substantial changes to the situation imposed by the military occupation and the colonisation of the Occupied Territories, and maintained Israeli control over the management and distribution of water. The 1995 agreement goes deepest into the question of water, although within a provisional framework awaiting the permanent status negotiations.¹⁶ The first thing to be highlighted is that it is an unequal agreement that only refers to the part of the basin of aquifers found within the Green Line, and any transfer of authority, even within such a limited framework, is restricted to the uses that only involve the Palestinians.¹⁷

The Israeli-Palestinian agreement of 1995 deals with water resources and sewage of the West Bank (excluding East Jerusalem) and the Gaza Strip. The first hurdle on the road to a global and integrated management of the water resources is precisely the reach of the agreement, since it does not go beyond the resources located within the Green Line, thus dividing the basins of the aquifers. Consequently, all the co-operation mechanisms that are established are deformed, in that they become instruments of Israeli control over the management of Palestinian resources. At the same time, transfers to the Palestinians of authority in the management of resources do not apply to the whole of the basin that is within the Green Line, but only to the resources and sewage related to the Palestinians (Art. 40.4). The Israelis linked the negotiations over water to the issue of the security of the settlements and the military facilities in the West Bank and Gaza, and as such the management of the water cycle for both remained in the hands of the Mekorot company.¹⁸

The convention passed by the United Nations General Assembly in 1997, also recognises the right of all states affected by a general or partial agreement in a river basin to participate in the negotiations and be party to the agreement (Article 4 "Parties to Watercourse Agreements").

¹⁵ "United Nations Convention on the Law of the Non-navigational Uses of International Watercourses" (GA Res. 51/229, 21st May 1997).

¹⁶ "The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip" (Washington D.C., 28 of September, 1995), Annex III (Protocol Concerning Civil Affairs), Appendix 1 (Powers and Responsibilities for Civil Affairs), Article 40 (Water and Sewage), Schedule 8 (Joint Water Committee), Schedule 9 (Supervision and Enforcement Mechanism), Schedule 10 (Data Concerning Aquifers), Schedule 11 (Gaza Strip).

¹⁷ "The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip" (Washington D.C., 28 of September, 1995), Annex III. Art. 40.3. / Art. 40.4. / Schedule 11 (The Gaza Strip).

¹⁸ Shmueli, "Approaches to Water Dispute Resolution: Applications to Arab-Israeli Negotiations", 4(2) *International Negotiation* (1999) 319.

This may have important consequences for the Jordan river basin in the future. Currently, agreements only exist between Israel and Jordan in the case of the Yarmuck¹⁹ and the lower Jordan, and between Syria and Jordan in the case of the Yarmuck. What is clear is that both Syria and the Palestine National Authority, when it finally becomes a State, should also intervene in the latter agreement, since the decisions taken directly affect both parties. In a small basin, like that of the Jordan, it is difficult to reach bilateral agreements that do not affect third parties, and as such the most reasonable and effective course of action would be a process of global negotiation. At present, this is not feasible due to the fact that some of the parties are involved in a political conflict that also comes to be expressed in territorial demands directly related with the hydrographic system. However, in the future, the very same bilateral agreements will force a process of global negotiation, since as soon as all parties are able to sit together at the same table, the current bilateral agreements will have no sense and will be challenged.

Other principles established by the 1997 Convention include: “Equitable and Reasonable Utilization and Participation” (Art.5); “Obligation Not to Cause Significant Harm (...) to other Watercourse States” (Art.7); “General Obligation to Co-operate (...) on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse” (Art.8); “Regular Exchange of Data and Information” (Art. 9); “Information Concerning Planned Measures” (Art.11).

The principle of reasonable and equitable utilisation is the one that has been most developed, since it is the basis for negotiations on the utilisation of resources. Both the Helsinki Rules and the convention of the Assembly General establish the factors that must be taken into account in order to determine what is to be considered “equitable and reasonable”. The 1997 Convention does so in its article 6:

Article 6 (Factors Relevant to Equitable and Reasonable Utilization)

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of Article 5 requires taking into account all relevant factors and circumstances, including:

Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

The social and economic needs of the watercourse States concerned;

The population dependent on the watercourse in each watercourse State;

The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;

Existing and potential uses of the watercourse;

Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

The availability of alternatives, of comparable value, to a particular planned or existing use.

Some of these factors are especially controversial in the case of the conflict over the Jordan and the aquifers of the West Bank and Gaza. The ones that have provoked most disagreement concern past and present utilisation. The Israelis are firm in their defence of historic rights, in which a distinction must be made between the water that came to be used after the wars of 1948 and 1967, and the water consumed by the Jewish communities before these dates.

