THE FIRST PLAGUE: THE DENIAL OF WATER AS A FORCIBLE TRANSFER UNDER INTERNATIONAL HUMANITARIAN LAW

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INTRODUCTION

According to the Old Testament, the first of Moses’ ten deadly plagues was to “strike the water of the Nile . . . [so that] the Egyptians would not be able to drink its water.”1 The implicit policy goal behind denying these water rights was to force the Egyptians to free the enslaved Jewish population. Water, of course, is indispensable for life. Thousands of years later, water is again being used as a policy tool in the region, effectively causing the constructive expulsion of the Palestinian population of the West Bank. And, like the first plague in biblical narrative, water is being used as part of a political machination to forcibly remove the residents of the West Bank from their homes.

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In 1967, Israel occupied several territories as part of its military campaign in the Six Day War, including the West Bank.\(^2\) Since then, the West Bank has remained under Israeli military occupation.\(^3\) While the majority of the Israeli population supports a peace process that sees the creation of an independent state of Palestine, elements within the Israeli government prefer a plan that sees the entire area formally annexed into Israel.\(^4\) The largest impediment to such a Thucydidean design is the 2.7 million Palestinians who currently live in the West Bank.\(^5\)

Forcible transfers and deportation have been recognized as some of the most abhorrent war crimes in human history.\(^6\) Article 49 of the Fourth Geneva Convention specifically prohibits the deportation of people out of occupied territory under belligerent military occupation by an occupying power.\(^7\) This paper posits, however, that forcible transfers are not only merely achieved through explicit deportation or transfer plans on the part of an occupying power. Instead, forcible transfers and deportations may also be achieved constructively through the production of inhabitable conditions that effectively force the local population to leave. To be considered a “constructive” transfer, an occupier must act in such a way as to make the lives of the local population unlivable and cause the departure of local individuals to rise beyond the mere nature of a voluntary departure.

The denial of adequate water rights is a clear means of constructive expulsion. Water in the West Bank is, for the most part, under the


\(^3\) Id.


effective control of Israeli authorities. “Water has been on the peace process agenda since . . . 1991” and yet has been dealt with in minimal detail. The denial of adequate water has been used as a means to coerce the Palestinian population to abandon the West Bank, and, particularly, to abandon Area C.

To demonstrate the foregoing proposal, this article will first explore the political nature of the West Bank, and whether it is, for the purposes of international law, an occupied territory. After establishing the applicable law, this paper will explore the legal concept of deportation and forcible transfers under international law to better understand how it applies to the conflict. This paper will then investigate water deprivation in the West Bank. After exploring the legal and policy aspects of water deprivation, this paper will offer policy recommendations for this legal quandary.

In order to ensure the fair treatment of the local population of the West Bank, three goals must be realized. First, the Palestinian Authority must work with the Israeli government to establish an investigative committee that cooperates with Israeli authorities in determining Palestinian populations at risk in the territories so that both parties may ensure adequate water is supplied to these populations, either through government subsidies or redistribution plans. Second, water distribution in the region must aspire to provide equal per-capita access to all individuals living in the West Bank—whether Israeli or Palestinian. Finally, if settlements are to continue to subsist in the West Bank, they must neither interfere with the current water rights of the local Palestinian population nor with the current population centers of the local population.

8. See infra Part III.
10. Under the Oslo Accords, the West Bank is divided into three areas of control. Area C is “[u]nder full Israeli civil administration and security control . . . [and] is the largest division in the West Bank, comprising 60 percent of the territory. The PA only has responsibility for providing education and medical services to the 150,000 Palestinians living there.” Israel also has “full authority over building permissions and zoning laws” in Area C. Finally, “Area C contains most of the West Bank’s natural resources and open areas.” Ehab Zahriveh, Maps: The occupation of the West Bank, AL JAZEERA AMERICA (July 4, 2014), http://america.aljazeera.com/multimedia/2014/7/west-bank-security.html.
I. DETERMINATION OF THE APPLICABLE LAW IN THE WEST BANK

Armed conflicts are governed by International Humanitarian Law (IHL), comprising mainly of the 1907 Hague Conventions (particularly the regulations found in the annex of Hague IV),\(^\text{11}\) the four Geneva Conventions,\(^\text{12}\) their two Additional Protocols,\(^\text{13}\) and customary international law.\(^\text{14}\) IHL only applies in specific situations in which it replaces other rules of national and international law, and thus, it is \textit{lex specialis}.\(^\text{15}\) When no armed conflict exists, \textit{lex generalis}—general international law—applies.\(^\text{16}\) This is why, for example, targeting combatants in an armed conflict is not always a violation of their right to life; by explicitly prohibiting the targeting of civilians and other persons (such as wounded, sick, or shipwrecked combatants), IHL implicitly

\(\text{11. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, INT’L COMM. OF THE RED CROSS, https://www.icrc.org/ihl/INTRO/195 [hereinafter Convention IV, 1907]. Eighteen states are party to an earlier version of this treaty, the 1899 Convention, but have not signed on to this one. Thus, the 1907 Treaty does not apply to those eighteen states. Israel, Egypt, Jordan, and Syria (belligerents in the 1967 war) are party to the 1907 Convention and so the 1899 Convention does not apply to relations between them.}


\(\text{13. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.}

\(\text{14. For example, regarding the attribution of acts, a well-established rule of customary international law dictates that the conduct of any organ of a State is regarded as an act of that State. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, ¶ 87 (April 29), available at http://www.icj-cij.org/docket/files/100/7619.pdf.}

