

## HUMAN RIGHTS IN INDEFINITE OCCUPATION: PALESTINE

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## I. INTRODUCTION

In regulating belligerent occupation of a foreign territory, international humanitarian law (“IHL”) permits an occupying power to take restrictive measures toward the local population, beyond what international human rights law (“IHRL”) would allow. The obligations

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of an occupying power to ensure the welfare of civilians are similarly limited, compared with the economic, social and cultural human rights obligations that governments owe their own citizens. Those restrictions reflect an assumption that occupation is a temporary, emergency situation, and that full protection of human rights will be restored at its conclusion. In prolonged occupations, however, civilians find themselves subject to indefinite infringement of their rights, with only the minimal protections of IHL. For that reason, states, judicial tribunals, and scholars increasingly apply human rights law during an occupation, using IHRL norms to inform the interpretation of the law of belligerent occupation. Applying human rights standards, however, risks normalizing foreign domination, undermining IHL provisions designed to prevent the occupying power from making permanent changes to the occupied territory and possibly prejudicing the right to self-determination by undermining local autonomy. There are also questions about how to harmonize the two bodies of law to understand what is required of an occupying power in any given situation. Enforcement of human rights law—challenging even in a domestic context—becomes extraordinarily difficult in a situation of occupation, when the foreign military power is likely to regard the civilians whose rights it must safeguard as the enemy.

This article suggests a partial framework for more fully realizing human rights in a prolonged occupation while retaining the protections of international humanitarian law, in the context of Israel's fifty-three-year occupation of the Palestinian territory. In particular, this article proposes using norms of nondiscrimination and progressive realization of economic and social rights to interpret the content of the occupant's obligations to provide for the welfare of civilians living under occupation. The analysis is grounded in the factual circumstances of the occupied Palestinian territory ("OPT"), given the duration of the occupation and the concerns about protections of civilians that it raises, but the principles outlined may be relevant for other prolonged occupations, as well. Thus, this article contributes to an underdeveloped aspect of the scholarship on complementarity between IHL and IHRL, namely the content of an occupant's duty to realize economic, social, and cultural rights and the relationship between that IHRL duty and its IHL duties to provide for civilian welfare. The article also addresses the issue of IHL enforcement in the political and diplomatic arena, arguing that articulating more specific and robust demands of Israel as an occupying power can provide specific and useful guidance to international organizations and third-party states.

Although there are justifications for preferring human rights standards even in cases in which IHL and IHRL are in genuine conflict<sup>1</sup>, the argument advanced here is limited to three spheres in which IHRL norms can be used to inform the content of IHL norms rather than displace them. In these spheres, using human rights standards to interpret the scope of IHL obligations can better address the long-term needs and rights of the occupied population, with less risk of undermining IHL protections or the IHRL right to self-determination.<sup>2</sup> It will also be argued that more robust human rights protections in these spheres reflect an appropriate balance between military necessity and civilian protections. This article will argue for: (1) nondiscrimination between protected persons and citizens and residents of the occupying power in the progressive realization of social and economic rights; (2) robust claims to freedom of movement throughout the territory, including into Israel and via Israel for purposes of travel abroad and between Gaza and the West Bank; and (3) protecting and promoting the rights that facilitate and lay the groundwork for future political participation and self-rule. In each of these spheres, this article will argue that the protective value of using human rights standards outweighs the potential harm of normalizing indefinite foreign control.

First, this article argues for progressive realization of at least some social and economic rights and, in realizing those rights, establishing a minimum standard of nondiscrimination between the occupying power's citizens and residents of the occupied territory. My claim is that the human rights standards of progressive realization and nondiscrimination inform the content of the occupying power's IHL responsibility for the welfare of the local population. An occupying power displaces the lawful sovereign and so must govern in its place, bearing an obligation, under Article 43 of the Hague Regulations, to facilitate normal life "as far as possible."<sup>3</sup> The content of the obliga-

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<sup>1</sup> See *infra* note 55 (Marco Sassoli characterizes the choice between international humanitarian law and international human rights law in situations of genuine conflict as a political decision, and I agree with him).

<sup>2</sup> While self-determination is a human right, the modern understanding of the law of occupation locates *de jure* sovereignty in the people, who should be permitted to exercise self-determination as soon as possible. So the right to self-determination is an intrinsic part of the law of belligerent occupation, too, and the temporary nature of the occupation aims to protect that right. See *infra* Part III.

<sup>3</sup> Convention with Regard to the Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention with Regard to the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (hereinafter "Hague Regulations").

tion is determined by the occupier's capacity and the local population's needs. In a prolonged occupation such as that of the Palestinian territory, the needs of the civilian population multiply, as does the occupying power's ability to make provisions to meet them, including by planning, mobilizing resources, and developing mechanisms to overcome security risks.<sup>4</sup> Especially in areas such as infrastructure and the provision of electricity, water, and health care, we can evaluate the *capacity* of the occupying power to meet the needs of the civilian population and fulfill its economic and social rights by reference to what the occupying power provides its own citizens. We can evaluate the *needs* of the occupied population by a similar standard. These are not exclusive standards, of course, and adjustments should be made to take into account, among other things, differences between the baseline situations of the two populations and their socio-economic and cultural context, special needs that might arise due to the conflict, the security situation in the occupied territory, and decisions made by representatives of the occupied population.<sup>5</sup> Nondiscrimination is the interpretive principle for determining the content of the Hague Regulations Article 43 duties as well as an independent standard for the obligation to realize economic and social rights.

Second, I will argue for more robust protections for the right to freedom of movement, including travel into and via Israeli territory, as an independent human rights obligation and as a guideline for interpreting the obligation of the occupying power to facilitate normal

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<sup>4</sup> EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION*, 78-79 (2nd ed. 2012). During the first half of the occupation of the West Bank and Gaza, the Israeli Supreme Court gave a robust interpretation of the authority of the occupying power to facilitate normal civilian life, holding that the preservationist principle of Article 43 should be balanced with the changing needs of a civilian population living under prolonged occupation. *See e.g.*, H CJ 69/81 *Abu Aita v. Regional Commander of the Judea and Samaria Area and Staff Officer in Charge of Matters of Customs and Excise*, 37(2) PD 197 (1981) (Isr.); H CJ 393/82 *Jam'iat Iscan al-Ma'almoun al-Tha'auniya al-Mahduda al-Mauliya v. Military Commander of the West Bank*, 37(4) PD 785 (1983) (Isr.); H CJ 337/71 *Christian Soc'y for the Sacred Places v. Minister of Def.*, 26(1) PD 574, 582 (1971) (Isr.). A broad interpretation of the power to "restore public life," however, is highly susceptible to abuse. Occupants may claim authority to make changes that suit their needs but argue they are restrained by Article 43 from undertaking measures that the civilian population actually needs. *See* BENVENISTI, at 77-78.