¹⁹ One of the main tributaries of the Jordan.

It seems clear that historic rights over resources acquired *manu militari* should not be recognised. The Arab party is particularly sensitive on this issue, since the acceptance of historic rights would mean that the Arabs would have to renounce their claims over both water and land.

More controversial is the historic right claimed by Israel over the water of the western aquifer of the West Bank, with the Israelis claiming that they have been exploiting it for the last 60 years.²⁰ However, the Palestinians argue that their consumption of the water has been frozen by the Israeli occupation authority since 1967; that, at the beginning of the 1970's, when Israel began the large-scale exploitation of the aquifer it did not notify Jordan; and that historic rights do not become legitimate unless the co-riparian states explicitly agree.²¹

The discussion over historic rights in the convention of 1997 centres on two points: in Article 6.1) "Existing and potential uses of the watercourse"; and in Article 7 (Obligation Not to Cause Significant Harm) 1. "Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States". It should be pointed out that mention of the rights of historic utilisation as such was avoided, which meant that this aspect was reduced to one of the "Factors Relevant to Equitable and Reasonable Utilization", and compensated for by the potential utilisation and the general principle of *sic utere tuo ut alienum non laedas*. The controversy, from this perspective, is between the possible equitable utilisation and the prohibition on causing significant harm,²² based on the understanding that a change in the distribution or utilisation may cause significant harm to the party that had previous access to its utilisation.

In the words of Dellapenna,

Priority of use, while undoubtedly relevant to an equitable allocation of water among national communities, has never been treated as dispositive in international law. This is implicit in all texts of the ILC Draft Articles, and explicit in the commentary to those articles as were adopted on the second reading. (...) To treat priority in time as controlling, or even dominant, would replace the balancing of need and interest characteristic of equitable utilisation with an absolute rule derived from history rather than from geography. (...) As Eyal Benvenisti, an Israeli expert on international water law, has noted, to give absolute priority to uses existing at the start of the negotiations destroys any incentive for the 'harmed state' – the state with the 'existing' uses – to negotiate with a state that seeks to initiate new uses.²³

The controversy over the consideration of harm caused by the utilisation of water to the other watercourse States could also be found in the conflict concerning the exploitation of water

²⁰ Shuval, "Le problème du partage de l'eau entre Israël et les Palestiniens. La recherche d'une solution équitable", 138 *Monde arabe - Maghreb Machrek*, (1992) 31. H. I. Shuval, "Towards resolving conflicts over water between Israel and its neighbours: the Israeli-Palestinian shared use of the Mountain Aquifer as a case study", in J. A. Allan & J. H. O. Court (eds.), *Water in the Jordan catchment countries: a critical evaluation of the role of water and environment in evolving relations in the region*, London, School of Oriental and African Studies (1995) 75.

²¹ Elmusa, "Dividing the Common Palestinian- Israeli Waters: an International Water Law Approach", XXII(3) *Journal of Palestine Studies* (1993) 67.

²² Pigrau, *supra* note 10, discusses the legal debate over this question.

²³ Dellapenna, *supra* note 9, at 280-281.

from the Jordan outside the basin through the Israeli National Water Carrier,²⁴ although on that occasion the no-harm principle went against Israeli interests.²⁵ The argument defended by Israel was that they remained within the quotas (now exceeded) of the Johnston negotiations.²⁶ Even so, water taken from the basin is water lost to those States lower down the watercourse, and as such harm is clearly caused, and more so if there is no explicit acceptance of the taking of water. Currently, the Arab States seem to have accepted it as inevitable, and Jordan, the most affected along with the West Bank, has accepted it explicitly when it signed the 1994 agreements. However, this does not mean that the Palestinians are unable to use it as an argument to support their claims over the water of the river Jordan.

The Palestinians, for their part, insist on natural factors as the contribution to the resources of the aquifers, and as such their quota would have to increase to at least 80% of the shared aquifers of the West Bank.²⁷ However, this factor is not one of the most important of the 1997 Convention, although it has been one of the most influential in the Johnston negotiations, and in the treaty between Israel and Jordan. In the negotiation in the 1950s, the Arabs based most of their arguments on the physical characteristics of the basin, such as the contribution to the volume of water, the surface of the basin in each State, and the area to be irrigated within the basin, in addition to the need to cultivate the Jordan Valley in order to provide work and food for the Palestinian refugees. On the contrary, since the first Zionist projects, Israel has based its arguments on the needs of the State for the future and for immigrants. Once the higher part of the basin was brought under its control, Israel changed its arguments, with both hydrographic arguments and those based upon historic utilisation coming to the fore. The former became clear when the agreement with Jordan was limited to the lower basin of the Jordan, while the latter

²⁴ The Israeli National Water Carrier takes water from the river Jordan and carries it to the Mediterranean coastal plain and the Negev desert, outside of the river basin, and as such the water cannot be used by the lower co-riparians, Jordan and the West Bank. The construction of the National Water Carrier was one of the causes of the tension that led to the war of June 1967.