\(\text{15. This governance is dubbed the Law of Armed Conflict. An example of \textit{lex specialis} can be found in Article 23 of the Convention IV, which states that it is unlawful “[t]o kill or wound [enemy forces] treacherously.” Convention IV, supra note 12, art. 23 (emphasis added).}

\(\text{16. See id., art. 23.}\)
permits targeting, and killing, combatants. Each body of law has special rules for states in a given situation, and therefore, any examination of the legality of a state’s action must begin with a determination of which body of law applies.\textsuperscript{17} Since \textit{lex generalis} applies whenever \textit{lex specialis} does not, the applicability of either body of law is governed by the applicability of the latter.\textsuperscript{18}

While it is clear that the West Bank was \textit{occupied} during an international armed conflict, during which time IHL applied, the status of the West Bank is currently disputed, and thus, it must be clarified whether the continued Israeli \textit{presence} in the region is either an occupation (and thus subject to rules of IHL) or whether the West Bank is merely a disputed territory where IHL does not apply. Occupations are, for the most part, governed by the Fourth Geneva Convention, to which Israel is a party.\textsuperscript{19}

Some Israeli legal authorities have stated that the West Bank is part of a disputed territory, and is not an occupied territory. Meir Shamgar, while attorney-general of Israel, made this argument, justifying, if Israel desired, Israel’s refusal to apply IHL to the West Bank, including the Geneva Conventions and the Hague regulations.\textsuperscript{20} The soundest legal argument supporting this conclusion is that no “High Contracting Party” of the Geneva Conventions controlled the West Bank prior to Israel.\textsuperscript{21} Since the Fourth Geneva Convention, which protects civilian victims of war, applies only to “cases of . . . occupation of the territory of a High Contracting Party,” it does not apply to the West Bank.\textsuperscript{22} After the end of the British Mandate on Palestine, the West Bank was captured by Transjordan (today, the Kingdom of Jordan), and annexed shortly

\begin{itemize}
\item 17. \textit{Id}.
\item 21. \textit{Id}.
\item 22. Convention IV, \textit{supra} note 12, art. 2.
\end{itemize}
thereafter.23 It was subsequently captured from the Kingdom of Jordan by Israel in 1967.24 Since Palestine is not a High Contracting Party (that is, since it is not a state) the Geneva Conventions do not apply.

This argument is dubious. Israel captured the territory from Transjordan, which itself was an occupying power of the West Bank.25 If Israel does not recognize occupation of the West Bank as possible, since it has no legitimate authority, it follows that Transjordan’s control and annexation of the territory would instead, under the Israeli argument, mean that Transjordan was the first legitimate sovereign of the territory. Essentially, both Israel and Jordan have equal (albeit illegitimate) claims to Palestine under international law; if Israel’s argument is wrong, then neither Jordan nor Israel is the legitimate sovereign of Palestine. Conversely, if Israel’s argument is correct, then Jordan was the legitimate sovereign from 1948 onwards because it captured the territory under circumstances almost identical to Israel’s.26 Regardless of the legal position, Israel is never the legitimate sovereign of Palestine. In 1988, Jordan recognized the independence of Palestine and renounced all claims to the territory.27 Therefore, even under Israel’s own logic, Palestine would be an independent state since it was granted independence by its first legitimate sovereign, Jordan. Since Palestine, even under the Israeli argument, would be an independent state, the Geneva Conventions apply to the continued military occupation of the West Bank.

Regardless of Palestinian statehood, however, Palestine is still an occupied territory and the Geneva Conventions still apply. The Israeli argument summarized above relies on Article 2, paragraph 2 of the

24. Israel and the Occupied Territories, supra note 2.
26. Israel and the Occupied Territories, supra note 2.
Fourth Geneva Convention to find that the Convention cannot begin to apply during a partial or total occupation of a territory not belonging to any state. However, even if the Israeli argument’s premise that Palestine is not a state is correct, the Fourth Geneva Convention still applies in the West Bank. The Fourth Geneva Convention is quite clear on the temporal scope of the law of occupation: once an occupation begins, all articles of the Convention apply until one year after the general close of military operations and a vast majority of the articles continue to apply “for the duration of the occupation.” This includes, crucially for the purposes of this writing, Article 49 of the Fourth Geneva Convention. While Palestine’s status as an independent state may still be marginally controversial (and therefore, Israel has argued it is at best unclear whether it can be considered a “High Contracting Party”), it is undisputed that Jordan and Israel were states in 1967; therefore, their resort to force in the 1967 Six Day War was an armed conflict fulfilling the requirements of Article 2 of the Fourth Convention. Furthermore, international jurisprudence has also recognized the West Bank as an occupied territory. Notably, the International Court of Justice (ICJ), which is the principal judicial organ of the United Nations and provides opinions based on international law, recognized the West Bank as an occupied territory in its July 9, 2004 Advisory Opinion, basing its logic in part on the definition of occupation found in the Hague Convention. Importantly, the court noted that “[s]ubsequent events in these territories . . . have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.”