<sup>5</sup> The principle of nondiscrimination would require Israel to increase the level of services it provides to Palestinians, even if the increased financial burden of doing so would require it to reduce the level available to its own civilians, in order to allocate resources on an equal basis.

civilian life.<sup>6</sup> In addition to its importance as an expression of human autonomy and dignity, freedom of movement is a precondition for the realization of other fundamental rights, such as the right to health, the right to education, the right to freedom of occupation, and protections for the family unit.<sup>7</sup> Harsh, and in some cases punitive, restrictions on the movement of people and goods are a pervasive and painful hallmark of the Israeli occupation.<sup>8</sup> Certainly, IHL and IHRL protect the right of Palestinians to travel, to choose their place of residence within the Palestinian territory, Gaza and the West Bank, and to travel abroad, and IHL permits the Israeli military to restrict travel, if necessary, for security. But in the context of an indefinite occupation there should be a strong presumption in favor of allowing such travel, even when it requires infringing on Israel's sovereign authority to determine who will enter its internationally recognized borders. This article will argue that in a half-century of occupation that shows no signs of ending, Israel has the responsibility and the capacity to modify the travel arrangements it dictates, including screening and transit technologies, to address any security concerns it might have while minimizing infringement on Palestinians' right to freedom of movement.<sup>9</sup> In addition, Israel has treated its international borders as permeable in one direction—by transferring its civilians into the occupied territory and engaging in de facto and de jure annexation of parts of it—while a succession of governments have denied that the 1949 armistice lines are binding.<sup>10</sup> Having voluntarily called into question the 1949 armistice lines and treated them as porous, Israel has weakened its claim to

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<sup>6</sup> The Israeli Supreme Court has held that human rights are part of the humanitarian considerations that an occupying power must take into account in fulfilling its obligations under article 43 of the Hague Regulations. H CJ 10356/02 Hass v. The IDF Commander in the West Bank, GOC Central Command, 58(3) PD 443 (2002), (unofficial English translation available at [http://www.hamoked.org/items/8240\\_eng.pdf](http://www.hamoked.org/items/8240_eng.pdf)) (Isr.).

<sup>7</sup> Sari Bashi & Eitan Diamond, *Separating Land, Separating People: Legal Analysis of Access Restrictions between Gaza and the West Bank*, GISHA—LEGAL CTR. FOR FREEDOM OF MOVEMENT (June 2015), <http://gisha.org/publication/4379>.

<sup>8</sup> *Id.* at 4-8; U.N. Off. of the High Comm'r for Human Rts. & U.N. Sec'y-General, *Freedom of Movement: Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem*, A/HRC/31/44 (Jan. 20, 2016).

<sup>9</sup> This responsibility derives from the Hague Regulations Article 43 requirement to restore normal civilian life, as will be described, and the principle that this obligation becomes more robust as an occupation lengthens. *See infra* Part III(2)(a).

<sup>10</sup> *See e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 121 (July 9) [hereinafter the Wall Case]; Orna Ben-Naftali, *PathoLAWgical Occupation: Normalizing the*

prevent Palestinians from crossing those lines, especially where such entry is necessary to fulfill rights, including, *inter alia*, the right to freedom of movement (transit) between the two parts of the occupied territory.

Third, while a military occupation by definition suspends political rights, an occupying power should protect the freedoms needed to lay the foundation for political participation in the future. These include expressing the economic, social and cultural aspects of self-determination and the freedom of movement necessary to engage in collective endeavors and develop and maintain community institutions.<sup>11</sup> They include civil rights such as freedom of expression, assembly, and the press. The travel restrictions fragment Palestinian society, making it particularly difficult to participate in collective endeavors and rendering communication and free assembly particularly important for community-building and social mobilization. As the Israeli authorities perpetuate the suppression of self-rule, they owe a growing obligation to facilitate the kinds of activities that allow Palestinians to prepare for the moment when it will be expressed.

This article will address the concerns that this approach raises about undermining IHL protections within the occupied territory and local decision-making, as well as its potential for actually leading to better protections.

The framework proposed takes account of the length of the occupation and actions Israel has taken to blur the distinction between its territory and the occupied Palestinian territory, in violation of IHL and the U.N. Charter's prohibition against acquiring territory by force.<sup>12</sup> It explores the consequences of such actions on Israel's obligations toward residents of the occupied territory, including estopping Israel from refusing to allocate funds to pay for Palestinian services or from denying Palestinians entry into Israel, where such funding or entry to Israel is needed to fulfill IHL obligations and realize human rights. I suggest that there need not be a contradiction between, on the one hand, opposing Israeli actions to control the OPT indefinitely and exploit it for Israeli civilian use and, on the other hand, claiming nondiscrimination in service provision between Israelis and Palestinians so

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*Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 156 (Orna Ben-Naftali ed., 2011); Omar Dajani, *Israel's Creeping Annexation*, 111 AJIL UNBOUND 51 (2017).

<sup>11</sup> Bashi & Diamond, *supra* note 7, at 25-27.

<sup>12</sup> U.N. Charter art. 2, ¶ 3-4.

long as the State of Israel exercises sovereignty (de jure and de facto, respectively) over both peoples.

This discussion focuses on the Israeli occupation of Gaza and the West Bank, but it may be relevant to other situations of occupation in which the occupying power seeks to blur the distinction between the occupied territory and its own sovereign territory.<sup>13</sup> Determining how the complementary relationship between IHRL and IHL shapes obligations in a given circumstance requires a case-by-case analysis, but the principles this article suggests can provide guidance in additional cases of prolonged occupation.

Part II will address the limitations of IHL in protecting civilians living under occupation, both in general and in the specific context of the Israeli occupation of Gaza and the West Bank. Part II will review the jurisprudence regarding the application of human rights law to situations of occupation, including concerns about undermining IHL protections and diluting human rights law. This section will introduce two concepts to be used in implementing a more robust human rights framework. First, it will argue that under the doctrine of estoppel or good faith, inconsistent positions taken by the Israeli authorities, especially concerning the blurring of the border between Israel and the occupied territory, weaken Israeli claims against allowing Palestinian access to Israeli territory and to Israeli budgets. Second, it will propose using principles of federalism to inform the divisions of power between the Israeli and Palestinian authorities in the sphere of service provision.

Part III will present justifications for making more robust human rights claims of Israel as an occupying power, outlining a framework for interpreting Israel's humanitarian obligations in light of IHRL norms. This section will argue that the Israeli authorities should progressively realize economic and social rights for Palestinians, on par with the level they provide to Israeli citizens and residents, including an obligation to pay for services if necessary. This section will interpret the right to freedom of movement and the obligation to facilitate normal civilian life as requiring Israel to allow Palestinians to travel throughout the Palestinian territory and into Israel where necessary, and to find non-intrusive methods of addressing any security concerns stemming from the travel. Additionally, this section will argue that the Israeli authorities should avoid limiting the freedoms needed to engage in the common cultural, social, and economic endeavors that form part of the right to self-determination.

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<sup>13</sup> Western Sahara, Crimea, and the Golan Heights are additional examples.

Part IV will argue that this suggested framework will lead to better outcomes in protecting Palestinians living under occupation. It offers concrete recommendations for third party states, U.N. bodies and civil society actors. Part V offers a brief conclusion.

