Israel and Palestine’s obligations relating to the rights to housing and health in the Occupied Palestinian Territories (OPT)

The complementarity between the Law of Occupation and the International Covenant on Economic, Social and Cultural Rights

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1 Introduction

The applicability of human rights in armed conflict situations has been subject to significant controversy. The classical position has long been that international humanitarian law (IHL) applies as *lex specialis* since other fields of law, including international human rights law (IHRL), are created for times of peace. This has been referred to as “the displacement view”.

Today, the prevailing view is that both fields of law apply in complementarity in an armed conflict, which is described as “the complementarity view”. Although both IHL and IHRL apply, “their *mode of application* – as opposed to their *applicability* – may differ in accordance with the ruling circumstances”.

Both frameworks include provisions protecting the civilian population’s rights to housing and health, but their scope of protection differs. While the material scope of the Law of Occupation (LO) mainly consist of obligations relating to protection, the International Covenant on Economic, Social and Cultural Rights (ICESCR) includes obligations beyond mere protection. Concerning the territorial scope, by definition the LO is applicable extra-territorially and obliges the Occupying Power (OP) to take measures in the occupied territory. The ICESCR on the other hand, is traditionally not applied extra-territorially. Temporally, the LO is applicable for as long as the territory is considered occupied, while the ICESCR applies all the time. The personal scope of the LO obliges both the OP and individuals of its armed forces, while only the State has obligations within the ICESCR.

This thesis will examine the complementarity within the material and the territorial scope of both frameworks, relating to the rights to housing and health which would accrue to Palestinians in the Occupied Palestinian Territories (OPT). First, this chapter will explain the background for the matter at hand in section 1.1. Section 1.2 includes the research questions subject to this thesis, and section 1.3 the methodology applied in this thesis, including the legal framework applicable to

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5 Hague Convention (IV) Respecting the Laws and Customs of War on Land (HC IV) with Annex: Regulations Respecting the Laws and Customs of War on Land, 18 October 1907 (HagueReg) Article 42(2).

both Israel and Palestine, and a short review of a field trip I took to the West Bank in October 2016.

1.1 Background
Before examining the complementarity between the two fields of law, some basic concepts need to be elaborated. This section will first give some background on the current situation between IHL and IHRL, and explain the terms “occupation” and the “Occupied Palestinian Territories”.

1.1.1 The current situation
The interest towards the human rights field has increased in the last decades, and the two international human rights Covenants have been ratified by most States in the world. Yet, the protection of IHRL is challenged by the many conflicts going on worldwide, which have called for more attention to the relationship between IHL and IHRL. Within IHL, protection of housing and health are found in the LO, namely the HagueReg, and the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (GC IV). Protection of housing and health within IHRL are found in the ICESCR. When it comes to the complementarity between the LO and human rights in belligerent occupations, the International Court of Justice (ICJ) has held that both apply in situations of armed conflict, except for situations of derogations. That both apply is also confirmed by the United Nations (UN) General Assembly. When it comes to their mode of application, the ICJ held in the Wall case that:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to

8 Especially relevant for situations of belligerent occupations are Articles 42-56.
9 Especially relevant for situations of belligerent occupations are Articles 27-34 and 47-78.
10 The right to housing is part of the right to an adequate standard of living in ICESCR Article 11. The right to health is contained in Article 12.
12 See UN General Assembly (UNGA) Res. 2675 (XXV), 9 December 1970, the preamble and para. 1.
answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as **lex specialis**, international humanitarian law.”

Based on this statement, both fields of law remain applicable in armed conflicts but their mode of application depends on the question at hand. In the *Wall* case the ICJ held that Israel was obliged “not to raise any obstacle to the exercise of [ESC-right]s in those fields [where the Palestinian Authority had some amount of jurisdiction]”. However, the content of this obligation and other eventual obligations was not elaborated in detail. Given the lack of a uniform decision on how the LO and the ICESCR apply in complementarity, they both need to be examined in order to assess the level of legal protection for Palestinians’ rights to housing and health in the OPT. This assessment shall be conducted on a rule-by-rule and case-by-case basis.

1.1.2 The term “occupation”

Territory is considered occupied when it is “actually placed under the authority of the hostile army” and it extends “only to the territory where such authority has been established and can be exercised.” Common Article 2 of the four Geneva Conventions of 1949 confirms that this rule applies to any territory occupied during an international armed conflict. If part of a State’s territory is overtaken by terrorist groups or organized armed groups operating in that State, the situation is not an occupation in terms of IHL.

In more recent years new formulations regarding occupations have appeared, such as “prolonged occupations” and “transformative occupations”. The means and methods in these occupations differ from the ones ordinary used in an occupation. What makes the occupation “prolonged” is not mentioned in neither conventional nor customary IHL. There we find no distinction between “short-term” or “long-term” occupations. A legal author has sug-

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13 ICJ, *Wall* case, para 106.

14 According to the Court, derogation clauses like the one in ICCPR Article 4 may narrow the protection offered by human rights Conventions. A derogation clause is specific to a treaty and cannot be applied by analogy to another treaty. See Vienna Convention on the Law of Treaties, 23 May 1969, (VCLT) Article 41(1), letter a. The ICESCR do not have a derogation clause, it only allows for limitations if they are “determined by law […] compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”. See ICESCR Article 4.

15 ICJ, *Wall* case, para 112.


17 HagueReg Article 42. The Regulations do not contain a definition on belligerent occupation, it only explains when and what part of the territory is considered occupied.

18 The last couple of years the word “occupation” has been used a lot in the media, relating to terrorist groups such as ISIS and Boko Haram, these situations must not be mixed with occupations in the terms of IHL.

gested that a prolonged occupation “is taken to be an occupation that lasts more than 5 years and extends into a period when hostilities are sharply reduced—i.e., a period at least approximating peacetime”.  

The term “transformative” occupation could better be called “operational” occupation. The main objective here is to “overhaul the institutional and political structure of the occupied territory, often to make it accord with the occupying power’s own preferences.” The ICRC Experts further lists up five reasons that might justify a transformative occupation, namely: the respect for human rights law; consent of the local population; the particular characteristics of prolonged occupation; the case of occupied failed States; and decisions taken by the UN Security Council. In such occupations, the human rights obligations incumbent upon the occupying power may be different than those in occupations not of a transformative character.

Based on the statements above, the Israeli occupation of Palestine is a prolonged occupation.

The latest situation raising questions similar to those of occupations, is the Russian unlawful annexation of Crimea in February-March 2014. The distinction between annexation and occupation has to do with the status of the territory, the temporal aspect and the use of hostilities. In an occupation, the OP “does not acquire sovereign rights over the territory, but exercises provisional and temporary control”. Annexation means that a State acquires another State’s “territory or part thereof […] by means of threats of force or the use of force”. As an act of aggression, the State proclaims the assigned territory as an expansion of its own territory, which is forbidden under international law. An occupation on the other hand, does not change the borders of the State. The occupied territory remains part of the original State, but with the OP controlling it. Because the level of hostilities and the temporal aspect are often less clear in prolonged occupations, this has led to the assumption that prolonged occupations amount to de facto annexation. In the prolonged occupation of Palestine, the

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22 Ibid. pp. 68-72.
23 Israel has confirmed its status as a “long-time” OP. See Vaios Koutroulis, “The application of international humanitarian law and international human rights law in situations of prolonged occupation: only a matter of time?”, IRRC 94, 855 (2012), p. 171.
26 Annexations may be done without the actual use of hostilities, though in many situations there will exist an implicit threat with the use of force.
28 Tristan Ferraro. “Determining the beginning and end of an occupation under international humanitarian law”. IRRC 94(885) (2012), p. 142. IRRC 94(885) is available at https://www.icrc.org/en/international-review/occupation. (accessed 29 May 2017). This is supported by the European parliament which have stated that “[legally spoken], an illegally annexed territory is occupied”. See Occupation/Annexation of a
State borders are slowly being erased making the situation more and more similar to a de facto annexation.\textsuperscript{29} The increasing amount of Israeli settlements in the OPT support this view.\textsuperscript{30} This situation may require that the OP in a prolonged occupation, has greater obligations within the ICESCR than an OP in short term occupations.

1.1.3 The Occupied Palestinian Territories

The OPT includes the territories of the West Bank including East Jerusalem and the Gaza Strip. When referring to the “West Bank” as part of the OPT, there are different understandings of what territories are included. During the Oslo Accords,\textsuperscript{31} the territory was divided into three areas (Areas A, B and C), where the parties got different levels of responsibilities and powers.\textsuperscript{32} The Palestinian Authority (PA) was supposed to get responsibilities and powers in all Areas after five years,\textsuperscript{33} yet the partition remains today.\textsuperscript{34} Areas A and B are subdivided
into 165 isolated units of land without any territorial contiguity, all surrounded by Area C land.\(^{35}\) By imposing movement restrictions in large parts of the West Bank,\(^{36}\) Israel controls import and export to the Palestinian Areas, which affect the Palestinian economy.\(^{37}\) Thereby, Israel still exercises some amount of authority in Areas A and B. This view is supported by the ICJ in the \textit{Wall} case, which affirmed that some transfer had taken place but that it was partial and limited. Then the ICJ referred to Article 42 of the HagueReg and the term “actually placed under the authority”, and concluded that the OPT consists of the “territories situated between the Green Line … and the former eastern boundary of Palestine under the Mandate”.\(^{38}\) The statement may be interpreted as including Areas A and B in the OPT, as well as East Jerusalem. East Jerusalem was originally a part of the OPT in the West Bank, but Israel unilaterally annexed the territory after the war in 1967.\(^{39}\) The international community never approved the annexation, and the illegality of it does not remove its status as OPT.\(^{40}\) This view is supported by the ICJ which included the Area of East Jerusalem in its findings.\(^{41}\)

After the Israeli disengagement from Gaza in 2005,\(^{42}\) and “the relaxation of some blockade-related restrictions in recent years”,\(^{43}\) the occupied status of Gaza has been disputed. The prevailing view is that Gaza is under belligerent occupation,\(^{44}\) due to three circumstances: 1) The presence of enemy troops inside the occupied territory is not a \textit{conditio sine qua non} for the existence of a belligerent occupation; 2) Article 42 of the HagueReg does not require

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\(^{35}\) See B’Tselem, “Area C”.


\(^{38}\) ICJ, \textit{Wall} case, paras. 77-78.


\(^{41}\) ICJ, \textit{Wall} case para. 1 pp. 139-141


\(^{44}\) The qualification of Gaza as occupied territory has been accepted by the vast majority of States. See UNGA Res. 66/79, 9 Dec 2011, paras. 5 and 10.
that the OP is the sole authority in the occupied area; 3) Israel still exercises the necessary control over the Area. The whole Area of the Gaza Strip is considered parts of the OPT.

1.2 Research questions

The aim of this thesis is to examine Israel and Palestine’s obligations relating to Palestinians’ rights to housing and health, based on the complementarity between the ICESCR Articles 11 and 12 and the LO. Chapter 2 discusses the territorial scope of the ICESCR and the relationship between IHL and IHRL. Chapter 3 analyses the material content of the relevant provisions in both fields of law. Chapter 4 provides an examination of the obligations incumbent upon Israel and Palestine. Finally, concluding remarks will be given in chapter 5 together with some considerations on the adjudication of ESC-violations. The author has chosen not to deal with aspects concerning law enforcement and prosecutions for relevant violations of international law. Similarly, responsibilities incumbent upon the international community shall not be examined here; the ICJ has already clarified some of these responsibilities in the Wall case.

The three inter-related main research questions and relevant sub-questions this thesis shall address are the following:

1) What is the territorial scope of the ICESCR, and what is the relationship between IHL and IHRL?
   a. Does the status as “occupied territory” free the local government from its ICESCR-obligations?
   b. Is the ICESCR applicable extra-territorially, making Israel responsible for ICESCR-obligations towards Palestinians in the OPT?
   c. Does the LO apply as lex specialis to the ICESCR?
   d. How could the ICESCR affect the application of the LO?

2) What is the material content of the rights to housing and health based on the complementarity between the ICESCR and the LO?
   a. What are the OP’s obligations relating to the rights to housing and health within the LO?

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47 The right to adequate housing is a part of the right to an adequate standard of living.
48 The displacement view.
49 The complementarity view.
b. What obligations relating to the rights to housing and health are incumbent upon a State Party to the ICESCR in situations of armed conflicts?

c. Based on the complementarity view, could the OP be responsible for both negative and positive ICESCR-obligations?

d. Does the status as a prolonged occupation affect the complementarity between the two fields of law?

3) Based on the complementarity between the ICESCR and the LO, what obligations relating to the rights to housing and health are incumbent upon Israel and Palestine in the OPT?

   a. Does the Oslo II Accord affect the application of the ICESCR and the LO?

   b. What obligations are incumbent upon the Parties in each Area of the OPT?

1.3 Methodology

This section explains the methodology applied in this these, the applicable legal framework and finally an overview of my field trip to the OPT.

1.3.1 Legal positivism

The traditional view in international law is that law is a collection of norms agreed upon by sovereign States. However, some legal authors argue that for rules to be considered law the rule must be issued by the sovereign. While States have sovereignty in their territories, the international community has no sovereign. The laws applicable here are either construed on agreements between States by the form of treaty law, considered to reflect States’ opinions as customary international law, or it is considered to reflect general principles of humanity derived from moral and ethics. This has resulted in a discussion on whether international

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51 See for instance VCLT Article 2(1), letter a.

52 See for instance CIHL.

law is considered “positive law” or not, due to its normative foundations and lack of a sovereign enforcement mechanism.\(^{54}\)

Some of the rights applied in this thesis may be considered derived from natural law. However, they are included in international covenants or treaties ratified by both Israel and Palestine, both well-knowingly that non-compliance may lead to sanctions. For the aim of this thesis, legal positivism will thereby be considered the applicable methodology. The answers are provided for by using legal sources and interpreted in accordance with internationally recognized principles of legal interpretation, included in the VCLT. Facts about the situation in the OPT are in general collected through reports from the UN, the ICRC, and different human rights NGOs.

1.3.2 The applicable legal framework

The legal situation in the OPT is challenged by the application of different sets of laws to Palestinians and Israelis. Even though the LO prohibits an OP from transferring its citizens to the occupied territory,\(^ {55}\) Israel has built settlements in the OPT and hundreds of thousands of Israeli citizens have moved to these territories. Israeli domestic law is applied to Israeli settlers, while military law and the LO are applied to Palestinians.\(^ {56}\) The ICESCR applies to both, but as will be shown, Israel denies its applicability to Palestinians in the OPT. Thereby Israel applies ESC-rights to Israelis and Palestine applies them to Palestinians.

1.3.2.1 The ICESCR

Both Israel and Palestine are parties to the ICESCR.\(^ {57}\) Regarding Palestine, some preliminary comments are in order. The general presumption is that only States can be responsible under human rights law, which raises a question about Palestine’s status as a State. The legal status of Palestine as a State is only partly recognized. In the UN Palestine has status as a non-member observer State, and its status as a State is recognized by the majority of UN member States, where approximately 70% of the States in the world recognize Palestine as a State.\(^ {58}\)

or Restrictions on the Use of Certain Conventional Weapons Which May be deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980 (Weapons Convention), Preamble.

Payandeh, “The Concept of International Law”, p. 970

GC IV Article 49.


See General Assembly Resolution 67/19, 2012, Status of Palestine in the United Nations. 137 out of 195 (independent) States has recognized Palestine as a State, which constitutes about 70% of the States in the World. See Permanent Observer Mission of The State of Palestine to the United Nations New York, “Dip-
Even though some States do not, this could not affect its ability to have duties under the ICESCR. Moreover, international tribunals and other organizations have concluded that also non-State entities could have human rights responsibilities. For purposes of this thesis, since Palestine has assumed State obligations under international human rights law and international humanitarian law, it will be referred to as a State.

When interpreting the ICESCR, I will use the Universal Declaration of Human Rights, 10 December 1948 (UDHR), and the International Covenant on Civil and Political Rights, 19 December 1966 (ICCPR), as well as regional human rights treaties. Due to a lack of case law concerning the ICESCR, case law from the European Court of Human Rights (ECtHR) and the Supreme Court of Israel sitting as the High Court of Justice (HCJ) will serve to interpret specific rights and relevant legal issues.

1.3.2.2 The law of occupation

The Hague Reg is considered to reflect customary international law (CIL), and as an OP Israel is bound by the regulations. The GC IV covers the protection of civilian persons in times of war, and both Israel and Palestine have ratified this. Yet, Israel has stated that the GC IV is inapplicable to the OPT, because the OPT never was Palestinian territory. The argument is based on the fact that the West Bank was annexed by Jordan in 1950 and that Egypt never claimed the Gaza Strip. The argument does not hold because of a too rigid interpretation of

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59 See UNGA, “Mission to Lebanon and Israel” A/HRC/2/7, 2 October 2006, para. 19, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/141/95/PDF/G0614195.pdf?OpenElement (last accessed 28 May 2017), where it was held that Hezbollah, as a non-State actor “remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights”. See also UNGA, “Human Rights in Palestine and Other Occupied Arab Territories”, A/HRC/12/48, 25 September 2009, para. 305 http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (accessed 28 May 2017), where it was held “In the context of the matter within the Mission’s mandate, it is clear that non-State actors that exercise government-like functions over a territory have a duty to respect human rights”.

60 Regarding IHRL, Palestine is also a member to the ICCPR, the Convention on the Rights of the Child and more. See United Nations Treaty Collection, “participant search”. Regarding IHL, see below.


the Convention and the rationale behind the Convention.64 This view is supported by the ICJ in the Wall case.65 The GC IV is applicable to the OPT.

The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (AP 1) is ratified by Palestine but not Israel.66 Yet, some of the provisions in AP 1 are considered CIL, and are therefore applicable to the OPT. 67

Even though this thesis will not examine the possibility to prosecute the parties’ alleged violations of their obligations, some references to the Rome Statute of the International Criminal Court, 1998 (ICC) will be necessary to emphasize the severity of eventual international law violations. The ICC Statutes went into effect for Palestine on 1 April 2015,68 giving the ICC jurisdiction over international crimes committed in the OPT since 13 June 2014.69 Israel is not a party to the ICC,70 but if crimes are committed on the territory of a State Party to the ICC,71 the ICC has jurisdiction.72

1.3.2.3 Other relevant material

Other relevant materials used in this thesis are resolutions from the UN main organs. Israel is a member of the UN,73 and is bound to act in accordance with the obligations under the UN Charter.74 Palestine is bound by the legal obligations included under the UN Charter, since most of them are part of customary international law, or expected to apply also to UN non-

64 Ibid. Territory also refers to the de facto title of territory, the drafters of GC IV did not mean to allow for occupation of such territory and the Convention is drafted for the protection of the civilians.
65 ICJ, Wall case, para. 101. The ICJ refers to a foregoing discussion, including the reasoning above, and concludes that the GC IV is applicable.
71 ICC Article 5
72 ICC Article 4.
74 Article 4(1) of the UN Charter.
member States. Both parties should act in accordance with resolutions adopted by the Security Council (SC) under Chapter VII of the UN Charter, decisions of the International Court of Justice,\(^75\) and resolutions by the General Assembly (GA) based on international law.\(^76\)

Agreements concluded between Israel and Palestine are in general binding upon both parties.\(^77\) Most relevant to this thesis is the Oslo II Accord and its Protocol Concerning Civil Affairs (Annex III).\(^78\)

### 1.3.3 Fieldwork

In October 2016 I was on a study trip to the West Bank. This trip was necessary to see how the occupation actually affected Palestinians’ rights to housing and health.

I stayed in Hebron, Bethlehem, Ramallah, Bil’in, Jericho, the Jordan Valley and East Jerusalem, and got to see the different conditions in Areas A, B and C. Accompanied by the Military Court Watch, I got to attend two military trials and saw how the military law was applied. I visited human rights NGOs from both Israel and Palestine such as B’Tselem and Addameer, and got to interview civilians living in the different Areas. The population’s enjoyment of the rights to housing and health varied a lot depending on where they lived. Especially interesting was the situation of Hebron, which is divided into one Palestinian side (H1) and one Israeli side (H2).\(^79\) I got to visit both sides.

Due to the need of documentation for facts being used in this thesis, my fieldwork will mostly be used with hypothetical issues concerning the content of the different rights. Where statistics are obtainable, my fieldwork will also be used in explaining the actual situation.