State practice overwhelmingly recognizes the existence of a belligerent occupation in the West Bank. The United States, one of

28. See Convention IV, supra note 12, art. 2.
29. Convention IV, supra note 12, art. 6 (“In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory . . . .”).
30. Id.
31. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 78 (July 9) [hereinafter Legal Consequences of the Construction of a Wall].
32. Id.
Israel’s most important allies, recognizes the West Bank as an occupied territory.\textsuperscript{33} In addition to the United States’ recognition of the West Bank as an occupied territory, 134 countries of the world (nearly 70% of the world’s nation-states representing an overwhelming majority of the world population) recognize Palestine as an independent nation-state. Moreover, the UN General Assembly recognizes Palestine as an independent nation-state.\textsuperscript{34} The United Nations Security Council, in 1967, recognized the territories taken by Israel as occupied territories.\textsuperscript{35} In a later resolution, the Security Council specifically called on “Israel, as the occupying Power, to abide scrupulously by the [1949 Fourth] Geneva Convention . . . and to desist from taking any action . . . materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem.”\textsuperscript{36} Thus, it follows that the uninvited presence of the Israeli military is a belligerent occupation. Peculiarly, even the Israeli government has argued in domestic Israeli court that the West Bank is an occupied territory.\textsuperscript{37} In 2005, the Israeli High Court of Justice (Israel’s Supreme Court) recognized the West Bank as an occupied territory.\textsuperscript{38} Thus, as far as state practice is concerned, those continuing to argue that the West Bank is not an occupied territory are few and far between.

For the purposes of the Geneva Conventions, the West Bank is an occupied territory. Before turning to the application of its articles, it is important to establish that military operations are closed. The Commentary of the Fourth Geneva Convention offers guidance on when


\textsuperscript{35} S.C. Res. 242, ¶ 1 (Nov. 22, 1967).

\textsuperscript{36} S.C. Res. 446, ¶ 3 (Mar. 22, 1979).


\textsuperscript{38} See, e.g., HCJ 2690/09 Yesh Din v. Commander of the IDF Forces in the West Bank [2009] (Isr.) (calling the territory an “occupied territory”).
operations are considered closed. Military operations, according to the commentary, end either “‘when the last shot has been fired’” or when there is “an armistice, capitulation or simply ‘debellatio.’” The 1967 war ended on June 10, 1967, when the last shot was fired, after Israel had defeated its enemies. Thus, military operations in the West Bank are closed.

It follows that, under Article 6 of the Fourth Geneva Convention, Israel is bound by the following articles of the Convention even one year after the general close of military operations: 1 through 12, 27, 29 through 34, 47, 49, 51 through 53, 59, 61 through 77, and 143. Moreover, Israel is bound by Security Council Resolution 446 to not “materially” affect the demographic composition of the West Bank.

II. THE SCOPE OF DEPORTATION & FORCIBLE TRANSFERS UNDER ARTICLE 49 OF THE FOURTH GENEVA CONVENTION

According to Article 49(2) of the Fourth Geneva Convention, “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.” Transfers are generally considered to be the intra-state relocation of a person, while deportation is the transfer of a person across a state line. The total prohibition of
deportation and forced transfers, outside of limited and narrow exceptions that do not apply in the present case,\textsuperscript{45} arose from “the painful recollections called forth by the ‘deportations’ of the Second World War.”\textsuperscript{46} While it was previously understood that deportations and forced transfers were so horrific a crime that they fell into “abeyance,” and thus, need not be addressed,\textsuperscript{47} the experience of World War II made clear that the prohibition needed to be codified.

Article 49 of the Fourth Geneva Convention was written to address the physically coercive forcible transfers of occupied populations that occurred during the Second World War.\textsuperscript{48} However, the meaning of Article 49 has since been interpreted to include transfers of populations without their genuine consent.\textsuperscript{49} Recognizing whether consent of the displaced exists includes analyzing the context of the displacement.\textsuperscript{50} A state may, when it intends to forcibly transfer or deport a population, make the conditions in a given region so unlivable that a population is \textit{forced} to leave without genuinely consenting to being displaced. Imagine, for example, two opposing belligerents in an armed conflict, State A and State B. Each has militarily conquered and is occupying a segment of territory from the other. Both intend to transfer out the local populations of their occupied territories. State A initiates a policy demanding the local population leave the occupied territory and find refuge elsewhere. State B cuts off all sources of water into the occupied territory to any individual who is part of the local population. Individuals in both territories leave. Both intentionally instituted a policy \textit{forcing} the local population to leave the occupied territory, regardless of the means.

from the area in which they are lawfully present, across a \textit{de jure} state border or, in certain circumstances, a \textit{de facto} border, without grounds permitted under international law. The Appeals Chamber considers that the \textit{mens rea} of the offence does not require that the perpetrator intend to displace the individual across the border on a permanent basis.”).\textsuperscript{45}Commentary of 1958, \textit{supra} note 6 (“The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2.”).

\textsuperscript{46}Id.
\textsuperscript{47}Id.
\textsuperscript{48}Id.
\textsuperscript{50}Id.
While there is as of yet no precedent for such an interpretation under international criminal law or international humanitarian law for such a specific reading of Article 49, an international tribunal has recognized the existence of ‘constructive expulsion.’ The Iran-United States Claims Tribunal was established to address the claims arising out of the 1979 hostage crisis at the United States’ embassy in Iran and the freezing of Iranian assets. The tribunal was composed of three United States’ judges, three Iranian judges, and three judges appointed by the first six.

