Transboundary Water Interaction IV: 
The Role of International Law in Hydro-Hegemonic Arrangements 
Rebecca L. Farnum, Stephanie Hawkins, and Mia Tamarin 
*Concept Paper prepared for HH8 24-25 October 2015* 
Working Draft – 8 October 2015 – Comments welcome via info@lwrg.org

**List of Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ERU</td>
<td>equitable and reasonable utilisation</td>
</tr>
<tr>
<td>FHH</td>
<td>Framework of Hydro-Hegemony</td>
</tr>
<tr>
<td>IHL</td>
<td>International humanitarian law</td>
</tr>
<tr>
<td>IHRL</td>
<td>International human rights law</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>ITL</td>
<td>International trade law</td>
</tr>
<tr>
<td>IWL</td>
<td>International water law</td>
</tr>
<tr>
<td>NSH</td>
<td>no significant harm</td>
</tr>
<tr>
<td>PA</td>
<td>Palestinian Authority</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>CESCPR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>

1. Introduction

Ideally, “law is the protector of the weak” (Frederick Schiller). Too often, though, it seems that “[t]he function of the law is not to provide justice or to preserve freedom. The function of the law is to keep those who hold power, in power” (Spence 1996: 90). This is true in local and national law, but perhaps even more so in international law. International law and cooperation have come a long way since the 1648 Treaty of Westphalia and 1945 founding of the United Nations (UN), but the world system is still technically anarchic. Under the Westphalian model of social organisation that exists formally to this day, states have complete sovereignty over their territories and there is no greater power than the nation-state. A citizen of a country is bound to that country’s laws whether she wishes or not. In contrast, states are not answerable to a force higher than themselves: the collective international community of states. While international law exists, it is based entirely on voluntary compliance. While all States are bound by certain non-derogable peremptory norms and customary international law (see *Section 2.2* for more on this issue), States are bound to treaty-based rules only as a result of their consent to those rules and their signing on to Conventions (see Crawford 2012). While disputes between states regarding their international obligations can be settled at the international court of justice, the Court’s jurisdiction only extends as far state consent (ibid.). The international community is thus the primary enforcer of international law through methods such as sanctions, shaming, and even legitimised use of force. It is an ‘enforcement system’ rife with issues of power and hegemony, which often have State-centric national interests at its centre.

This does not seem to bode well for the ability of international law to control states or protect weaker states from bullying hegemons. State actors have admitted to – and
demonstrated – their willingness to breach international law when it serves their interests (Baradan et al. 2013). But this does not mean that international law has no influence. Huth’s et al. (2011) study of 165 territorial disputes since 1945 found that actors who had strong legal claims are more than twice as likely to seek negotiations before using force, suggesting a new kind of ‘battle’ using ‘lawfare’ as well as warfare (for more, see Kennedy 2012). International law shapes states’ bargaining power. It also creates and reproduces ideational power. As Caron (2004: 312) states, “[i]t is true that international law did not stop Saddam Hussein from invading Kuwait in August of 1990, but it made possible a resolution condemning that invasion the very same afternoon. International law shapes the way the many nations of the world digest an event, it shapes the way an event is discussed: which arguments are in and which are out.”

This paper serves as an initial consideration of the ways that international law impacts water discourses and distribution. Arguing that numerous sections of international law intersect with water resources management and transboundary water interactions, and that none of these sectors are free from issues of power and justice, the paper builds from the growing literature on hydro-hegemony to consider the (counter-)hydro-hegemonic potential of international law. The ways in which the modern international legal system is both hegemonic, being produced by and producing those with power, and counter-hegemonic, providing a unique opportunity to ‘level the playing field’, will be explored. After reviewing the international legal norms and mechanisms most relevant to transboundary water interactions and introducing a framework for the consideration of structural issues within international law (Section 2), the paper will examine how those norms and mechanisms influence the hydro-hegemonic outcomes of three primary issues: water resources distribution in transboundary aquifer basins (Section 3), virtual water trades (Section 4), and human rights (Section 5). Section 6 will draw from the three issue analyses to form conclusions about the hydro-hegemonic realities and counter-hydro-hegemonic potential of international law and suggest further areas for exploration.

2. Water, Law, and Hegemony: Relevant Literature and Concepts

This paper will first review the extant literature and systems of international law regarding intersections around water resources, law, and hydro-hegemony. This section will begin with an overview of the Framework of Hydro-Hegemony (FHH) and explain why international law as a form of soft power is relevant to the theoretical framework. It will then turn to an overview of the extant international legal systems most relevant to transboundary water interactions: international water law (IWL), international trade law (ITL), international human rights law (IHRL), and international humanitarian law (IHL). It will also consider the ‘sovereignty paradox’ so fundamental to international law and critical to considerations of hegemony, power, and justice. It will conclude with a presentation of a framework for understanding the place of international law in hydro-hegemonic realities, both through its structure and content.

2.1. The Framework of Hydro-Hegemony and International Law

2.1.1. The Framework of Hydro-Hegemony

Working Draft – Comments welcome via info@lwrg.org
The FHH was developed to understand “who gets how much water, how and why” Zeitoun and Warner (2006: 435). Rather than assuming a simplistic dualism of conflict and cooperation leading to absolute control or equal co-management, the authors see outcomes of transboundary water management as resulting from the varying configurations of the political interplays between the interested actors (building from theories of the co-existence of conflict and cooperation developed by Mirumachi; see Mirumachi 2015). Power is thus seen in the FHH as the “prime determinant enabling the successful execution of the water resource control” (Zeitoun and Warner 2006: 451). Building from Lukes’ (1974) theorisation of the three “faces” of the actualisation of power, the Framework makes use of three “pillars” of Hydro-Hegemony representing material, bargaining, and ideational forms of power (see Figures 1 and 2). This focus allows for attention to the subtle ways in which states interact, drawing analytical emphasis to water resource control strategies and power asymmetries impacting the distribution of water.

The FHH is rooted in international relations literature on power analysis, hegemony theories and security studies, with the theorisation’s conception of power explicitly built upon “critical and realist [international relations] theories applied to hydropolitics” (Zeitoun and Warner 2008: 809). As with the majority of transboundary water interactions analysis, the FHH has been State-centric. It is thus no surprise that international law is included in several considerations of hydro-hegemony (Zeitoun and Warner 2006; Woodhouse and Zeitoun 2008; Daoudy 2008; Zeitoun et al. 2011). This paper seeks to focus this element of analysis, arguing that international law and its surrounding discourses have a major effect on water distribution and the furthering or countering of hydro-hegemony. The most notable way international law and hydro-hegemony are related is through the ideational pillar of power in the FHH. The importance of law in hydro-hegemonic analysis is demonstrated by the 2010 revision of the Framework from a formulation emphasising riparian position (the location of a state in relation to a watercourse, i.e. upstream or downstream) and exploitation potential (Figure 1, Zeitoun and Warner 2006) to a configuration stressing the significance of soft power (Figure 2, Cascão and Zeitoun 2010). This revision reflects a conclusion from Zeitoun and Allan (2008: 10) noting that riparian position is only one element of the Framework, and not necessarily
determinative of transboundary water interaction outcomes: “Turkey, South Africa and China are upstream hegemons; Afghanistan, Nepal and Ethiopia are upstream riparians but are not hegemons. Egypt is a downstream hegemon: Bangladesh and Mexico are downstream but are not hydro-hegemons.”

2.1.2. International Law as Soft Power

The strong emphasis on attention to power is probably the most significant contribution of the FHH to the study of international water resources. The impacts of power asymmetries over water negotiation outcomes had been previously considered (e.g., Waterbury 2002; Lowi 1993), but the Framework was the first analytical tool to explicitly use power as its driving lens. While the conception of material, bargaining, and ideational pillars borrows from Lukes’ formulation, international relations distinctions between hard and soft forms of power (building from Nye 1990, 2004) are clearly visible. The FHH’s emphasis on not only hard power but also the more subtle and relatively hidden manifestations of soft power, and its conceptualisation of power as not merely outcomes but also processes, calls for transboundary water management to pay wider attention to the nuances of water conflicts, distribution, and utilisation.