²⁵ The transfer of water resources outside of the basin is not specifically considered in the convention, and as such any approach to the problem must be based on the principles of no harm to the other co-riparian states or the equitable use (A. Khassawneh, "The International Law and Middle East Waters", in J. A. Allan & C. Mallat (eds.), *Water in the Middle East. Legal, Political and Commercial Implication*, London & New York, I.B.Tauris Publishers (1995) 26). According to Khassawneh, advisor to the government of Jordan, and as such of a riparian State down-river in the Jordan basin, it would have been preferable to deal with the issue in the articles of the convention.

²⁶ In the 1950s the United States' government was the driving force behind a process of negotiations over water resources of the Jordan river basin. Firstly, there was a desire to meet the needs of the refugees in the Jordan valley and of Jewish immigrants in Israel. Secondly, there was a desire to reduce the possibility that the distribution of the waters of the river Jordan might lead to conflict. The third motivating factor was the attempt to use the functionalist approach to the political conflict and to build peace through technical co-operation in the distribution and management of water resources. The special envoy, Eric Johnston, managed to get Arabs and Israelis to reach a technical agreement, but never a political one, since the signing of the treaty involved the recognition of the state of Israel and accepting the expulsion of the Palestinian population. Negotiations failed, and showed that the functionalist approach to the conflict might be useful to lay the foundations of peace, but not to resolve the political conflict.

²⁷ Elmusa, *supra* note 21, at 68.

were seen in the Israeli demands for consumption over the waters of both the lower Jordan and the underground waters of the Araba valley. Thus it becomes apparent that natural factors directly depend on the definition of the basin that is adopted and on the parts of the system that enter into the negotiations. On the other hand, even if we maintain a purely legal perspective, the Jordan river basin is also a good example of why natural factors should not dominate negotiations, since the principle contributors to the volume of water of the river are the Lebanon and Syria (according to the lines drawn by the armistice of 1949), the two States with the widest number of alternatives to the water of the Jordan.²⁸

The remaining factors are also used by all parties to negotiate the quotas of water that they each demand. In this respect, the economic and social needs of the States is especially important, since the difference in development and consumption between the Israeli and Palestinian populations means that there is a grave imbalance in the needs of the two. Socio-economic factors and those referring to alternative uses are especially favourable to Palestinians and Jordan.

For Israel it is much easier to renounce the water used for irrigation, due to the fact that agriculture is relatively less important for employment and for the economy in general, which means that large amounts of water could be made available for other uses. In addition, the Israeli capacity to access alternative supplies is greater than the other co-riparian states.

However, access to both artificial and hydrographic resources does not mean that there is no need for a equitable distribution of water resources between the different parts. The position of Israel in the current negotiations, once a favourable status quo had been achieved, is based on the rejection of a redistribution of existing supplies and on centring negotiations on increasing the production of water. This implies that the others suffer a handicap from the very beginning, and as such it should not substitute the principles established by the ILC.

In a situation of acute shortage, as is the case of the region in question here, socio-economic elements are directly related to demographic factors. The dependence of the population on the watercourse will continue to grow until it soon exceeds the watercourse's capacity to cover the basic needs for survival. In this respect, the principle included in the Helsinki Rules, that establishes that there are no preferences among the uses of resources, will be difficult to apply (art. VI). The International Law Commission qualified the principle with a second paragraph in article 10, that deals with "Relationship Between Different Kinds of Uses: 1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses. 2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs". A negotiated solution to the problem of shortage in the region should establish a hierarchy of uses, since as the demand for urban consumption grows according to minimum vital needs, the other uses, basically irrigation, will have to take a back seat.