In *Short v. Islamic Republic of Iran*, a United States’ national, and employee of Lockheed Martin, lived under increasing stress because of anti-American threats and violence, culminating during the return of Khomeini, the leader of the revolution. The tribunal ultimately did not find Iran liable because Short failed to establish his departure was caused by Iran. However, the tribunal did note that an individual could be wrongfully expelled “in the absence of any order of specific state action.” Judge Charles M. Brower of the Iran-United States Claims Tribunal wrote a dissenting opinion noting that an individual could be constructively expelled by circumstances arising out of state policy, and found that Khomeini’s statements were part of a policy that caused the “rather complete exodus of Americans from Iran.”

Comparatively, in *Yeager v. Islamic Republic of Iran*, the tribunal found Iran liable for the wrongful expulsion of a United States’ national. This case differed from *Short* in that it involved harassment by Iran’s revolutionary guard.

Constructive forcible transfers or deportations will also often, by their very nature, involve other violations of international law related to

51. *About the Tribunal, Iran-United States Claims Tribunal*, https://www.iusct.net/Pages/Public/A-About.aspx (last visited Jan. 9, 2016).
52. *Id.*
57. *Id.* at *12.
military occupation. Often, the only way to accomplish a constructive forcible transfer is by committing other acts already prohibited by international law. One example of this is the destruction of property in an occupied territory. According to Article 53 of the Fourth Geneva Convention, “[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”\textsuperscript{59} To this, Meir Shamgar points to the commentary of Article 53, which states in part that the prohibition on destruction of property does not apply in cases where “imperative military requirements so demand,” and that it is “for the Occupying power to judge the importance of such military requirements.”\textsuperscript{60} However, no military operations or objectives currently exist in the West Bank that would systematically trigger the high threshold for destruction rendered “absolutely necessary by military operations” exception. It has already been noted that military operations in the West Bank are closed.\textsuperscript{61} While the exception can still apply even after the general close of military operations,\textsuperscript{62} and it is true that determining the importance of the military requirements is left to the occupying power, the occupying power is not immune to external scrutiny, particularly when the destruction is particularly egregious vis-à-vis this exception. It is for this reason that the ICJ, when faced with the same question, did not simply defer to the Israeli position on Article 53, but found, on the contrary, that Israel’s destruction of property in the West Bank was not “absolutely necessary.”\textsuperscript{63} 

Aside from Article 53, public or private property can only be targeted if the property is a “military objective.”\textsuperscript{64} There is no clear definition of
what constitutes “military objectives” under customary international law.\(^{65}\) The First Additional Protocol, to which Israel is not a party, defines “military objectives” as, in part, “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose . . . destruction . . . in the circumstances ruling at the time, offers a definitive military advantage.”\(^{66}\) The Commentary of the First Additional Protocol\(^{67}\) makes further references to the definition found in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict\(^{68}\) as partially defining military objectives. It states, in part, that military objectives are properties that are:

(a) [not] situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;

(b) . . . used for military purposes.\(^{69}\)

\(^{65}\) See, e.g., CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 631 (Yves Sandoz et al. eds., 1987) (“[T]here was no agreed definition of such objectives, and in fact, during the Second World War and during several armed conflicts which have taken place since then, each belligerent determined what should be understood by such objectives as it pleased . . . . Thus a restrictive definition was necessary if the essential distinction between combatants and civilians and between civilian objects and military objectives was to be maintained.”).

\(^{66}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52, ¶ 2, June 8, 1977, 1125 U.N.T.S. 3.

\(^{67}\) Israel is not a signatory of the Additional Protocols of the Geneva Conventions, but the commentaries still provide insight on customary law and international legal interpretation.


\(^{69}\) Rule 8: Definition of Military Objectives, supra note 64.
Therefore, property cannot be destroyed merely because its existence violates a military order if that property has nothing to do with military purposes or military use or if the property is going to be destroyed for its proximity to military resources.

The Convention (IV) respecting the Laws and Customs of War on Land, \textsuperscript{70} which Israel swiftly implemented following the capture of the West Bank in 1967,\textsuperscript{71} regulates conduct to ensure constructive transfer and deportations do not occur. For example, Regulation 53 states that “an army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.”\textsuperscript{72} Accordingly, the appropriation of private property or public resources that cannot be used for military operations is illegal.

III. Water Regulation in the West Bank

Water is an essential resource that must be allocated among any population of a given territory without discrimination based on citizenship, race, or religion. The United Nations’ Committee on Economic, Social and Cultural Rights (CESCR) stated in 2003 that “[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”\textsuperscript{73} The CESCR’s Comment provides valuable policy guidance. It is also the framework for an important self-evident truth: without access to potable water, humans cannot maintain a sedentary life. Water, a fundamental building block for life and for civilization, has far-reaching


\textsuperscript{71}. See, e.g., Howard Grief, A Legal Discourse on Occupation, JERUSALEM SUMMIT (June 10, 2007), \url{http://www.jerusalemsummit.org/eng/razdel-inn.php?id=189} (noting that after the military engagement in the West Bank, “the National Unity Government headed by Levi Eshkol instantly applied Article 43 of the Hague Regulations to keep the existing laws in force”).

\textsuperscript{72}. Convention IV, 1907, \textit{supra} note 11, art. 53 (emphasis added).

uses which those living in the first world may often take for granted. The CESC, in its General Comment, further noted the wide-ranging purposes for water beyond merely personal and domestic uses, including the production of food, environmental hygiene and health, securing livelihood, and enjoying cultural practices. The CESC clarified that “water should be treated as a social and cultural good, and not primarily as an economic good” and, notably, that states must distribute water “without discrimination.” While the CESC’s understanding of water as a resource seems exceedingly obvious, water distribution in the West Bank has been fundamentally unfair and demonstrates a failure of relevant authorities to take heed of the CESC’s conclusions. The distribution of water, owing to a confluence of factors, has left the local population of the West Bank with a shortage of water leading to devastating consequences on daily life. The local population that do not have access to water cannot maintain a sedentary life, and these segments are thus effectively forced to relocate.