## II. WHY AND WHY NOT HUMAN RIGHTS

The law of occupation is designed to regulate a temporary situation in which a foreign military power rules by force, displacing the lawful sovereign and supplanting expression of the people's right to self-determination as a result of military exigency.<sup>14</sup> The law of occupation gives an occupant broad powers to restrict individual rights in order to meet security needs. Article 43 of the Hague Regulations of 1907 describes the balance an occupier should strive to achieve, between taking action that is militarily necessary and facilitating normal life for the civilian population:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>15</sup>

Subsequent developments in IHL, especially after World War II, have enhanced considerations of humanity and protections for individuals, displacing what used to be a paramount concern for the restoration of the ousted sovereign at the end of the conflict.<sup>16</sup> Yet the law of occupation still inherently abridges human rights due to the strong weight given to security considerations and the suspension of political rights due to the reality of foreign military rule.<sup>17</sup>

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<sup>14</sup> GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 31-32 (1957); BENVENISTI, *supra* note 4, at 20-21; YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 58 (2d ed. 2019); AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* 18 (2017); Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 244 (Emma Playfair ed., 1992).

<sup>15</sup> GROSS, *supra* note 14, at 26; Adam Roberts, *Prolonged Military Occupation: The Israeli Occupied Territories Since 1967*, 84 *AM. J. INT'L L.* 44, 46 (1990).

<sup>16</sup> Theodor Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT'L L.* 239 (2000).

<sup>17</sup> GROSS, *supra* note 14, at 28-29.



Subject to balancing tests, even an occupier that meets its obligations under IHL could still engage in serious human rights violations. For example, the International Covenant on Civil and Political Rights (“ICCPR”)<sup>18</sup> requires detainees to be informed of any charges against them and to be permitted to defend themselves through a fair trial. In contrast, the law of occupation allows an occupying power to detain individuals without trial for six-month periods that can be renewed indefinitely “for imperative reasons of security,”<sup>19</sup> even though such measures should be exceptional. Additional serious human rights violations that IHL might authorize, if deemed to be militarily necessary, include: indefinite suspension of the right to vote, stand for elections and govern oneself;<sup>20</sup> assigned residence (confining persons to a location that the occupying power chooses);<sup>21</sup> seizing private property for the security needs of the occupying power;<sup>22</sup> restricting freedom of movement for the security needs of the occupying power;<sup>23</sup> preventing civilians from leaving the occupied territory without due process;<sup>24</sup> declaring land off-limits to its owners for security reasons, without compensation;<sup>25</sup> and restricting freedom of speech and assembly by closing newspapers, outlawing demonstrations, and detaining people for speech deemed to threaten security.<sup>26</sup> IHL does provide protections—Article 27 of the Fourth Geneva Convention, for example, requires an occupying power to respect the rights of the local population, and Article 43 of the Hague Regulations creates a positive obligation on

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<sup>18</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter “ICCPR”).

<sup>19</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, art. 78 [hereinafter “Fourth Geneva Convention”].

<sup>20</sup> VON GLAHN, *supra* note 14, at 98.

<sup>21</sup> *Id.*

<sup>22</sup> Hague Regulations, art. 52.

<sup>23</sup> Hague Regulations, art. 43 (allowing the occupying power to take measures necessary to restore security). Articles 27 and 64 of the Fourth Geneva Convention limit this power to some extent, but maintain the discretion of the occupant to take restrictive measures where militarily necessary.

<sup>24</sup> *Israel Bars Thousands of Palestinians from Traveling Abroad; Many Other [sic] Don't Even Bother to Make the Attempt*, B'TSELEM (May 15, 2017), [https://www.btselem.org/freedom\\_of\\_movement/20170515\\_thousands\\_of\\_palestinians\\_barred\\_from\\_traveling\\_abroad](https://www.btselem.org/freedom_of_movement/20170515_thousands_of_palestinians_barred_from_traveling_abroad). While the sweeping nature of Israeli prohibitions on Palestinians leaving the West Bank may be unlawful, in principle, an occupying power's general security powers permit it to prevent residents of an occupied territory from traveling abroad, if there is a militarily necessary and in the absence of a prohibition against doing so.

<sup>25</sup> Fourth Geneva Convention, art. 49.

<sup>26</sup> See *e.g.*, BENVENISTI, *supra* note 4, at 93; VON GLAHN, *supra* note 14, at 98.

the occupier to restore normal life, which includes human rights protections.<sup>27</sup> The broad nature of an occupant's security powers, however, exceeds what would be permitted under IHRL.

Where an occupation is prolonged, the limited protections of IHL become even more problematic.<sup>28</sup> A recently published article by Yutaka Arai-Takahashi analyzes the legislative history of the classic conventions regarding belligerent occupation and adds weight to the conclusion reached by other scholars, that occupation law was designed for a provisional state of affairs.<sup>29</sup> At least some modern occupations, however, have evolved to resemble conquest, cloaked in the legal guise of belligerent occupation.<sup>30</sup> Some scholars question the suitability of IHL to regulate long-term foreign domination, suggesting that the very fact of a prolonged or indefinite occupation might itself be unlawful.<sup>31</sup> No timeframe at which an occupation should expire is specified, but it is argued that both an excessive duration and indications that an occupier pursues a project of annexation would render an occupation unlawful.<sup>32</sup> The present article is grounded in the same concerns about prolonged occupation that led some to declare an indefinite occupation, such as the occupation of the OPT, to be unlawful *per se*, but it will remain within the confines of *jus in bello*, asking how IHRL might be applied to a prolonged occupation, so long as the occupation continues.

The Israeli occupation of the West Bank and Gaza Strip presents so many challenges to protecting fundamental rights not only because the occupation is so prolonged,<sup>33</sup> but also because the Israeli authori-

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<sup>27</sup> Fourth Geneva Convention, art. 27; Hague Regulations, art. 43.

<sup>28</sup> See Roberts, *supra* note 15.

<sup>29</sup> Yutaka Arai-Takahashi, *Unearthing the Problematic Terrain of Prolonged Occupation*, 52 ISR. L. REV. 125 (2019).

<sup>30</sup> GROSS, *supra* note 14, at 21-23.

<sup>31</sup> Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551 (2005); Valentina Azarova, *Israel's Unlawfully Prolonged Occupation: Consequences under an Integrated Legal Framework*, EUR. COUNCIL FOREIGN REL. (June 2017), [https://www.ecfr.eu/publications/summary/israels\\_unlawfully\\_prolonged\\_occupation\\_7294](https://www.ecfr.eu/publications/summary/israels_unlawfully_prolonged_occupation_7294).

<sup>32</sup> Azarova, *supra* note 31.