In the current and any future situation, irrigation has lost importance in the face of a shortage that already affects domestic, urban and industrial consumption. McCaffrey also comments on this point: "The expression 'vital human needs' was discussed at some length in the UN negotiations. The final text maintains the ILC's language but a 'statement of understanding' accompanying the text of the Convention indicates that "[i]n determining 'vital human needs',

²⁸ Dellapenna, *supra* note 9, at 287.

special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation”.²⁹

Currently, in the basins of the river Jordan and of the aquifers of the historic region of Palestine, it is difficult to think of agricultural production for survival as being a priority over minimum needs of urban consumption. It seems obvious that importing foodstuffs can supplement agricultural production based on irrigation. The Israeli representative seemed to agree on this point, since in the declaration justifying the Israeli vote, she highlighted that in terms of “vital human needs”, the supply of drinking water should be the maximum priority.³⁰ However, in the short to medium term, the Palestinians will need a great deal of water for irrigation, for economic reasons, to create employment, and to ensure the viability of the future Palestinian State.³¹

The discussions over the water quotas in the Israeli-Palestinian Agreement of 1995, took place on the basis of the criteria of Tel Aviv and not on the basis of the needs and rights of the two parties involved, or the principles of the International Law Association or the International Law Commission.

The needs of the Palestinians that required an immediate response were measured in terms of domestic consumption and not irrigation, something entirely predictable, given that negotiations over water for irrigation would have involved the question of the control of land and its exploitation, an issue that the Israelis wanted to avoid at this stage of the negotiation. In fact, up until the present day, withdrawals of the Israeli army have been negotiated, as has the issue of political authority over the population and liberated land, while neither the withdrawal of colonists, nor the handing over of land either expropriated or confiscated by the Israeli army, colonists or authorities have been discussed.

Even in the case of domestic and urban demand, it was the Israeli criterion that was followed, a criterion that can be considered tremendously restrictive and based on consumption levels during the occupation and not on the unsatisfied latent demand that would come to light if the restrictions were lifted. Elmusa has clearly demonstrated that there is an unsatisfied latent demand that does not depend on household income but rather on the restrictions imposed by the occupation and by the pricing policy of Mekorot. According to his calculations, at the time of the negotiations surrounding the Oslo B Agreement in 1995, the figure for latent demand doubled that of the manifest demand.³² The water for irrigation purposes suffers even greater restrictions than that for urban consumption. In this case, we must also take into account the confiscations, prohibitions and limitations, both with respect to water resources and to land, and as such calculating the latent demand for water for irrigation is akin to calculating the level of Palestinian agricultural underdevelopment as a result of the occupation.

According to the 1995 agreement, permits for new infrastructure are granted by the Joint Water Committee, in which Israel has the power of veto. Israeli policy has consisted of delaying

²⁹ McCaffrey, *supra* note 6, at 255.

³⁰ United Nations Assembly. Press Release (GA/9248).

³¹ On the question of agriculture and the future of the Palestinian State, see Izquierdo Brichs, “Agricultura y escasez de agua en Israel y los Territorios Ocupados de Palestina” [Agriculture and water scarcity in Israel and the Palestinian Occupied Territories], 1 *Ulisses Cibernètic: Coneixement i integració* (2003) <<http://www.humanrights-observatory.net/revista1/agricultura.pdf>>

³² S.S. Elmusa, *Water Conflict. Economics, Politics, Law and Palestinian-Israeli Water Resources*, Washington D.C., Institute for Palestine Studies (1997) 139-149.

and hindering the drilling of new wells laid down in the agreements.³³ In any case, this might be considered to be a minor problem compared with the current practices of destroying water facilities and placing restrictions on and even shutting off supplies as a form of collective punishment,³⁴ despite a joint Israeli-Palestinian declaration prohibiting such practices.³⁵ In addition, the construction of the wall of separation has meant further changes in favour of Israel, based on a series of *fait accomplis*, that impede Palestinian access to wells that produce almost 4 million cubic metres, placing the main areas of recharge of the western aquifer under direct Israeli control.³⁶

The principles laid down by the International Law Commission, despite the fact that the convention has not come into effect could be considered to be soft law and should be an important instrument to face up to the challenge of water resources management and of their shortage in the shared river basins. By considering a system as that which includes both surface and underground fresh water, even without using the extended concept of geographic basin, the door is opened to a global and integrated management of resources. Other principles, such as the obligation to co-operate in order to achieve an optimum utilisation of resources, and to sharing data and information, also point in the same direction.

The agreements over the management of resources gave Israel the power of veto, thus allowing it to ensure that the status quo was maintained. In order to carry out the tasks established by the agreement, the two parties created the Joint Water Committee. The list of the committee's functions led one to think of a joint management of resources, and, consequently, of progress towards greater efficiency.³⁷ However, the fact that the remit of the committee is restricted to the West Bank allow one to think that the real role of the committee is not to improve management of resources, but rather to control the water and management of aquifers in the Palestinian zone. As such functions have become specified, it has become clear that they mainly refer to

³³ W. Sabbah, M. Abu Amrieh, & F. Al-Juneidi, *Potentials for Sustainable and Equitable development of Irrigated Agriculture in the West Bank*, Bethlehem, ARIJ (2000) <www.arij.org/pub/water/>.