A. Appropriation of Water Resources in the Aftermath of the Six Day War

Following the Six Day War, Israel issued several military orders which curtailed the West Bank local population’s right to water. Military Order 92 gave “the absolute authority of controlling all issues related to water to the Water Officer who is appointed by the Israeli courts.” Four days later, Military Order 58 was issued, which prohibited the construction of any new water installations without a license. This order

74. Id.
75. Id.
76. Id.
78. Appendix 1 Israeli Military Orders Regarding Water, PALESTINIAN WATER AUTHORITY, http://www.pwa.ps/page.aspx?id=Yy1DfNa1609414323aYy1DfN (last visited Dec. 15, 2015) (“[I]t is prohibited to construct any new water installation without a license and that the licensing officer has the right of rejecting any application for a license without having to give the justification for his rejection.”).
79. Id.
is particularly important for the current examination given the broad power Military Order 92 already bestowed upon the Israeli Water Officer, as it allowed Licensing Officers, who are appointed by the Water Officer, to reject applications without any basis. Given the broad power entrusted to the Water Officer by the Israeli military, there is no meaningful review of the rejections by Licensing Officers. Military Order 158 ordered that all wells, springs, and water projects would thereafter be under the full, direct command of the Israeli Military Commander. Crucially, military orders apply to the local population in the West Bank, but they do not apply to Israeli citizens in the West Bank—that is, Israeli settlers. As a result, the aforementioned military orders apply inherently discriminatory water policies on the local population of the West Bank.

In addition to Military Orders, the Israeli military actively destroyed local population water projects while simultaneously building Israeli projects. According to a report by the United Nations Economic and Social Council, Israeli authorities destroyed approximately 140 water pumps belonging to the local population of the West Bank, which prevented local farmers from continuing agricultural irrigation in the

80. Id.
83. ILAN PELEG, HUMAN RIGHTS IN THE WEST BANK AND GAZA: LEGACY AND POLITICS 76 (Syracuse Univ. Press 1st ed. 1995).
84. While Israel has an obligation to refrain from applying domestic Israeli law to occupied populations, it cannot leverage this prohibition to intentionally discriminate against the local population, forcing them to leave. If Israel insists on transferring parts of the Israeli population to the West Bank, which in and of itself is contrary to international law then it is ipso facto forced to violate Article 49 of the 4th Geneva Convention as well for reasons outlined in this paper, since these transfers contribute to the habitable conditions for the local population in the West Bank. See, e.g., Rule 130: Transfer of Own Civilian Population into Occupied Territory, ICRC, http://www.icrc.org/customary-ihl/eng/docs/v1_chapter38_rule130 (last visited Jan. 6, 2016).
The military also destroyed irrigation canals along citrus and banana plantations. These destructions were done on the basis of establishing a new “security belt.” Meanwhile, hydrological surveys by Israeli settlement authorities together with Merkorot, Israel’s national water company, were undertaken, leading to the construction, by 1985, of over thirty new wells in the West Bank solely for Israeli settlers. In 1982, Israel transferred its water authority to Mekorot. The cooperation between the Israeli military and its settlement authority proved highly successful at inhibiting Palestinian access to water. By 2007, 217,000 Palestinians (about 10% of the West Bank’s local population) lived in communities without access to a running water network. According to the World Bank, this population is forced to find natural springs or use cisterns and tankers, paying over four times more, for poorer quality water than water from the network. These communities, which are exclusively in Area C, spend up to 40% of their income on water. By contrast, in 2007, all 149 Israeli settlements, all within Area C, were connected to a running water network. The pipes that connect to these settlements often run near Palestinian dwellings, but Israel does not permit Palestinians to connect to them. Thus, Area C Palestinians are

86. Id.
87. Id.
88. Id.
91. Id. at V.
94. Hass, supra note 92.
particularly pressured to leave their territory in search for adequate water.

B. Water Regulation Under the Oslo Accords and its Effects

Hope for increased water rights began with the Oslo negotiations, and, particularly, with the signing, between the Israeli government and the Palestinian Liberation Organization (PLO), of the “Israeli and Palestinian Authority Interim Agreement on the West Bank and Gaza Strip,” also known as the “Oslo Accords.” However, rather than providing hope, the Oslo Accords represent the greatest failure of the Israeli-Palestinian peace process in regards to water rights as it exacerbated the problem, and, as a result, aggravated tensions between Israel and the local population of the West Bank. The agreement specifically addressed water rights, noting, in Article 40(1) that “Israel recognizes the Palestinian water rights in the West Bank.” The Palestinian Water Authority (PWA) was created by a Presidential decree in Palestine to uphold their responsibilities under the Oslo agreement. The PWA was meant to be responsible for, *inter alia*, managing water resources and monitoring water projects. However, the interim agreements had two fatal shortcomings.


96. *Id.*


1. Estimated Water Needs

First, interestingly, the agreement made particular mention of the amount of water required for Palestinians. For example, the Accords specifically mentioned that the Israelis and Palestinians “agreed that the future needs of the Palestinians in the West Bank are estimated to be between 70 - 80 mcm/year.” 99 In addition to the alarming authority both sides vested in themselves to decide the absolute needs of a future population, this clause is troubling for several reasons.