Hegemons (actors with greater levels of influence more easily able to ensure the processes and outcomes of water negotiations), use, and distribution, exist in virtually every transboundary water relationship. It is no surprise that stronger players win the ‘game’ more frequently. Weaker players in transboundary water management are typically constrained in their actions and outcomes by the hegemon’s interest. Hegemons wield a variety of compliance-producing mechanisms (the ‘carrot’) and authoritarian strategies (the ‘stick’) through their use of power to influence outcomes. Other involved states may, though, hold the potential to push against both the carrots and sticks. Cascão (2008, building from Scott 1985) developed the concept of ‘counter-hegemony’ to describe the work non-hegemonic states might engage with in order to resist hegemonic control. Various studies and theorisations suggest that soft forms of power are a particularly useful tool for non-hegemons (Zeitoun et al. forthcoming; Zeitoun et al. 2011; Cascão and Zeitoun 2010). It is through this emphasis on soft power that issues of international law clearly come into questions of hydro-hegemony.

The most obvious form of power is the ‘hard’ material power of economic and military power as well as technological capacity. This first dimension of power in the FHH considers the brute capacity of a state to physically take water. One of the biggest critiques of international law is its lack of hard power: except through the methods described above, there is no centralised and objective authoritarian mechanism ensuring compliance from all states (Dixon 2013: 15) (of course, such a centralised authority would doubtless create an entirely new set of concerns). The second dimension, bargaining power, revolves around the ability to control the “rules of the game” (Zeitoun and Warner 2006: 442), influencing the agenda, and determining what is and is not on the negotiating table. Appeals to international law are a component of this second dimension of power, and is often used to legitimise state practice (Dellapenna 2003). So, too, is the ability to create, write, and influence international law. This power is held by academics and lawyers in the drafting of articles; activists, corporations, and civil society leaders in their campaigns, and States themselves through their participation in the UN General Assembly and Security
The third dimension of power is the most difficult to concretely grasp, and also probably the most difficult to counteract. Through ideational power, hegemons influence ideas and assumptions – not merely their own, but also other actors’. This third dimension is the capacity to create, uphold, and destroy narratives, perceptions, and knowledge (rooted in Foucault’s (1980) understanding that power is inseparable from knowledge). International law reflects and reproduces global discourses on issues, which influence domestic debate and policy-making (Cortell and Davis 1996). It shapes and perpetuates norms of behaviour. As a repository and creator of ideas, it is a tool and actor in ideational power; as an author of international ‘rules’, it is a tool and actor in bargaining power. As such, international law wields significant soft power – and thus influences hydro-hegemonic relations – even when it does not carry with it a strong global police force with hard power (Daoudy 2008).

2.2. Transboundary Water Interaction and International Law

2.2.1. International Water Law

The international legal regime governing freshwater has strengthened the core obligations of a State towards its riparian neighbours through ‘soft law,’ that is, non-binding legal documents developed by the International Law Commission (ILC), a UN General Assembly body, as well as through the work of authoritative international NGOs. This work has formed the basis of many legally binding treaties, and the core principles are widely accepted to constitute customary international law (McCaffrey 2007, Salman 2014). Unlike conventions, which are legally binding agreements applicable only to the parties of the treaty, custom is binding on all states. Thus, in legal terms, the core provisions of IWL apply to all states, given its status as customary international law (McCaffrey 2007).

The core principles of IWL are primarily the duty to ensure equitable and reasonable utilisation (ERU) of a watercourse, the obligation not to cause significant harm (no significant harm) (NSH) to a watercourse, as well as procedural obligations under the duty of cooperation, such as notification and consultation during the planning of development that will likely affect a watercourse (McCaffrey 2007). These core principles are the bedrock of the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses (Watercourses Convention), the primary framework Convention governing international watercourses and the product of over 20 years of work carried out by the ILC. It has formed the basis of a multitude of bi- and multi-lateral agreements (see Boisson de Chazournes 2013), and its recent entry into force on 17 August 2014 presents new significance and implications as a legally binding treaty to those who have ratified it (McCaffrey 2014). As well as being reproduced in the 2008 ILC Draft Articles on the Law of Transboundary Aquifers (Draft Aquifer Articles), the principles are also central to the UN Economic Commission for Europe’s (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention). The Helsinki Convention is a regional implementation convention for UNECE states that has recently become a global treaty, for which non-UNECE countries are able to accede (McCaffrey 2014). The newly global nature of the Helsinki Convention creates an intricate international framework for IWL in combination with the Watercourses Convention (Rieu-Clarke and Kinna 2014), placing different emphases on the customary principles and differing scopes in their application, as will be discussed below.
There has been historical disagreement between States over the priority of concepts of ERU and NSH and how they interact (Wouters 1999). ERU in the Watercourses Convention (Article 5), Helsinki Convention (Article 2) and the Draft Aquifer Articles (Article 4) all require that states use and develop a watercourse by taking into account the watercourse States concerned. Both ILC texts list a series of factors to be taken into account in determining ERU (UNWC, Article 6; Draft Aquifer Articles, Article 5), including social, economic, cultural and historical considerations. In legal terms, the principle of ERU acts as the legal entitlement of riparian rights, with NSH as the regulatory check (Wouters 1999). State preference of what legal right should apply, however, will seemingly depend on a State’s riparian position in traditional situations regarding surface water. For instance, a lower riparian state would supposedly favour the principle of NSH to protect against the use from upstream states. Conversely, upper riparian users are likely to favour the principle of ERU, which provides more scope to make use of water, without consideration for downstream users (Salman 2007).

Differences in upper and lower riparian interests are illustrated by the dispute between Mexico and the US in the 1890s. Mexico complained of US practices wastefully diverting water from the The Rio Grande, to the detriment of downstream users (McCaffrey 1996). The US Attorney General asserted a principle of absolute territorial sovereignty (the Harmon Doctrine), claiming that the US did not have an obligation under international law as to how it utilised its own territorial waters (McCaffrey 1996). Today, the principle of ERU is the generally agreed rule, a form of “restricted sovereignty” (Dellapenna 2001). This is the recognition of a riparian right, where states may use water from a common source, provided their use does not unreasonably interfere with other riparian states’ uses (Salman 2007).

As these principles favour opposing state preferences, they are generally seen as conflicting principles. The belief by some that ERU is the fundamental and guiding principle of the Watercourses Convention is evidenced by the change in language of Article 7 to “having due regard to articles 5 and 6;” when it was contended that there was particular emphasis on the no significant harm rule (ILC 1993, Wouters 1999, Salman 2007, Salman 2014). Conversely, it is considered that the Helsinki Convention favours the principle of NSH, since it is placed at the forefront of the treaty (Rieu-Clarke and Kinna 2014). In international negotiations over water, or the topic of IWL, one of the two principles is usually subordinated for the other depending on whom it benefits (Stoa 2014). The dichotomy between these two principles in the context of aquifers and hydro-hegemony is discussed in Section 3.

2.2.2. International Trade Law

ITL deals with the trade of goods between countries. While international trade agreements have some of the oldest legal roots, the vast majority of historical trade negotiations were bilateral, governed by basic treaty law. The contemporary system of ITL is explicitly concerned with global trade and economic liberalism and has existed since the beginnings of the UN in 1947-48. It is based primarily on the World Trade Organization (WTO or the Organization) and its predecessor (now revised and used as a framework) the General Agreement on Tariffs and Trade (GATT).

The World Trade Organization was created on 1 January 1995 as an institution “whose primary purpose is to open trade for the benefit of all” (WTO 2013a). Like all
international law, the WTO’s rules and regulations are applicable only to member-states that have signed onto the agreements.

The WTO integrates preexisting trade agreements (most notably, GATT) with new treaties to create a binding framework for trade negotiations and dispute resolution. The WTO’s primary principles are non-discrimination, transparency, competition, lower trade barriers, and environmental and societal protections. Member countries are required to treat all other member countries as “most favoured nations”: The same conditions for trade (quotas, tariffs, etc.) must be applied to all partners, and non-WTO members cannot be given better treatment. There are exceptions for regional trade agreements and the like (e.g., because of the European Union, France is permitted to treat German and American imports differently). Through the national treatment policy, once foreign goods have entered the market, they must be treated the same as domestic goods (e.g., while a tariff may be applied at the border, an additional tax may not be charged to consumers at a store). WTO members agree upon tariffs, quotas, and trade deals; the Organization helps to enforce these deals and arbitrates disputes.

Water and ITL have a complicated relationship. Though the physical transfer of water is challenging and expensive, negotiations over bulk water transfers and sales are on the rise (Boisson de Chazournes 2013: 105). But it is not clear whether or not “water in its natural form” is considered a “good” to be regulated by the WTO (Baillat 2010: 97). The North American Free Trade Agreement (NAFTA) purposefully does not include water in its provisions (Rand 2012). In addition to looming questions over the trade of liquid water itself, though, are issues of virtual water trade and human rights. Through virtual water, the water embedded in the processes of production, manufacturing, and transport for a good, ITL regulates the movement of water around the world. ITL also intersects with questions of human rights. The human right to water raises concerns about trade processes limiting people’s access to water. Increasing attention to issues of fair trade and global working conditions raises further interest in manufacturing and trade processes.