\(^75\) The UN Charter, Articles 92-94(1).
\(^76\) Articles 14 and 25 of the UN Charter. The binding effect of GA resolutions is disputed, but in accordance with Article 4(1) of the Charter, member States should carry out its decisions.
\(^77\) VCLT Article 26.
2 The relationship between the LO and the ICESCR and the territorial scope of the ICESCR

2.1 Introduction

Within the LO, the OP has obligations towards the population of the occupied territory. Should the content of these obligations be elaborated by the content of the ICESCR, the ICESCR must be applicable extra-territorially. If this is the case, the obligations incumbent upon the occupied State could either; 1) cease due to the application of IHL; 2) they could remain incumbent upon the authority of the occupied State; 3) they could be transferred to the occupying power, or; 4) they could be shared between the two. As seen, the first alternative was disproved by the ICJ in the Wall case. This leaves three options:

1) The obligations within the ICESCR remain the obligations of the occupied State, due to de jure jurisdiction. In the OPT, this will mean that ESC-obligations are incumbent upon Palestine, because the OPT is Palestinian territory “by law”.

2) The ICESCR is applicable extra-territorially due to the OP having de facto jurisdiction. In the OPT, this will mean that ESC-obligations are incumbent upon Israel because the OPT is “actually placed under the authority” of Israel.

3) Both Israel and Palestine are obliged to act in accordance with the ICESCR and fulfill their ESC-obligations.

In order to understand whether the ICESCR could be applied extra-territorially and affect the OP’s obligations within the LO, I will first explain the relationship between the two fields of law (section 2.2). Then the territorial scope of the ICESCR will be examined, including the general obligation clause in Article 2 of the Covenant (section 2.3), Palestine’s obligation due to de jure jurisdiction (section 2.4), and Israel’s obligation due to de facto jurisdiction (section 2.5).

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80 The material content of the OP’s obligations is subject to the next chapter.
82 As held in ch.1, the situation of belligerent occupation does not change the territorial boundaries of the occupied State. The territory is still de jure part of the occupied State’s jurisdiction.
83 When the territory of the occupied State is “actually placed under the authority” of the OP (HagueReg Article 42), the OP will have the de facto jurisdiction.
2.2 The relationship between the LO and the ICESCR

Given that both the LO and the ICESCR apply, there are four imaginable categories of conflicts: 1) The LO covers the situation and the ICESCR is silent; 2) The ICESCR covers the situation and the LO is silent; 3) Both the LO and the ICESCR cover the situation with the same outcome; 4) Both the LO and the ICESCR cover the situation, but with different outcomes. Regarding the first situation, there will be no conflict and the solution will be to apply the LO. The second situation may make the OP bound to apply the ICESCR, depending on the factual circumstances. The third option will not create any problems regarding the interpretation, since the outcome will be the same. The law of occupation may here be presumed to be in accordance with the ICESCR. In the last situation, the solution will depend on the complementarity between the two fields of law.

In the Expert Meeting on Occupations, the relationship between the two frameworks was dominated by the approach of IHL as *lex specialis*, and that the two frameworks should be applied in complementarity. While most of the experts held that the ICESCR would be relevant in belligerent occupations, only one expert held that the Covenant was meant to apply during occupations. This section examines the theories behind the “displacement view” where the LO may work as *lex specialis* to the ICESCR, and the “complementarity view” where the ICESCR may affect the interpretation of the LO. A comparison on the material content of the rights to housing and health within both fields of law will be done in the next chapter.

2.2.1 The displacement view: To what extent does the LO apply as *lex specialis* to the ICESCR?

This section will first examine some general considerations on the application of IHL as *lex specialis* to IHRL. Then the principle of *lex specialis* will be examined in relation to the LO and provisions relating to housing and health within the ICESCR. Finally, the notion of *lex specialis* will be examined in relation to prolonged occupations.

2.2.1.1 IHL as *lex specialis* to IHRL

The principle of *lex specialis derogat lex generalis*, states that the specialized rule overrides the general rule. If a set of rules should be considered especially developed for a given situation, another set must be considered generally developed for that situation. As held in the in-

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84 What law one chooses to refer to could affect the applicable remedies.
86 Ibid., pp. 64-65.
troduction chapter, IHRL was considered developed for situations of peace, making IHL *lex specialis* in situations of armed conflict. In more recent years, this view has been challenged.

At least four reasons may be raised towards the general view of applying the whole field of IHL as *lex specialis* to IHRL. First, the reason for IHL not considering all issues covered for in IHRL is a result of the time of adaption rather than an intention to create a system in derogation from IHRL as *lex generalis*. In fact, IHRL could be used to “fill the gaps that an earlier normative framework could not take into account so as to offer solutions to problems not covered, or only partially covered, by IHL.”

Second, the principle applies to concrete rules, not the entire legal framework. In the *Nuclear Weapons* case, the ICJ interpreted the principle correctly, by formulating the *lex specialis* rule in relation to the application of a specific norm, namely that of Article 6 of the ICCPR. Third, the rule should be used as an interpretative aid in order to avoid norm conflicts, not as a rule to determine which norm that should prevail on a general basis. This is also done in the *Nuclear Weapons* case, where the ICJ interpreted the adjective “arbitrary” in art. 6 of the ICCPR according to IHL, and thereby operated a “harmonizing interpretation” rather than excluding the rule in the ICCPR per se.

Fourth, even if applicable to some rules, a general application would not do justice to the complexity of the relations between the two legal frameworks. The ECtHR seems to adhere to this view. Following the 2008 hostilities between Russia and Georgia, Russia invoked itself free from IHRL-obligations, due to *lex specialis*. The ECtHR stated that “Article 2 must be interpreted in so far as possible in the light of the general principles of international law, including the rules of international humanitarian law […] Generally speaking, the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part”.

Based on the arguments above, whether provisions in IHL apply as *lex specialis* to IHRL, must be examined on a rule-by-rule and case-by-case basis. The provisions relating to the rights to housing and health within the LO, must be viewed together with the relevant provisions of the ICESCR.


89 Ibid. p. 143


93 Ibid.

94 Ibid.

95 Ibid.

96 ECtHR, *Georgia v. Russia, Admissibility*, Application No. 38263/08, 13 December 2011, pp. 23–25, paras. 69 and 72. All cases from the ECtHR are available from [http://hudoc.echr.coe.int/eng#](http://hudoc.echr.coe.int/eng#)
2.2.1.2 The LO as lex specialis to the ICESCR

The LO includes two different models for how the OP may control the civilian population. The OP may either take law enforcement measures to maintain the public order and civil life, or it may use military force if the threshold for this is fulfilled. These two are referred to as the “law enforcement model” and the “conduct of hostilities model”. The LO is silent on the interaction between these two. According to legal scholars, the law enforcement model is considered the main model when the OP has a relatively secure hold on the occupied territory, and the hostilities have ceased. The conduct of hostilities model is considered to apply when hostile groups challenge the authority of the OP, making it necessary for the OP to use military force to control the territory. In the Expert Meeting, most of the experts asserted that any use of force in relation with the policing duty of the OP, should be governed by the law enforcement model and that this model should be presumed in occupied territory. Meaning that in non-hostile situations, the OP must act like an ordinary government and take control of the situation by ordinary means, not the use of military force.

These findings seem to presume that what makes IHL lex specialis is the possibility to "bypass" the general laws where military necessity and security reasons so require. Where there is a lack of hostilities, and the law enforcement model applies, such requirements may never be fulfilled. It is only where the conduct of hostilities model applies that IHL could be considered lex specialis. The principle "indicates the appropriate balance between the principles of military necessity and humanity, and limits the extent to which IHRL is needed to restrain the imperatives of military necessity for the sake of humanitarian concerns.”

When the law enforcement model applies, IHRL could prevail as lex specialis, while IHL could prevail as lex specialis when the conduct of hostilities model applies. Relating to the West Bank, the UN Secretary-General on human rights in the OPT has held that the law enforcement model applies.

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100 The aim of military necessity means that the government of a belligerent State could use force to achieve the strategic objectives it founds necessary. See IHL Dictionary pp. 75 and 123. A “strategic objective” means that the target must be of military character. The amount of force must still be in accordance with other principles of IHL and must not be indiscriminate, disproportionate, or excessive, see CIHL Rules 11, 14 and 18.
2.2.1.2.1 Military necessity and the right to housing

Where the conduct of hostilities model applies, civilians’ right to protection of their houses could be challenged. What constitutes an unlawful destruction of the right to housing under IHRL will be determined by IHL. This will result in the attack being lawful if it is justified by military necessity and not excessive in relation to the concrete and direct military advantage anticipated. The threshold is quite high, and considerations of the right to housing as a fundamental human right may make the threshold even higher. If the occupation is relatively stabilized, it would thereby be hard to think of reasons which fulfill the criterion of military necessity. Albeit, it could be imagined that the situation suddenly changes and becomes more hostile. Here, the OP’s security and control may be jeopardized, and hostile groups may use their homes to store arms, to make essential plans of future attacks, to practice the attacks etc. Given that the OP is not able to control the situation otherwise, destruction may be rendered necessary if it will result in a prevention of an attack on the OP.

2.2.1.2.2 Military necessity and the right to health

Even when the conduct of hostilities model applies, IHL gives a strong protection of the right to health. As held in the Expert Meeting, the complementarity between the two fields of law implies that IHRL broadens the content of the protection offered for in IHL. Notably, military necessity may never allow for any direct violation on civilians’ right to health. When it comes to indirect violations of civilians’ right to health, the situation may be less clear. In a situation where both military personnel and civilians require approximately the same amount of health care, lex specialis may argue that health professionals should prioritize military personnel. If the civilian and the military personnel do not require the same amount of health care, medical ethics would require that the one in most need of health care gets treated first. Such a priority may be done both where the law enforcement model and the conduct of hostilities model apply. However, it is important to emphasize that health personnel always shall do their best to help all persons in need of health care.

2.2.1.3 Lex specialis in prolonged occupations

The notion of military necessity in prolonged occupations could be interpreted broadly, by stating that “the longer a conflict (including a belligerent occupation) lasts, the more pressing

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104 See GC IV Article 53, and Article 23(g) of the Hague Reg.
105 CIHL Rule 14.
106 This is only an example and it is not sure that this will be an accurate reason. In the same way other situations may allow for an attack as well. The qualification must be done by the military commander in each particular case.
the necessity to submit the enemy at the earliest possible moment becomes.”\textsuperscript{107} According to Koutroulis, such a broad application has never been invoked by States, international courts’ jurisprudence, or legal doctrines, and it cannot be invoked to broaden the interpretation of what is considered military necessity.\textsuperscript{108}

There are a few cases relating to the issue of whether the duration of the occupation alone may influence the interpretation of these exceptions. In the \textit{Wall} case, none of the States that intervened in the proceedings before the ICJ suggested a narrow interpretation of the notion of military necessity, except from Switzerland as noted below.\textsuperscript{109} Most of the case law is to be found in the Supreme Court of Israel sitting as the High Court of Justice (HCJ).

In the \textit{Askan} case, the HCJ pointed towards a more narrow interpretation of the notion, and held that “military and security needs predominate in a short-term military occupation. Conversely, the needs of the local population gain weight in a long-term military occupation”.\textsuperscript{110} By making the needs of the population an argument of heightened importance, the more compelling must the military necessity be to outweigh them.\textsuperscript{111} In this sense, the time element will implicitly influence the notion. Koutroulis has held that due to the Court’s lack of subsequent case law, the time factor itself cannot impose a narrow interpretation. The absence of hostilities in prolonged occupations will naturally affect the notion of military necessity, because “[w]hen military operations have ceased, military necessities must inevitably be less demanding”.\textsuperscript{112} Thereby the time-element and the lack of hostilities together, may require a more narrow interpretation of this notion.

This is also what Switzerland underlined in its written statement to the ICJ, where it held that “[t]he law of armed conflict strikes a balance between humanitarian demands and military needs. [...] Hence, every step taken in the context of hostilities, of a military, security or administrative character, must respect the principle of necessity, proportionality and humanity. [...] Any examination of necessity and proportionality in circumstances of prolonged occupation when hostilities have ceased must be more rigorous, since stricter conditions govern the imposition of restrictions in such circumstances on the fundamental rights of protected per-

\textsuperscript{107} This is used as an example by Koutroulis with reference to the meaning of military necessity, where the “legitimate purpose of the conflict” is defined as the submission of the enemy ‘at the earliest possible moment’. See Koutroulis, “The application of IHL and IHRL”, p. 190.
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid. pp. 191-192.
\textsuperscript{110} Ibid. p. 192.
\textsuperscript{111} Ibid.
sons.” In his comments on this statement, Koutroulis underlines that it is the combination of the prolonged character and the absence of hostilities which lead to a narrower interpretation. Due to the needs of the civilian population taking precedence, these circumstances make it possible to view IHRL as *lex specialis* in prolonged occupations. Considering IHRL as the most suitable framework here, excludes the possibility for destruction of houses due to military necessity. The longer an occupation lasts, the harder it is to prove such actions proportionate, because the OP should always use less destructive means first, and the content of the human rights provisions become more prominent and binding.

2.2.1.4 Conclusion

The outcome of applying the LO as *lex specialis* to the ICESCR may vary due to different considerations. Where the conduct of hostilities model applies, the LO may prevail as *lex specialis* in relation to the rights to housing and health. Where the law enforcement model applies, for instance in prolonged occupations, the LO will not prevail as *lex specialis*. Here, the IHRL may be considered *lex specialis*.

2.2.2 The complementarity view: To what extent may the ICESCR improve the protection offered to the civilians in the LO?

Even though the LO does not include any references to IHRL, it includes provisions aiming to protect the life of civilians, in accordance with the principle of distinction. As will be seen in the next chapter, the provisions protecting the civilians under the LO have close similarities to those in the ICESCR, and it may be said that the guarantees offered to civilians are a mix of these two. However, IHL provisions protect both civilians and civilian objects, while IHRL provisions are mainly concerned with protection for the individual. By applying the LO and the ICESCR in a complementary manner, there are six different scenarios on how that interaction can unfold in practice. These scenarios are:

- 1. HRL might act as a gateway for the application of IHL by way of renvoi;
- 2. HRL might give effect to a relevant but otherwise inapplicable provision of IHL;

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114 Koutroulis, “The application of IHL and IHRL”, pp. 193-194
115 See *CIHL* Rules 1, 3 and 5.
117 However certain ESC rights require the existence of an object, i.e a house in relevance with the right to adequate housing, it is the individual need of this house that is protected. Not the house itself.
3. HRL might inform the interpretation of IHL, including possibly by supplementing or completing the IHL rule;
4. HRL might prevail over inconsistent IHL;
5. HRL might fill in the gaps in circumstances in which there is no relevant IHL provision;
6. HRL might augment IHL through HRL procedural and accountability mechanisms.”

When it comes to the rights to housing and health, all six ways of interaction will affect the complementarity of the LO and the ICESCR. When the occupation persists and the situation stabilizes, ESC-rights “prove to be vital to [better understand] the scope of the obligations [incumbent on the OP] […] They give concrete form to the general obligation to ensure public order and civil life as in Article 43 of the Hague Regulations of 1907.”

The complementarity view may be challenged by the rationale behind the different fields of law. While obligations incumbent upon States under the ICESCR are customized for situations with a certain amount of governmental functions present, the LO is customized for situations where there is no well-functioning government. Albeit, the OP must have a certain amount of authority to control the occupied territory, but the degree of obligations incumbent upon the OP is designed for situations where the main resources are used to keep this control. Where a well-functioning government is controlling the State, the State will naturally have more resources to use on the improvement of civil life. Concerning the differences in governmental functions, especially two points need to be elaborated:

1) The ICESCR includes a financial and logistical commitment.
2) The threshold for fulfilment of ICESCR-rights and LO-rights differ.

These two issues will now be addressed below.

1) Financial and logistical commitment
The whole framework of the ICESCR is built on the presumption that the more resources the State has, the greater its obligations are. To show its progress, the State has to deliver reports on its work. This significant financial and logistical commitment cannot be expected

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118 Betlehem, “The Relationship between IHL and IHRL”, pp. 180-195. (*HRL is to be understood as Human Rights Law, here described as IHRL*).
119 Ferrero, “Expert Meeting”, p. 95
120 HagueReg Article 42.
122 See ICESCR Article 2(1), which will be elaborated in chapter 3.
123 This will be elaborated in chapter 3.
from a temporary occupying power. However, some obligations could be fulfilled without being too costly, e.g., the obligation to respect the rights and refrain from interference.

2) The threshold for fulfilment
While the LO consists of a minimum degree of protection, the ICESCR requires the State to use the maximum of its available resources in order to fulfil the rights. Thereby the ICESCR imposes more positive obligations upon the OP, than the LO. An example here is the State’s duty within the ICESCR, to adapt legal measures and make plans for development over a long-term perspective. Under the LO, the State should preserve the status quo making the OP generally prohibited from adapting such measures. In the Wall case, the ICJ held that Israel, as the OP, was obliged to uphold the provisions of the Covenant “in the exercise of the powers available to it on this basis.” This could mean that the OP’s obligations within the LO should be interpreted in accordance with obligations set in the ICESCR. If this is the case, the ICESCR has to be applicable extra-territorially.

2.3 Article 2 of the ICESCR
Article 2(1) of the ICESCR is the only general clause explaining the obligations incumbent upon a State Party under the Covenant. The Covenant does not have a clause regulating the territorial scope of these obligations. It has been held by the ICJ, in the Wall case, that the lack of such a clause may be explicable by the fact that the “Covenant guarantees rights which are essentially territorial.” Therefore it could not be excluded that it “applies both to territories over which a State Party has sovereignty and to those over which that State exercises territorial jurisdiction.” Extra-territorial application of the Covenant has been examined in large amounts of legal literature without coming to a unified conclusion.

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124 Lubell, “Human rights obligations in military occupation”, p. 330. Obligations within the ICCPR may be high at cost too though the threshold for fulfilment of these obligations do not depend on the resources of the State.
125 See more on this obligation in the next chapter.
126 Kolb and Hyde, “An introduction to”, p. 231. See more on this in ch.3.
127 ICJ, Wall case, para. 112.
128 ICESCR Article 2(1): Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
130 Ibid.
In international law, the primary basis of jurisdiction is territorial and includes a State’s capacity to control all events taking place in its territory.\textsuperscript{132} Jurisdiction is closely related to the concept of State sovereignty: a State’s ability to govern its own internal affairs without outside interference.\textsuperscript{133} The principle of territoriality is also confirmed as the general rule in art. 29 of the Vienna Convention on the Law of the Treaties (VCLT), which states that a treaty is binding upon “each party in respect of its entire territory”.\textsuperscript{134}

In IHRL, the principal paradigm is that the obligations derived from the Covenants, bind the State Party and the individuals under the “jurisdiction” of that State.\textsuperscript{135} Here, the term jurisdiction defines the group of individuals to whom the State has obligations to under human right laws.\textsuperscript{136} It may therefore be understood in a broader sense, including both territories where the State has jurisdiction \textit{de jure}, as the sovereign, or \textit{de facto} by exercising a certain degree of authority in the territory.

\section*{2.4 Obligations due to \textit{de jure} jurisdiction: Palestine’s obligations in the OPT}

This section will examine the obligations incumbent upon Palestine relating to the rights to housing and health. I will first examine the situation in other occupied territories, before concluding on whether Palestine has ESC-obligations towards the Palestinians in the OPT.

\subsection*{2.4.1 ICESCR-obligations in occupied territory}

Even though a territory is occupied by foreign forces, it is still \textit{de jure} part of the occupied State’s jurisdiction. Thereby, the principal rule is that the government of the occupied State remains responsible for its obligations towards the population. During a belligerent occupation, the State lacks control of the occupied parts of its territory, which makes it difficult for

\begin{itemize}
  \item \textsuperscript{132} CIJ, the Case of the S.S. Lotus (\textit{France} v. \textit{Turkey}), Judgement No. 9, 7 September 1927, pp. 18-19, \url{http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf} (accessed 30 May 2017). Relating to the ECHR, the principle is confirmed in ECtHR, \textit{Banković and Others v. Belgium, Admissibility}, Case No. 52207/99, 12 December 2001, para. 71.
  \item \textsuperscript{133} The principle of sovereignty is affirmed in Article 2(1) of the UN charter, which emphasize that all members of the UN are equal and sovereign.
  \item \textsuperscript{134} Article 29 of the VCLT also include two situations where a treaty may be binding outside the territory of the contracting party. This could happen if such an “intention appears from the treaty” or “is otherwise established”. This will be examined in chapter 2.5 concerning Israel’s obligations within the ICESCR.
  \item \textsuperscript{135} The territorial scope of the UDHR is enshrined in the last paragraph of its preamble: Member States should use both national and international progressive measures to secure and promote the respect for the declaration, both among the people of the Member States and among the peoples of the territories under their jurisdiction.
  \item \textsuperscript{136} See Gilles Giacca, \textit{Economic, Social and Cultural Rights in Armed Conflict}, (Oxford Monographs in International Law, 2014), p. 111. This is the basis taken in the ICCPR Article 2(1), which states that each State Party has an obligation to respect and ensure the rights “to all individuals within its territory and subject to its jurisdiction”.
\end{itemize}
the government to act in accordance with its human rights obligations. The lack of control, movement restrictions applied by the OP and the lack of resources, may all affect the possibility to obtain human rights obligations in some parts of the territory.