Peculiarly, even if you take the higher estimate (80 mcm/year), this is equivalent to 219,178 cubic meters/day (80,000,000/365). The local population of the West Bank is over 2.8 million. 100 This results in, even in ideal standards according to the Oslo Accords, approximately ninety-one liters per capita per day (lpcd), 101 which is still below international standards for adequate water according to the World Health Organization, which defines 100-150 lpcd as adequate. 102 In reality, according to a World Bank report, 103 supply rates are much lower, totaling, in a quarter of connected populations, to be less than fifty lpcd, and to about 16% of Area C’s southern population, less than twenty lpcd. 104

Corroborating the World Bank report, B’Tselem and Amnesty International estimate Palestinians in the West Bank have access to approximately seventy lpcd. 105 Amnesty International has found that some Palestinians have access to as little as ten to twenty lpcd, which is comparable to water access in refugee camps in Sudan and the Congo. 106

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99. Oslo, supra note 95 (emphasis added).
101. Calculated by dividing 219,179 cubic meters by the Palestinian population of 2.4 million, and multiplying by 1,000 to obtain liters.
102. See *Assessment on Restrictions of Water Sector Development, supra* note 90, at 17 (according to the World Bank, the consumption level should “be compared with the World Health Organization (WHO) recommended standard of 100 lpcd for optimal water supply, as well as with the ‘15 lpcd, 500 meters minimum distance to source’ criterion adopted by international humanitarian disaster response agencies”).
103. *Id.*
104. *Id.*
106. *Assessment on Restrictions of Water Sector Development, supra* note 90, at 17.
By comparison, the average settler has access to an estimated 300 lpcd, which is access to thirty times more water than some Palestinians per capita.\textsuperscript{107} The amount of water available to the average Palestinian is now less than was available at any time since the start of the occupation in 1967.\textsuperscript{108}

According to Israeli authorities, “[w]ater matters, like other civil powers, have been for some time under the full responsibility of the P.A.”\textsuperscript{109} Additionally, Israeli authorities claim that “[j]urisdiction over water was transferred [to the P.A.] completely and on time.”\textsuperscript{110} However, as Amnesty International points out, this is untrue.\textsuperscript{111} According to Amnesty International, under the Oslo Accords, the P.A. only gained “responsibility for managing the supply of the insufficient quantity of water allocated for use by the Palestinian population.”\textsuperscript{112} Israeli authorities also state that they are “aware of the water shortage in the territories, which is part of the general water shortage in [both Israel and the West Bank].”\textsuperscript{113} However, as noted earlier, the Israeli settlers in the West Bank, numbering only about 340,000, have access to an average of 300 liters of water per person, per day.\textsuperscript{114} Settlers use this access to water for personal use, but also to perpetuate industries in the occupied territories.\textsuperscript{115}

\begin{itemize}
\item \textsuperscript{108} Id. at 10.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Amnesy Report, supra note 107, at 17 (“In truth, however, the PA did not acquire control of water resources in the OPT under the Oslo Accords.”).
\item \textsuperscript{112} Id.
\item \textsuperscript{113} The Water Issue in the West Bank and Gaza, supra note 109.
\item \textsuperscript{114} The World Factbook: West Bank, supra note 5.
\item \textsuperscript{115} Ripe for Abuse Palestinian Child Labor in Israeli Agricultural Settlements in the West Bank, Human Rights Watch (April 13, 2015), https://www.hrw.org/report/2015/04/13/ripe-abuse/palestinian-child-labor-israeli-agricultural-settlements-west-bank (noting that the majority of the land used by Israeli settlements in the occupied portion of the Jordan Valley, for example, are cultivated with date palms, field crops, and produce, and the amount of water provided to these
The arbitrary amount of water the drafters of Oslo assumed was needed by the local population is entirely incorrect. Oddly, it does not address the “needs” of Israeli settlers, who, as stated above, use on average over four times what the local population use per capita. Instead of providing water security to the local population of the West Bank, Oslo further alienated the local population from their fundamental right to water. The amount of water needed by the local population should be based on a calculation of the product of the satisfactory amount required by the World Health Organization and the population of the West Bank. The Palestinian negotiators at Oslo likely agreed to the unfair stipulation in Oslo II because it was meant to lead to a permanent settlement in five years. Thus, Palestinian negotiators believed they would gain complete control over the water in the near future anyway. In making such an agreement, however, they failed the Palestinian people, and have, rather ironically, been instrumental in allowing the constructive forced transfer of the West Bank’s local population.

2. Structure of the JWC

The Oslo Accords also created the Joint Water Committee (JWC), which has the authority to permit or deny water projects. The JWC is composed of an equal number of Palestinians and Israelis, and is ostensibly meant to provide fair representation. However, all decisions
made by the JWC require consensus. Thus, in principle, Israelis have veto power over all projects initiated by Palestinians. Though Palestinians should have the same authority, Israel conducts water projects even if Palestinians veto the proposal. Due to the dramatic imbalance of power, the JWC merely institutionalizes the power that Israel already wields in limiting the use of water by Palestinians while maximizing the use of water by Israeli settlers. Thus, according to the World Bank,

JWC has not fulfilled its role of providing an effective collaborative governance framework for joint resource management and investment. . . . The JWC does not function as a “joint” water resource governance institution because of fundamental asymmetries – of power, of capacity, of information, of interests – that prevent the development of a consensual approach to resolving water management conflicts.