<sup>33</sup> See Sari Bashi & Tamar Feldman, *Scale of Control: Israel's Continued Responsibility in the Gaza Strip*, GISHA 12-25 (Nov. 2011), [https://gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol\\_en.pdf](https://gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.pdf) (taking the position, shared by most of the international community, that the Israeli authorities continue to owe obligations to Palestinian residents of Gaza under the law of occupation).

ties have systematically violated even these (problematic) rules of occupation.<sup>34</sup> Almost immediately upon capturing the West Bank, Gaza, and other territories in the 1967 Mideast War, Israel annexed East Jerusalem and began establishing civilian settlements in the rest of the OPT, violating the prohibition against acquiring territory by force and against the occupier transferring its own civilians into the occupied territory.<sup>35</sup> In the West Bank, the presence of civilian settlements is a trigger for serious human rights violations, including restrictions on the freedom of movement of Palestinians in the name of security for Israeli settlers; expropriation of private property for the benefit of Israeli settlements; restrictions on Palestinian construction and economic development in “Area C,” the 60% of the West Bank where most Israeli settlements are built; and discriminatory allocation of natural resources, whose exploitation for the economic benefit of the occupying power also violates IHL.<sup>36</sup> There are now more than a half million Israeli settlers living in the West Bank, and the Israeli authorities have established a dual system of laws designed to privilege them over the protected persons living under occupation.<sup>37</sup> In addition, the Israeli military severely restricts travel to and from Gaza for reasons that go far beyond security needs;<sup>38</sup> demolishes the homes of family members of suspected attackers, in violation of the prohibition on collective punishment;<sup>39</sup> deports residents of east Jerusalem outside the occupied territory by revoking their residence;<sup>40</sup> suppresses peaceful

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<sup>34</sup> See Ben-Naftali, *supra* note 10; Ben-Naftali, Gross & Michaeli, *supra* note 31; Azarova, *supra* note 31.

<sup>35</sup> The Wall Case, 2004 I.C.J. Rep. at 192, ¶ 136.

<sup>36</sup> HUMAN RIGHTS WATCH, SEPARATE AND UNEQUAL: ISRAEL’S DISCRIMINATORY TREATMENT OF PALESTINIANS IN THE OCCUPIED PALESTINIAN TERRITORIES 8 (Dec. 2010), [https://www.hrw.org/sites/default/files/reports/iopt1210webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/iopt1210webwcover_0.pdf).

<sup>37</sup> ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL, ONE RULE, TWO LEGAL SYSTEMS: ISRAEL’S REGIME OF LAWS IN THE WEST BANK (Oct. 2014), <https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>.

<sup>38</sup> U.N. Human Rts. Council, Rep. of the Detailed Findings of the Indep. Int’l Comm’n of Inquiry on the Protests in the Occupied Palestinian Territory, ¶¶ 150-183 U.N. Doc. A/HRC/40/CRP.2 (Mar. 18, 2019) [hereinafter “HRC, Protests in the OPT Rep.”]; Bashi & Diamond, *supra* note 7, at 25-27.

<sup>39</sup> DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 145-63 (2002).

<sup>40</sup> Al-Quds U. Cmty Action Ctr. et al., *Punitive Residency Revocation: The Most Recent Tool of Forcible Transfer*, 114 JERUSALEM Q. (Mar. 17, 2018).

political and grassroots activities;<sup>41</sup> and fails to live up to its obligation to facilitate normal civilian life in the OPT.<sup>42</sup> While IHL allows restrictive action in the name of security, in some cases, Israel restricts freedoms beyond what is militarily necessary, and in other cases it takes actions that are *per se* unlawful under IHL, such as collective punishment,<sup>43</sup> deportation,<sup>44</sup> and establishing civilian settlements in the occupied territory.<sup>45</sup> The Israeli authorities make claims to part, if not all, of the occupied territory, considering it to be the Biblical land of Israel, historically belonging to the Jewish people.<sup>46</sup>

For victims of these human rights and IHL abuses, there is little judicial or political recourse. The U.N. Security Council has failed to act, in part due to the American veto. The Israeli Supreme Court, while effective in mitigating the effects of the occupation on some individuals, is unwilling to challenge broader governmental or military policy.<sup>47</sup> The possibility of prosecutions at the International Criminal Court remains nascent.<sup>48</sup>

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41 ISR. DEF. FORCES, MIL. ORDER 5770-2009, ORDER REGARDING SECURITY PROVISIONS (JUDEA & SAMARIA) (Nov. 1, 2009), unofficial English translation available at <http://nolegalfrontiers.org/military-orders/mil019ed2.html?%20lang=en> (Israeli military legislation in the West Bank, for example, bans expressions of “praise, sympathy or support” for most of the Palestinian factions, which Israel has declared to be “hostile” organizations. Offenses include singing songs and chanting slogans that express identification with an outlawed group.); Human Rts. Watch, *Israel/West Bank: Jail for Peaceful Protesters* (Jan. 11, 2011), <https://www.hrw.org/news/2011/01/11/israel/west-bank-jail-peaceful-protesters>.

42 ORHAN NIKSIC ET AL., AREA C AND THE FUTURE OF THE PALESTINIAN ECONOMY (2014); HRC, Protests in the OPT Rep., *supra* note 38, at 56-57; HUMAN RIGHTS WATCH, WORLD REPORT 2019 (2019).

43 Hague IV, art. 50; Fourth Geneva Convention, art. 33.

44 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art 49, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT'L REV. RED CROSS 207, 214-15 (2012).

45 See *The Wall Case*, 2004 I.C.J. Rep. at 184, ¶ 120.

46 See Tovah Lazaroff, *Bible is Jewish Deed to Land of Israel, Settlement Envoy Tells UNSC*, JERUSALEM POST (Apr. 30, 2019), <https://www.jpost.com/Arab-Israeli-Conflict/Israel-defends-right-to-West-Bank-settlements-at-UNSC-watch-live-588178> (discussing comments by Israel’s ambassador to the United Nations Security Council).

47 See, e.g., KRETZMER, *supra* note 39; MICHAEL SFARD, *THE WALL AND THE GATE: ISRAEL, PALESTINE AND THE LEGAL BATTLE FOR HUMAN RIGHTS* (2018); Ben-Naftali, *supra* note 10.

48 OFF. OF THE PROSECUTOR, INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2018 (2018), <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>.

The duration of the Israeli occupation of Gaza and the West Bank raises questions about the suitability of the law of occupation to adequately protect generations of protected persons whose human rights are abridged by the broad security powers that IHL gives an occupying power. At the same time, it has been argued that making more robust human rights claims would undermine IHL protections or pre-judge a political outcome, normalizing and accepting the permanence of what should be a temporary displacement of self-rule.<sup>49</sup> Yet the myth of the “temporariness” of the occupation and the promise to respect human rights in some future political arrangement encourages international enforcement bodies, international organizations, diplomats, and activists to defer robust human rights claims for some unknown, imagined future in which the occupation ends.

So addressing abuses in Gaza and the West Bank raises twin challenges: a system of laws intended to govern a temporary situation that has become prolonged and indefinite, as well as violations of even the parsimonious protections that the law of occupation offers, with no effective recourse. How might human rights law enhance protections? The remainder of this section will address that question and also introduce two concepts relevant to implementing Israeli human rights obligations toward Palestinians: the doctrine of estoppel and the principle of federalism.

#### A. *Applying Human Rights Law to Occupied Territory*

Regional and international tribunals increasingly accept that a state is bound by its international human rights obligations when it exercises jurisdiction extraterritorially in situations of occupation.<sup>50</sup>

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<sup>49</sup> GROSS, *supra* note 14, at 338-96.