Consideration of environmental and social concerns is one of the WTO’s principles. The controversial Tuna-Dolphin GATT cases of the 1990s made popularly known the exceptions for restricting trade on the basis on something “necessary to protect human, animal or plant life or health” or “relating to the conservation of exhaustible natural resources” (WTO 2013b). However, these cases also reinforced that the WTO will only apply these exceptions to the products themselves, not the processes or policies that produce them (World Trade Organization Panel 1994). Because concerns over virtual water and human rights in international trade are almost entirely about processes of production rather than the products themselves, ITL as it currently exists is unlikely to be of much use in addressing these issues.

2.2.3. International Human Rights Law

IHRL is a body of international law extends rights to individuals to be enforced by states, who have the obligation to protect, respect and fulfil those rights (Crawford 2012). The human rights regime is underscored by key treaties, to which the majority of UN member states are party. Where an “Optional Protocol” to a treaty has been ratified by states, individuals are able to bring a complaint against a state party alleging a violation of treaty rights to the relevant ‘treaty body’ (Biglino and Golay 2013). Not all treaty body based complaint mechanisms have entered into force,
however. As a result, rights are often unenforceable, and implementation rests on pressure from third party states through sanctions and shaming (Gopalan and Fuller 2014). Ideational power therefore plays a dominant role in human rights law, since it is often contended that states do not want to be seen to have a negative human rights record (ibid).

The human right to water is not expressly recognised in the key treaties, however there is growing recognition of the right by both the international community and authoritative human rights bodies. The key authority for the human right to water can be found in General Comment 15, adopted in 2002 by the UN Committee on Economic, Social and Cultural Rights (CESCR), the body that monitors the implementation of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). General Comment 15 notes that the right to water has been recognized in a wide range of international documents and reaffirms its fundamental importance. Most significantly, the comment provides that “the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights” (emphasis added). Although General Comment 15 is not legally binding per se (see McCaffrey 2005), the instrument nevertheless provides an authoritative avenue for the human right to water through other, legally binding human rights. Specifically, General Comment 15 argues that the right to water is legally binding under the ICESCR Articles 11 (the right to an adequate standard of living) and 12 (the right to health).

Scholars and advocates have been deriving the right to water from binding human rights provisions relating to other rights, as a basic necessity for their fulfilment. For example they emphasise the discriminatory basis of water use between a hegemon and a non-hegemon, highlighting the significant differences in water consumption. In intra-state conflicts, discriminatory practices are fundamentally illegal under international law. The 1966 International Covenant on Civil and Political Rights (ICCPR) provides that states must extend human rights protection to ‘all individuals within its territory and subject to its jurisdiction’ (ICCPR, Article 2(1)). Equality of human rights applications relies on the premise that rights be exercised without discrimination for the virtue of one’s humanity, making it ‘Universal’ (ICESCR, UDHR).

In terms of enforcement, Optional Protocol to the ICESCR entered into force on 5 May 2013. This consequently gave the CESCR competence to receive and consider communications from individuals, or groups of individuals (see Articles 1 and 2). Through this mechanism, the CESCR can send recommendations to states, to which the state must respond stating the action taken (Optional Protocol, Article 9). However, it is only applicable to the 21 states that have ratified the Optional Protocol. In addition, and of critical importance to hydro-hegemony considerations, the human right to water can also be considered an extraterritorial right. In other words, although human rights traditionally apply only to a state and its citizens, General Comment 15 nevertheless provides that a state should not deprive another state of its capacity to guarantee the right to water of its residents (see also Coomans 2011). In effect, the CESCR could then consider communications from individuals who reside outside of the territory of a violating state party to the Protocol (Biglino and Golay 2013). In addition, obligations of state-to-state assistance under the human right to water have
been shown to arguably exist, albeit to a limited extent, in a transboundary context (Leb 2012).

While enforcement remains weak, General Comment 15 has acted as a catalyst in arguments for the human right to water, and in 2010, the right was formally recognized by the UN General Assembly. While UN General Assembly Resolutions constitute soft law only, it represents the gaining recognition of the right by the international community, and the foundation for which human rights arguments and language can be rooted. Broadly speaking, non-binding texts have been useful in introducing global norms, by generating expectations of international actors’ attitudes and future behaviour (Shelton 2000). However, the effect of language to the human right to water remains to be seen, and the hegemonic influence of human rights language is more critically addressed in Section 4 below.

2.2.4. International Humanitarian Law

In situations of international armed conflict and occupation, rules of IHL apply in relation to state methods and means of warfare, principally to limit the effects of armed conflict and to protect civilians. IHL is primarily found in the 1907 Hague Regulations, the four Geneva Conventions of 1949, as well as their two Additional Protocols relating to the protection of victims of armed conflict. Except in relation to the human right to water, IHL is not considered in the scope of this paper’s analysis. However, it is important to highlight that the rules of IHL contain certain protections over water services under the general protection afforded to civilian objects, as well as the protection afforded to objects indispensable to the survival of the civilian population (Additional Protocol I, Article 54; Additional Protocol II, Article 14). In addition, natural water sources forming part of the natural environment are protected against methods of means of warfare that are intended, or may be expected, to cause “widespread, long-term and severe damage,” (Additional Protocol I, Article 55(1)) whilst water infrastructure is also protected against seizure unless required by military necessity (Hague Regulations, Article 23(g)). Finally, in situations of occupation, IHL sets out rules regarding the Occupying Power’s right to seize and use property and resources in occupied territory (Hague Regulations, Article 46-56) (for more on the role of IHL in the protection of essential services including water, see ICRC 2015).

2.2.5. The Sovereignty Paradox

Running through each of the above streams of international law and critical to questions of law and power is the issue of state sovereignty. State sovereignty is the bedrock of international law. With the nation-state as the supreme actor in international legal relations, it is sovereignty which gives states the ‘legal personality’ necessary to engage with international law and make agreements with other sovereign states (Crawford 2012). Fundamentally, its purpose is to ensure States’ independence from the interference of foreign powers and ensure States’ exclusive jurisdiction and supremacy over its own territory (Steinberger 2000). The principle of permanent sovereignty over natural resources has developed as a claim by developing countries in light of unfair exploitation of oil and gas by industrialized countries and multinationals in the past (Pahuja 2013). Thus it has been a post-colonialist trend for developing states to reassert their sovereignty, in particular their sovereignty over natural resources, in an effort to assert their independence through self-determination (Majinge 2008; Pahuja 2013). This can be said to be a counter-hegemonic strategy to
prevent the exploitation of natural resources for imperialist foreign benefactors (even as negotiations processes and outcomes may further limit and/or compromise national rights and self-determination, see Drew 2001 for more on this). Furthermore, the claim to sovereignty puts developing states on an equal legal footing next to even the most powerful nations, since international law is underpinned by the notion of “sovereign equality” (UN Charter, Article 2). Consequently, while authoritarian behaviour has been traditionally backed by sovereignty (Cannady and Kubicek 2014), a ‘sovereignty paradox’ ensues while it is simultaneously asserted as a counter-hegemonic strategy against authoritarian behaviour. These issues are challenged both legally and normatively as many ‘peoples’ do not have their own contemporary nation-state, and the concept of sovereignty is increasingly used for both hegemonic and counter-hegemonic leverage between and across a variety of actors.

State sovereignty, however, is not absolute, and the sovereign right to use natural resources is conditioned by the need to respect the sovereignty of other States (Steinberger 2000), which is well established in IWL (also underpinned by “sovereign equality” (UNWC, Article 8)). In recognition of the lack of respect water has for borders, IWL has developed the accepted notion of “limited territorial sovereignty,” in rejection of the Harmon Doctrine (McCaffrey 2007). As noted by Tvedt et al. (2015: 48-49), the international court of justice has never cited sovereignty as a guiding principle for the allocation of natural resources, whilst no interpretation of sovereignty “insulates a state from its obligations towards other states.” Similarly, the notion of human rights is directly opposed to the concept of sovereignty, since it governs the purely internal matter of states’ responsibility to protect the human rights of individuals within their own territory (Kearnes 2000).