States that are partly controlled by an OP, have frequently raised these arguments in their periodic reports to the Committee on Economic, Social and Cultural Rights (CESCR). Among others, Azerbaijan, Cyprus, Georgia, and Moldova have reported on the general difficulty for implementing and monitoring their human rights obligations in disputed areas controlled by an OP. Whether such circumstances could free the State from its obligations, is under-researched and barely taken into account by the drafters of the relevant law on this area. Because the ICESCR is silent on the matter, the answer must be found in State practice or sources of international law, such as general principles of international law, or subsidiary means as case law of international or domestic courts.

137 Movement restrictions and border controls will naturally affect the import and export of goods and services.


140 Giacca, “ESC-rights”, p.116 (footnotes omitted): Georgia - In its 2006 report to the Human Rights Committee (HRC), Georgia expresses the difficulty with obtaining its human rights obligations within the territories of Abkhazia and the Tskhinvali region/South Ossetia, because the effective control is exercised by the Russian Federation. It states that measures are actively taken by the Government of Georgia trying to ensure the human rights of its population in these areas, but that they lack sufficient means to guarantee the rights because they do not have the “de facto” control of these areas. See HRC, “Report of Georgia”, Third Periodic Report, CCPR/C/GEO/3, 7 November 2006, paras. 22 and 119, at http://www.ecoi.net/file_upload/249_1185270837_georgien.pdf. (The report concerns the ICCPR, but the inability-argument is still relevant.)


142 Giacca, ESC-rights, p. 115: In Article 5 of Amended Protocol II to the Conventional Weapons Convention, 1996 the State Party is relieved from compliance with certain provisions “only if such compliance is not feasible due to forcible loss of control of the area as a result of enemy military action, including situations where direct enemy military action makes it impossible to comply”.

143 United Nations, Statute of the International Court of Justice, 18 April 1946, Article 38.
The general principle of *pacta sunt servanda*, states that “treaties and other international engagements are binding upon the nations that accede to them”. The principle is reaffirmed in the VCLT Article 62(1), where it is held that non-foreseen changes of circumstances, in general do not free the Party of its obligations under a treaty. The Article includes two exceptions to this rule:

a) if the existence of the circumstances constituted an “essential basis of the consent of the parties to be bound by the treaty”, and

b) the effect of this change is “radically to transform the extent of obligations still to be performed under the treaties.”

According to Article 61(1) both permanent and temporary impossibility may be invoked grounds for suspending a treaty. I will not go into a thorough examination of these exceptions, though it is important to be aware of their existence. In their reports to the CESC, the States based their arguments on impossibility to fulfill ESC-obligations on the fact that another State had the effective control of the territory. Neither of the States mentioned these rules in the VCLT, however it may be stated that their arguments for not fulfilling their obligations, relied on the rationale behind these rules.

Another solution is to see the non-fulfilment argument as part of the principle of progressive realization. The State should use all appropriate means and apply the maximum of its available resources, to take steps to fulfil its obligations in the Covenant. The lack of control will naturally affect the possibility of the State to take such steps. Given that the occupied State has tried its best to fulfil and monitor the rights, could the lack of resources and available means itself justify that the State is free from obligations within the ICESCR? And if not, is concurrent human rights responsibilities possible between two States?

In the case of *Assandize v. Georgia*, the ECtHR held that jurisdiction is “primarily” or “essentially” territorial, and that a contracting State’s jurisdiction do not cease due to parts of its territory being temporarily subject to a local authority sustained by another State. “[D]ifficulties in securing compliance with the rights guaranteed by the Convention in all parts of their territory” do not free the State of its obligations. The State Party “nonetheless remains responsible for events occurring anywhere within its national territory.”

In *Ilașcu and others v. Moldova and Russia* (*Ilașcu* case) it was held that the responsibility of the State consists of a duty to take “diplomatic, economic, judicial or other measures” within its power, to secure the applicants the rights guaranteed by the Convention. For the

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145 See Article 62, para. 1, letter a and b.
146 ICESCR Article 2(1).
147 ECtHR, *Case of Assanidze v. Georgia*, *Judgement*, Application No. 71503/01, 8 April 2004 (*Assanidze Case*), paras. 137 and 146. The notion of jurisdiction in ECHR and the ICESCR is presumed to be the same, based on the arguments above.
State’s obligations to be considered fulfilled, the State had to verify that such measures actually were taken and that a “minimum effort” was made. This had been done by Moldova, and Russia (which had the effective control) was considered responsible for violating the applicants’ rights.

In *Catan and Others v. Moldova and Russia* (*Catan* case), the Moldovan government was considered to have fulfilled their human rights obligations. The Court held that “the Moldovan Government have paid for the rent and refurbishment of new premises and have also paid for all equipment, staff salaries and transport costs, thereby enabling the schools to continue operating and the children to continue learning in Moldovan, albeit in far from ideal conditions”.

Even though there was no evidence of the Russian involvement in the language policy of the Moldavian Republic of Transdniestria (MRT), the Court still concluded that Russia was responsible because of its “continued military, economic and political support for the “MRT”, which was of essential meaning to the survival of the “MRT.”

Both in the *Ilaşcu* case and the *Catan* case, the European Court concluded that Moldova had fulfilled their obligations, but due to its insufficient measures Russia had obligations too. Thereby, concurrent responsibility between independent duty-bearers is possible within the ECHR. By analogy to the application of the ECHR obligations by the ECtHR, it is argued that the same rationale should be applied with regard to legal obligations under the ICESCR.

In the *Catan* case, it could be argued that what the European Court does is to lay human rights responsibility on Russia because they are the only one able to ensure the rights, due to their control of the territory. With Moldova having done what they could to ensure the rights, the Court held Russia responsible because its government is in a position to address the problem.

When summing up the case law of the ECtHR, three observations are in order:

1) Positive human rights obligations remain the responsibility of the occupied State, even if the loss of control implies difficulties in securing compliance with the human rights in all parts of the State’s territory.
2) To fulfil its positive obligations, the Contracting State has to take all “diplomatic, economic, judicial or other measures” within its power.
3) Concurrent responsibility between independent duty-bearers is possible.

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149 ECtHR, *Catan and Others v. Moldova and Russia* Judgement, Application Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012 (*Catan* case) para. 147. In the *Ilaşcu* judgment the ECtHR reached the opposite conclusion.
150 The *Catan* Case, para. 150.
2.4.2 Palestine’s ICESCR-obligations in the OPT

Based on an analogy with the practice of the ECtHR, Palestine can be considered as continuing to have ESC-obligations, even though it is an occupied State. The PA should use all available measures in order to fulfil Palestinians’ ESC-rights. However, restrictions imposed by Israel may make it hard for the PA to monitor the ESC-conditions in the OPT, and affect the content of Palestine’s obligations. The exact amount of obligations incumbent upon Palestine must be determined by examining the content of each respective right and Palestine’s possibility to take the necessary measures in the territory.

2.5 Obligations due to de facto jurisdiction: Israel’s obligations in the OPT

This section will examine the possibility of Israel having ESC-obligations towards the Palestinian people living in the OPT. I will first examine the legal basis for such an application, then whether ESC-obligations are incumbent upon Israel.

2.5.1 The question about extra-territorial applicability of the ICESCR

As stated above, Article 29 of the VCLT includes two situations where a treaty may be binding outside the territory of the contracting party. This could happen if 1) such an “intention appears from the treaty” or 2) “is otherwise established”. It is not enough that the State Party is participating in the occupation, there has to be a jurisdictional link between the applicant and the State Party to the human rights Covenant.

2.5.1.1 Extra-territorial application appears from the ICESCR

When it comes to the right to education, the ICESCR explicitly states that if a State has not been able to secure primary education free of charge, at the time of becoming a Party to the Covenant, the State has an obligation to do so in “other territories under its jurisdiction” as well as in its metropolitan territory.

The formulation could either be viewed as stating that extra-territorial application only is possible within the right to education, or it could be read that “at least here” such an application is possible, without denying the possibility in other areas. Where a State has effective control in another State’s territory, the controlling State has

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152 By 31 January 2017, there were 98 fixed checkpoints in the West Bank and two boarders crossing between the Gaza Strip and Israel. As for roads, 59.22 kilometers of roads in the West Bank were classified for the sole, or practically sole, use of Israelis. See B’Tselem, “Checkpoints, Physical Obstructions, and Forbidden Roads”.

153 This will be subject to the next chapters.

154 Relating to the ECHR, see ECtHR, Saddam Hussein v. Albania and others, Admissibility, Application No. 23276/04, 14 March 2006. Here the ECtHR held that because the applicant, a former president of Iraq, had not addressed each respondent State’s role and responsibilities, nor how they were involved in his arrest, detention and handover, it was no jurisdictional link between the applicant and the respondent States.

155 ICESCR Article 14.
to ensure that education was given. Given the fact that free education solely relies on State enforcement and due to the important character of the right, it would appear like a valid solution that also other fundamental rights may be incumbent upon a controlling State.

All State Parties have obligations to take steps “individually and through international assistance and co-operation”. The transnational character of this obligation could point to the view that obligations outside a State Party’s territory are possible. All States have a duty to respect, protect and fulfil human rights. When a State has de facto jurisdiction in another State’s territory, this may imply that their obligation to co-operate is strengthened.

Based on the above, a possibility to apply the ICESCR extra-territorially appears feasible from the language of the Covenant. Not only does the Covenant not exclude its extra-territorial application, but in certain circumstances it also requires it.

2.5.1.2 Extra-territorial application is otherwise established

The extra-territorial application of an international treaty may also be established otherwise. Relevant grounds for this are agreements and practice between States, or other relevant rules. This criterion differs from that based on specific inclusion in a treaty provision, having to do with the substantive character of the situation. To establish whether extra-territorial application is possible, one would have to do a contextual examination of the circumstances in each case.

In the Wall case, extra-territorial application of the ICESCR was confirmed by the ICJ. The Court held that the OPT “have for over 37 years been subject to [Israel’s] territorial jurisdiction as the occupying Power”, clearly taking the circumstances of the case into considerations when determining the extra-territorial applicability of the Covenant. Thus far, this is the only case by the ICJ confirming such an application of the ICESCR. The situation is clearer when dealing with the ICCPR. Here, extra-territorial application has been upheld by the ICJ also in the DRC v. Uganda case, and more recently in the Provisional Measures Order in the Georgia v Russian Federation case. The different approaches to the two Covenants seem to rely on the economic aspect of the rights, where the ESC-rights are considered to be more expensive than civilian and political rights. Albeit, the costs will depend on the type

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156 ICESCR Article 2(1).
157 The content of these obligations will be elaborated in chapter 3.
158 VCLT Article 31(3).
159 ICJ, DRC v. Uganda case, paras. 178-179.
161 Lubell states that the economic aspect of the obligations within the ICESCR is “often at the heart” of the discussion differentiation between extra-territorial application between the ICCPR and the ICESCR. Yet, ICCPR-rights may also be a costly affair. See Lubell, “Human rights obligations in military occupation”, p. 330.
of obligations. For instance, negative obligations to respect the rights, will potentially require spending less resources than positive obligations.\(^\text{162}\) This has led to the assumption that negative obligations always apply extra-territorially, while positive obligations applicability outside a State’s territory will depend on the temporal aspect of the occupation.\(^\text{163}\)

The ICJ held that Israel had an obligation “not to raise any obstacles” in the areas where the PA exercised ESC-rights,\(^\text{164}\) and would naturally be interpreted as stating that Israel has a negative obligation to respect ESC-rights in these areas. The Court says nothing about Israel’s obligations in the OPT-areas which are fully under Israeli control. Here, it may be held that Israel also has positive obligations to protect and fulfil the rights. In the DRC v. Uganda case, the ICJ concluded that Uganda, as an OP, was responsible for protecting the human rights of the population in the occupied territory of Ituri.\(^\text{165}\) Although this case was about the civil and political rights of the population, it shows that the obligation to protect human rights also could extend extra-territorially.\(^\text{166}\)

The ECtHR case law has held that there are two circumstances under which human rights (namely the ECHR) are applicable extra-territorially. According to the Court, a State who exercises de facto jurisdiction over another territory, either by

1) its agents exercising control and authority over an individual,\(^\text{167}\) or
2) the State having control of an area belonging to another State,\(^\text{168}\)

is considered to be responsible for the entire range of substantive human rights of the population living there.\(^\text{169}\) In relation to the ICCPR, the Human Rights Committee (HRC) has stated that the Covenant applies ‘to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or

\(^{162}\) Negative obligations consist of a duty to refrain from action, in order not to do anything that will violate an ESC-right. Positive obligations consist of a duty to take proactive measures to implement the rights. See Giacca, *ESC-rights*, p. 24.

\(^{163}\) See Lubell, “Human rights obligations in military occupation”, p. 333. The special circumstances and considerations in a prolonged occupation is examined thoroughly in ch. 3.5.

\(^{164}\) ICJ, *Wall* case, para. 112, p. 181.


\(^{169}\) In legal theory, these two tests have been described as the test of 1) “State agent authority”, and 2) the test of “effective control over an area”. For full explanations of these tests, see Lubell, “Human rights obligations in military occupation”, pp. 317-337.
effective control was obtained’. The same must be stated in relation to the ICESCR, at least concerning the negative obligations within the Covenant. A belligerent occupation with an OP having the “actual authority” over the territory of the other State, and responsibilities towards the civil population in that territory, fulfils the criteria in both these tests.

In the Loizidou v. Turkey case before the ECtHR, a Cypriot national complained that the Turkish armed forces, as the OP of the northern part of Cyprus, had violated her right to property by preventing her from gaining access to her home and other properties there. Turkey denied that the Covenant was applicable, because the actions happened outside Turkish territory. The ECtHR declined Turkey’s argument, and held that the concept of jurisdiction under ECHR art. 1 “is not restricted to the national territory of the High Contracting Parties [...] the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”

Based on the cases above, the ICESCR is applicable extra-territorially. Negative human rights obligations seem to apply extra-territorially irrespective of the length of the occupation, while positive human rights obligations may apply extra-territorially depending on the situation.

2.5.2 Extra-territorial application of the ICESCR in relation to Israel as the OP

Even though the ICJ stated that the Covenant applies extra-territorially to the OPT, Israel does not agree which makes the application difficult. In their reports to the CESCR, Israel does not include the situation in the OPT. The arguments are built on three aspects:

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171 Hague Reg Article 42.
172 Hague Reg Article 43. The content of this Article will be elaborated in chapter 3.
174 Ibid. Para. 47.
175 Ibid. Para. 62 (footnotes omitted). See also ECtHR, *Chiragov and Others v. Armenia*, Judgement, Application No. 13216/05, 16 June 2015, para. 168, where the ECtHR confirmed the extra-territorial application of the ECHR.
176 This is subject to chapter 3 and 4.
1) Human rights law is made for peacetime, and is thereby not applicable in situations of armed conflict, where IHL is the applicable legal framework.\textsuperscript{178}

2) Human rights instruments do not apply, because of the absence of a specific declaration which extended the applicability of the Covenant with respect to the OPT.\textsuperscript{179}

3) Relating to Gaza, Israel argue that it does not have ‘effective control, in the sense envisaged by the Hague Regulations’, because of its withdrawal of military forces. Thereby they do not have sufficient control for the purpose of human rights law. Here below I will address all three grounds.

1) Human rights law is not applicable in the field of IHL
This view is based on the presumption that IHL applies as \textit{lex specialis} and displaces the whole framework of human rights law. As explained in the introduction chapter, this view can no longer be upheld. Both fields of law are applicable in an armed conflict, as explained among others in several ICJ decisions.

2) The absence of a special declaration extending the applicability to the OPT
The extra-territorial applicability of the ICESCR could either be viewed as stemming from those obligations which the OP is bound to uphold based on its own treaty ratifications, or those of the occupied State. The first option creates the view that the OP enforces principles upon the population of the other State, without them having the possibility to deny them. The second forces the OP to be bound by obligations they have not concluded upon.\textsuperscript{180} In relation to Israel and Palestine, the issue does not need to become problematic due to both of them being bound by the ICESCR. Even though Israel did not mean to bind itself to apply human rights obligations in the OPT, an extension of the obligations to these areas could be natural because Israel has had the \textit{de facto} control in these territories since 1967. Due to the fact that IHL also includes obligations towards the caretaking of the population living in the OPT,\textsuperscript{181} Israel was aware that they would have some ESC obligations towards the Palestinians.

In relation to the ICCPR, support for this view is found in the General Comments of the UN Human Rights Committee. General Comment No. 26 holds that the rights “belong to

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\textsuperscript{179} Israel has held that human rights instruments do not apply, nor were they intended to apply, to ‘areas that are not subject to its sovereign territory and jurisdiction’. See CESC\textsuperscript{R}, Report of Israel (Second Periodic Report), E/1990/6/Add.32 16 October 2001, paras. 5–8.

\textsuperscript{180} Lubell, “Human rights obligations in military occupation”, p. 334.

\textsuperscript{181} See chapter 4 for a complete account on the responsibilities of Israel as the OP.
the people living in the territory of the State party [...] once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.”

Even though an occupation is regarded a temporal change of authority, rather than a change of government, the view should be upheld especially when the occupation lasts for a certain amount of time. The interpretation can also be based on general moral considerations, and it could be viewed as stemming from Article 2(1) of the ICESCR, which holds that States have a joint responsibility to cooperate in order to fulfill the rights.

The possibility for an OP to enter into treaties on behalf of the occupied State was discussed in the ICRC Expert Meeting on Occupations. The Experts discussion was mainly focused on the possibility of the OP to enter into treaty relations on behalf of the occupied State. The majority held that the OP was not entitled to do so. What is interesting for the purpose of the discussion in this chapter, are certain positions about the territorial boundaries in an occupation. Some experts emphasized that occupation is a very fluid situation, where the geographical boundaries change, making it difficult to delimit the territorial effects of treaties signed by the OP on behalf of a territory under partial occupation. When the OP has transferred parts of its population to the occupied territory, the same considerations could be relevant. Here the OP will have obligations towards its own population, which in the case of the OPT is spread across the Palestinian territories. As the time has passed, Israelis’ and Palestinians’ possibility to enjoy ESC-rights have become largely different. Even though the Israeli settlers live in settlements where Palestinians have no access, there are areas they both have access to where Israelis still have better rights than Palestinians. Such fluid boundaries combined with the fact that Israel has exercised de facto jurisdiction in the OPT for about 50 years, could serve as a basis for arguing that Israel is obliged to apply ESC-rights to Palestinians in the OPT as well.

Based on the statements above and the findings of the ICJ, the absence of a special declaration extending the applicability to the OPT, does not stand in the way of extra-territorial application of Israel’s ESC-obligations towards Palestinians in the OPT.

3) Gaza

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182 HRC, GC No.26, Continuity of obligations, CCPR/C/21/Rev.1/Add.8/Rev.1 (8 December 1997) para. 4.
183 Lubell argues that the element of time and the presumption against deliberate retrogressive measures could argue that the OP has obligations extra-territorially. See Lubell, “Human rights obligations in military occupation”, p. 336.
185 Ibid. p. 60.
Upon close assessment, the Gaza-argument does not hold. As mentioned in the first chapter, the territory of Gaza is still considered as parts of the OPT. Israel’s argument is also rejected by the ICJ, which has held that Gaza still is under Israeli effective control.\textsuperscript{186} Even if Israel were to insist that they do not have the required control in the area, this argument does not hold. In \textit{Al-Skeini and Others v. the United Kingdom} case, the UK Government denied the applicability of the ECHR arguing that they were unable of maintaining law and order in southeast Iraq.\textsuperscript{187} This argument was not accepted by the ECtHR which held that the ECHR was applicable extra-territorially.\textsuperscript{188}

None of the three arguments advanced by Israel can be upheld, as also maintained by the ICJ, the HRC and the CESCR. Israel has obligations under the ICESCR due to the extra-territorial application of the Covenant.