<sup>50</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8) (ruling that the International Convention on Civil and Political Rights continues during an armed conflict); The Wall Case, 2004 I.C.J. Rep. at 171-81, ¶¶ 86-113 (reaffirming the continued applicability of IHL and international human rights obligations); Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgement, 2005 I.C.J. Rep. 168 (Dec. 19); Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. 2216, ¶ 56; Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1, ¶ 77; See also Meron, *supra* note 16; Françoise Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INT’L REV. RED CROSS 549 (2008); Ralph Wilde, *Expert Opinion on the Applicability of Human Rights Law to the Palestinian Territories with a Specific Focus on the Respective Responsibilities of Israel, as the Extraterritorial State, and Palestine, as the Territorial State*, DIAKONIA INT’L HUMANITARIAN L. RESOURCE CTR. IN JERUSALEM 4, 8-9 (2018), <https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl—expert-opinions/the-applicability-of-human->

That has also been the position of the monitoring bodies of both the ICCPR<sup>51</sup> and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”),<sup>52</sup> and the Israeli Supreme Court has implicitly accepted that position.<sup>53</sup> Where human rights law appears to contradict the law of occupation—for example, in requiring due process, protections for private property and other rights that IHL would

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rights-law-to-the-palestinian-territories-with-a-specific-focus-on; Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *ISR. L. REV.* 310 (2007).

<sup>51</sup> U.N. Human Rts. Comm., General Comment No. 29: States of Emergency (Art. 4) , ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); U.N. Human Rts. Comm., Concluding Observations of the Human Rights Committee: Israel, ¶ 3, U.N. Doc. CCPR/C/ISR/CO/3 (Sept. 2010).

<sup>52</sup> U.N. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; U.N. Comm. on Economic, Social and Cultural Rights, Consideration of Repts. Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations: Israel, U.N. Doc. E/C.12/1/Add.69 (Aug. 31, 2001). *See also* The Wall Case, 2004 I.C.J. at 187-88, ¶ 127.

<sup>53</sup> The Israeli Supreme Court has not ruled that IHRL applies directly to Israeli actions in the OPT, but it has said that it is willing to assume that human rights standards apply, and it has analyzed the conduct of the Israeli authorities in the OPT by reference to Israel’s international human rights obligations, stating that IHRL can be used to fill “gaps” in the law of occupation. *See, e.g.*, HCJ 769/02, Public Comm. Against Torture in Israel v. Government of Israel 2006(2) IsrLR 459, 476-77, ¶ 18 (2006) (English translation at <https://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-government>); HCJ 3239/02 Ma’arab v. The IDF Commander in Judea and Samaria, 57(2) PD 349 (2002), English translation at <https://versa.cardozo.yu.edu/opinions/marab-v-idf-commander-west-bank>. Other countries have explicitly recognized the extraterritorial application of human rights obligations, including during times of armed conflict. *See e.g.*, UK MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* para. 11.19 (2004). The United States rejects applying its international human rights treaty obligations extraterritorially. *See* Oona A. Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law*, 96 *MINN. L. REV.* 1883 (2012). *Cf.* U.S. Dep’t of State, Off. of the Legal Advisor, Harold Koh, Legal Adviser, Memorandum Opinion on the Geographic Scope of the International Convention on Civil and Political Rights (Oct. 19, 2010), <https://www.justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf> (applying negative but not positive obligations under the ICCPR in areas under the effective control of the United States); U.S. Dep’t of State, Off. of the Legal Advisor, Harold Koh, Legal Adviser, Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict (Jan. 21, 2013), <https://www.justsecurity.org/wp-content/uploads/2014/03/state-department-cat-memo.pdf> (applying the Convention Against Torture to areas under the effective control of the United States). For a discussion of these leaked memos, *see* Marco Milanovic, *Harold Koh’s Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties*, JUST SECURITY (Mar. 7, 2014), <https://www.justsecurity.org/8010/harold-kohs-legal-opinions-position-extraterritorial-application-human-rights-treaties/>.

subject to military exigencies—IHL may prevail as the *lex specialis*, yet its provisions should still be interpreted to give maximum protection to individual rights.<sup>54</sup> There may also be cases in which, even during an armed conflict, IHRL is more precisely tailored to address a particular issue or situation and is, therefore, the specific body of law to be applied. However, IHL norms would inform the interpretation of the human rights norm.<sup>55</sup>

Some legal scholars, however, have raised compelling arguments against holding occupying powers accountable under IHRL. In a recently published book, Aeyal Gross analyzes case law from the International Court of Justice, the Israeli Supreme Court, and the European Court of Human Rights, and argues that applying human rights law to situations of occupation tends to erode IHL protections for protected persons, with little benefit.<sup>56</sup> Gross argues that in treating all persons as equal bearers of rights, IHRL erases the important distinction between protected persons living under occupation and civilian nationals of the occupying power.<sup>57</sup> In addition, when courts engage in proportionality inquiries based on IHRL, they incorporate additional justifications for restricting the rights of protected persons, imported from human rights law, such as the public interest or the rights of others, including nationals of the occupying country.<sup>58</sup> Occupation law contains absolute prohibitions that could be undermined by a human rights framework of proportionality and balancing.<sup>59</sup> Proposals to equalize

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<sup>54</sup> There are a number of models for working through the parallel application of IHL and IHRL. See the discussion in Hathaway, *supra* note 53; Marco Sassoli, *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflict*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 34 (Orna Ben-Naftali ed. 2011); DINSTEIN, *supra* note 14, at 89-92.

<sup>55</sup> Sassoli, *supra* note 54, at 71. See also Hathaway, *supra* note 53, at 1900-01; ELIAV LIEBLICH & OWEN ALTERMAN, TRANSNATIONAL ASYMMETRIC ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW: KEY CONTEMPORARY CHALLENGES 45 (2015).

<sup>56</sup> GROSS, *supra* note 14. In the context of counter-terrorism measures, Yuval Shany has questioned whether infusing human rights norms into the counter-terrorism paradigm could undermine state compliance, because doing so may be perceived as utopian and unsupported by state practice. Yuval Shany, *Competing Legal Paradigms for Fighting Terror*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 13, 32-33 (Orna Ben-Naftali ed., 2011).

<sup>57</sup> GROSS, *supra* note 14, at 345-349.

<sup>58</sup> *Id.* See also Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUR. J. INT'L L. 1 (2007).

<sup>59</sup> IHL, for example, strictly prohibits deportation outside the occupied territory, while the human rights framework would be more nuanced. Fourth Geneva Convention, arts. 49, 76.

rights and access to resources between Palestinian residents of the West Bank and Israeli settlers, or to extend Israeli labor law protections to Palestinian workers in unlawful Israeli settlements,<sup>60</sup> risks legitimizing the presence of settlements and deepening the de facto annexation of occupied territory. Other scholars warn that an occupying power applying its own human rights law risks violating its IHL obligation not to change the existing law of the land, and the two bodies of law may contradict each other.<sup>61</sup> There is also a general risk of undermining IHRL by watering down its protections in the context of armed conflicts and then applying that diluted standard to peacetime.<sup>62</sup>

These are good reasons to exercise caution in applying human rights law to situations of prolonged military occupation. I will raise a question about the limitations of these concerns before addressing the potential of IHRL to expand avenues for protection of civilians living under occupation and suggesting a way forward that takes into account the nature of the Israeli occupation of the West Bank and Gaza.