This paper addresses the way in which the concept of sovereignty, as a fundamental aspect of international law, affects hydro-hegemonic relations. It is addressed firstly in terms of states’ arguments for control over water through use of the content of international law, specifically in the context of aquifer distribution (bargaining power). Secondly, the way in which hydro-hegemony is affected by the existence of sovereignty within the structure of international law is addressed through consideration of regulation over virtual water and the human right to water (ideational power).

2.3. Conceptualising the (Counter-)Hydro-Hegemonic Reality of International Law

Law can serve both as a tool of justice and an oppressive instrument of hegemony. On the one hand, due to the indeterminacy of Law (Miévillé 2004), the Rule of Law reinforces hydro-hegemonic soft power. Ideational and bargaining powers are tools used by hydro-hegemons in developing a legitimising ‘legal narrative’ (Shehadeh 1996). Non-hegemons can also use international law to strengthen these same soft powers, but the stronger, with a surplus of resources, will tend to prevail. Structurally, international law is problematic and has from its imperial birth served to further hegemonic arrangements. There is a violent relation of law itself: of which laws apply, when, by whom, to what end? (Kennedy 2012: 164). As these are precisely the questions sought by hydro-hegemony research, it is important to explore the very use of and underlying structure of international law. An attempt at ‘changing’ or improving the provisions of law and its acceptance as a liberating tool risks increasing its legitimacy; in other words, consent to the base hegemony of the Westphalian imperialist system.
The framework parameters and structure of international law – its emphasis on state sovereignty, its assumptions of equality, and the *de jure* sovereign equality versus *de facto* politico-economic hierarchy of states (see Pahuja 2011) – are represented by the thick border around Figure 3. The systemic issues described above in using law as (counter-)hydro-hegemonic tools are thus constrained within the ‘borders’ of international law’s structures, limiting the space for counter-hegemonic action. However, the playing-field in which actors interact (represented by a ‘balance’) can be leveraged through legal tools therein (symbolised by the two arrow ‘weights’ on the balance). In soft power terms, Figure 3’s border represents the structural hegemony of international law, created and upheld by ideational power; its arrows symbolise the bargaining power potential of various legal tools within that system. Figure 3 outlines examples of legal principles as potential ‘leverage’, which will be explained throughout the following sections.

![Figure 3. A Conceptualisation of International Law and its Role in (Counter-)Hydro-Hegemony](image)

The next sections will consider how power imbalances influence various water concerns regarding distribution (with a specific focus on aquifers), virtual water trades, and human rights discourses, exploring how international law impacts ideational and bargaining power and questioning whether the tools of international law can ever overcome the unjust system that created them.

3. Aquifer Distribution

Drawing from the overview of the intersections between international law, water resources, and hydro-hegemony presented in Section 2, this section considers how the international legal principles governing aquifer and basin distribution are potentially hegemonic or counter-hegemonic. It does this by first outlining the provisions in IWL most debated between states, and secondly by analysing those provisions in the context of the case study of Turkey using the FHH, in order to determine the hegemonic or counter-hegemonic nature of those provisions.

3.1. Legal Principles

3.1.1. The Development of Legal Rules over Transboundary Aquifers

Much of the law governing transboundary groundwater can be found in IWL, as outlined in Section 2.2.1. However, these rules are primarily geared towards surface
water, and critically, the scope of the Watercourses Convention only extends to
groundwater that is hydrologically connected to surface waters (Article 2(a)). This
can be interpreted broadly since in strict hydrogeological terms, all groundwaters are
connected to the surface, even if, for instance, recharge is negligible. However, it is
generally agreed that the Watercourses Convention neglects ‘unconnected’
groundwater, or so called “fossil aquifers” (Martin-Nagle 2011). This is supported by
the preparatory documents leading to the Convention, which reveals a clear objection
by certain states to include ‘confined groundwater’ in the convention’s scope (ILC
1993). Thus, the negation of ‘confined groundwater’ in the Convention was no
oversight.

The lack of attention paid to transboundary groundwater is rapidly changing however.
In response to the regulatory gap of the Watercourses Convention, the ILC has
developed the Draft articles on the Law of Transboundary Aquifers (Draft Articles) in
2008, which were finally adopted in General Assembly Resolution 63/124.
Significantly, these rules apply not only to groundwater but also to aquifers, where
both groundwater and the permeable geological formation (rock) in which it is stored
are within its scope (Article 2(a)). The articles reiterate the principles of ERU, NSH
and the duty to cooperate, whilst adding a controversial provision affirming State
sovereignty. Determining how these principles are potentially hegemonic or counter-
hegemonic are important, since despite its non-binding legal status, the Draft Articles
are an authoritative basis for bi- and multi-lateral agreements, or a future framework
Convention (Eckstein and Sindico 2014). Thus, how these principles develop have
implications for power asymmetries that exist.

3.1.2. Sovereignty

There have been heated academic debates surrounding the controversial sovereignty
provision in Article 3 of the Draft Articles. Its inclusion is deemed irrelevant, since
sovereignty undoubtedly exists in relation to the rock in the same way as in applies to
a river bed, but should not apply to the water since its use inevitably affects the
sovereignty of other states (McCaffrey 2008; McIntyre 2011). Critically, McCaffrey
(2008) notes that it provides States with a legal argument to claim absolute
sovereignty, a notion that ceases to exist in contemporary IWL, and is a direct
contradiction to ERU. The claim that the sovereignty principle can be used in this way
has been rebutted, since sovereignty is never absolute. Eckstein (2011) argues that the
requirement that sovereignty be exercised “in accordance with international law and
the present draft articles” (Article 3) ensures against the interpretation of absolute
sovereignty by states. This argument begs the question as to why the provision was
necessary to be included at all. As McCaffrey predicts, the answer may lie in the
potential soft power the provision can provide States in hydro-hegemonic relations,
which will be addressed in Section 3.2 below.

3.1.3. Equitable and Reasonable Use and the Obligation not to Cause Harm

While the sovereignty provision seemingly departs from contemporary IWL, the Draft
Articles reaffirm the principles of ERU (Articles 4 and 5) and NSH (Article 6).
However, there is doubt over the relevance of the ERU in the context of groundwater
(Hanasz 2015). Although groundwater does flow through aquifers, it may take years,
or centuries, for groundwater to move long distances. Upstream/downstream positions
are also less clear or irrelevant in terms of transboundary harm, since flow dynamics can take different directions through the various aquifer layers (see Figure 4), and can change according to human intervention (Schot and van der Wal 1992). Furthermore, the hidden nature of aquifers creates difficulty in collecting accurate data, which includes defining aquifer boundaries (Öztan and Axelrod 2011). Consequently, the problems that already exist in applying the politically charged and vague principle of ERU in surface water allocations are monumentally more challenging in relation to groundwater and aquifers.

Figure 4. Conceptual Illustration of a Transboundary Aquifer (Stephan 2009)

The relationship between ERU, NSH and State sovereignty will now be discussed in relation to Turkey’s expressions over these principles in the run up to the Watercourses Convention and the Draft Articles.

3.2. Case Study: Turkey and the Ceylanpinar Aquifer shared with Syria

Turkey is not party to the Watercourses Convention and even actively voted against its adoption in 1997. It nevertheless commented extensively to the ILC during the Convention’s formation, and again for the Draft Articles. It is thus considered to have an interest in the way the principles are written and presented in international law, which may tell us something about the potential hegemonic nature of IWL provisions. This section now analyses Turkey’s comments in the context of the FHH, with attention to Turkey’s geography (riparian position and exploitation potential), and soft power through legal provisions.

3.2.1. Geography: Riparian Position and Exploitation Potential

Turkey is an upstream state for the Euphrates-Tigris River basin, and analyses of the upstream/downstream dynamics of this basin are extensive (Daoudy 2008; Kibaroglu 2015). Primarily, these analyses are in relation to the dam developments by Turkey and the effects on the downstream states, Syria and Iraq. However, focus on hydropolitical relations over aquifer allocation is scarce (for an exception see von Bogdandy and Wolfrum 2012).
The Ceylanpinar Aquifer is an important resource to study since its recharge zone is located in southeastern Turkey, and discharges through the Ras al-Ain Springs in northern Syria (Figures 5 and 6) (Öztan and Axelrod 2011). Thus, Turkey remains an upstream riparian state, just as it is for the entire Euphrates-Tigris River basin. It is an unconfined aquifer, which is hydraulically connected to the Khabour River (Figure 5). Thus, the relationship between groundwater and surface water is important, and the groundwater in the aquifer falls under the scope of IWL generally.