³⁴ LAW - The Palestinian Society for the Protection of Human Rights and the Environment, "Israeli forces commit massacre in Jenin refugee camp" (information of 8th de April, 2002 at [Lawlist] law@lawsociety.org); United Nations - ECOSOC (20 June 2001) "Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the occupied Palestinian territory, including Jerusalem, and of the Arab population in the occupied Syrian Golan. Note by the Secretary-General" (GA/56/90-E/2001/17). The difficulties of Palestinians in terms of the supply of water and the construction of new infrastructures agreed in 1995 pale into insignificance when compared to the policy of destroying water facilities, and the use of restrictions and the shutting off of the water supply as a collective punishment during the *Intifada* of al-Aqsa. The impact of the occupation on all spheres of life of Palestinian society can be followed in the reports of the United Nations <<http://www.un.org/Depts/dpa/qpal/>>

³⁵ Israel - Palestinian Joint Water Committee, "Joint Declaration for Keeping the Water Infrastructure out of the Cycle of Violence" (31st of January de 2001).

³⁶ On the wall, see: Palestinian Environmental NGOs Network (PENGON), *Apartheid Wall Report #1*, Jerusalem (November 2002) <<http://www.pengon.org/wall/wall.html>>.

³⁷ "The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip" (Washington D.C., 28 of September, 1995), Annex III. Art. 40.12.

controlling any changes in the status quo favourable to Israel.³⁸ The parity in the composition of the committee and decision-making by consensus effectively gives the Israeli's the power of veto of Palestinian management.³⁹ The agreement, in addition, created a specific body to ensure that its provisions are implemented, thus allowing the status quo to be maintained.⁴⁰ The Joint Supervision and Enforcement Teams (JSET), among other functions, were to ensure that the extraction of water destined for the Palestinians did not exceed the agreed quotas. The composition of such teams, like the JWC, is based on the criterion of parity, and to carry out their task they have freedom of movement and access to all facilities that serve the Palestinians.

Consequently, the paradox arises whereby the JSET, the product of the agreement between the two parties, is doing the job of control and restriction that Israelis had to do before. As in other political and security aspects of the Oslo A and Oslo B agreements, Palestine autonomy means that the maintenance of a situation imposed by occupation and unaltered by the agreements becomes either the full the responsibility of the Palestine National Authority, or a responsibility shared with Israeli organisations.

Conclusion: The Need for Future Negotiations to be Based on the Principles of the 1997 Convention

The impact of the principles established by the Helsinki Rules and by the 1997 Convention on the agreement between Israel and the PLO over water management has been practically nil. The ILA definition of a geographic basin has not been respected, nor has the more restricted definition of a system put forward by the ILC, since the basins are divided and the agreements are only partial. Nor have the principles of equitable and reasonable use and participation been taken into account, something that can also be said of the criteria required to define such use. In the negotiations between Israelis and Palestinians, the main factor has been the maintenance of the status quo and the relation of power between the different parts; in other words, Israeli high-handedness has allowed them to impose *fait accomplis*, with no attempt made to take into account the needs of the other actors in the basins. In the light of the agreements, it might be said that Israel has applied the Harmon doctrine to the issue of the resources within its territory, while at the same time they have extended their sovereignty over the resources that the Palestinians also claim in the West Bank (including East Jerusalem).

The efficient management of water resources is still far away. The shortage of water will be increasingly acute in the future and the policy imposed by Israel does not put in place sufficient guarantees for the problem to be dealt with. What is more, the current agreements establish models of management that are totally counterproductive, which is reflected in the greater difficulties faced by the weaker parties, and even questions the very survival of the Palestinian population. Thus, it is more important than ever before that future negotiations are based on the principles established by the 1997 Convention, since they alone can lead to an efficient management of resources and the solution of the conflict.

³⁸ "The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip" (Washington D.C., 28 of September, 1995), Annex III. Schedule 8 (Joint Water Committee).

³⁹ "The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip" (Washington D.C., 28 of September, 1995), Annex III. Art. 40.13 / Art. 40.14.

⁴⁰ "The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip" (Washington D.C., 28 of September, 1995), Annex III. Schedule 9 (Supervision and Enforcement Mechanism).