Moreover, since military law supersedes civil administrative decisions, Israeli Military Orders may still veto projects even when they are approved by the JWC.

In addition to Article 40, which deals specifically with water, the Oslo accords divided the West Bank in three areas: Area A, Area B, and Area C. Areas A and B, mostly population centers under Palestinian Civil control, comprise approximately 40% of the territory of the West Bank. The remaining 60%, Area C, is under total Israeli control and includes most of the resources and infrastructure needed to support Areas A and B. Areas A and B are themselves essentially districts within Area C. Additionally, all Israeli settlements, with the exception of the

http://www.alhaq.org/attachments/article/236/Occupation_Colonialism_Apartheid-FullStudy.pdf [hereinafter SOUTH AFRICA REPORT].

122. Oslo, supra note 95, art. 40(14).

123. SOUTH AFRICA REPORT, supra note 121, at 143-44.

124. ASSESSMENT ON RESTRICTIONS OF WATER SECTOR DEVELOPMENT, supra note 90, at ix.

125. Oslo, supra note 95, art. 11.


127. ASSESSMENT ON RESTRICTIONS OF WATER SECTOR DEVELOPMENT, supra note 90, at ix.

128. What is Area C?, supra note 126.
Hebron settlement, are located in Area C.\textsuperscript{129} As it is under Israeli control, it is the area most susceptible to forcible transfer of the local population, and subsequent usurpation of the land by settlers.\textsuperscript{130} Moreover, since almost all sources of fresh water in the West Bank are located in Area C, the area’s resources are essential to the survival of all Palestinians.\textsuperscript{131} The Israeli Civil Administration, in addition to both the Israeli members of the PWC and the military, may veto Palestinian water projects in Area C.\textsuperscript{132} Thus, there are three levels of Israeli control which may veto Palestinian water projects in the West Bank.

For settlers, the JWC alone approved 95\% wastewater projects, 100\% of Water Supply Network projects, and 100\% of Well projects.\textsuperscript{133} By comparison, for Palestinians, the JWC denied 58\% of Wastewater projects, 50\% of the Water Supply Network projects, and 49\% of the Wells projects.\textsuperscript{134} This, of course, does not include the possibility of being denied by the military or the Civil Administration of Area C. Taken together these measures represent a means to frustrate the endeavors of the local population of the West Bank in using water resources in the region. This has led the World Bank to conclude that the “JWC has not fulfilled its role of providing an effective collaborative governance framework for joint resource management and investment.”\textsuperscript{135} The JWC is a broken mechanism; the local population should not have to rely on the final authority of the occupying power to begin benign water projects.

C. Displacing the Local Population in Contravention of International Law

Water resources have been restricted to the local population to such a degree as to constitute an appropriation in contravention of international

129. Id.
130. See id.
131. What is Area C?, supra note 126.
132. SOUTH AFRICA REPORT, supra note 121, at 143.
133. Jan Selby, Cooperation, Domination and Colonisation: The Israeli-Palestinian Joint Water Committee, 6 WATER ALTERNATIVES 1, 12 (2013).
134. Id.
135. ASSESSMENT ON RESTRICTIONS OF WATER SECTOR DEVELOPMENT, supra note 90, at ix.
law. In addition to the structural mechanisms that prohibit expansion of water resource projects of the West Bank’s local population, the local population has suffered tremendous hardship and loss because of the limited allocation of water, and thus, members of the population are forced to leave. For example, according to one Palestinian villager,  

“There is no water in the village, so we have to bring it from far away and it’s expensive. I can’t wash and clean as often as needed. We can’t afford it. It’s a daily struggle. The goats also need to drink. We can’t keep more goats because we can’t afford the water, and we can’t grow food for us and fodder for the animals, so we have to buy it and this too is expensive.” 136

The limitations on water rights make prohibitive not only the needs of daily domestic life, but also the sustenance of agriculture and livestock. Since water has been deprived to such a significant degree, and diverted to the populations of the settlements in the West Bank, it constitutes a taking of public property in violation of Regulation 53 of Hague IV. 137 While a taking is also a separate violation of IHL, here it buttresses, in a fashion similar to the one envisioned by the Court in Yeager, 138 the forcible transfer of the local population.

The appropriation of water also constitutes the obstruction and destruction of resources, in violation of international law. The structural system described above, including military orders, the Oslo Accords, and Israel’s Civil Administration, have had a crippling effect on agricultural activities of the local population of the West Bank. 139 Those who do not obey the rules of this structure—by using water in contravention of Israeli orders—risk having their crops, fields, property, and equipment destroyed by military bulldozers, as was witnessed by Amnesty International in 2008. 140 Destruction of property is not only a contributing condition to the forced transfer of the local population, but it also violates Article 53 of the Geneva Convention prohibiting the destruction of property in an occupied territory. 141

136. AMNESTY REPORT, supra note 107, at 23.
137. Convention IV, supra note 12, art. 53.
139. Id. at 13, 17.
140. Id. at 43-44.
141. Convention IV, supra note 12, art. 53.
In addition to violating both Hague and Geneva laws, several international observers have concluded that the water policy in the West Bank is “working”: the local population is leaving the West Bank in search of a sustainable life. For example, according to the United Nations Secretary-General, “[Israel’s] settlement policy of confiscating land and imposing restrictions on water resources has meant that a large proportion of the population that would normally have earned a living by traditional agriculture have gradually begun to seek employment in Israel as unskilled workers.” While the local population of the West Bank is committed to continuing to live in their traditional homes, water is, as this paper has noted, an indispensable resource. The severe, plain, and inequitable distribution of water in the West Bank is forcing the local population to leave.