To conclude, both Palestine and Israel have ESC-obligations towards the Palestinians in the OPT.

\textsuperscript{186} The ICJ rejects Israel’s position and recalls that despite the disengagement of Israeli troops in 2005, Israel still exercise effective control over the airspace and territorial waters of the Gaza Strip, denying any movement of people or goods in and out of this area. Israel also controls the electricity, water, telecommunications networks and population registry. See CESR, The Examination of the Third Periodic Report of Israel under the International Covenant on Economic, Social and Cultural rights, \textit{International Commission of Jurists Submission to the Committee on Economic, Social and Cultural rights}, 47th Session, 2011, p. 2, \url{http://www.refworld.org/publisher,CESCR,,ISR,4e79dbac2,0.html} (accessed 29 May 2017).

\textsuperscript{187} ECtHR, \textit{Al-Skeini} case, para. 112.

\textsuperscript{188} ECtHR, \textit{Al-Skeini} case, para. 137-138.
3 The material content of the rights to housing and health

3.1 Introduction
Given the extra-territorial application of the ICESCR, the complementarity view holds that the OP’s obligations could be extended by obligations in the ICESCR. In the Expert Meeting, it was held that the application of ESC-rights in a belligerent occupation resulted in a three-faceted test, where one would have to “distinguish between positive and negative human rights obligations, short-term and long-term occupation, and civil and political rights versus economic, social and cultural rights.”

This chapter will start with examining obligations relating to housing and health incumbent upon an OP under the LO (section 3.2), before examining the obligations incumbent upon a State Party to the ICESCR (section 3.3). Then I will examine the complementarity scenario by distinguishing between positive and negative obligations (section 3.4), before examining the effect a prolonged occupation may have on the obligations (section 3.5).

3.2 The right to protection within the LO
This section will examine an OP’s obligations relating to the protection of rights to housing and health within the LO. In order to understand the scope of an OP’s obligations towards the local population, I will first explain the main boundaries of an OP’s powers and responsibilities in occupied territory. Then obligations relating to civilians right to housing will be examined, followed by obligations relating to their right to health.

3.2.1 The main obligations of an OP
The main obligations of an OP are codified in Article 43 of the HagueReg and Article 64 of the GC IV. The OP should as far as possible maintain the status quo in the occupied territory, and “permit life to continue as normally as possible”. It shall respect the laws in force and take all measures in its power to “restore, and ensure … public order and safety” for the population, unless it is “absolutely prevented” from doing so. The notion of “public order and safety” has been criticized to be a wrongful interpretation of the authentic French text “l’ordre et la vie publics”. The French text encompasses “des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours”, which in English means “social functions, ordinary transactions which constitute daily life”. Thereby, the correct reading of Article 43

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191 HagueReg Article 43.
is that the OP must use “all functions of government” to ensure “public order and civil life”. What constitutes “civil life” and the measures the OP may or may not take, must be read out of the specific IHL-provisions. Due to the fact that the territory is considered occupied when it is “actually placed under the authority” of the OP, the threshold for lawfully restricting these obligations due to the OP being “absolutely prevented” from exercising control is very high. The exceptions must be read out of Article 64(2) of the GC IV, and international law, including IHRL. Within Article 64 of GC IV, the OP has a small opportunity to enact new legislation if it is required for the OP’s possibility to fulfil its obligations under the convention, and it is essential to “maintain the orderly government of the territory” and security of the OP, its forces and infrastructure.

The population of an occupied territory is considered protected persons. The main provision for their protection is found in Article 27 of GC IV, which holds that civilians are entitled to respect for their person, honour, family rights, religious convictions and practices, and their manners and customs, in all circumstances. “Respect for manners and customs” is particularly important in occupied territory, and reminds the OP that it shall respect the population’s culture. Relating to the rights to housing and health, “respect for their persons” is the most relevant article. According to the Commentary, this notion must be understood in its widest sense. All rights of the individual should be respected, in particular the right to intellectual, moral and physical integrity. “Intellectual” and “moral” integrity means respect for moral values and could be viewed together with the mental health of the individual. Protection of the “physical” integrity involves a protection of the life and health of the person. The

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193 Ferrero, “Expert Meeting”, p. 57. This view is also the prevailing view in the HCJ, see David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories (State University of New York Press, 2002) pp. 58–59.
194 HagueReg Article 42.
195 Imaginable circumstances which makes the OP absolutely prevented from exercising control, could be extreme situations of riots etc., Or if something happens in another part of the occupied territory, making the OP required deploying large forces from one area to another, so that the forces being left do not have the capacity to uphold the control.
196 The complementarity between GC IV Article 64(2) and HagueReg Article 43 may be read out of Article 154 of the GC IV, which states that the GC IV is supplementary to the provisions in the HagueReg. See Ferrero, “Expert Meeting”, p. 58.
198 GC IV Article 64(2). The provision applies to the entire domestic legal system, not only penal legislation. See See Commentary to the GC IV (1958) (hereinafter: the Commentary), p. 335.
199 GC IV Article 4(1).
200 Placed at the head of Part III this provision has a key position among the Articles of the Convention and should be taken into considerations at all times. See the Commentary, p. 199-200.
201 The commentary p. 201.
OP shall give them humane treatment and protect them against “all acts of violence or threats thereof”, 202 Any form of discrimination when providing the right is prohibited. 203 In Paragraph 4, the Article lays down the main notion for limiting the rights within the IHL. If military necessity requires it, the OP may take “measures of control and security” with regard to the population. 204 The convention itself does not specify what measures may be taken due to reasons of control and security, except from the fact that such measures never must affect fundamental rights of the persons concerned. 205 According to the Commentary, the applicable measures are wide ranging, from mild restrictions such as the carrying of identity cards and the duty of registering with the police authorities, to harsher provisions like permission-restrictions to change the place of residence, restrictions on movement, and prohibition of access to certain areas. 206 An assessment of what measures are “military necessary” must be done in each case.

When it comes to the rights to housing and health, the OP should respect both the lives of the persons and private property. 207 It has a general obligation to use all available means to ensure that the material conditions in the occupied territory remain at a reasonable level. 208 It should provide “necessary foodstuffs, medical stores and other articles”. “Other articles” include “any article necessary to support life”. 209 The Commentaries do not explain what such articles may be, but an elaboration is found in AP I, Article 69. This article adds clothing, bedding, means of shelter, and “other supplies essential to the survival of the civilian population of the occupied territory.” 210 The word “other” shows that the list is non-exhaustive. 211 The obligation to provide “means of shelter” must be viewed as an important part of the right to housing. If the population is unable to live in their houses, the OP has an obligation to pro-

202 Humane treatment and the prohibition of certain acts incompatible with it, are general and absolute in character. See the Commentary p. 204-205. This is also enshrined in GC IV Article 5 para. 3.
203 GC IV Article 27(3), and the Commentary para. 3. A prohibition on discrimination does not mean that all differentiation is forbidden.
204 GC IV Article 27(4).
205 This is to be read out of Article 47 of GC IV. See the Commentary p. 207.
206 The Commentary p. 207. Movement restrictions will naturally have an effect on the possibility to enjoy some of the ESC-rights. The legality of such restrictions will depend on the character of the rights discussed. As with IHL-provisions a natural point of view would be that fundamental ESC-rights cannot be restricted either. This perspective will be discussed under the right to protection within the ICESCR.
207 HagueReg Article 46.
208 GC IV Article 55. The obligation must be viewed in accordance with the OP’s resources. Due to the circumstances, the OP may be faced with “financial and transport problems, etc.”, affecting the scope of the obligation. See p. 310 of the Commentary.
209 The Commentary p. 310.
210 See AP I Article 69. Objects necessary for religious worship is also included. In the commentaries to this Article it is held that the Paragraph supplements the content of GC IV Article 55. See the Commentary of 1987, p. 812, para. 2779.
211 See also the Commentary p. 812, para. 2780.
vide makeshift shelters such as “tents, prefabricated or other forms of housing”, as a preliminary step to more long-term reconstruction. The fact that Israel is not a party to AP I does not affect this interpretation, given that Article 69 of AP I is meant to elaborate Article 55 of GC IV, which already includes “any articles necessary to support life”.

### 3.2.2 Obligations relating to the right to housing

Violence against the house of a civilian is prohibited under the general protection clause in Article 27 of GC IV. The LO protects civilian houses from unlawful destruction, and the civilians from being forced to leave their house.

The OP is prohibited from destroying real and personal property belonging to private persons or the State. All types of movable or unmovable property is protected, both houses and other buildings. Relating to private property, two important considerations are in order:

1) The provision only refers to “destruction”; and
2) Destruction could be allowed if “rendered absolutely necessary by military operations”.

These will now be elaborated.

1) “Destruction”:

Only destruction of private property is prohibited. Under certain circumstances the OP could requisition private property for reasons of military necessity. If requisition is necessary, the OP should subject the persons to assigned residence or to internment. The criterion of military necessity implies that requisition may only be legal for a certain amount of time. When the building is no longer needed, the threshold of military necessity would stop being fulfilled. Hereby the qualification of “necessity” must be done continuously.

2) If “rendered absolutely necessary by military operations”:

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212 The Commentary, p. 812, para. 2779.
213 GC IV Article 53. See also Article 23(g) of the HagueReg which covers hostilities in general; *CIHL* Rule 51 on ‘Public and Private Property in Occupied Territory’.
214 According to the HagueReg Article 53, movable property belonging to the individual may be seized, which makes the protection weaker than that of unmovable property. Of unmovable property, public buildings might be administrated and usufructed by the OP, while private property and property viewed as private property is protected. See HagueReg Article 46, 55 and 56.
215 See the Commentary p. 301.
216 GC IV Article 78. Hereby, the OP still has a duty to protect the population. According to the US Field Manual (1956), requisition makes the owner entitled to restoration and compensation by the end of the war.
217 As an example, requisition may be rendered necessary if it provides the OP access to an area of indispensable importance. House occupations by civilian nationals of the OP could never be justified by military necessity and will always be unlawful.
If “imperative military requirements” demand it, a property may be totally or partially destroyed.\textsuperscript{218} Each situation would have to be qualified individually, but the notion of “imperative” shows that the threshold is quite high. Military necessity may never justify “[W]anton destruction of cities, towns or villages”.\textsuperscript{219} Such extensive destructions and appropriations of property amount to a war crime and is a grave breach of the Fourth Geneva Convention.\textsuperscript{220} The OP must therefore prove the legality of such destructions.

Forcible transfers of individuals or large groups are prohibited,\textsuperscript{221} and may amount to a war crime.\textsuperscript{222} The prohibition is absolute and must be distinguished from those cases where evacuation of a given area is necessary due to military necessity or the security of the population.\textsuperscript{223} Due to the absolute character of this provision, military necessity could not justify forcible transfer.

The OP is also under an absolute prohibition of transferring its own citizens to the occupied territory.\textsuperscript{224} Such actions have no legal validity and constitute a flagrant violation under international law.\textsuperscript{225}

In practice, most cases concerning violations of these rights are dealt with by national tribunals. Examples of older cases are found in several national tribunals in the aftermath of the Second World War (WW2). In the US Military Tribunal at Nuremberg in 1948, several cases held that destruction of private property in most situations would be illegal and that it required a lot of proof to prove that military necessity rendered the destruction necessary.\textsuperscript{226} In China, a Chinese Military Tribunal found that a Japanese military commander was guilty of the destruction of property. The commander had “incit[ed] or permit[ed] his subordinates … to cause destruction of property”, and notably 700 houses were set on fire.\textsuperscript{227}

\textsuperscript{218} The Commentary p. 302.
\textsuperscript{219} The Charter of the International Military Tribunal, Article 6(b).
\textsuperscript{220} GC IV Article 146 and 147. See also ICC Article 8(2)(a) iv and (b) xiii.
\textsuperscript{221} GC IV Article 49. Only forcible transfers are forbidden. If people give their consent to the transfer, this may be allowed. See the Commentary p. 279. The right is also protected in Article 51(2) (forced labour), Article 76(1) (treatment of accused protected persons) and Article 70(2) (refugees).
\textsuperscript{222} GC IV Article 49(6) and ICC Article 8(2)(b), viii.
\textsuperscript{223} GC IV Article 49(2). Reasons of military necessity which may justify evacuation may be if the OP plans to bomb an area, given that the rules for such an attack is fulfilled. The OP should strive to evacuate the population inside the occupied territory, and they should be transferred back to their homes when the hostilities have ceased. General obligations incumbent upon the OP relating to protected persons do not cease to apply, see Article 49(3).
\textsuperscript{224} GC IV Article 49(6) and ICC Article 8(2)(b), viii.
\textsuperscript{225} This was held by the Security Council in relation to the establishment of Israeli settlements in the OPT, see SC res. 2334, 23 December 2016, p. 2, para. 1.
\textsuperscript{227} Ibid.
In recent times, the HCJ has dealt with many cases concerning destruction of private property. In contrast to the above-mentioned cases, this Court seems to avoid assessing the exercise of discretion by the military commanders involved. In several cases, it is reaffirmed that the examination of what is a lawful violation of the right to property, is within the commander’s discretion, causing a rather wide interpretation of the notion of “military necessity”. The wide interpretation has included sequestration for erecting military positions and outposts, as well as for paving roads in order to protect the Israeli residents living in the area, and to get access to various locations. Curiously, the HCJ has also stated that the area of discretion must be stringent. This inconsistency in the case law does not assist in protecting the right to property and more specifically that to housing.

When it comes to the establishment of settlements, the HCJ has held that requisition of private land could be justified if the authorities could show that a settlement was established at a strategic position and that its aim was enhancing defence of the State. According to international law, the prohibition on moving citizens from the territory of the OP into the occupied territory, is absolute. The interpretation in the Supreme Court of Israel has been criticized to be an “overstretched concept of a security-based exception to the protection of private property”.

To sum up the relevant practice, it is clear that the existence of “military necessity” must be closely examined in each specific situation. The discretion given to the military commanders may be criticized as being too wide, and it may be a problem that the tribunals trying the exercise of such discretion are of the same State as the OP. As held by Kretzmer in his article on the application of the LO in the Supreme Court of Israel, “It would be naive to think that a domestic court could deal with such an anomalous situation as if it were an outside, neutral, observer that is oblivious to the political realities in its own country”. This situation is quite problematic since the domestic judiciary cannot always be relied upon to rectify wrongful decisions taken by the military commanders.


229 Ibid.

230 Ibid. See also the Case of Mara’abe v. The Prime Minister of Israel where the HCJ reaffirmed that “[w]hen the decisions or acts of the military commander impinge upon human rights, they are justic[i]able” and that “‘[s]ecurity considerations” or “military necessity” are not magic words”. See HCJ, Mara’abe v. The Prime Minister of Israel, Judgement, Case No. 7957/04, 12 September 2004; 31 March 2005; 21 June 2005. (Footnotes omitted). All cases from the HCJ are available at http://elyon1.court.gov.il/eng/home/index.html (accessed 29 May 2017).

231 Ibid.


3.2.3 Obligations relating to the right to health

The OP shall use all available means to ensure and maintain “the medical and hospital establishments and services, public health and hygiene in the occupied territory”, and allow all types of medical personnel to carry out its duties. All these tasks should be done with the cooperation of the national and local authorities. If the occupied country itself has the resources to take care of the health of its population, the OP will only have an obligation not to interfere. Otherwise, the OP should do what it can to import the “necessary foodstuff, medical stores and other articles”, and to order the necessary work to maintain the health of the population. If the OP does not have the required resources, it shall agree to relief schemes and facilitate the population by all means at its disposal.

Civilian hospitals, medical vehicles, and their staff are entitled to wear the Red Cross emblem offering them special protection. The emblem gives a right to protection against interference in their work, thereby they may not be subject to movement restrictions. If new hospitals are set up in areas where the occupied State is not operating, the OP shall grant them and their staff the required protection too. All health-related measures adopted by the OP shall respect “the moral and ethical susceptibilities” of the population.

Together with the obligation to provide health care, the OP also has a duty to take prophylactic measures to maintain the health of the populations. Such measures may include the “supervision of public health, education of the general public, the distribution of medicines, the organization of medical examinations and disinfection, the establishment of stocks of medical supplies, the dispatch of medical teams to areas where epidemics are raging, the isolation and accommodation in hospital of people suffering from communicable diseases,
and the opening of new hospitals and medical centres."\textsuperscript{243} Due to the special character of a prolonged occupation, this duty becomes very important.

The protection of the right to health within the LO may never be restricted. This could be read out of the strong formulations of the health-related rights, together with Article 47 of the GC IV.\textsuperscript{244} The benefits of the protected persons laid down in the Convention, shall not be violated “in any case or in any manner”. Belligerents shall respect hospitals and medical personnel in all circumstances. Even if the OP claims it has annexed the territory, independent of the illegality of that claim, the protection continues to apply.\textsuperscript{245} Palestinians living in East-Jerusalem are thereby protected in the same way as the rest of the population living in the OPT.

The absolute prohibition on attacking medical stations and personnel in the OPT is, among others, reaffirmed in resolutions adopted by the UN, where the UN Commission on Human Rights “strongly condemns” attacks of medical personnel and objects, as well as the practice of preventing ambulances and vehicles from the ICRC to reach the wounded in order to transport them to hospitals.\textsuperscript{246} The HCJ has also affirmed that IHL “forbids, under all circumstances, attack of stations and mobile medical units of the “Medical Service,” that is to say, hospitals, medical warehouses, evacuation points for the wounded and sick, and ambulances”.\textsuperscript{247} Violations of these provisions are considered war crimes.\textsuperscript{248}

### 3.3 The protection of the rights to housing and health under the ICESCR

This section examines the obligations incumbent upon a State Party to the ICESCR, relating to the rights to housing and health. The normative part of the population’s rights to housing and health is included in Articles 11(1) and 12 of the ICESCR, and the content of a State’s obligations relating to all rights in Article 2(1). The content of all articles is elaborated by the CESC in separate General Comments. In belligerent occupations, it is the scope of each State’s obligations (the OP and the government of the occupied State), which is subject to disagreement.\textsuperscript{249}

\textsuperscript{243} See the Commentary p. 314.

\textsuperscript{244} These rights do not include any legal exceptions due to military necessity or security, as with the protection of property in Article 53.

\textsuperscript{245} GC IV Article 47. See also the Commentary p. 247.


\textsuperscript{247} HCJ, Physicians for Human Rights v. IDF Commander in the West Bank, Judgement, Case No. 2936/02, 28 April 2002, p. 1.

\textsuperscript{248} ICC Article 8(2) (a) iii and (b) iii and xxiv.

\textsuperscript{249} In the Expert Meeting on Occupations, the different approaches to ICESCR’s application in belligerent occupations were based on the amount of leeway offered to the implementation of States’ obligations in the Covenant. Some experts held that the Covenant could be interpreted rather broadly, while other held that it implied some minimum obligations on the State. See Ferrero, “Expert Meeting”, pp. 64-65.
I will start with examining the general obligations incumbent upon a State Party to the ICESCR, hereby Article 2(1) of the covenant and the obligation to respect, protect and fulfil, and the prohibition on discrimination. Then I will give some general comments on the normative part of the rights applicable in belligerent occupations. Then the rights to housing and health will be examined in separate sections. These sections will include the normative part of the rights applicable in belligerent occupations, and the State’s obligations relating to each right. The prohibition on discrimination relating to these rights will be elaborated in relation to Israel and Palestine’s obligations in chapter 4.

3.3.1 ICESCR Article 2(1) and the obligation to respect, protect and fulfil

The main obligations of a State Party to the ICESCR are included in Article 2(1) of the Covenant, which states that:

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

The vagueness of the provision has resulted in a variety of interpretations from State to State. The CESCR has elaborated the content of the legal obligations, based on States’ obligation to respect, protect and fulfil human rights.250 Based on the content of Article 2(1), I will start with elaborating the content of the positive obligation to fulfil. Then the obligations to respect and protect will be explained.