Figure 5. Map of the Ceylanpinar Aquifer (Öztan & Axelrod 2011)
Exploitation potential is an even bigger consideration for hydro-hegemony analyses over groundwater due to the expense and technological expertise required to exploit the resource. In this case, both countries actively exploit the aquifer’s resources, and increased use and unlicensed wells in both countries have caused over-exploitation leading to increased water deficits and reduced flows to the Khabour River (Öztan and Axelrod 2011).

Continued over-exploitation could lead to depletion, from which the aquifer may not be able to recover (Öztan and Axelrod 2011). While both Turkey and Syria currently benefit from the exploitation of the Ceylanpinar Aquifer, if the aquifer were depleted, both parties would bear the costs (Chermark et al. 2005; Jarvis et al. 2005). As such, the traditional upstream/downstream dynamic of rivers does not apply in the same way for aquifers. Instead, drawdown crossing borders becomes a primary transboundary issue (see Figure 7). Consequently, without cooperation over the regulation of the resource, a race to the bottom by each State to pump as much water before depletion of the aquifer could arise; the classic tragedy of the commons (See Hardin 1968).
Critically, however, exploitation potential is unequal. The majority of the aquifer lies under Turkish territory, giving Turkey more exploitation opportunities. In addition, as the recharge zone lies predominantly in Turkey (see Figure 6), Turkey has more control over the management of the resource for continued use. Moreover, while conflict and instability has plunged Syria in economic decline (World Bank 2015a), Turkey remains one of the top 20 economies in the world (World Bank 2015b), giving it access to more expensive and effective pumping technology. Exploitation potential could therefore be the biggest determination of hydro-hegemony over transboundary aquifers. How law governs this situation could be critical, both for non-hegemonic States, and the longevity of aquifer resources themselves.

3.2.2. International Water Law: Power in the Principles?

Turkey has a prominent history of using international legal principles as ‘soft’ power to increase control over the transboundary waters (Daoudy 2008). Concurrently, Iraq and Syria have also sought IWL principles in strategic attempts to curb upstream control of the waters (ibid). However, for Turkey, there has been little public concern over its shared groundwaters (Öztan and Axelrod 2011). Despite this, Turkey has been vocal in its comments to the ILC in the development of the Draft Articles. In the development of the Watercourses Convention, Turkey expressed concerns about the scope including groundwater resources, even if they are connected to transboundary surface waters (ILC 1993: 168). Thus, Turkey undoubtedly has an interest in the way in which its transboundary groundwater resources are regulated.

In the development of the Watercourses Convention, Turkey had explicit reservations against the obligation of NSH in favour of the principle of ERU (ILC 1993; UNGA 1996). Turkey expressed the same preference of these principles in its comments to the Draft Articles, attempting to weaken the obligation of NSH by suggesting that the phrase “shall take all appropriate measures” should be replaced with the lower threshold of “shall try” (ILC 2008). Turkey’s interpretation of the principle of ERU has also been strongly in favour of state rights and sovereignty, stating that “[i]t is necessary that equitable and reasonable utilization should be understood and interpreted in the light of the fundamental principle of the sovereign rights of States over their territory” (UNGA 1996). Syria claims that Turkey’s interpretation of water allocation is not distribution, but “allocation of uses of water” (see Daoudy 2008, citing Syrian Arab Republic in 1995). Essentially, Turkey advocates for the distribution of projects while avoiding the issue of quantitative allocation (Daoudy 2008). It has been claimed by Syria that this is a strategic tactic, effectively delaying the process of water distribution to allow for the uninterrupted completion of a major dam development project (See Daoudy 2008, citing Kasm 1996: 27). This benefit-sharing approach is in fact how the Draft Articles have developed the principle of ERU, moving away from specific allocations when dealing with groundwater. ERU and benefit-sharing are thus preliminarily included as hydro-hegemonic leverage of international legal principles, since their wide interpretability plays into the hands of the powerful.

Even more fundamental to this analysis, is the issue of sovereignty. In its comments to the Draft Articles, Turkey stated that the principle of sovereignty was preferred, as it is important in situations where dialogue between states “is not at the level which enables joint equitable and reasonable utilization. Therefore, States should be able to exercise full sovereign rights to exploit, develop and manage the water resources
located within their land territories according to the present draft articles” (ILC 2008: para 94). The desire for the sovereignty principle to apply to transboundary groundwaters is also evident in its comments to the ILC in 1993, stating that it could not give its approval to the Watercourses Convention if its scope went beyond the scope of surface water to include groundwater, since it would be inconsistent with the principle concerning the permanent sovereignty of States of their own natural resources (ILC 1993: 168). Turkey went on to state in 1996 that groundwaters should be excluded from the scope of the Convention, since if surface water and groundwater are considered as constituting a unitary whole, “such a unity cannot be taken as a basis for determining the rights of utilization” (UNGA 1996).

Overall, it appears that Turkey simultaneously seeks to its secure rights over its groundwater resources, whilst actively stalling the process of determining what those rights are. In other words, the status quo is ultimately in Turkey’s best interest. This is seemingly best secured by the principle of sovereignty, which provides the strongest rights for States over their territory when argued under absolute sovereignty theory (McCaffrey, 2009) (See Figure 3). Despite the fact that in legal terms, sovereignty can never be absolute, it is shown here that Turkey, who already enjoys a hegemonic position, has argued against limits to its sovereignty. Further research is required to demonstrate whether this is a pattern among other hegemonic states. However, it can be seen that all of the States who commented in favour of the sovereignty principle in the comments to the Draft Articles were hydro-hegemons (that is, Turkey, Israel, Austria and Brazil) (ILC 2008).

3.3. Summary

Taken as a whole, it may be the case that in terms of the content of legal provisions in hydro-hegemonic settings, the principles of ERU, benefit-sharing and sovereignty contributes to the power of States that already enjoy a hegemonic position (through exploitation potential but not necessarily riparian position), through legal leverage in the content of international law manifested in bargaining power (see Figure 3). Thus, for a counter-hydro-hegemonic strategy it follows that (along with the NSH provision) sovereignty can be argued in response by non-hegemons. However, it must be argued fiercely in terms of preventing interference from other States’ aquifer utilization (absolute territorial integrity), and not in terms of unrestricted resource rights. This, of course, creates a claim-counter-claim culture with no objective mediator, and is vulnerable to the dominant administrative advantage of hegemons with abundant resources. Moreover, the claim-counter-claim culture contradicts the more contemporary view that water must be seen as a “common concern” (Magsig 2015) or through a “community of interests” (McIntyre 2010). The ideological Westphilian model of social organisation essentially forces non-hegemons to engage in sovereignty arguments in defence of hegemonic domination. Thus, it could also be said that sovereignty is an expression of ideational power in its ability to uphold and reinforce the very structures that enable its existence as a governing concept. While this section has dealt with sovereignty primarily as a bargaining power principle, the next sections will explore sovereignty as a structural concept in international law.

4. Virtual Water Trade

4.1. Virtual Water Trade

“Virtual water” has been defined by Tony Allan (2003) as “the water needed to produce agricultural commodities,” with recognition that the term could be expanded
to include other commodities as well. Virtual water trade refers to the ability of countries to trade ‘water’ by importing and exporting goods requiring water for production, rather than actual water. Although simplified classifications of types of water should be treated with caution, water used in the production of goods may be ‘green’ (soil moisture), ‘blue’ (surface and ground water), or ‘grey’ (water required to dilute pollutants). Crop and livestock imports and exports account for the majority of global virtual water trade (Hoekstra and Chapagain 2008), as most of the world’s water is found in the soil and is not directly accessible by humans.

In the past two decades, virtual water discourses have garnered significant attention from scholars of both environmental sciences and international relations examining the hydrologic and political ramifications of the idea. Hoekstra and Hung’s (2002: 7) “water footprint” quantifies the water used by a country by summing its domestic use and net virtual water import (see also Hoekstra and Chapagain 2007). The footprint tool and the idea of virtual water have been used by organisations like the Food and Agriculture Organization of the United Nations (FAO) in education campaigns on sustainable water use.

Proponents of virtual water trade argue that food trades from water-rich, arable land to arid land can help to enhance the arid area’s food and water securities, freeing up local water resources for other uses. Other authors point out that “[f]ood trade is a socioeconomically and politically very complex issue, particularly in poor countries depending on agrarian economies, rendering its role in supporting hunger and poverty alleviation uncertain” (Rockström et al. 2007: 6258), and argue that “[n]ot all forms of virtual water are equal” (Biro 2012: 97). Critics of virtual water discourse are concerned that “extolling the virtues of markets and imports as against domestic production” are yet another component of the neoliberal economic prescription (Iyer 2008: 16).