Other international observers have also found Israel to manifest a sinister intent in its water policies. According to an international fact-finding mission on Israeli settlements in the occupied territories by the Office of the High Commissioner for Human Rights, “[t]he denial of water is used to trigger displacement, particularly in areas slated for expansion, especially since these communities are mostly farmers and herders.” The continued expansion of Israeli settlements, coupled with the exodus of the local population, will continue to confirm the existence of a constructive forced transfer policy. The distribution of water in the West Bank, structurally engineered by Israeli authorities, and codified and endorsed by both the Israeli government and the PLO, constitutes a constructive forced transfer in violation of Article 49 of the Fourth Geneva Convention. It also violates Israel’s duty to not “materially”


144. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, supra note 7, art. 49.
IV. POLICY SUGGESTIONS TO IMPROVE THE CONDITIONS OF WATER ALLOCATION IN THE WEST

While water may be a scarce resource, both Israelis and Palestinians have the potential to enjoy water in the region free from discrimination. Given the egregious levels of discrimination, the problem is innately a human-made one, not an environmental one. This means that the problem can be solved through proactive and targeted policy changes.

First, both Israel and the authorities of the West Bank (currently the PLO) must establish a surveying mechanism for the West Bank whereby all residents of the West Bank have access to an equal amount of water per capita. Thus, if water shortages exist, water entering areas with an extremely high lpcd, including settlements, must have their water diverted to areas where water scarcity exists. A complaints commission must be set up and composed of an equal number of Palestinians and Israelis. This commission should be empowered to hear complaints by Israelis and Palestinians living in the West Bank, to make final, authoritative recommendations on water-related issues, and have authority over all water projects in the region. This panel’s decisions should be based on simple majority voting procedures, and should be composed of members from different, but relevant, backgrounds, including, but not limited to, lawyers, engineers, and environmental scientists. Such a panel should have the ultimate goal of providing equal access to water to all residents in the West Bank, but must also take care to ensure that such levels are above the minimum international standards noted in this paper. In addition to receiving complaints, such a commission should also examine the situation of water in particularly disadvantaged areas (particularly where access to water is below thirty lpcd).

Second, given the provisional and legally problematic nature of settlements, no settlement should be created within a designated radius of a Palestinian village, nor any Palestinian village that existed in 1967. This will ensure that water is not being used for the explicit purpose of

transferring the local population to make way for Israeli settlements. The problematic nature of settlements already triggers the ire of most states in the world, as well as international organizations including the UN. Demonstrating to the world community that there is no actual active policy to displace Palestinians, especially by using a resource as precious as water, is particularly important for an eventual reconciliation. It is certainly true that, regarding Israel’s Military Orders in the West Bank, the Israeli government has legitimate concerns vis-à-vis its own security and with security in the West Bank. Regarding these security concerns, the Israeli High Court of Justice eloquently noted:

As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. . . . [W]e are convinced that at the end of the day, a struggle according to the law will strengthen . . . [Israel’s] power and her spirit. There is no security without law.\textsuperscript{146}

Finally, both the Israeli government and the Palestinian authority must commit to update the water needs for individuals living in the West Bank, and ensure that these needs are computed and presented on a \textit{per capita} basis, not one that discriminates based on ethnicity, religion, nationality, or citizenship. Thus, the “Palestinian” needs versus the “settler” needs dichotomy should not exist. If needed, Israel should provide subsidies for water for those individuals—Israeli or Palestinian—who cannot access the water network so they may access the minimum standard of water requirements established by the WHO. This would not only provide required, recurring, and productive meetings between high-level politicians on both sides of the conflict, it would also allow for greater dialogue and cooperation between Israelis and Palestinians. Israel cannot be expected to control the effects of climate change. However, it should be expected to ensure it does not hoard whatever water is available, forcing the West Bank Palestinian population to leave. A non-discriminatory policy would ensure that both sides face harder periods of drought together, as comrades, but also share the joy of water surpluses as companions. It would promote collegiality for a conflict that has seen bitterness for too long.

\textsuperscript{146} HCJ 2056/04 Beit Sourik Vill. Council v. The Gov’t of Isr. 43 I.L.M. 1099, 1128 [2004] (Isr.) ¶ 86 (emphasis added).
CONCLUSION

The denial of adequate water to the West Bank, an occupied territory, constitutes a forced transfer under international law. The denial of adequate water has caused the relocation of the local population of the West Bank, effectively ghettoizing the local population in areas with better, though often not adequate, access to water, mostly in Areas A and B. This forced transfer has ushered the construction of Israeli settlements into the former homes of Palestinians in Area C. In addition to causing great human suffering, the policies implemented by Israel in relation to water constitute grave breaches of the Geneva Convention, and may one day lead to prosecutions for violations under the laws and customs of warfare.

Refashioning Israel’s water policy and allowing greater water independence to Palestinians would improve economic activity and quality of life in the West Bank, and would build tremendous confidence between the two sides. If Israelis and Palestinians can work together to provide adequate water to two peoples, it would presage a fruitful future of mutual cooperation and trust and contribute to the end of the Israeli-Palestinian conflict.