The obligation to *fulfil* contained in Article 2(1), impose obligations upon States to “facilitate, provide, and promote” the population’s rights.251 To facilitate (or promote) the State should take positive measures making it possible for the individuals to enjoy the rights. In general, the State will have to create “legal, institutional, administrative and procedural conditions, as well as to provide material benefit for the realization of certain rights without discrimination”.252 Such measures shall ensure that the full realization of each right is progressively achieved.253 The more resources a State has, the more steps it could take. Thereby,

250 This is often referred to as the tripartite division of human rights and is applicable both within the rights of the ICCPR and the ICESCR. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht (22–26 January 1997), para. 6.


252 All appropriate means must be taken without discrimination. ICESCR Article 2(1) and (2).

253 This is referred to as the principle of “progressive realization” enshrined in Article 2(1). Unlike obligations in the ICCPR which all are of immediate nature, the ICESCR also imposes obligations of progressive nature.
the threshold of fulfilment will be higher for a State with many resources compared to a State with less resources. Without regard to the resources of a State, the State shall always fulfil the minimum core content of the rights.

The obligation to fulfil makes the State obliged to “provide the right directly whenever an individual or group is unable”.254 The duty applies in situations where the individuals are not able to take care of the rights themselves, and is especially relevant in situations of occupation. Here the resources being available for the citizens may be increased, making it necessary for the Government to provide the essential emergency aid.255

In order to show that the State has taken all necessary steps in order to fulfil ESC-rights, the State should effectively monitor the situation and deliver reports on its work. 256

The obligation to respect is generally considered an obligation of a negative nature. The State must refrain from “interfering directly or indirectly” with the population’s rights to housing and health.257 A direct interference would inter alia be any physical act that violates these rights, while an indirect interference would be measures which indirectly hinder the possibility to enjoy these rights. Thereby, all measures which hinder or prevent the enjoyment of the rights must be avoided.258

The obligation to protect has similarities with the obligation to respect, and includes both negative and positive obligations. While the obligation to respect requires the State itself to respect the rights, the obligation to protect requires the State to make sure third-parties respect the rights. The State must take all applicable measures to protect the individuals under its jurisdiction from third-parties’ interference. If the person concerned already “has access to the socio-economic resources and there is a measure or the threat of a measure that seeks to erode the current enjoyment of the resource”,259 the State’s has a negative obligation to protect the right. If the State has failed to give a person access to the socio-economic resources,

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254 Giacca, ESC-rights, p. 62.
255 The Government should either provide the right themselves or by assistance from the international community. See ICESCR Article 2(1). This obligation has a link to the duty to provide humanitarian relief within IHL, see GC IV Article 59.
256 The reports should demonstrate that all necessary steps are taken to realize the right for every individual, either by the State itself or with international cooperation. The steps should be done in the shortest possible time in accordance with the maximum of available resources. See CESCR, “Revised general guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Right”, E/C.12/1991/1 (17 June 1991).
258 Giacca, ESC-rights, p. 52.
the State has a positive obligation to ensure such access. If an alleged crime has happened, the immediate effect of the obligation would require a State to investigate the situation. To fulfil its progressive obligation, the State should, among others, budget enough money to pay both prosecutors and investigators. Due to resource constraints, many States have trouble to fulfil this obligation. Therefore, its threshold is considered to leave an important margin of appreciation. Where the Covenant applies in accordance with IHL, it could be imagined that the available resources will require the State only to investigate the gravest breaches covered by IHL. Where third-parties interfere with the population’s rights, the State has an obligation to act in order to protect the population.

3.3.2 A State Party’s obligation to exercise the rights without discrimination
Each State Party to the ICESCR should “recognize the right of everyone” to housing and health. “Everyone” means that no person can be excluded from the enjoyment of the right, and must be read together with the non-discrimination clause in Article 2(2). The Parties shall guarantee that both rights are being exercised without discrimination.

Both Palestine and Israel have populations in the OPT. This section will examine whether different treatment of Palestinians and Israelis amounts to discrimination, and whether any differences in the rights being provided in the different Areas of the OPT amounts to discrimination.

3.3.2.1 Discrimination between Israelis and Palestinians
The OP is under an absolute prohibition on transferring its own population to the occupied territory. Therefore, the question about discrimination between the citizens of the OP and the citizens of the occupied territory does not receive much attention within international law scholarship. Yet, hundreds of thousand Israelis have settled in the OPT, which raise questions on whether different degrees of protection for Israelis and Palestinians amount to discrimination. The HCJ has dealt with the issue in several cases.

In a case on priority in educational matters, the Court found that the government of Israel had treated Israelis and Arabs in a discriminatory manner. In its findings, the Court

260 Ibid.
261 The obligation has a linkage to the right to a fair trial in Article 14, ICCPR, see CESCR, Statement on ‘An evaluation of the obligation’, E/C.12/2007/1, 10 May 2007, para. 7; CESCR, General Comment No 12, para. 15.
263 ICESCR Article 11 and 12. The Palestinian Authority also have an obligation to secure the right to equality and non-discrimination for its population under Article 3 and Article 11 of the ACHR. Here the right to adequate housing is found in Article 38, and the right to health in Article 39.
264 HCJ, Supreme Monitoring Committee for Arab Affairs in Israel and others v. Prime Minister of Israel, Judgement, Case No. 11163/03, 27 February 2006, para. 19.
reaffirmed several of its former decisions confirming the importance of non-discrimination, and held that “The right to equality is one of the most important human rights” and that “discrimination … on the basis of a person’s religion or race … inflicts a mortal blow on human dignity.” Further on, the Court stated that the principle “applies to all spheres of government activity. Notwithstanding, it is of special importance with regard to the duty of the government to treat the Jewish citizens of the State and non-Jewish citizens equally.” Regarding the general mistreatment of Israeli and Arab areas in socio-economic affairs, the Court held that “the exclusion of Arab towns from socio-economic programmes, whose purpose is specific and different, constitutes improper discrimination”. Public resources — especially resources that are allocated to remedy a socio-economic injustice — should be allocated equally and fairly in view of the purpose for which they were allocated and the different needs of members of society to receive the resources.” Based on the facts before it, the HCJ then concluded that the principle of equality had been violated in this case.

In a case on discrimination in religious affairs, the Court held that “[t]he principle of equality applies to all the areas in which the State operates […] [t]he resources of the State, whether in land or money, as well as other resources, belong to all citizens, and all citizens are entitled to benefit from them in accordance with the principle of equality, without discrimination on the basis of religion, race, gender or other illegitimate consideration.”

Based on the above-mentioned cases, the prevailing view in prolonged occupations must be that when it comes to ensuring human rights, the State has a duty not to discriminate between its own citizens and the local population living there. Israelis and Palestinians are entitled to the same amount of protection under the law.

### 3.3.2.2 Discrimination in the different areas of the OPT

The prohibition of discrimination is a fundamental principle of international human rights law, with a basis in customary international law and codified in virtually all international human rights law treaties. From a domestic law perspective, the Israeli Supreme Court examined the question of discrimination within specified territories and reaffirmed that the principle of equality applies to all citizens in all areas in which the State operates. In the OPT, the Areas are subject to different degrees of Israeli and Palestinian Authority, and due to movement restrictions, the amount of resources and the availability of applying them differ. Yet, the population should be given the highest level of protection achievable through the available resources of the State. Independent on which State the obligations are incumbent upon, the

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265 Ibid. para. 13, (footnotes omitted).
267 Ibid. Para. 21.
268 HCJ, Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Religious Affair, Judgement, Case No. 1113/99, 18 April 2000, para. 3.
question on discrimination refers to the content of the protection being offered. If each Area of the OPT should be viewed separately, this would mean that it would be legal to provide a different level of protection to citizens in i.e. Areas A and C of the West Bank.

A similar question has been examined in Lebanon, concerning the “adaption” of some villages by donor countries. Here, the Commission of Inquiry held that the “adaption” of some villages by donor countries while others were left aside, might amount to discrimination. The “adopted” villages had access to more resources than the “non-adopted” areas, which made their possibility to enjoy ESC-rights different.269

The populations’ different access to resources is similar in these two cases. The issue of authority also has some similarities. While the areas in Lebanon where “adopted” by third-parties, eventually causing a discrimination due to the adoption of some areas instead of others, the areas in the OPT are subject to different authorities as a result of agreements and elections. Yet, all areas of the OPT are still subject to Palestinian de jure jurisdiction, and it would be discriminatory to give some people more rights than others. The Palestinian population is entitled to the same protection, irrespective of which State the obligations are incumbent upon.

3.3.3 The normative part of the rights applicable in belligerent occupations

The normative part of each ESC-right consists of a minimum core content, considered to be of a “non-derogable”-nature.270 This core content applies to the population in all circumstances (including belligerent occupations),271 and could be understood as a starting point from where the State can envisage a progressive realization.272 The purpose of dealing with core-obligations are two: First, to secure that States interpret the ESC-rights without an “excessive margin of discretion” and second, “to determine when developed States would be required to assist developing countries in implementing minimum core rights”.273 Because responsibilities incumbent upon the international community will not be examined in this thesis, the focus will relate to the first purpose, in order to ensure that Israel and Palestine ensure a minimum degree of protection for the Palestinian population. Due to the principle of progressive realiza-

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270 The ICESCR has no derogation clause, but the term could be read as not giving states the opportunity to limit these rights under the limitation clause in ICESCR Article 4. See CESCR, GC No 14, para. 47; GC 15, para. 40.

271 Ferrero, “Expert Meeting”, pp. 65-67 and 92, and CESCR, GC No 12, paras. 8–13; GC No 13, para. 57; GC No. 14 paras. 12 and 47.

272 Giacca, ESC-rights, p. 30.

tation, a State’s obligation in prolonged occupations may be considered to include more than the minimum core content of each right. However, this assessment would require a thorough examination of the State’s resources, which goes beyond the scope of this thesis.

In the latest reports from international organs, such as the ICC, the UN and human rights NGOs, it was reported that the major concerns when it comes to Palestinians’ rights to housing and health include destruction of Palestinian houses and health facilities; the denial of building permits and building materials; lack of land to build on; movement restrictions which affect the possibility to enjoy health care and to access houses; lack of infrastructure (hereby electricity and water); forced displacement; violation of Bedouin’s and other shepherd communities’ cultural way of living; interference with the right to health care; lack of protection against Israeli settler violence and house occupations; and discrimination between Israelis and Palestinians in all these fields.274 Only those parts of the ESC-rights to housing and health which concerns these issues will be elaborated here.

3.3.4 The right to adequate housing

This section will elaborate the content of the right to adequate housing, relevant for the Palestinians living in the OPT. The right is of a fundamental value for the fulfilment of other human rights, and is therefore found in several human rights documents.275 In the ICESCR it is contained within Article 11, as a central part of the right to an adequate standard of living.276

I will start with explaining the normative part of the right and its minimum core content applicable in belligerent occupations. Then the duty of a State to respect, protect and fulfil the right to housing will be elaborated.


276 See also ACHR Article 38, 31 and 21(1) relevant for Palestine’s obligations. In accordance with the ICESCR, Article 38 of the ACHR also includes a linkage between the measures required and the resources of the State.
The normative part of the right to housing

The right to adequate housing is found in the ICESCR Article 11(1), and includes a right for “everyone” to “live somewhere in security, peace and dignity”. All aspects of the right should be adequate, including the right to: privacy, space, security, lighting and ventilation, basic infrastructure and location with regard to work and basic facilities - all at a reasonable cost.\textsuperscript{278}

The right to housing must not be mixed with the right to own property.\textsuperscript{279} Housing also includes non-owned property, and include “rental accommodation, cooperative housing, lease, owner-occupation, emergency housing or informal settlements.”\textsuperscript{280} Neither does the right include a right to land.\textsuperscript{281}

In situations of belligerent occupations, the full content of the right to housing will often be hard to provide, because restrictions applied by the OP causes a lack of resources in the occupied territory. The CESCR has thus identified its minimum core content, contained in General Comment No. 4 (GC No. 4).\textsuperscript{282} The minimum core content of the right to housing includes obligations relating to legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; locality; and cultural adequacy.\textsuperscript{283} I will now elaborate the content of those obligations most relevant for Palestinians’ right to housing in the OPT.

Palestinians’ right to housing is especially challenged by restrictions imposed by Israel relating to among others, movement, and import and export of building materials.\textsuperscript{284} First, these restrictions affect the availability of services, materials, facilities and infrastructure. Palestinians are entitled to sustainable access to natural and common resources, such as water for drinking, washing and sanitation; energy for cooking, heating and lighting; and emergency services.\textsuperscript{285} Second, restrictions affect the habitability and accessibility of Palestinians’ hous-

\textsuperscript{277} The reference to “himself and his family” must be viewed in the light of the time when the Convention was drafted, and the general assumptions on gender roles these days. It applies to all human beings and must be read in accordance with the general non-discrimination clause in Article 2(2). See GC NO. 4, paras. 6-7.


\textsuperscript{279} The right to property is absent from the ICESCR, but it is enshrined in UDHR Article 17 as well as other human rights treaties.

\textsuperscript{280} OHCHR, “the Right to Adequate Housing, Fact Sheet No. 21 (Rev. 1)” (Hereinafter: OHCHR Fact sheet) Pp. 7-8. Available at: \url{http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf}

\textsuperscript{281} OHCHR Fact sheet p. 8


\textsuperscript{283} GC No. 4, Para. 8, letter a-g.

\textsuperscript{284} How these restrictions affect the Palestinian people will be elaborated in ch. 4

\textsuperscript{285} GC No. 4 para. 8, letter b.
ing units. Housing units shall provide the inhabitants with adequate space; protect them from cold, damp, heat, rain, wind or other threats to health; and structural hazards.\textsuperscript{286} They shall also be accessible to those entitled to it.\textsuperscript{287} Third, restrictions affect Palestinians’ right to have a house located with access to employment options, health care services, schools, childcare centres and other social facilities.\textsuperscript{288} Fourth, restrictions affect the right to cultural adequacy for the Bedouins and other shepherd communities in the OPT. Housing units shall be built in accordance with their cultural heritage, and allow them to continue their natural way of living.\textsuperscript{289}

### 3.3.4.2 A State Party’s obligation to respect, protect and fulfil the right to housing

This section examines the obligation to respect, protect and fulfil the right to housing and gives examples on how these obligations may have been violated in the OPT.

The duty to respect the right to adequate housing requires the State not to “arbitrarily or unlawfully evict someone” from their home,\textsuperscript{290} and not to interfere with any of the rights mentioned in the core content above. Examples of direct interference could be to demolish a person’s home, or to otherwise force a person to leave his or her home. Indirectly, the right could be interfered by complicating the process of getting building permits, by hindering the access to electricity and water, or by restricting the access to building materials.\textsuperscript{291} Other acts and omissions on the part of State authorities may also violate this duty.

To protect the right to adequate housing, the State should take all measures to ensure that third-parties or external circumstances do not violate the right. Hereby, the State has a duty to ensure that its nationals, or nationals of other States, do not violate the populations enjoyment of the right. If Israeli settlers violate Palestinians’ right to housing, the obligation to protect includes a positive duty to act in order to stop these violations. Where violations have occurred, the obligation includes a duty to prosecute the alleged perpetrators.

To fulfil the right to adequate housing, the State would have to take all measures to facilitate, promote and provide the population with adequate houses. This does not mean that

\textsuperscript{286} GC No. 4, para. 8, letter d.
\textsuperscript{287} GC No. 4, para. 8, letter e.
\textsuperscript{288} GC No. 4, para. 8, letter f.
\textsuperscript{289} Under the LO the OP has a duty to respect the manners and customs of the occupied area, ibid. p. 3. This could imply a negative duty on the OP, not to interfere with the populations possibility to construct such houses. See GC No. 4, para. 8, letter g.
\textsuperscript{290} CESCR, GC No 7, para. 8: Forcible eviction is understood under international human rights law as ‘the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection’. CESCR, General Comment No 7, para. 4: As an obligation of conduct, the prohibition on forced eviction is protected in the ICCPR as well. See Article 6 (the right to life), Article 9 (to security of the person), Article 17 (non-interference with privacy, family and home).
\textsuperscript{291} See OHCHR Fact sheet p. 33.
the State should build houses for the entire population, but it should take the required measures to prevent homelessness. However, in specific cases such as nature or man-made disasters, the duty to fulfil this right may require the State to provide houses or housing allowances. If the weather conditions require special measures in order to make the house habitable, the State should take such measures. In Lebanon, the Government tried to fulfil the rights of the population by giving them prefabricated housing units, however insulation was required before the units were considered “adequate”.

The obligation to fulfil, further requires the State to adopt appropriate “legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to adequate housing”, hereby adopting a national housing policy or plan, with the aim of giving all people an adequate housing. The State should monitor the right, and if it gets violated, it should ensure adequate remedies for the violation.

In order to fulfil the right, the State should also facilitate and promote access to adequate services reasonably near the house, such as facilities essential for “health, security, comfort and nutrition”.

3.3.5 The right to health
This section examines the right to health in situations of belligerent occupations. The right is contained in Article 12 of the ICESCR, and is a fundamental human right indispensable for the exercise of other human rights. The material content of the right is included in Paragraph 1 of the Article, while Paragraph 2 enumerates illustrative, non-exhaustive examples of the States Parties’ obligations. I will first elaborate the material part of the right applicable in belligerent occupations, before examining a State’s obligations relating to the right.

292 OHCHR Fact sheet p. 6.
293 Ibid.
294 See p. 45.
295 Such a plan must identify the resources available to meet the goals, and the responsibilities and time frame for the implementation of the necessary measures. See OHCHR Fact sheet p. 33
296 Ibid.
297 GC No. 4, para.8, letter b.
298 In the ACHR, the right to health is enshrined in Article 39. It contains in general the same protection as offered by the ICESCR.
300 GC No. 14, para. 13.
3.3.5.1 The normative part of the right to health

The right to health provides a right for everyone to enjoyment of the “highest attainable standard” of “physical and mental health”. The notion cannot be read too strictly. A person’s health is a very complex thing to regulate for a State, since biological and socio-economic preconditions are individual for each person. The right should therefore not be understood as a right to be healthy. Each person has a freedom to control one’s health and body, and the right should be understood as “a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.” Health “facilities, goods and services” include the whole specter of health care and support, such as medication, psychotherapy, hospital care, residential facilities, rehabilitation and also income support when health-related issues makes a person unable of earning money.

The CESCR has elaborated the content of the right to health in its General Comments No. 14 (GC No. 14), which set out four elements to be included in the right under all circumstances. Health care should be available, accessible, acceptable and consist of a certain degree of quality. These specific criteria will now be elaborated.

For the right to be available, the State should have “functioning public health and health-care facilities, goods and services, as well as programmes” available for its citizens in sufficient quantity. To be accessible, health care should be both physically, economically and informationally accessible. Physically, it must be within safe reach for all of the population. Economically, accessibility could be viewed under the term affordability; the costs must be affordable for all parts of the population, either by making the price low or by having

301 Article 12(1).
302 There are many non-controllable factors that could affect a person’s health. Genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles. See para. 9 of the General Comments.
303 GC No. 14, para. 8.
304 Such necessities include “access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health”, see GC No. 14, paras. 9 and 11.
305 The notion of “Health facilities, goods and services, and programmes” will hereby only be referred to as “health care”.
307 See GC No. 14, para. 12 letter a-d.
308 This will include “safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel […] and essential drugs”, see GC No. 14, para. 12(a).
309 GC No. 14, para. 12(b).
systems for public providence. Informationally, each person has the right to seek and to receive health-related information. It is the criteria to physically and economically accessibility which is mostly exposed in the OPT.

To be acceptable, health care must be “respectful of medical ethics and culturally appropriate”. The notion of quality implies the use of “skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation”. As with the right to housing, both water and electricity is necessary to provide acceptable health care of a certain quality.

The minimum core content of the right to health consists of an essential level of healthcare and includes a wide spectre of rights. Without discrimination, the State shall ensure access to and distribution of health care, access to nutritionally adequate and safe food, access to housing and sanitation, and provide essential drugs. It shall also adopt and implement a national public health strategy and plan of action. I will now elaborate the content of those rights relevant for the Palestinians in the OPT.

The right to access to and distribution of health care and essential drugs, includes a right for everyone to these rights, irrespective of a person’s amount of money, place of residence or other circumstances that may hinder a person’s right to health. The State may have to adopt health funds or take other measures to ensure an equitable distribution of this right, including a distribution of drugs necessary for the person.

Access to housing and sanitation includes some of the same aspects as the right to housing in Article 11(1). Because the right to housing also is subject to this thesis, the content of this right does not need any further elaboration.