Tracing the patterns of food imports and exports globally raises several questions. The comparative advantage argument – that it is economically a better use of global water resources for water-rich countries to produce water-intensive crops and export them to water-poor countries – has some merit, but relying solely on this argument ignores historical and current power asymmetries. Nor do food trade patterns always follow comparative advantage and economic principles. It is seemingly irrational for the United States and Australia to export relatively unprofitable cereals – especially as Australia is the world’s driest inhabited continent yet its biggest water exporter (Biro 2012: 97). Given how grains are subsidised in these countries, cereals are sometimes sold at less than their cost of production (ibid; 97-98). But virtual water may provide a political function, “as these food exports help assure regime stability in the Middle East, they can equally be seen as an investment in oil supply security” (ibid: 98).

The issue becomes further muddied when the complexity of international corporations, entities responsible for a vast amount of virtual water trade, are considered. Expanding the FHH to consider virtual water trade, Sojamo et al. (2012) developed an idea of “virtual water hegemony” examining the domination of the global agro-food market by Western agribusiness conglomerates; Farnum (2013) focused her study of “virtual hydro-hegemony” on countries and state-based forms of power. Regardless of the primary unit of study, it is clear that virtual water flows are not free of the political and power concerns found in any other transboundary water interaction.

4.2. International Law and Virtual Water Trade

Working Draft – Comments welcome via info@lwrg.org
ITL governs all virtual water ‘flows’. The goods that transport virtual water – agricultural produce and manufactured products – are regulated by the World Trade Organization. The Organization’s work to reduce trade barriers serves to increase virtual water flows. Food safety laws, import quotas, and tariffs all influence where and how virtual water travels. As such, the WTO oversees nearly all virtual water trade between WTO members. The WTO is at least minimally aware of this: One of its recent working papers explores the “relation between international trade and freshwater scarcity” (Hoekstra 2010). The paper argues that international trade reduces the global use of water in agriculture but notes that “the WTO explicitly refrains from making environmental agreements” (ibid: 2). An increasing number of researchers are considering how extant agricultural subsidies agreements may be expanded to include virtual water concerns (see, for example, Gualtieri 2008); however, the impacts of trade on virtual water movement are not explicitly considered by the extant system.

Like ITL, IWL says nothing overt about virtual water, and indeed, only applies to water when it is part of a watercourse. Van der Zaag et al. (2002) argue that states need to consider the value of blue and green water relative to each other while determining ERU, but this is not generally part of the accounting. While IWL’s logic and frameworks could potentially be applied to virtual water flows, this cannot be legally enforced without states’ agreement. Nor would parallel adoption of IWL principles to virtual water law necessarily be in weaker parties’ best interest. Woodhouse and Zeitoun (2008) argue that IWL needs to take account of hegemonic practices if ERU is to truly be operationalized. This is not currently done: Burleson (2005-2006) points out the barriers to successfully implementing or leveraging principles of IWL in addressing waters shared between one state and one non-state or unrecognised state actor (e.g., Israel and Palestine); Tarlock highlights the gap between the principle of ERU and wealthy states’ incentives to take unilateral action with little attention to a particular reading of international law (Tarlock 2009: 371).

While there a human right to water is increasingly codified in international law (Section 5), the realisation and operationalisation of that right is far from universal, and issues of virtual water are again not carefully considered. Again, there is a disconnect between virtual water concerns and mainstream understandings of ‘water’. The General Assembly Resolution recognising water as a human right specifically names “drinking water and sanitation”. Other human rights are perhaps more relevant to virtual water flows: The human rights to property, employment, and health and most significantly, food, could be applicable. However, the potential for these rights to be used in counter-hydro-hegemonic action against virtual water inequities has yet to be substantially tested.

4.3. The Lack of a Virtual Water Law

Though the above extant legal frameworks all have implications for virtual water trade, the concept of virtual water has not yet explicitly entered the realm of international law. “International water law” is little more than “transboundary river basin law” combined with historic agreements on the law of the seas for navigational and territorial purposes and developing ‘soft law’ over aquifers. There is no “International Virtual Water Trading Council” or “Treaty on Virtual Water Flows”, though the former has been suggested (McKay 2007) – though creating such may further fragment already divided attention and responsibility. Nor have many scholars
yet tackled the issue of international law and virtual water. An average international trade lawyer may not even know what “virtual water” means. Article after article on global and international law has nothing to say on virtual water (Dauody 2008; Dellapenna and Gupta 2008; Elyer 2006; Kirsner et al. 2001-2002; McCraffrey 2009; McIntyre 2013; Nardone 2003; Salman 2007; Urueña 2009; Woodhouse and Zeitoun 2008; Wouters 2013).

Certain authors and articles are, however, beginning to fill this gap. Gerlak et al. (2009: 313) argue for paying more attention to virtual water: “This concept of virtual water is especially significant for equity in water-short areas because it seeks to trace hidden or unintended movement of water”. Liao et al. (2008: 503) content that the “failure to consider water resources may distort analysis of trade liberalization”. Litovsky and Villapando (2012) point out that virtual water exports influence land security, and laws concerning land ownership should take this into account, especially as it concerns small-scale agriculture. Sindico (2007) discusses the possibility of treating water as a foodstuff, argues for the need for a dispute settlement mechanism for water transfers, and considers the wisdom of giving water a waiver in WTO reforms.

Better leveraging international law as a counter-hegemonic tool in virtual hydro-hegemony will require more fully connecting the various content and mechanisms found within the structure of the international legal regime, essentially making an entirely new ‘balance’ in Figure 3.

### 4.4. Implications for Counter-Hegemony

Each year, the United Kingdom consumes some 3,600 Olympic swimming pools’ worth (nine million cubic metres) of Peruvian water via the more than seven thousand tonnes of asparagus it imports (Hepworth et al. 2010: 3; FAOSTAT 2013). The bulk of this asparagus “is grown intensively in large blocks of land reclaimed from the desert, irrigated by groundwater delivered by drip irrigation through hundreds of kilometres of pipeline. In 2002 this greening of the desert became unsustainable, when the irrigation needs of asparagus began to push the exploitation of the valley’s aquifer into the red” (Hepworth et al. 2010: 3). Multiple UK news stories have critiqued big businesses for the market, especially in Evesham, a town famous for its asparagus production and annual festival (Lawrence 2010; Poulter 2010; Telegraph 2010). But the UK continues to buy, Peru continues to grow, and virtual water continues to flow. Local Peruvians lack a clear legal mechanism to push against the negative impacts these trade patterns have on their personal and community water resources and security. International law as it stands is ill equipped to redress inequalities or injustices that emerge around water access and allocation as the result of resource-impacting trade.

The focus of international law on state sovereignty further complicates its potential as a counter-hegemonic tool in virtual water trades. While the state remains a significant actor, international corporations, mass producers (particularly Western agribusiness, see Sojamo et al. 2012), and local consumers are the most powerful players in virtual water trade. If international law is to be useful for those disadvantaged in trade systems, it must take these multi-scalar actors into account.

Scholars and international organisations such as the OECD suggest placing an economic cost on water via domestic pricing mechanisms as a way to manage virtual
water trade (Weiss 2014). Given track records, however, there is a serious concern that pricing water as an economic good is likely to enhance internal hydro-hegemonic realities between corporations, communities, and individuals.

The impact of the above bodies of law and policies on virtual water is vague at best. International law must be written and approved by states through multiple actors working at multiple levels; ambiguity may be a political necessity in getting treaties passed (Fischhendler 2008). But when law is open to interpretation, it seems likely that it will be interpreted in favour of the powerful. While international law does not adequately consider issues of virtual water and its state-centrism ignores the power of multinational corporations, the soft power potential of human rights discourses and legal precedent should not be ignored.

5. Human Rights

The human right to water is still a matter of debate as a binding right: its content, scope and application – which water, how much and at what cost – remain undefined. Nonetheless, many advocates and scholars are calling for the human right to water’s integration into IHRL provisions and discursively use human rights language in support of their water claims. This section of the paper will use the case of Israel and Palestine to demonstrate the implications of human rights discourses in hegemonic arrangements, with particular attention to the issue of sovereignty, the economic framing of water, and the humanitarian-minimum.