First, I query the extent to which the abysmal record of courts in protecting persons living under occupation is a result of their falling into the honey trap of applying IHRL. Instead, it could reflect their institutional limitations and other difficulties inherent in judicial oversight of situations of foreign domination. The critique of applying human rights law to situations of occupation includes thorough surveys of decisions in a number of jurisdictions in which courts applied human rights law to the detriment of those living under occupation, undermining bright-line protections that the law of occupation would afford.<sup>63</sup> Israel/Palestine is one of those jurisdictions. The question to be asked is how the result of those decisions would have been different, had the claims presented to the court been based in IHL rather than IHRL, and had the courts not chosen to give IHRL significant weight in their rulings. Judicial decisions in situations of belligerent occupation—even for regional courts with strong reputations for independence and geographical and political distance from the underlying conflict—are highly politicized, even in the best of circumstances.<sup>64</sup> We

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<sup>60</sup> HCJ 5666/03 Kav LaOved v. National Labor Court 62(3) PD 264 (2007) (Isr.).

<sup>61</sup> Noam Lubell, *Human Rights Obligations in Military Occupations*, 94 *INT'L REV. RED CROSS* 317 (2012).

<sup>62</sup> MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY* 231 (2011).

<sup>63</sup> *See, e.g.*, GROSS, *supra* note 14.

<sup>64</sup> *See generally* CHARLES BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 223 (1990); A.M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 30 (1962); EYAL



might ask the following question, and the answer is inherently speculative: what would the outcome have been, had these cases been decided based on IHL alone? The Israeli Supreme Court, for example, when asked to nullify unlawful policies backed by the Israeli security establishment, has given them a stamp of approval using sometimes strained interpretations of IHL. The court has interpreted IHL to authorize restricting the freedom of movement of Palestinians living under occupation, in order to protect the security of Israeli settlers unlawfully present in the West Bank;<sup>65</sup> exploiting quarries in the West Bank for Israeli use while denying licenses to Palestinian quarries;<sup>66</sup> deporting residents of the occupied territory outside its boundaries;<sup>67</sup> and other measures. A full discussion of this issue is beyond the scope of this article, but it would be useful to see empirical studies that attempt the tricky task of comparing the outcomes of judicial proceedings, based on whether the courts applied IHL only or whether they also used IHRL, in considering the claims of persons subject to foreign occupation. IHLR may provide a convenient rhetorical tool for undermining IHL protections, but that does not mean that its application is inherently damaging. There is no shortage of models of complementarity and conflict resolution that, if used with integrity, would apply IHRL without undermining absolutist IHL protections for civilians.<sup>68</sup>

On the other hand, there are potential benefits to be reaped from applying IHRL as a normative principle for making demands of the Israeli authorities, mobilizing diplomatic pressure on the Israeli government to meet them, and enforcing third party state responsibilities.<sup>69</sup> Enforcing IHL through national courts is difficult, and in the context of the Israeli occupation the prospect of international judicial

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BENVENISTI & GEORGE W. DOWNS, *BETWEEN FRAGMENTATION AND DEMOCRACY: THE ROLE OF NATIONAL AND INTERNATIONAL COURTS* (2017); KRETZMER, *supra* note 39; Kretzmer, *supra* note 44; SFARD, *supra* note 47.

<sup>65</sup> HCJ 7957/04 Mara'abe v. Prime Minister 60(2) PD 477, 497 (2005) (Isr.) (English translation available at <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Mara%27abe%20v.%20Prime%20Minister.pdf>).

<sup>66</sup> HCJ 2164/09 Yesh Din Volunteers for Human Rights. v. Commander of IDF Forces in Judea and Samaria, ILDC 1820 (2011) (Isr.) (Unofficial English translation available at <http://www.hamoked.org/images/psak.pdf>).

<sup>67</sup> Kretzmer, *supra* note 44, at 165-86. The Israeli Supreme Court has repeatedly upheld the authority of the Israeli military to deport residents of the occupied territory, despite the absolute prohibition of Article 49 of the Fourth Geneva Convention. *See, e.g.*, HCJ 17/71 Marar v. Minister of Defense 25(1) PD 141 (1971) (Isr.); HCJ 320/80 Kawasme v. Minister of Defense 36(1) PD 617 (1982) (Isr.); HCJ 785/87 Afu v. IDF Commander of the West Bank 42(2) PD 4 (1988) (Isr.).

<sup>68</sup> *See* LIEBLICH & ALTERMAN, *supra* note 55, at 43-51; Hathaway *supra* note 53.

<sup>69</sup> *See infra* Part IV.

enforcement is remote.<sup>70</sup> But uneasiness about holding the Israeli authorities responsible for robust human rights standards limits the scope of diplomatic activity to enforce IHL and third-party state responsibilities, including duties of nonrecognition of breaches of IHL. Those who care about protecting civilians living under occupation find themselves hamstrung, frustrated with the impoverished baseline for demanding protection but worried about the consequences of articulating more robust demands, including the fear of undermining bright-line rules, normalizing the occupation, and undermining the agency of the Palestinian authorities. The framework I suggest aims to unravel that knot, destabilizing existing assumptions of who is financially responsible for services in Gaza and the West Bank, who has a right to cross borders between Israel and the OPT, and the extent to which the Israeli authorities should tolerate security risks in order to facilitate free expression and assembly. At the current time, enforcement avenues are primarily diplomatic, but they should rely on a coherent legal framework.

### *B. Consistency, Good Faith, and Estoppel*

Even as jurists and rights advocates worry about the ramifications of making more robust claims to human rights, the Israeli authorities demonstrate resourcefulness in benefiting from inconsistent positions about the legal status of the OPT to justify maximal control over territory, with minimal responsibility for Palestinians living there. On the one hand, the Israeli military insists on the powers of a belligerent occupier to expropriate land, detain without trial, close off territory, and shut down nonprofit organizations in the West Bank, and the Israeli Justice Ministry defends those practices against domestic court challenges by arguing that it holds the West Bank under belligerent occupation and therefore has broad security discretion.<sup>71</sup> In Gaza, the military claims unspecified IHL authority to control Gaza's airspace, territorial waters, wide swaths of its land mass near the Israeli border,<sup>72</sup>

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<sup>70</sup> See generally BENVENISTI, *supra* note 4; KRETZMER, *supra* note 39; Azarova, *supra* note 30.

<sup>71</sup> H.C.J. 785/87 Afu v. Commander of IDF Forces in the Judea and Samaria 42(2) PD at 17; KRETZMER, *supra* note 39; Kretzmer, *supra* note 43, at 210.