The duty to adapt and implement a national public health strategy and plan of action is an important part of the obligation of progressive realization. The strategy and plan of action shall show what steps need to be taken in order to ensure all persons the highest attainable standard of health.

The notion “minimum normative content” was used in the Expert Meeting, relating to the OP’s obligations within the LO. Is the content of this notion the same as the CESCR’s “minimum core content”?

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310 GC No. 14, para. 12(c) letter c. I.e. some persons may have religious reasons to not do blood-transfers. Or in relevance with a heart surgery (where heart valves from pigs is a normal replacement) the surgeon must for instance respect that Muslims should not have pieces from pigs and come up with another alternative.

311 GC No. 14, para. 12, letter d.

312 The provisions are found in GC No. 14, para.43, letter a-f.


314 For more details on this plan, see Saul, Kinley and Mowbray, The ICESCR, pp. 1049-1050.
The Experts on Occupations held that the content, at a minimum, implied obligations to guarantee: “access without discrimination to medicines, medical equipment and medical services; an adequate supply of safe drinking water; and the possibility of obtaining essential medicines as defined by the [WHO]”. In contrast to the CESCR, the Experts did not include the access to food, the access to housing and the obligation to adapt a national health strategy plan. However, relating to a person’s right to have access to the conditions necessary for his or her individual livelihood, some Experts held that the population had a right to “adequate food, clothing and housing, as well as the continuous improvement of living conditions”.315 The rights to food and housing relating to the right to health could therefore be viewed as similar to those held by the Experts. On the implementation of a national health strategy plan, it was said that if the occupation persisted, the OP had to look at the future of the population, and adapt plans for a public health strategy to meet their obligations under the ICESCR.316

In prolonged occupations, the notion of “minimum normative content” used in the Expert Meeting could be viewed containing the same as the notion of “minimum core content” used by the CESCR. 317

### 3.3.5.2 A State Party’s obligation to respect, protect and fulfil the right to health

In addition to the State’s obligations included in Article 2 of the ICESCR and those elaborated by the obligation to respect, protect and fulfil, the right to health also includes some specific obligation for a State in order to ensure the full realization of the right. First, I will give some comments on these obligations, before elaborating the State’s duty to respect, protect and fulfil the right to health.

Paragraph 2 of Article 12 states that the full enjoyment of the right to health, includes an obligation to take steps in order to ensure (a) the right to maternal, child and reproductive health; (b) healthy natural and workplace environments; (c) prevention, treatment and control of diseases; and (d) health facilities, goods and services. As held earlier, the State will normally not be able to ensure the full realization of the right in a belligerent occupation. However, in a prolonged occupation, it might be imagined that either the OP or the government of the Occupied State has resources which will require the State to ensure a protection beyond the minimum core content. I will therefore elaborate the content of those provisions relevant for the Palestinians in the OPT.317

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315 Ferrero, “Expert Meeting”, p. 66
316 Ibid. p. 67
317 The right to healthy natural and workplace environments is not a main problem for Palestinians’ right to health, and will therefore not be elaborated here. For more on this subject see GC No. 14, paras. 15, 44 (b). The ECtHR has interpreted the right to a clean environment as part of the right to private and family life in ECHR Article 8. For some interesting decisions on this right see ECtHR, Roche v. the United Kingdom, Judgement, Application No. 32555/96, 19 October 2005, paras. 3, 9-10, 14, 157-169; and ECtHR, Brincat
The right to maternal, child and reproductive health imposes an obligation on the State to take measures both before the child is born, during the birth and after.\textsuperscript{318} Such measures could require the State to provide for midwives when a child is born, and to facilitate for a safe birth.

The right to prevention, treatment and control of diseases, includes a duty “[t]o take measures to prevent, treat and control epidemic and endemic diseases.”\textsuperscript{319} Treatment includes urgent medical care where this is needed, for instance in cases of accidents, disaster reliefs, humanitarian assistance in emergency situations etc. In a belligerent occupation the living conditions may be very terrible, which causes a faster spreading of diseases. It is therefore important that infected persons get treated right away.

The right to health facilities, goods and services is highly relevant for Palestinians in the OPT. It includes a duty for the State to make sure everyone has timely access to basic health services, which include “all services dealing with the diagnosis and treatment of disease, or the promotion, maintenance and restoration of health. They include personal and non-personal health services.”\textsuperscript{320} The State should do its best to ensure that all persons have access to the health care they require,\textsuperscript{321} and that health facilities are located relatively near to where people live.

The obligation to respect the right to health requires abstention “from denying or limiting equal access for all persons” to all aspects of the right to health, and to abstain from enforcing discriminatory practices as a State policy.\textsuperscript{322} Directly it could be interfered by denying a person essential health care services. Indirectly, it could be done by imposing movement restrictions which make it unreasonably difficult to get the required help.

The obligation to protect the right to health implies a continuous obligation on the State to provide the essential primary and urgent health care. The State must take all applica-

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\textsuperscript{318} GC No. 14, para. 14.


\textsuperscript{320} See WHO, health services on \url{http://www.who.int/topics/health_services/en/} (accessed 28 May 2017). The right also consists of an obligation to provide the population with necessary health-related education, see GC No. 14, para. 44, letter d and e. This will not be elaborated here because it is not one of the main problems for Palestinians’ right to health.

\textsuperscript{321} GC No. 14, para. 17.

\textsuperscript{322} CESCR, General Comment No 14, paras. 34 and 50.
ble measures to make it possible for health professionals to do their work. They should make sure health care reaches out to the persons in need. If health facilities are broken, the State should repair the systems. The obligation also includes a duty to control the standards of the health professionals, including the medical equipment etc.

To fulfill the right to health, the State should facilitate the enjoyment of health and access to medicines. It must ensure that a sufficient number of hospitals and other health-related facilities are available to the population, and provide the right to its population, even when the people are not able of realizing the right themselves. To promote the right, States must undertake actions that create, maintain and restore the health of the population.

3.4 The complementarity between the ICESCR and the LO relating to the rights to housing and health

By distinguishing between negative and positive obligations incumbent upon an OP, this section will examine the complementarity between the ICESCR and the LO relating to the rights to housing and health.

3.4.1 The negative obligations incumbent upon an OP

The negative obligations, or obligations of non-interference incumbent upon a State are found in the obligations to respect and protect ESC-rights. As seen in chapter 2, the ICJ has held that an OP has certain negative human rights obligations, both in the Wall case and the DRC v. Uganda case.

The OP will always have an obligation to respect the ESC-rights and to refrain from interfering with the population’s rights to housing and health. When it comes to the obligation to protect, the scope of protection offered within both fields of law differs. As a corollary of the duty to protect the right to health, the LO also protects health facilities or other health-related objects from being attacked. The ICESCR only protects the individual’s right to health. The LO may thereby be said to offer a greater protection of the right to health, by making violations of hospitals etc. forbidden. Where harm to health professionals or damage to health facilities challenge the population’s right to health, the attack may amount to a breach of the ICESCR art. 12. As seen in chapter 3.2 and 3.3, the ICESCR contains several

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323 I.e. this could be challenged by different kind of movement restrictions.
324 GC No. 14, para. 35.
325 GC No. 14, paras. 36 and 37.
327 In Somalia, the ICRC assumed that the attacks on two doctors and 15 medical students represented ‘more than 150,000 consultations per year that will not take place as a result of that single attack’. See ICRC, “Health Care in Danger: A Sixteen-Country Study”, July 2011, p. 3, https://ihl-databases.icrc.org/customary-ihl/eng/docs/home (last accessed 28 May 2017). However, such an interpretation would be too broad by
rules protecting access to health care. Some of these rules will require positive measures in order to be fulfilled. These will be examined later.

Where a house is destroyed in a belligerent occupation, the right to housing within the ICESCR may be violated if the house served as a person’s home. The ICESCR protects a person’s right to a home, not houses in general. To violate the right to adequate housing the object being destroyed or damaged, has to correspond to the formal residence of the individual. This was in issue in the Loizidou case, where Turkish troops prevented a Cypriot land owner from returning to and enjoying her land in Northern Cyprus. While the lack of access of the applicant to her property amounted to a violation of the right to property (Article 1 of Protocol No 1 ECHR), there was no violation of the right to a home (Article 8) since the applicant did not have a home on the land in question.328

The State may be held responsible for failure to protect their population from violent attacks against their houses and for forced displacement. In Darfur, the Commission found that the local militia and the Government were guilty in violations of both IHL and IHRL, for attacking peoples home without any military justification.329

Based on the above, negative obligations incumbent upon a State Party to the ICESCR complement the obligations upon an OP within the LO, and the OP should respect and protect the local population’s rights to housing and health.

3.4.2 The positive obligations incumbent upon an OP
The positive obligations within the ICESCR consist of a duty to act in order to protect the rights and to fulfil the rights. At the very least, these obligations should be the same one as required by already existing IHL obligations.330 The question is whether the ICESCR imposes greater obligations upon the OP than those under the LO.

The ICRC-experts concluded that IHL and IHRL “largely overlap when the issue in question is meeting the immediate needs of the civilian population.”331 In relation to the right to health, the OP has positive duties to ensure medical supplies, the maintenance of hospitals and certain public health services within the LO.332 Within the ICESCR, States also have a positive duty to fulfil the right by investing in long-time strategies for advancing health care.

328 ECHR, Loizidou v Turkey case, paras. 65–66.
331 Ferrero, “Expert Meeting”, p. 95.
332 GC IV, Articles 55 and 56. Even though the reference here is to co-operation with local authorities, the OP has the primary responsibility.
Such a demand, requiring long-time strategies, is not to be found in the LO. Even though the LO may require the OP to build hospitals, the State is under no obligation to show what steps it is going to take to reach this demand. Obligations within the LO mainly consists of immediate obligations which should be taken there and then, not the adoption of measures for future development. Even though obligations within both frameworks rely on the resources of the State, the lack of resources within the ICESCR does not free the State of its entire obligation. If immediate realization is impossible, the State still has a duty to take steps in the direction of a change. Would this mean that the OP would have to put huge sums into building health care systems in the occupied territory?

At first sight, this may seem rather far-fetched, due to the presumed temporariness of an occupation. The temporary character is exactly the rationale that the LO is built on. Because the occupation is considered temporary, the OP should not make permanent changes in the territory. In accordance with the principle of progressive realization, the positive obligation to fulfil requires the State to continuously work towards an improvement of the population’s enjoyment of the rights. If belligerent occupations last over a certain period, the State may thereby be obligated to do more than only preserving the status quo. Due to the temporary character of short-term occupations, the duty to take positive measures may not be required of the OP. As will be shown, more might be required of the State in prolonged occupations.

Together with refraining from interference, protection may require the OP to take steps to prevent violations from happening. Here, Lubell argues that “in circumstances where troops have the requisite ability, they must also be responsible for the positive elements— for instance, they cannot stand aside and witness a violent crime when they have the ability to step in and prevent it.”

In the DRC v. Uganda case, the ICJ held that the OP’s obligations within Article 43 of the HagueReg comprise “the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.” The Court then found that as an OP, Uganda was responsible for “any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.” The obligation to protect the ESC-rights to housing and health are thereby complementary to Article 43 of the HagueReg.

Some might argue that the lack of resources may free the State from its obligations within the ICESCR. If this is the case, the State should prove that it actually was unable of

333 GC IV, Articles 55 and 56, and ICESCR Article 2.
providing a protection.\textsuperscript{336} Within the LO, the OP then has a duty to provide relief schemes. If neither the occupied State, nor the OP is able of providing adequate supplies to the whole part of the population, the OP shall agree to relief schemes and facilitate the population by all means at its disposal.\textsuperscript{337} Within the ICESCR, this obligation may be viewed as part of the obligation for States to cooperate in Article 2(1).

In relation to the right to housing, Article 55 of the GC IV, imposes an obligation on the OP to provide “tents, prefabricated or other forms of housing”, if the population is unable to live in their houses.\textsuperscript{338} The obligation is an essential preliminary step to a more long-term reconstruction. The LO does not include any obligations on such long-term measures, which makes the linkage with the ICESCR very interesting. Based on Betlehem’s six scenarios of interaction, IHRL might inform the interpretation of IHL; it might prevail over inconsistent IHL; and it might fill in the gaps in circumstances with no relevant IHL provision.\textsuperscript{339} Due to the importance of having a house to live in, the OP may be responsible for adopting measures provided for in the minimum core content of the ICESCR, to make sure the population’s housing situation is adequate. To what extent such measures should be adopted may rely on the duration of the occupation. A tent could be adequate for a very short period of time, if the weather conditions allow for it. However, for longer periods of time more measures may be required of the OP.

Within the ICESCR the State has a positive duty to facilitate and promote access to services necessary for the housing situation to be adequate. Hereby the State should provide electricity to the population, building materials, sanitation and washing facilities, and other necessary means. Reasoned in the OP’s obligation to restore and ensure civil life, these positive obligations should be incumbent upon the OP as well.

When it comes to the positive obligation to adopt housing policies and plans within the ICESCR, the situation is less clear. In general, the OP should preserve the status quo and not make changes to the occupied territory. However, the OP may adopt legal measures necessary for the OP’s possibility to fulfil its obligations under the Covenant, if these are essential to “maintain the orderly government of the territory” and the security of the OP, its forces and infrastructure.\textsuperscript{340} This might be interpreted as making the OP obliged to adopt at least temporary housing policies and laws, if such is necessary to fulfil the right to housing for the

\textsuperscript{336} ECtHR, \textit{Ilaşcu} case, para. 334, where it is held that “[w]hen faced with a partial or total failure to act, the Court’s task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made”.

\textsuperscript{337} GC IV Article 59. If the occupied State itself is able to maintain adequate supplies for the whole population, the obligation incumbent upon the OP would be of negative nature, by not interfering with the supplies. See The Commentary, p. 313.

\textsuperscript{338} See p. 36

\textsuperscript{339} See pp. 19-20, scenarios 3-5,

\textsuperscript{340} See p. 34.
population in occupied territories. However, if such policies and laws already exist, the OP would only have a negative obligation not to interfere with this right. Obligations relating to policies and legislation must in general be viewed as an obligation between a State and its citizens, and only special circumstances may imply such obligations on an OP. 341

3.4.3 Concluding remarks
When it comes to the negative obligations within the ICESCR, the obligations of the OP are complementary to the obligations within the LO. When it comes to the positive obligations, the solution is less clear. Here the degree of control and the temporal element seems to be important when determining the obligations incumbent upon the OP. This solution finds support in the Expert Meeting, where one expert held that negative human rights obligations should be applicable everywhere, irrespective of the degree of control. In contrast, positive obligations were highly dependent on the degree of control. 342

3.5 Prolonged occupations effect on the applicable framework
This section examines whether the long duration of an occupation affects the positive obligations incumbent upon an OP.

In the ICRC expert meeting, many of the experts pointed out that the LO was originally developed for short-term occupations, though it continued to apply in long-term occupations. However, the long duration challenged the conservationist principle raising questions about whether some of the provisions in the LO should be interpreted more flexibly in the light of the specific situation arising in a long-term occupation. The specific situation would be that “the changing needs of the civilian population would become even more pressing” in prolonged occupations. Thereby, the experts unanimously held that along with the security interests of the OP, the welfare of the local population “played a key role” and should “be established as the main principle guiding the measures and policies undertaken” by the OP in their administration of the occupied territory. 343 This would imply that human rights may play a more important role when the duration of an occupation becomes protracted. 344 The long duration and the lack of hostilities in prolonged occupations, has been used both to argue for a permissive application of the LO, expanding the powers of the OP, and for a restrictive application, limiting the freedom of its powers. 345 These will now be examined.

341 Such circumstances may be the temporal element of the occupation. As the time develops, populations may increase and require the building of new habitable areas.
342 Ferrero, “Expert Meeting”, p. 63
343 Ibid. p. 72.
344 Ibid. p. 74.
3.5.1 A permissive application of the LO and the ESC-rights to housing and health

The passage of time may change the needs of the population, which could lead to a more permissive application of the LO, reasoned in the changed circumstances of civil life which requires the OP to take positive measures for the welfare of the population. Maintenance of civil life could imply a duty to “include changes, investment and development” for the population in the occupied territory. The only existing case law in this field is to be found in the judgements of the HCJ. Here, an expansive interpretation of the LO has been grounded on the OP’s need to introduce changes of more permanent nature, in order to take care of the needs of the local population. Though these investments would imply a development in the living standards for the populations in the OPT, they would also imply an improvement of the standards of the Israeli settlers and the Israeli army. Whom the changes have been made for would be a difficult, but important part, of the justification of such measures.

The duties arising from the LO may be elaborated by applying the ICESCR by analogy, to “flesh out the notion” and to substantiate and supplement the meaning of the “welfare of the population”. In this way, the OP’s ESC-obligations would increase in accordance with the duration of the occupation. This view is supported by the Inter-American Commission for Human Rights (IACmHR). Dealing with the ICCPR and the rights of detainees, the Commission held that:

“[W]here detainees find themselves in uncertain or protracted situations of armed conflict or occupation, the Commission considers that the supervisory mechanisms as well as judicial guarantees under international human rights law and domestic law […] may necessarily supersede international humanitarian law where this is necessary to safeguard the fundamental rights of those detainees.”

What the Commission suggests here is that in such situations, IHRL-norms may prevail as lex specialis. The statement only refers to the rights of detainees, but the view might be upheld in all situations where fundamental rights of civilians are at risk. Concerning the rights

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346 Ibid. Ferrero, p 73.
347 Koutroulis, “The application of IHL and IHRL”, p. 171
348 Ibid. p. 186; HCJ, Bassil Abu Aitaetal v. The Regional Commander of Judea and Samaria and Staff Officer in Charge of Matters of Custom and Excise, Judgement, Case No. 69/81, 5 April 1983 and HCJ, Omar Abdu Kadar Kanzil et al. v. Officer in Charge of Customs, Gaza Strip Region and the Regional Commander of the Gaza Strip, Judgement, Case No. 493/81, 5 April 1983, pp. 129–147, paras. 50-53. Measures that have been allowed relates to new tax-legislation, the construction of high-speed motorways, new electricity systems etc.
349 This has been referred to as «borderline cases», see Ferrero, “Expert Meeting”, p. 73.
350 The experts of the ICRC suggested three different tests in order to check if the measures are lawful, see Ferrero, “Expert Meeting”, pp. 74 – 77.
to housing and health, this is supported by some of the ICRC experts who held that the content of these human rights articles should be applied when interpreting the LO-provisions on this field.  

As held by Koutroulis, “some positive obligations to take action in favour of growth and development” should be incumbent upon the OP. For instance the OP may have to adapt plans on how they are going to increase the populations protection of housing and health. In order to reach the goals of these plans, it may adapt new legislation for the benefit of the population. It may also be obligated to build houses for the ones in need, to provide the opportunity to get health care beyond what is essential and take other measures beyond what is laid down in the LO.

3.5.2 A restrictive application of the LO and the ESC-rights to housing and health

The special circumstances arising from a protracted occupation, may imply stronger demands on the OP than what is laid down in the LO. Here the law enforcement model applies, which makes the OP function more in the capacity of a policy power than a military power. The OP’s obligations to take care of the civilian population under the LO, combined with the lack of resources in the occupied territory, might have made the authorities of the occupied territory dependent on the OP’s resources. With the occupation going on for a while, the OP’s control over the area will often be well established, making the OP capable of putting more resources into the caretaking of the civilians. In relation to the OP’s obligations within the ICESCR, the increase of resources will affect its obligation in accordance with the principle of progressive realization.

In a prolonged occupation, the occupied territory’s dependency upon the OP becomes crucial. When the area is considered occupied, the OP must provide some necessary services to secure the lives and health of the population. After a while, the occupied State may gain some amount of self-control in some of the areas, as with the Oslo Accords in the OPT. This give rise to questions about the duration of an occupation, and the duties of the OP under the LO. If these areas are no longer subject to the authority of the OP, could the long duration mean that the OP still has some obligations towards the population?