For those unfamiliar with the legal background of the Israeli-Palestinian conflict: as a result of Israel’s military effective-control over Palestinian Territory, Israel’s legal status in Palestine is long-term occupation. A ‘territory is considered occupied when it is actually placed under the authority of the hostile army’ (IV Hague Convention Article 42), both in the West Bank where control is direct and in Gaza (following Gross’s (2012) ‘Functional’ approach that duties of an occupant are ‘as great as its power’ insofar as Israel controls borders, fuel, electricity and other supplies). Under IHL, population transfer of the occupied forces to the occupied territory is prohibited (Fourth Geneva Convention Article 49). The presence of Israeli citizens within the Occupied Territories (known as “Settlers”) thus creates separate classes of residents and consequently separate legal regimes governing them, as well as a blurring of responsibilities between the Palestinian government (PA) and Israeli authorities.

5.1. International Legal Bodies and the Human Right to Water

IWL promotes the notion of water for a ‘humanitarian-minimum’, highlighting its human rights character by stressing States’ obligation to give “priority in water management to essential personal and domestic” needs (OHCHR, 2010:28; see also UN Watercourses Convention, Article 10, which provides that “special regard [must be] given to the requirements of vital human needs.”). To position IWL similarly to IHRL, the premise of the individual can be extrapolated to the notion of the State. If water as a resource is considered property of the state (Niehuss 2005), then the state, like the property owner, is granted maximum protection of its property. Like the property owner, the state has its own right to water and is presumed a balanced affair against its counter-parts. As Miéville’s (2004) analysis shows, the law emerges to regulate this property protection. Thus, sovereignty over one’s resources is part of the right to self-determination (for further on this, see the dissenting opinion of Judge
Weermantry in *Case Concerning East Timor* and in turn the right of self-determination as practicing one’s sovereignty is the fulfilment of property rights protection (Scobbie 2011). When such sovereignty doesn’t exist or is limited, this framework may in turn overlook the violations of water rights. For example, the lack of a sovereign power, as defined in the Geneva Convention as a “High Contracting Power”, is legally used by Israel to deny the applicability of international law to Palestine. When actors seek to protect Palestine’s rights through IWL, they argue against this position by Israel, but they also overlook Israel’s *de facto* sovereign control (Niehuss 2005), a major structural barrier.

IWL obliges cooperation based on sovereignty. Whilst it sets out clear legal principles to adhere to, they are primarily overarching guidelines for States who must negotiate the details, such as equitable share, in their own terms (See also UN Watercourses Convention, Article 8, which requires states to cooperate on a basis of sovereign equality and territorial integrity). Although some realms of international law have evolved to appreciate State inequalities (for example, emerging international climate change law sets out the principle of ‘common but differentiated responsibilities’), both IHRL and IWL assume an equal playing-field of the actors involved. Thus, through law, a supposed equal negotiation is facilitated. However, hegemonic arrangements are clearly at play and as Allan (2011) argues, law is fundamentally subordinate to politics. The examination of hydro-hegemony theory reveals that the terms of water cooperation are almost always reflective of the agenda set by a hydro-hegemon (Zeitoun and Warner 2006; Zeitoun 2011; Selby 2003), whereby power prevails (Miéville 2004). The implication of such equality as presumed under IHRL is a de-contextualised balancing of rights: “Ripped from context, abstracted into rights to be balanced, the occupier and the occupied, the saviour and the sinner, can seem strangely similar” (Kennedy 2014: 25; see also Gross 2007).

5.2. The Issue of Sovereignty

The human right to water is generally framed as enhancing state provisions for water, emphasising the role of the sovereign. Further, it applies as a long-term provision related to the material structures of water services (Mollinga 2008). Thus the right is conceived through state obligations to its population, and conversely, through the ‘participatory-approach’ whereby individuals become actors in decision-making. As a developmental policy, this framework assumes a democracy where human rights are upheld and “strengthen states’ accountability for the delivery of... services” (OHCHR, 2010:15). Consequently, those groups under the control of a sovereign whose legal status is distinct, such as refugees or occupied peoples, are alienated from the political process of claiming and achieving water rights.

The fulfilment of the right to water through state provisions can have further legal implications. The UN Concluding Observations of the HR Committee 2010 on the case of Palestine asserts that “The State party should ensure that *all residents of the West Bank have equal access to water*” (ICCPR 2015, emphasis added). Thus, Palestinians rights are assessed vis-à-vis those of Israeli settlers’, despite their vitally different status within these territories and the illegality of settler presence (see Article 49(6) of the Fourth Geneva Convention). The implication of advocating for equality is twofold. On the one hand, it would mean that Israeli settlers are considered part of the local population (and also occupied, and thus granted special status as ‘protected persons’), which does not enhance the protection of Palestinian rights and directly legitimises Israeli violations under IHL. On the other hand, it would mean
applying Israeli law on Palestinians, which would be a de facto annexation of the territory and is also illegal (under UN Charter Art 2) and counter to Palestinian interest and the viability of the Palestinian State. The legitimisation of the settlement project via water rights and access is a direct product of, among others, of the co-application of different bodies of law.

5.3. A Human Right as an Economic Good

At first sight the human right to water is articulated in a language that marginalises water’s economic element: “The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good” (CESCR 2003). However, the process for how this can be achieved remains unclear. In practice, this is translated to setting the benchmark for human rights breaches, and its technical, quantitative background furthers a regime of regulation. As Bronwen (2004: 6) shows, the “fulfilment of the human right to water is quite consistent with provision of water by private actors to individual citizens. In such a context it also necessitates elaborate regulatory frameworks. Both lead to a central salience for benchmark standards”. Thus such a take on water rights can reinforce a depoliticised position of human rights whereby “... far from there being a directly enforceable right to receive a particular resource or public benefit, judicial elaboration of a human right to water is more likely to craft a right to a ‘reasonable regulatory approach’” (ibid: 10).

McIntyre (2012: 659) explains this regulation in light of the development of International Administrative Law, reflecting ‘Good Water Governance’. In highlighting the opportunities to understanding the human right to water not as an enforceable right but as “an expression of universally accepted standards” (ibid: 654), through human rights, law is seen a useful prism to tackle private actors’ behaviour. However, as Bakker (2003: 38) emphasises, regulation is a discursive practice “embodying rules that define knowledge and legitimise authority” which is “inscribed within ideological allegiances as well as political alliances”. Thus regulation is a principal stage where “social negotiation of contradictions inherent in the accumulation regulation nexus is played out” (ibid: 39).

5.4. The Humanitarian-minimum

Scholars often seek to emphasise the right to water’s element as a basic human-need, undoubtedly reinforced by IHRL language. This notion is projected as a ‘humanitarian-minimum’ of water required to be met in order for it to be fulfilled as a human right, thus it is qualified and quantified (e.g., the World Health Organisation’s standard of 100 litres per person per day). Such discourse is prevalent among many advocates since too often basic necessities are not met. However, meeting humanitarian needs does not contest nor counter hegemony; it may even reinforce the structures that allow for hegemonic arrangements. For example, meeting humanitarian standards is sometimes a position held by hegemons to limit rights of non-hegemons, and the use of human rights “so often legitimates and excuses government behaviour” (Kennedy 2014: 24). This is done both by limiting water consumption to meet only the required threshold, whilst denying national-agricultural water rights (Dichter 1994).

Working Draft – Comments welcome via info@lwrg.org
The above is apparent in the Israeli position on water provisions for Palestine, which “only recognizes minimal drinking needs” (Shuval and Dwiek 2004: 3), whilst Israel retains sovereignty over shared resources (Meir Ben-Meir, former Israeli Water Commissioner, is quoted in Isaac 2005 as saying “I recognize needs, not rights. We are prepared to connect Arab villages to Israel as well, but I want to retain sovereignty on hand”). Its promotion of humans needs as taking precedent over natural properties (currently the dominant water allocation practice, see Benvenisti 1996) undermine Palestinian self-determination and collective water rights (Daibes 2003: 11). Scholars argue that the explicit use of human rights language allows organisations to address water issues without “…the notion of a collective Palestinian right of self-determination over natural resources” (Sultana and Loftus 2013). Such avoidance hinders Palestinian national claims over water resources. Human rights discourse that focuses on humanitarian needs over equitable rights may thus reinforce the very structures facilitating hydro-hegemonic realities (illustrated in Figure 3).