<sup>72</sup> U.N. Office of Coordination of Humanitarian Affairs-Occupied Palestinian Territory, *The Humanitarian Impact of Restrictions on Access to Land Near the Perimeter Fence in the Gaza Strip* (Aug. 2018), [https://www.ochaopt.org/sites/default/files/ara\\_fs\\_2018\\_final\\_english.pdf](https://www.ochaopt.org/sites/default/files/ara_fs_2018_final_english.pdf).

its population registry, and its customs and value added tax system.<sup>73</sup> On the other hand, the Israeli Foreign Ministry denies the fact of occupation, calling the West Bank “disputed territory” and citing the Jewish people’s historical and/or religious claims to it, and the Israeli authorities consider the Gaza Strip to be “foreign” and “hostile” territory, where Israel owes no obligations under the law of occupation.<sup>74</sup> Dozens of Israeli civilian laws and military orders blur the distinction between the law of the occupied territory and the law of the State of Israel<sup>75</sup>, and restrictions on Palestinian access to areas of the West Bank where Israeli settlers live, work, and engage in recreation, create a *de facto* annexation.<sup>76</sup> Israel has already formally annexed occupied East Jerusalem,<sup>77</sup> and Israel’s Prime Minister has announced that he will annex most of the rest of the West Bank, a move that most of the larger Israeli political parties at least partially support.<sup>78</sup> Israelis move freely into the West Bank, and can establish unlawful civilian settlements, but Palestinians are foreigners with respect to the right to enter East Jerusalem, which is part of the occupied West Bank.<sup>79</sup> The Israeli authorities have also, somewhat cynically, argued for the principle of

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<sup>73</sup> Bashi & Feldman, *supra* note 33, at 12-25.

<sup>74</sup> *Id.* at 42 (stating the Israeli position that the OPT are “‘administered’ territor[ies] or belonging to the ‘Jewish people’” and that certain IHL obligations were transferred to the Palestinian Authority post-Oslo); H CJ 4305/08 Abu Ajwa v. Defense Minister, State Response of June 1, 2008, ¶¶ 19, 25 (Hebrew), [https://www.gisha.org/UserFiles/File/LegalDocuments/abuajwa/state\\_answer\\_4385-08\\_01-06-08.PDF](https://www.gisha.org/UserFiles/File/LegalDocuments/abuajwa/state_answer_4385-08_01-06-08.PDF) (denying responsibility for Gaza residents who live in “hostile” and “foreign” territory).

<sup>75</sup> See *Annexation Legislation Database*, YESH DIN (Apr. 1, 2019), <https://www.yesh-din.org/en/about-the-database/>.

<sup>76</sup> U.N. Human Rts. Council, Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, U.N. Doc. A/HRC/40/73, at 8-9 (2019).

<sup>77</sup> *Id.* at 7.

<sup>78</sup> Francesca Paris, *Ahead of Israeli Election, Netanyahu Pledges to Annex West Bank Settlements*, NAT’L PUB. RADIO (Apr. 7, 2019), <https://www.npr.org/2019/04/07/710799152/ahead-of-israeli-election-netanyahu-pledges-to-annex-west-bank-settlements>; Oliver Holmes, *Netanyahu Vows to Annex Large Parts of Occupied West Bank*, GUARDIAN (Sept. 11, 2019), <https://www.theguardian.com/world/2019/sep/10/netanyahu-vows-annex-large-parts-occupied-west-bank-trump>.

<sup>79</sup> See ISR. MINISTRY OF DEF., COORDINATOR FOR GOV’T ACTIVITIES IN THE TERRITORIES, STATUS HARSHAOT BILTI MISUVAG LIKNISAT FALASTINIM LIYISRAEL, LIMA VARAM BAYN EZOR YEHUDA VISHOMRON LIVAYN RITZUAT AZA ULIYITZIATAM LIKHUL (HEBREW) [UNCLASSIFIED STATUS OF PERMISSIONS FOR PALESTINIANS TO ENTER ISRAEL, TRANSIT BETWEEN JUDEA AND SAMARIA AND THE GAZA STRIP AND TRAVEL ABROAD] (May 6, 2019), <https://www.gisha.org/UserFiles/File/LegalDocuments/procedures/general/50.pdf>.

nondiscrimination in the treatment of Israeli settlers in the OPT, for example to justify expropriating Palestinian private property to be used for Israeli residential units in unlawful West Bank settlements<sup>80</sup> or to make it easier for Jewish settlers to purchase land.<sup>81</sup>

The Israeli authorities thus benefit from maximum flexibility in their conduct within the OPT. They settle the parts of the land on which they have lain their sights, effectively making those settlements part of Israel, yet they treat most Palestinians as foreign subjects of military law against whom they take restrictive measures in the name of military necessity.

This article argues that Israeli actions that blur the distinction between Israel and the occupied territory weaken the ability of the Israeli authorities to rely on that distinction. The doctrine of estoppel<sup>82</sup> in international law aims to preclude a party from benefiting from its own inconsistency to the detriment of another party that has relied on the conduct or position taken by the first party.<sup>83</sup> International tribunals have upheld the principle that “the law will demand consistency in conduct, where the result of inconsistency would be to prejudice another party.”<sup>84</sup> International law is predicated on good faith, and good faith requires a party to be consistent in its positions.<sup>85</sup> The broader principles of good faith in international law mean that there are consequences to taking inconsistent positions to one’s advantage or to the

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<sup>80</sup> HCJ 1308/17 Silwad Municipality v. Israeli Knesset, State Response of Aug. 21, 2017, ¶¶ 297-301 (Hebrew), [https://www.adalah.org/uploads/uploads/Settlement\\_regulation\\_law\\_state\\_reply\\_23082017.pdf](https://www.adalah.org/uploads/uploads/Settlement_regulation_law_state_reply_23082017.pdf).

<sup>81</sup> Letter from Tzvi Mintz, Head of the Lands Dep’t, Legal Advisor’s Unit of the Israeli Defense Ministry, to the Deputy Attorney Gen. (Apr. 9, 2019) (Hebrew), [https://www.haaretz.co.il/embeds/pdf\\_upload/2019/20190915-135450.pdf](https://www.haaretz.co.il/embeds/pdf_upload/2019/20190915-135450.pdf). The letter and the legal opinion attached to it express the Defense Ministry’s support for enacting a military order that would end restrictions on Israeli settlers purchasing land in the West Bank as individuals, rather than as part of a corporation, based on the argument that the restriction discriminates against Israelis based on their national origin. The letter argues that canceling the restriction, which requires repealing a legal provision predating the 1967 occupation, is justified despite the IHL prohibition against changing local law in occupied territory, because the local law in question unlawfully discriminates against Israeli settlers based on their race or national origin.

<sup>82</sup> 28 AM. JUR. 2D *Estoppel and Waiver* § 27 (1964).

<sup>83</sup> D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BRIT. Y.B. INT’L L. 176, 177 (1957); Case concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6, 32 (June 15).

<sup>84</sup> Bowett, *supra* note 83, at 186.