This question was examined in the HCJ, after the Israeli disengagement from Gaza in 2005. Here, the Court determined that the area was no longer considered parts of the occupied

353 Koutroulis, “The application of IHL and IHRL”, p. 182.
354 The determination of the beginning and end of an occupation falls on the outside of this thesis. For information on this subject, see Ferraro, “Determining the beginning and end”, pp. 133 – 163.
yet the Court concluded that the State of Israel continued to have obligations towards the population in Gaza. The responsibility was considered being derived from the relationship that was created after the Israeli military rule, where Gaza almost completely got dependent upon the supply of electricity from Israel.\textsuperscript{356}

At first glance, the findings could be read as stating that the prolonged character of the occupation had led to an extension of the obligations incumbent upon Israel while the area was considered occupied.\textsuperscript{357} However, the HCJ does not mention any rules of the LO in its judgement.\textsuperscript{358} This could be read as the Court implicitly confirming that Israel still exercises the necessary amount of control over Gaza, making Israel obligated because the occupation still is a fact.\textsuperscript{359} Or, it could be read as stating that Israel has gained obligations because of its long earlier conduct, creating the view that obligations may arise on the OP by some sort of customary basis. Either way, the findings are of great interest relating to the A and B areas of the West Bank. Whether relying solely on Palestine’s dependency on Israel or the fact that Israel still has some sort of control, this might imply that Israel (as the OP), still has obligations even where Palestine (as the occupied State) has some authority. This question will be further examined in the next chapter.

To conclude: in prolonged occupations, the OP’s obligations within the LO extend to include obligations within the ICESCR. ESC-obligations incumbent upon the OP may include both negative and positive obligations.


\textsuperscript{357} That the prolonged situation creates greater obligations seems to be an important argument in ICJ’s interpretations in the \textit{Wall} case. See ICJ, \textit{Wall} case, p. 181, para. 112.

\textsuperscript{358} HCJ, \textit{Al-Bassiouni case}, para. 13.

\textsuperscript{359} The amount of control necessary for the maintenance of an occupation, is lower than that required for the establishment of an obligation. See Dapo Akande, “Classification of armed conflicts: relevant legal concepts”, in Elizabeth Wilmshurst (ed.), \textit{International Law and the Classification of Conflicts} (Oxford University Press, 2012), p. 48. The fact that a large majority of States still recognize Gaza as OPT, as held in ch. 1, support this view.
4 What obligations are incumbent upon Israel and Palestine in the OPT?

4.1 Introduction

Based on the findings of the previous chapters, both Israel and Palestine have ESC-obligations towards the Palestinian population in the OPT. This chapter examines how obligations relating to housing and health are divided between the Parties in all Areas of the OPT.\textsuperscript{360} In the West Bank and the Gaza Strip obligations relating to housing and health are divided between the Parties in the Oslo II Accord.\textsuperscript{361} I will first provide some comments on the content of this agreement, before analyzing the Parties’ obligations derived from the ICESCR, and on Israel’s behalf obligations within the LO (section 4.2). In the next three sections I will examine the Parties obligations in the West Bank and the Gaza Strip, relating to infrastructure - relevant for both housing and health (section 4.3), and the remaining obligations relating to housing (section 4.4) and health (section 4.5). Then obligations relating to East Jerusalem will be examined (section 4.6), followed by some comments on the prohibition of discrimination relating to the situation in the OPT (section 4.7). Finally, I will conclude on the Parties obligation to respect, protect and fulfil ESC-rights in the OPT (section 4.8).

4.2 The Oslo II Accord and the applicability of the ICESCR and the LO

The Oslo II Accord should have led to a redeployment of Israeli military forces to specified military locations in the West Bank and the Gaza Strip,\textsuperscript{362} ending with Palestine having territorial and functional jurisdiction in areas without Israeli presence.\textsuperscript{363} It has been over 18 years since Israel should have withdrawn its forces, and the transfer of jurisdiction should have ended.\textsuperscript{364} However, in the West Bank, Palestine only has authority in about 40% of the territory, whereof 22% (Area B) is within joint Israeli security control.\textsuperscript{365} In only 18% of the West

\textsuperscript{360} Concurrent human rights responsibilities between independent duty-bearers is possible. See pp. 24-25.
\textsuperscript{361} The agreement should transfer powers and responsibilities from the Israeli military government, to the Palestinian Authority (PA). See Oslo II, Article 1, paras. 1 and 2.
\textsuperscript{362} “Israeli military forces” includes Israeli Police and other Israeli security forces, see Oslo II, Article X, para. 5. For the withdrawal of Israeli forces, see Oslo II, Article X, paras. 1 and 2, and Article XI, para. 2, letter d.
\textsuperscript{363} On Gaza Strip territory, Palestine’s territorial jurisdiction should not extend to the Settlements and the Military Installation Area. On West Bank territory, territorial jurisdiction in area C should have been gradually transferred to Palestine within a period of 18 months. See Oslo II, Article XVII (2) (a). Palestine’s functional jurisdiction should apply to all persons within these areas, except for Israelis. See Oslo II, Article XVII, para. 2, letter b and d, and Article IV of Annex III.
\textsuperscript{364} The transitional period should have ended on 4 May 1999, five years after the signing of the Gaza-Jericho Agreement, signed 4 May 1994. See the preamble of Oslo II and Oslo I, Article V para. 1.
\textsuperscript{365} According to the Oslo II Accord, Palestine got powers and responsibilities for internal security and public order in Area A, see Oslo II, Article XIII, para. 1. In Area B and C, such powers should have been transferred, yet Palestine is only in charge of civil powers in Area B, and civil powers not relating to territory in Area C. See Oslo II, Article XI, para. 2, letter c and Article XIII, para. 8.
Bank is Palestine endowed with most governmental powers. The division of powers and responsibilities relating to civil affairs are set out in Annex III to the Oslo II Accord. According to the Oslo II Accord, the West Bank and the Gaza Strip should be viewed as a “single territorial unit”. However, as held in the introduction chapter, Areas A and B of the West Bank are subdivided into 165 isolated units of land without any territorial contiguity, all surrounded by Area C land. Most of the Palestinian population lives in Areas A and B (2.4 millions), while some 180,000 persons live in area C. In comparison, Area C is home to at least 325,000 Israeli settlers, settled in 125 Israeli settlements. With no territorial contiguity and all surrounded by territory under Israeli control, it is hard for Palestine to fulfil its powers and responsibilities laid down in the Oslo II Accord, as well as responsibilities within the ICESCR.

In the Gaza Strip, Palestine has territorial and functional jurisdiction, except for areas with Israeli Settlements and Israeli Military Installations. However, the Gaza Strip was under Israeli martial law until September 2005, and after Israeli forces had withdrawn from the area, Israel retained control of Gaza’s air and sea space and the borders between Gaza and Israel. When Hamas took control of the Gaza Strip in June 2007, Israel imposed a siege on Gaza. Today, some blockade-related restrictions have been dissolved. Yet, Israel denies Gazans to import certain goods that are essential for their possibility to enjoy the rights to housing and health.

The division of powers and responsibilities set out in the Oslo II Accord must be questioned. First, this division was only meant to be temporary. Therefore, the West Bank was divided based on demographics, not geography. Second, under international law, agree-

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366 See pp. 5-6 (footnotes omitted).
367 Oslo II, Article XI, para. 1.
368 See B’Tselem, “Area C”.
370 These numbers are from 2011. See B’Tselem, “Acting the Landlord” pp. 12-13.
371 See B’Tselem, “Background on the Gaza Strip”.
372 OCHA OPT, “Gaza Blockade”.
374 Oslo II, Article XI, para. 2, letter a and para. 3, letter a, b and c.
ments must be kept and parties shall fulfil them in good faith.\textsuperscript{375} Without transferring the agreed upon powers to Palestine, Israel has breached the agreement. Third, obligations within the LO are non-derogable and thereby applicable to Israel as long as the Palestinian territories are considered occupied.\textsuperscript{376} Fourth, should the agreement still be valid, both parties “shall exercise their powers and responsibilities pursuant to [the] agreement with due regard to internationally-accepted norms and principles of human rights”.\textsuperscript{377} Given the complementarity between the ICESCR and the LO in prolonged occupations, the division of powers and responsibilities set out in the agreement must therefore be supplied with the relevant provisions in these legal frameworks.

In the prolonged occupation of Palestine, Israel acts like an ordinary government and should take control by ordinary means, not military power. Thereby the \textit{law enforcement model} applies. This calls for a more permissive application of the LO, reasoned in the need to secure the Palestinian population’s “civil life”. According to Bethlehem: where provisions in the LO are unclear or inconsistent, the ICESCR may prevail; where there is no relevant provision within the LO, the ICESCR may fill in the gaps; and where the LO already includes a relevant provision, the ICESCR may inform the interpretation imposing a greater responsibility on Israel.\textsuperscript{378} What constitutes “civil life” in the LO, should therefore be interpreted in accordance with the right to adequate living in ICESCR Article 11, including the right to adequate housing. And Israel’s obligations relating to medical assistance and medical supply within the LO, should be supplied by the right to health in ICESCR Article 12. Israel may thereby be obliged to adapt laws and make plans, in order to progressively realize the Palestinian population’s right to housing and health.

The LO does not regulate the OP’s duties in territories with shared authority. Here, the LO may be applied more restrictively, making Israel obliged to take measures also in territories where Palestine has some authority. What such measures may consist of will depend on the occupied State’s capacity to fulfil the rights.\textsuperscript{379} A possibility will be that the PA, as the government of the occupied State, has the primary responsibility in fulfilling the population’s rights in such areas. But where fulfilment is impossible due to Israel’s direct or indirect interference with the rights, Israel becomes responsible for fulfilling the rest of these rights. Such a solution gives an OP two choices: 1) it has to respect the rights by refraining from all sorts of interference, hereby not to impose import restrictions, or apply policies which indirectly affect the occupied State’s possibility to take care of the population in these territories; or 2) it has to

\textsuperscript{375} The principle of pacta sunt servanda.
\textsuperscript{376} The LO does not include a derogation-clause.
\textsuperscript{377} Oslo II, Article XIX.
\textsuperscript{378} See pp. 19-20.
\textsuperscript{379} ECtHR, \textit{Ilașcu} case. See pp. 24-25.
fulfil the rights themselves by building adequate houses and provide health care. In the following these circumstances will be examined.

4.3 Obligations relating to infrastructure in the West Bank and the Gaza Strip

With basis in the Oslo II Accord, this section will examine the Parties’ obligations relating to the right to housing and the right to health in the West Bank and the Gaza Strip. I will first examine each Party’s obligations relating to infrastructure, which are parts of both rights. Then the remaining obligations relating to the two rights will be examined.

4.3.1 Obligations relating to infrastructure

The right to housing and the right to health both include obligations relating to infrastructure. For a housing unit to be adequate, it should be surrounded by an appropriate infrastructure with access to among others electricity and water. Without these two, the population will have problems with cooking and heating, which both are essential for surviving. Relating to the right to health, water is important for several reasons. Humans cannot live without drinking water, making the lack of clean water a big threat to a person’s health. Clean water is also necessary for hygienic reasons and for treatment in hospitals. Hospital treatments also requires electricity, because several medical instruments are dependent on power.

4.3.1.1 The situation with regard to electricity and water

4.3.1.1.1 Electricity

According to the Oslo II Accord, electricity in Gaza and Areas A and B of the West Bank is Palestine’s responsibility, while Israel is responsible in Area C. However, approximately 95% of the total electricity supply to the territories under Palestinian responsibility is bought from Israel, making Palestine’s electricity supply dependent on Israel. Due to political reasons and Palestinian families not paying their electricity bills, the PA have not paid Israel for all electricity supplied to neither the West Bank nor Gaza, which have made Israel cut off the electricity from time to time. In a report from 2011, it was held that the total available elec-

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380 “Infrastructure” here refers to water and electricity.
381 Oslo II, Appendix 1, Article 10(1). Responsibilities in Area C should have been transferred, yet Israel still holds the authority in Area C. The Palestinian Energy Authority (PEA) provides electricity to Palestinians, see Appendix 1, Article 10(2).
Electricity in Gaza was 40% below the estimated daily demand, and that power cuts of up to 12 hours daily affected “essential services as water supply […] and health facilities.”

4.3.1.1.2 Water

Aquifers in different parts of the OPT provide the West Bank and the Gaza Strip with water. According to the Oslo II Accord, Israel has the right to about 80% of the water from the aquifers, while Palestine has the right to approximately 20%. As with electricity, Palestinians are thereby reliant on purchasing large amounts of water from Israel. Even with the purchased amount of water, Palestine only have access to about 75% of the water they were supposed to receive by the year of 2000.

In the West Bank, Palestine is responsible for providing water to Palestinians, and Israel to Israelis. The water resources are dealt with by a Joint Water Committee (JWC), and every project relating to the use of water resources needs approval by the JWC to be legal. All decisions of the JWC must be made by consensus, giving Israel the opportunity to affect the decision in each case. Israelis have unlimited access to running water year around, while Palestinians must deal with water shutoffs from time to time, creating a large distinction between Israelis and Palestinians. The average consumption of water is approximately 79 liters per person/per day for Palestinians, while Israelis use 287 liters per day/per person. The WHO recommends between 50 - 100 liters per person/per day.

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385 The total annual recharge is 679 mcm, of which 78 mcm remained to be developed. Of the existing 601 mcm, Israel got 483 mcm, and Palestine 118 mcm. Thereby Israel has the right to 80.3 % of the water, while Palestine has the right to 19.6 % of the water. See Annex III, Appendix 1, Schedule 10.
387 According to B’Tselem, Palestine do not have access to more water due to: Technical problems and outdated equipment; A drop of water level at several locations; An overestimation of the available underground water when the agreement was signed in 1995. See B’Tselem, “Issues under the Oslo Accords”, last modified 28 Sep 2016, http://www.btselem.org/water/oslo_accords (accessed 28 May 2017); and B’Tselem, “Discriminatory Water Supply”.
388 See Appendix 1, Article 40(4).
389 Oslo II, Article XI, para. 1 and annex III, Appendix 1, Article 40(11) and (12).
390 Appendix 1, Article 40(12) and schedule 8, para 1 (a-d).
391 See Appendix 1, Article 40(13) and (14).
392 Due to the lack of enough water, the Palestinian authorities provide water by rotation, and sometimes need to shut off the water. See B’Tselem, “Discriminatory Water Supply”.
393 A few places it has been reported that an Israeli household in Area C have access to 23 times more water than a Palestinian household in the same area. See B’Tselem, “Acting the landlord”, p. 65.
395 Both domestic, commercial, and industrial purposes are included. See B’Tselem, “Discriminatory Water Supply”. 
66
The Gaza Strip constitutes a separate water sector and Gazans shall use sources located within Gaza’s borders. Palestine shall operate, manage and develop water systems and resources, except for those supplying water to the Israeli Settlements and the Military Installation area. Due to a lack of resources, the access to water is very limited. In 2011, 20% of Gazans had access to water once every five days (and then only for 6–8 hours), 50% had access once every four days, and a further 30% once every second day. As with electricity, Israel supplies Gazans with water. However, only 4.2 mcm out of the promised 9.2 mcm are supplied from Israel, due to the lack of usable infrastructure.

4.3.1.2 What obligations are incumbent upon the parties?

4.3.1.2.1 Area C of the West Bank

The duty to provide electricity and water are not directly regulated in the LO. That said, obligations relating to their supply might be viewed as parts of the OP’s obligation to “restore, and ensure” all “ordinary transactions which constitute civil life”. The OP also has a duty to provide necessary foodstuffs and “other supplies essential to the survival of the civilian population”. Electricity and water are essential for surviving, and as the OP, Israel shall in general provide water and electricity to Palestinians in the OPT.

In Area C of the West Bank, Israel has the “exclusive authority” and is beyond doubt the OP. Israel controls the planning policy and most resources relating to electricity and water. Palestine has no opportunity to regulate construction of infrastructure in this Area. Due to the prolonged duration of the occupation, obligations relating to infrastructure within the rights to housing and health in the ICESCR, become incumbent upon Israel. Israel should

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397 Oslo II, Article XI, para. 1 and annex III, appendix 1, Article 40, para. 25 and Schedule 11
398 Annex III, Schedule 11, paras. 1 and 2
401 Infrastructure is a problem for all supply and treatment of water because it relies on electricity. Due to the sporadically disappearance of electricity, the recycling of water is non-reliant. This also cause a great health hazard due to people drinking unsafe water. Examinations of the amount of chloride and nitrogen in water wells in Gaza, shows that only some 6.5% of all wells in Gaza provide water that meets WHO standards. See B’Tselem, “Water crisis in Gaza Strip”.
402 HagueReg Article 43.
403 See p. 35.
404 The obligations could either be viewed as stemming from an application of the ICESCR by analogue to the LO, or as an expansive interpretation of “civil life” in the OP’s obligations under Article 55 of GC IV.
adapt plans and take legal measures to build the required infrastructure, and the duty shall be fulfilled without discrimination between Israelis and Palestinians.\textsuperscript{405}

\subsection*{4.3.1.2.2 Areas A and B of the West Bank}

In Areas A and B, Palestine has civil powers relating to territory. While Israel controls large parts of the security in Area B, Palestine controls security in Area A. This makes Israel obliged to protect the infrastructure in Area B, while Palestine should protect it in Area A. In both Areas, Palestine should have the primary responsibility in fulfilling the populations’ right to infrastructure. However, the main resources for water and electricity are placed in Area C, and are thereby under Israeli control. By having the power to shut down electricity and water, Israel is still able to control important parts of both Areas, even without formal public powers. Water and electricity is essential for communities’ functioning, and Israel’s control in these spheres makes Israel able to control large parts of these communities. Thereby Israel should still be regarded as having some “effective control” in Areas A and B. If Palestine has taken all measures within its power, without being able to fulfil the population’s rights, Israel should therefore be obliged to fulfil the population’s enjoyment of relevant civilian infrastructure. If the PA had more water and electricity resources, they would not have gained large debts to Israel due to expensive purchases of those services. And, if the PA could buy those services from other States, they could get the required amount of water and electricity necessary for supplying all A and B Areas residents with water and electricity. By controlling large parts of these resources, Israel controls the PA’s possibility to fulfil this right. The PA’s dependency on Israel in this sphere, calls for a more restrictive application of the LO by making Israel responsible for the supply of electricity and water even in Areas where the PA has some authority. The PA should still adapt plans for development in these Areas, but Israel shall respect these plans and help the PA to fulfil the populations right to infrastructure. The duty to respect also obliges Israel to sell electricity and water at price levels the Palestinians can afford.

\subsection*{4.3.1.2.3 The Gaza Strip}

As the supreme Palestinian Authority, the PA has a duty to fulfil Gazans right to water and electricity. The purchase of electricity supplies is based on a contract, and the PA must keep its end of the agreement. Thereby the PA cannot refuse to pay Israel. On the other hand, Israel has a duty to respect the Palestinians’ right to electricity and cannot deny them electricity supplies. This was confirmed in the Al-Bassiouni Judgment, where the Israeli Supreme Court stated that Israel was under an obligation to supply electricity to Gaza, due to Gazans dependency on Israel. Even though the restrictions imposed on Gaza at the time of this judgement

\textsuperscript{405} GC IV Article 27 and ICESCR Article 2(2).
has become less strict, import restrictions are still imposed on some goods necessary for fulfilling Gazans right to electricity and water. For Gazans to be able to rebuild and improve the infrastructure, Gazans need to import goods as i.e. water pumps, pipelines, electric generators, cement and chlorine. However, these items are found on the Israeli “dual use” list, and Gazans are only allowed to import a limited basis of these items, for projects authorized by the PA and supervised by international organizations. In a prolonged occupation, the needs of the local population outweigh the OP’s military necessity and security reasons, and makes Israel bound to ensure the Gazans supplies of water and electricity. Thereby Israel should allow the PA to import such goods to Gaza, in order for the PA to fulfil Gazans rights. This duty could be viewed as parts of the obligation to respect Gazans right, because the obligation consists of a negative obligation not to impose import and export restrictions. By allowing all required import and export, the Palestinian authority could fulfil Gazans right to electricity and water. Without such an allowance, Israel should fulfil Gazans rights to water and electricity, due to the Israel being the one who hinders Palestine from fulfilling these rights.

4.4 Obligations relating to the right to housing in the West Bank and the Gaza Strip

This section examines obligations specific for the right to housing. I will first give a short explanation of the situation, before examining the remaining ESC-obligations to the right to housing.