5.5. Human Rights and Hydro-Hegemony

As the review of the international legal framework demonstrates, water human rights are limited and confused. Water rights are frequently applied in parallel in various legal provisions (IWL, IHRL, and in armed-conflict IHL). There is a legal distinction between collective rights over water as a resource and rights as a human-need, even though the two are referred to interchangeably, thus overlooking the importance of agricultural water use in livelihoods. The human-centric approach of activists to the human right to water has often detracted from other national rights, with an individualist discourse reinforcing capitalist logic even as it is masked as counter-hegemonic action. Human rights discourses also strengthen the sovereign’s role, as rights are specifically understood as protected and realised by the State. This framing may overlook local and intra-national conflicts wherein provisions for the human rights to water may fall between the cracks of the law. Collective water rights to self-determination over one’s natural resources are compromised via the humanitarian-threshold logic. The issue of state sovereignty in hydro-hegemonic systems can thus be both a limiting and an enhancing tool for counter-hydro-hegemonic action.

However, human rights language may be used to contest hegemony on a local level. For example, Israeli domestic law facilitates a regime of land ownership (Kedar 2003) whereby unrecognised villages are deemed illegal and thus not connected to state services. Here, human rights discourses for the protection of individuals may have greater fruition as a leveraging mechanism. It is useful to note that in reference to citizens, the use of human rights language does not bring rise to the tensions described above, yet here too, law is used as a hegemonic tool whereby the State itself may act as the hegemon, facilitating an inequitable legal regime. When we turn to refugees, migrants and the stateless, human rights claims from a prospective sovereign would have limited legal grounds since in such contexts the populations’ status can be considered temporary. Therefore claims for adequate services, as well as the participatory approach, are far more limited and infrastructure likely to be much less developed.

In local struggles against water resources’ privatisation, human rights provisions may discursively reinforce such processes, and are therefore a limited counter-hegemony tool. Corporations are increasingly more vocal supporters of the right to water (Bronwen 2004), as through it specifically the accessibility gap is highlighted – a
market gap created by ‘state failure’ (Bakker 2003) – which can be filled in by such corporations (Sultana and Loftus 2013). As Bakker asserts, “[h]uman rights are individualistic, anthropocentric, state-centric and compatible with private sector provision of water supply; and as such, a limited strategy for those seeking to refute water privatization” (Bakker 2007: 447). To understand such hegemonic power “the analysis of the discourses and arguments that are mobilized to defend or legitimate particular strategies...” (Swyngedouw 2009) is of crucial importance.

Critiques offered by Critical Legal Studies can most clearly explain the problematic in using human rights discourses under capitalism (see Kennedy 2005; Kennedy 2002; Stewart and Zartaloudis 2003). Such scholarship can serve as a warning sign for activists and scholars that the call for a universal human right “can distract our attention from background norms and economic conditions which often do far more damage” (Kennedy 2014: 25). Subsequently, counter-hydro-hegemonic action must be strategic in calculating the ‘costs and benefits’ (Kennedy 2014: 26) of using claims about the human right to water with an understanding of how such tools may hinder long-term aims by consenting to – and thus upholding – a fundamentally liberal discourse, with very real implications of limiting water rights claims.

A human right to water would seemingly be a tool for contesting hegemony. The content of human rights discourses may be successfully leveraged to become more effective in contesting harmful hydro-hegemonic realities. Integrating virtual water concepts (Section 4), for example, would be using a legal tool within the system of international law illustrated in Figure 3 while the limiting ‘borders’ of international law’s structures remain intact. Some scholars identify potentials to the right by recognising the work of struggles seeking to transform it “from an empty signifier to a powerful tool for mobilizing from the grassroots... if activists succeed in reclaiming the right to water from more technocratic interpretations, the struggle might mean more than simply achieving access to sufficient volumes of safe water. Potentially, such a struggle would mean achieving the right to be able to participate more democratically in the making of what Linton, among others, terms the ‘hydrosocial cycle”’ (Sultana and Loftus 2013: 100). A possible way forward for human rights and any counter-hydro-hegemonic potential might just be a complete re-envision of what that might entail.

6. Conclusions

While state-level negotiations over aquifer access, international agricultural trading patterns, and individual-centric activist claims to water for personal use concern vastly different aspects of water, engage different levels of and types of actors, and occupy different discursive spaces, all three are strongly connected to hydro-hegemonic realities. International law plays a strong role in each, and understanding the interplay between law, power, and hydro-hegemony in each issue is vital to understanding the most desirable path forward.

Legal principles governing transboundary watercourse access, international trade, and human rights actualisation are a source of bargaining power for states in the sense that they provide a body of rules reflecting broad consensus which States can appeal to in relation to their conduct (building from Daoudy 2008). Given States’ interest and involvement in the development of principles, it seems that even powerful States fear
accountability and that States are unlikely to willingly give up their bargaining power that has been legitimised through international law.

In principle, these various forms of bargaining power can be used as counter-hydro-hegemonic tools for weaker parties in water management and interactions. In reality, though, as demonstrated in Section 3-5, the structural hegemony of international law, created and sustained by powerful states through ideational power, may limit the extent to which bargaining power is effective.

If it is accepted that international law is structurally hegemonic, the next question becomes whether the use of that structure can ever be counter-hegemonic. Should counter-hydro-hegemonic strategies reject or disengage with international law? Or should they make the most of the potential within the bargaining power of the extant system to seek change from within? These authors argue that the use of international law in breaking hydro-hegemony requires firstly an awareness of the ideational power inherent in international law. This issue goes far beyond questions of water, but directly affects those issues and thus must be considered by water scholars, policymakers, and activists. Those with a nuanced awareness of international law’s ideational power should then seek the development of international law through negotiation with awareness of and attention to hegemonic and counterhegemonic provisions. The explicit naming of and accommodations for extant and potential inequalities is a critical part of a fair legal system. Finally, bargaining power must be used in strategic ways. International law is only one small part of the greater power picture, with actors having a variety of tools to choose from, but the intentional and careful use of lawyers and legal resources can go a long way in furthering various actors’ positions.

More research and activism on international law and hydro-hegemony is necessary. Future work should seek to further exemplify the use of international law in counter-hydro-hegemonic action, identifying what has and has not been successful. In the absence of global revolution and a new epoch of social organisation that would radically tear down the structures of our current world, efforts must also be made to reform the structure of international law. It is imperative that such reform does not breed yet another system blindly reinforcing negative hydro-hegemonic realities; at the very least, there must be awareness of the system’s hegemonic roots and active work against continued negative hegemony. Part of law’s equivocality on these issues is the result of fragmentation. Global water governance frames water alternately as an environmental problem, an economic concern, and a human rights matter. This creates legal fragmentation, such that it is not clear where responsibility for monitoring water lies, and which agreements have precedence (Urueña 2009). This fragmentation is clearly seen in this paper, with multiple sectors of law impacting the various cases and issues. And numerous treaties and areas of law not considered in much detail in this paper are also relevant, including environmental and climate change law, regional agreements, domestic laws, and private sector regulation. Urueña argues that this fragmentation can be seen, not as a problem or source of anxiety and confusion, but as an opportunity to be creative in finding solutions that traditional law cannot provide (ibid.). The fragmentation of international law is a serious pragmatic (rather than normative) critique of the extant system of international law; leveraged correctly, it could be one way to begin reshaping the hegemonic border of Figure 3. The extant hegemonic structure of international law is upheld via ideational power. It is our job as researchers, practitioners, and individuals living in
this world to make use of the tools both within and without the box of Figure 3 to see past that ideational power and move toward a more just and equitable system.
References


Boisson de Chazournes, L 2013, Fresh Water in International Law, Oxford University Press.


Crawford J 2012, Brownlie's Principles of Public International Law, 8 edn., Oxford University Press.


Dixon, M 2013, Textbook on International Law, Oxford University Press.


Dross, JP, Talhami, M, de Pinho Oliveira, E, Cordoba, and Zeitoun, M, 2015, “Urban services during protracted armed conflict: A call for a better approach to assisting affected people”, ALNAP, the Urban Humanitarian Response Community of Practice, and the ICRC.

*Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).*


Selby, J 2003, Water, Power and Politics in the Middle East the Other Israeli Palestinian Conflict, I.B. Tauris & Co Ltd.


Shelton, D 2000, Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System, Oxford University Press.

Shuval H & Dwiek H, eds. 2004, Water for Life in the Middle East proceedings of the second Israeli-Palestinian International Conference Antalya, Turkey October 10-13:1 IPCRI.

Spence, G 1996, From freedom to slavery: the rebirth of tyranny in America, New York, St. Martin's Press.


Syrian Arab Republic 1995, Verbal Note from Turkey to Syria, 2 December.

The Hague Convention (IV), Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.


World Bank 2015a, “Syria Overview”,

World Bank 2015b, “Gross domestic product ranking table”,