4.4.1 The situation

4.4.1.1 Area C of the West Bank

Administration of civilian affairs in Area C of the West Bank is done by the Civil Administration (CA), and all Palestinian construction requires approval of the CA. Palestinians are prohibited from building on approximately 70% of the Area. Of the remaining 30%, the CA imposes several restrictions, which in practice make Palestinians allowed to build on about 0.5 percent of Area C. On this half percent, large amounts are already built up. For the

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406 B’Tselem, “Water crisis in Gaza Strip”.
408 Export is necessary for the Gazans to have an economic income.
410 See B’Tselem, “Acting the Landlord”, p.11
411 The actual percent of land Palestinians are allowed to build on varies from source to source, but all are below 1 %. See among others Human Rights Watch, “Israel: Stop Unlawful West Bank Home Demolitions”, last modified 24 Aug 2013, https://www.hrw.org/news/2013/08/24/israel-stop-unlawful-west-bank-home-demolitions; OCHA OPT, “Humanitarian Factsheet on Area C of the West Bank”, last modified Dec 2011,
remaining parts, the CA almost never grants building permits. Due to the need of a house, Palestinians are forced to build without permits, and Israel orders the house demolished. From 2000 – 2012 the CA served an average of 766 demolition orders a year, where an average of 218 of these was demolished. Area C is also home to about 20,000 Bedouins or members of other shepherding communities. These people live in tents, sheet-metal shacks or caves, and only have limited access to water, sanitation and infrastructures. Israeli policies in these areas have led to drastic changes to the Bedouin way of life.

4.4.1.2 Areas A and B of the West Bank
In areas A and B, the PA has powers and responsibilities in the sphere of planning and zoning, and the right to issue building permits. However, due to the housing shortage for Palestinians in Area C, Palestinians are forced to build on all available land in Areas A and B, even if it is more suited to other use. Such buildings are not always safe, because they are constructed without appropriate building methods. By building in all areas, the housing units also lacks appropriate infrastructure which makes the housing situation inadequate.

4.4.1.3 The Gaza strip
In Gaza, import restrictions hinders Gazans to import goods necessary for construction of houses. According to numbers from 2010, it will take 78 years to rebuild Gaza with the restrictions imposed by Israel. Thereby the right to housing will not be fulfilled until 2088.

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413 The figure calculated is based on geographic data processing by Shai Efrati. See B’Tselem, “Acting the Landlord”, p. 15
415 Ibid. pp. 19-20. The order can be appealed to the HCJ, though the legal procedure is too expensive for most Area C residents, and most appeals are rejected.
416 Ibid. pp. 20 and 60. Almost 1/3 of these were demolished by the building owners themselves, after receiving the order. The rest were demolished by the Israeli army.
417 Ibid. p. 12.
418 Ibid. p. 56.
419 As long as the planning and zoning do not damage or affect the infrastructure serving Israeli Settlements and military locations, the government are free to plan as they want to. See Annex III, Appendix 1, Article 27.
420 Annex III, Appendix 1, Article 24(5).
4.4.2 What obligations are incumbent upon the parties?

In all areas of the OPT, Israel shall respect Palestinians’ right to housing. Destruction of houses due to the lack of building permits could never be based on military necessity, and forced evictions are always prohibited. Israel is also strictly prohibited from moving Israelis into the OPT, an act which both violates the LO and the duty to respect Palestinians’ right to housing.422

4.4.2.1 Area C

As the OP, Israel may enact laws and make changes to the territory for the benefit of the local people. ICESCR art. 12 elaborates the content of this provision, and calls for a more permissive application of the LO. The notion of “may enact” should therefore be read as “shall enact”, making the OP bound to take legal measures for the benefit of the local population. When allocating resources, Israel shall include Palestinian housing units in Area C in their plans and budgets, hereby providing Palestinians with more land. In these lands, Israel has a duty to grant Palestinians building permits without discrimination.

Regarding construction of houses, Israel’s duty as an OP must be elaborated by the content of ICESCR Article 12. Its duty to provide makeshift shelters as a preliminary step to more long-term reconstruction, should therefore extend to a duty to provide such long-term solutions. And these solutions should fulfil the minimum core content of the right to housing.

Regarding the Bedouins and other shepherd communities, Israel is already bound to respect their cultural needs and way of life.423 This provision must apply to the construction of houses as well, and make Israel bound to fulfil this population’s right to housing in accordance with their cultural needs.

4.4.2.2 Area A and B

In A and B Areas, Palestine has the primary duty to fulfil the right to housing, due to its powers in the sphere of public administration affairs. Palestine must adapt plans for housing, and regulate where people may or may not build. It should use all available resources to ensure that all housing units in these Areas are adequate. However, due to Israel’s control of Area C, it may be questioned whether Israel has more duties in Areas A and B. Due to the inconsistency of land belonging to these Areas, and the unclear boundaries to Area C, non-fulfilment of Israel’s duty to fulfil the right in Area C, forces Palestinians to move to Areas A and B. To some extent, Israel’s policies in Area C will thereby amount to an indirect violation of the duty to respect the rights in these Areas. By providing the Palestinians more land in Area C, they will not be forced to build in Areas A and B.

422 See chapter 3.2.2.
423 GC IV Article 27.
A possibility here will be to make Israel responsible when Palestine has taken all measures within its power.\textsuperscript{424} For instance, when Palestine has made plans for fulfilment of the right to housing in these Areas, as well as has adopted laws and taken other necessary steps, Israel should assist the PA in fulfilling the obligations owed to this population. Such assistance could be to supply Palestinians with required construction materials, both for construction of houses and for the development of infrastructure.

The fact that Palestinians build on all territories due to the lack of available territory in Area C, does not free Palestine from its duty to adopt and enforce plans for the development of housing units. As a State authority, the PA must take responsibilities and deal with the situation. If the PA has taken all measures within its powers and has not succeeded, then Israel may be obliged to fulfil the rest of the right.

By controlling security in Area B, Israel has an obligation to protect the right to housing for the population in this Area. Where Israeli settlers or other persons violate Palestinians’ houses, the Israeli Police has a duty to investigate, and to eventually prosecute and punish the perpetrators. In Area A, the Palestinian police should protect their population against violations of the right to housing.

4.4.2.3 The Gaza strip

In Gaza, the PA is in general responsible for the right to housing. However, as with the right to infrastructure, Israel has a duty to respect Gazans right to housing and allow import of goods necessary for construction. The denial of import clearly hinders the PA from realizing the populations right to housing. Due to Gazans dependency on Israel in order to enjoy the right to housing, the LO should be applied more restrictively and impose obligations on Israel even after the disengagement from Gaza. Thereby Israel has an obligation to fulfil Gazans right to housing, either by constructing houses for the population itself, or by allowing for international assistance to reach Palestinians.\textsuperscript{425} Otherwise it is impossible for Palestine to fulfil its obligations.

4.5 Obligations relating to the right to health in the West Bank and the Gaza Strip

Within the LO, several provisions oblige Israel to respect, protect and fulfil Palestinians’ right to health.\textsuperscript{426} As seen above in chapter 3, the content of the right to health within the LO and the ICESCR is considered to cover the same amount of protection. Yet, the ICESCR also includes a duty to adopt a national public health strategy and plan. I will first give some comments on the situation, before determining each Party’s responsibilities.

\textsuperscript{424} ECtHR, Catan Case. See p. 25.

\textsuperscript{425} If Israel allows for import and export, Palestine may be responsible for fulfilling the right to housing.

\textsuperscript{426} See chapter 3.2.3.
4.5.1 The situation

According to the Oslo II Accord, Palestine has the duty to provide health care for Palestinians in all areas of the OPT. However, fulfilment of the right is difficult due to the lack of resources, movement restrictions, and other restrictions imposed by Israel.

4.5.2 Area C of the West Bank

In Area C, Israel has the main authority. Yet, Palestine is responsible for Palestinians’ right to health. Movement restrictions challenge the PA’s possibility to provide health care, as well as Palestinians’ right to health care. At times women are giving birth at checkpoints due to denial of access, either because the driver has the wrong ID or due to other movement restrictions.427 According to the Health Department of the CA, developing “medical services, access to medical treatments, and establishing medical clinics and facilities for Area C residents” is one of the top priorities.428 Thereby the CA shall participate in the financing of these projects, however most projects are funded by international organizations, such as the United States Agency for International Development (USAID), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and the Middle East Quartet.429

4.5.2.1 Areas A and B of the West Bank

In Area A and B, Palestine has the right to enact local plans and issue building permits for hospitals.430 However, the lack of available territory makes it hard for Palestinians to do so. The practice with building houses on all available soil, impedes the PA in building medical clinics, because there is no area to build on. Thereby, many of the residents in these Areas lack basic services such as health care and sanitation.431 In South Hebron Hills, there is only one permanent medical clinic, which is about twenty kilometres away from some of the villages. In two other villages, the medical clinics only operates two days a week, and they are only accessible by off-road vehicle, on foot or donkey.432

430 Appendix 1, art. 24(5).
431 B’Tselem, “Acting the Landlord”, pp. 78 and 91.
432 In addition, they are both located in buildings slated for demolitions. Ibid. pp. 28-29.
4.5.2.2 The Gaza Strip

In Gaza, the provision of health care is even worse than on the West Bank. As seen above, Gazans do not have the required resources to rebuild the territory, thereby hospitals, nor to repair and develop the infrastructure. This clearly affects the possibility to enjoy health care in Gaza.

4.5.3 What obligations are incumbent upon the parties?

4.5.3.1 Area C of the West Bank

As the OP in Area C, Israel has the main obligation to provide health care to the Palestinians. Yet, the Oslo II Accord states that the PA has this responsibility. Provisions within the LO cannot be derogated from, and where health care is needed, Israel has a duty to assist the PA. This does not necessarily mean that the PA cannot have obligations relating to the right to health for Palestinians in Area C, but Israel has the same obligations. Wherever a Palestinian is in need for health care, Israel is obliged to help them. And when the PA provides health care, Israel is obliged not to interfere and to facilitate that health care could be given. As held above, the need of the civilian population is the primary consideration in prolonged occupations, not military necessity. Palestinians’ right to health cannot be challenged on grounds of military necessity. When ambulances arrive at checkpoints, Israeli forces should let them through without delay. In cases of giving birth at the checkpoints, Israeli authorities should either let the driver through because medical reasons would generally prevail over Israel’s security concerns, or they should provide the required health care in areas accessible without the need to go through checkpoints.

By being in charge of planning and zoning, Israel is also responsible for the quality and quantity of Palestinian hospitals. Israel shall allocate money to pay for health facilities and medical supplies in Area C. It is only when Israel does not have the resources, that they should seek international organisations for assistance.

4.5.3.2 Areas A and B of the West Bank

In Area A and B, Palestine has the primary responsibility for the right to health. The PA has to take responsibility and use all available resources in order to ensure all Palestinians access to hospitals. Even though there is a lack of territory, Palestine still has to adopt plans for the development of health care, i.e. to build hospitals. Israel’s essential duty in these Areas is solely to respect Palestinians’ right to health. However, the severity of the lack of health care needed may impose a greater responsibility on Israel. For instance, when Palestinians need special health care and the PA do not have the required resources, Israel might be obliged to treat Palestinians in their hospitals. Israel’s duty to respect Palestinians’ right to health also includes a duty not to cut off electricity or water to hospitals, and to allow ambulances and relief personnel access to these Areas.
As the OP, Israel has a residual responsibility for Palestinians’ right to health. Even in Areas where Palestine has the primary control, Israel is still considered to be the OP and thereby has responsibilities towards the civilian population. Israel controls external borders, the energy and water resources, and imports and exports in and from the Palestinian territories. As with the right to housing, the right to health also calls for a more restrictive application of the LO, implying responsibilities on Israel even where Palestine may have some control. It is impossible for the PA to provide the required health care when Israel has an overall control on all these spheres. Because the provisions relating to health in the LO and the ICESCR are considered to offer the same protection, Israel should assist the PA in order to give all Palestinians the required amount of health care. When the PA has taken all measures within its powers, Israel shall use its resources to help the PA.

4.5.3.3 The Gaza Strip
As with the right to health in A and B Areas, the same arguments apply to Gaza. Israel has a duty to assist the PA in providing health care to Gazans.433

4.6 Obligations relating to East-Jerusalem
Israel has unilaterally annexed East Jerusalem, which is why the Area was not a part of the Oslo II Accord. However, the territory is still part of the OPT. The Area must be viewed as Area C of the West Bank, which makes Israel in charge of both the right to housing and the right to health in East Jerusalem.

4.7 Non-discrimination and violations of the rights to housing and health
Examples on situations where Israel has violated and discriminated Palestinians’ rights to housing and health are many. Discrimination is especially seen in the proceedings of getting building permits, the lack of protection of housing and health and the application of movement restrictions. With the application of Israeli domestic laws, which entitles “persons of Jewish race or descendency”434 to superior rights and privileges,435 Israelis have better protection of their rights than Palestinians. Some of these issues will be addressed in more detail below.

Relating to the possibility to get building permits, a study by Jan Selby from the University of Sussex, found that only a limited number of Palestinian projects got authorized by the JWC, as opposed to nearly 100% of the Israeli settler projects. At the same time, the pro-

433 As with the infrastructure, Israel refuses to cooperate with Hamas, making the PA responsible for acts on Hamas’ behalf.
434 Jewish National Fund, Memorandum of Association, art. 3(c).
435 For those holding “Jewish nationality” (as distinct from Israeli citizenship), special immigration rights and privileges are provided in the Israeli Basic Law: Law of Return (1950).
ceedings in Israeli projects was finished within months, while Palestinian projects could be delayed for years.\textsuperscript{436} The policy with destroying houses which lack building permits especially affect shepherd communities, due their way of living. During the first two months of 2017, Israeli authorities demolished 24 homes and other structures in 18 Bedouin communities, due to the lack of building permits.\textsuperscript{437}

When it comes to the protection against interference with Palestinians’ rights to housing and health, the Palestinians lack legal protection in some situations. The most pressing issue is settler violence against Palestinians’ houses. In Area C, 95\% of 120 complaints on settler violence of Palestinians’ houses were closed without filing charges.\textsuperscript{438} In Hebron, there have been situations where members of the Israeli Police forces have failed to protect Palestinians’ houses, and even violated the rights themselves.\textsuperscript{439}

Movement restrictions clearly affect Palestinians’ civil life and increase the difference between Israelis and Palestinians. As in Hebron, where movement restrictions have led to the closing of shops, workplaces, schools and more, which have forced Palestinians to leave their homes.\textsuperscript{440} As seen above, movement restrictions also create large differences in Palestinians’ and Israelis’ enjoyment of health care, both relating to the availability, accessibility, acceptability and quality of the right to health.

In a recent report from the UN Economic and Social Commission for Western Asia, later withdrawn, it was concluded that Israel’s discriminatory policies in the OPT, relating to, among others, issues of housing and health, amounted to apartheid.\textsuperscript{441} There is no doubt that Israel has violated its obligation to provide the rights to housing and health without discrimination in the OPT.

\section*{4.8 Conclusion}

In Area C of the West Bank and East-Jerusalem, Israel is fully responsible for the Palestinian population’s right to housing and health. In Areas A and B of the West Bank and the Gaza Strip, the responsibility is shared between Palestine and Israel, with Palestine having primary responsibility and Israel residual responsibility. Palestine should use all resources within its powers in order to fulfil the population’s rights to housing and health, but where Palestine lacks resources, Israel shall assist Palestine in fulfilling the population’s rights. Due to the prohibition on discrimination, the population in all territories is entitled to the same amount of

\begin{footnotesize}
\begin{enumerate}
\item See B’Tselem, “Issues under the Oslo Accords”.
\item B’Tselem, “Acting the Landlord”, p. 38.
\item See B’Tselem, “Ghost Town” pp. 43-44, 48-51, 59-66.
\item Ibid. pp. 14-16 and 25-28
\item ESCWA, Report on Apartheid, pp. 41-47.
\end{enumerate}
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protection. By Israel assisting Palestine in fulfilling Palestinians’ rights to housing and health, discrimination would be prevented.
5 Concluding remarks and some considerations regarding violations of ESC-rights subject to shared responsibility

The LO and the ICESCR apply in complementarity in situations of prolonged occupations, making both Israel and Palestine obliged to respect, protect and fulfil Palestinians’ ESC-rights. However, Israeli policies make it hard for the Palestinian Authority to fulfil Palestinians’ rights to housing and health. Thereby, Israel is bound to help Palestine in fulfilling the populations’ rights.

In a recent report on the Israeli Settlements in the OPT, the UN Secretary-General (UNSG) confirmed that Israeli policies in the OPT are incompatible with Israel’s obligations under both IHL and IHRL, and held that “Israeli settlement activity further constitutes one of the main obstacles to a viable Palestinian State.” This statement confirms how Israeli policies make it hard for Palestine to fulfil its ESC-obligations. Yet, Palestine has obligations as well, which raise the question on how responsibility could be determined?

The ICESCR and the LO define the content of the international obligations whose breaches give rise to State responsibility. The general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences of such acts, are found in the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001. In Paragraph 3 of the commentary to Article 47, it is held that where the States concerned have not agreed upon responsibilities, “the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2.” According to Article 2, an internationally wrongful act of a State has occurred when an action or omission:

“(a) is attributable to the State under international law; and
(b) constitutes a breach of an international obligation of the State.”

Israel and Palestine have agreed upon a sharing and a transfer of responsibilities in the Oslo Accords. However, as discussed above, the arrangements set there have not been upheld.

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442 UN, “Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan***”, p. 15, para. 61.


444 Often referred to as the primary rules of responsibility.


446 Ibid. p. 124.
Since Palestinians in the OPT have gotten their rights to housing and health violated, it is thereby necessary to examine the conduct of both States in order to determine their respective responsibility for these violations. The legal basis for such a determination is subject to controversy.\textsuperscript{447} Yet, shared responsibility has been dealt with in some cases,\textsuperscript{448} where it seems like the courts relied on a modification of the secondary rules of responsibility,\textsuperscript{449} as with the \textit{Ilaşçu} case referred to earlier. While partly shared, most of responsibility for the violations that have occurred in the OPT lies with Israel as the Occupying Power.

Another question which needs to be answered in situations of shared responsibility between two States, is where the victims shall address their complaints. In general, justiciability of ESC-rights is dealt with in domestic courts.\textsuperscript{450} Since Israel has excessive authority in large parts of the OPT and has residual responsibility for ESC-rights, it will be natural to address the complaints to the HCJ. Yet, Israel denies the extra-territorial applicability of the ICESCR, which makes justiciability in the HCJ difficult, if not impossible.

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR),\textsuperscript{451} permits individuals of member States to make complaints to the CESCR, when domestic remedies are exhausted.\textsuperscript{452} However, neither Israel nor Palestine has ratified this protocol, and justiciability of Palestinians rights remain difficult.

Given the complementarity between IHL and IHRL, a possibility could be to address the complaints as violations of IHL.\textsuperscript{453} However, IHL treaties do not include an individual complaints procedure. Based on an idea launched at the Hague Appeal for Peace and Justice for the 21st Century, Jann Kleffner argues for the establishment of an individual complaints procedure for violations of IHL.\textsuperscript{454} Such a mechanism could improve the compliance with IHL and IHRL, by giving a supervisory body competence to deal with individual complaints.


\textsuperscript{448} See among others: Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), 
Judgement, 9 April 1949; ICJ, IÇ, East Timor (Portugal v. Australia), Judgement, 30 June 1995; ECtHR, 
Ilaşçu case.

\textsuperscript{449} Nollkaemper and Jacobs, “Shared Responsibility in International Law” pp. 55-62.


\textsuperscript{452} OP-ICESCR, Art. 3(1).

\textsuperscript{453} Violations of the rights to housing and health may amount to a crime against humanity, within Article 7(1) (d)(j) and (k) of the ICC. When it comes to the crime of apartheid, (j), see ESCWA, “Report of Apartheid”.

only to “those rules that confer rights to individuals”.⁴⁵⁵ Thereby the gap between IHL and IHRL could be closed or at least narrowed, and individuals in armed conflicts would have a better protection. Without such a procedure, Palestinians are reliant on Israel’s own effort to comply with the ICESCR, and that Israel would follow the recommendations from UN organs. Without Israel doing so, “[t]he systemic human rights violations that accompany this occupation […] are intensifying an already perilous situation”⁴⁵⁶.

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⁴⁵⁵ Ibid. pp. 244-247.

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<td>17 July 1998</td>
<td>Rome Statute of the International Criminal Court</td>
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<td>03 May 1996</td>
<td>Amended Protocol II to the Conventional Weapons Convention</td>
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<td>9 June 2001</td>
<td>Draft articles on Responsibility of States for Internationally Wrongful Acts</td>
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<td>10 December 2008</td>
<td>Optional Protocol to the International Covenant on Economic, Social and Cultural Rights</td>
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| Date          | Agreement/Protocol/
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