<sup>85</sup> J.R.G. Weeramantry, *Estoppel and the Preclusive Effects of Inconsistent Statements and Conduct: The Practice of the Iran-United States Claims Tribunal*, 27 NETH. Y.B. OF INT’L L. 113, 117 (1996).

detriment of another, even where reliance to the detriment of another party cannot be determined. A prior inconsistent position may weaken a party's claim under related doctrines of admission,<sup>86</sup> preclusion,<sup>87</sup> or the principle that "no one can profit from his own fault."<sup>88</sup> Where all the elements of estoppel are not present, an inconsistent position, taken to the detriment of another party, at least weakens what would ordinarily be a valid claim by the first party. So the blurring of the boundaries between the OPT and Israel—undertaken through conduct such as de facto and de jure annexation of parts of the territory as well as statements repudiating the binding nature of the 1949 armistice lines, Israel's internationally recognized border—may preclude certain arguments and at the very least weakens the validity of Israeli insistence on the integrity of that border when it comes to allowing Palestinians to enter Israel in order to realize human rights or enjoy normal civilian life.

The suggestion is not to recognize the unlawful annexation of occupied territory or the unlawful transfer of Israeli settlers into it, nor to suggest that Israel has forfeited sovereignty over its own territory, when it comes to Palestinian requests to enter Israel. Instead, as will be seen in the next part, Israel's blurring of the line between Israel and the OPT, and in some cases to the detrimental reliance of Palestinians on that obfuscation, weakens arguments against Israel allocating money for services to Palestinians or allowing Palestinians to enter Israel, where such money or access is needed to realize the right to freedom of movement,<sup>89</sup> the right to improve one's standard of living, and the IHL obligation to facilitate a properly functioning economy in the OPT.

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<sup>86</sup> *Id.* at 194-96.

<sup>87</sup> *Id.* at 140 (analyzing the broader approach to the doctrine of estoppel taken by the Iran-United States Claims Tribunal).

<sup>88</sup> ROBERT KOLB, *GOOD FAITH IN INTERNATIONAL LAW* (2017), 117-18 (distinguishing estoppel that would bar a party from making a claim from the situations in which "the initial representation is characterized by an unlawful act or by a legally relevant immoral act. Thus, the element of 'detrimental reliance' disappears. The issue is not to protect a legitimate expectation in the first place, but rather to sanction an illegality or a fault.").

<sup>89</sup> The right to freedom of movement does not include the right to travel into Israel, but the right to travel within the OPT and to enter and leave the OPT, which depends on transit via Israel, as will be discussed in Part III.

*C. Federalism and Devolution of Power*

In parsing the responsibilities of the Israeli and Palestinian authorities to realize economic and social rights and fulfill IHL obligations, this article proposes using principles of federalism to respect the spheres in which the Palestinian authorities are active in providing services while holding Israel accountable for filling gaps. While federalism is usually considered within a unitary state, it has origins in regimes of foreign domination as well, such as colonialism or occupation.<sup>90</sup> Federal systems can refer to aggregations of state entities, but they also include systems in which power devolves from a central government to sub-state entities or regional or local governments exercising autonomy under the umbrella of the sovereign government.<sup>91</sup> Federal systems in places like the United Kingdom, Spain, and Belgium were created through a process of devolution, in which “concentrated powers of government of a formerly unitary state have been distributed among component political units.”<sup>92</sup> These models carve out spheres for the central and local governments in which each gets to make final decisions.<sup>93</sup> The central government may retain residual responsibility or be required to fill in gaps where sub-state entities do not perform adequately. Central and local or regional governments thus navigate spheres of responsibility for providing services such as health care, for example, with elaborate rules and funding schemes to resolve ambiguities and conflicts.<sup>94</sup>

The delegation of responsibilities to the Palestinian authorities has aspects of federalism both structurally as well as normatively. As a matter of structure, beginning in the 1990s, power devolved from the

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<sup>90</sup> The British division of India into administrative divisions is an example. AREND LIJPHART, PATTERNS OF DEMOCRACY 174-186 (2012); Nicholas Aroney, *Types of Federalism*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW 1, 5-7 (Rainer Grote et al. eds. 2016) at 184-85.

<sup>91</sup> See, e.g., MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW 5-7 (Rainer Grote et al. eds. 2016) (discussing the distinction between aggregation and devolution in federal systems).

<sup>92</sup> *Id.* at 7.

<sup>93</sup> LIJPHART, *supra* note 90, at 175-76.

<sup>94</sup> The literature is vast. For a description of federalism and health care in Canada and Switzerland, see, e.g., Paul J. Donahue, *Federalism and the Financing of Health Care in Canada and Switzerland: Lessons for Health Care Reform in the United States*, 21 B.C. INT'L & COMP. L. REV. 385 (1998). For a discussion of federalism and health care in the United States, see Rich & White, *infra* note 163; James E. Holloway, *ERISA, Preemption and Comprehensive Federal Health Care: A Call for “Cooperative Federalism” to Preserve the States’ Role in Formulating Health Care Policy*, 16 CAMPBELL L. REV. 405 (1994).

Israeli government<sup>95</sup> to the Palestinian Authority (“PA”) in defined spheres, with Israel reserving all powers not explicitly delegated. Under the Oslo Accords that created the PA, “Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred.”<sup>96</sup> The Accords specify that the PA’s “functional jurisdiction” includes the powers that the Israeli military transferred to it, while Israel maintains residual authority.<sup>97</sup>

The structural division of powers between Israel and the Palestinian authorities flows from the normative obligations held by Israel and the Palestinian authorities, including Israel’s IHL and IHRL obligations and the obligations of the Palestinian authorities to respect human rights in the areas in which they exercise control. The Oslo Accords delegating power to the local authorities note that Israel is obliged to exercise its residual powers with “due regard to internationally-accepted norms and principles of human rights and the rule of law.”<sup>98</sup> Those principles continue to hold the occupying power responsible for IHL protections, even if it has delegated responsibilities to local authorities.<sup>99</sup>

The Palestinian authorities are responsible for service provision such as education, health, and social welfare, within the confines of parameters set by the Israeli occupation authorities, using a combination of tax monies collected by Israel and transferred to the PA (import and other duties), taxes the Palestinian authorities collect on their own at rates set by Israel (value added tax), and taxes that the Palestinian authorities impose and collect independently (income tax, transfer taxes, licensing fees, and others).<sup>100</sup> Israel maintains overall authority, including de facto sovereign authority over borders, population registry, telecommunication frequencies, natural resources, and others. In

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<sup>95</sup> Formally it is the Israeli military commander who exercises de facto sovereignty in the occupied territory and thus can transfer power, although the Israeli government is deeply involved in creating and implementing policy. *See, e.g., About, COORDINATOR OF ACTIVITIES IN THE TERRITORIES* <http://www.cogat.mod.gov.il/en/about/Pages/default.aspx> (last updated May 25, 2020) (Isr.).

<sup>96</sup> Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, Sept. 28, 1995, 36 I.L.M. 551, 558 at art. I(1) [hereinafter “Oslo II”].

<sup>97</sup> *Id.* at art. XVII(2)(b).

<sup>98</sup> *Id.* at art. XIX.

<sup>99</sup> Fourth Geneva Convention, art. 47. *See* Part III(2)(a).

<sup>100</sup> Oslo II, ann. V; Agreement on Gaza Strip and Jericho Area, Isr.-PLO, May 4, 1994, 33 I.L.M. 622, ann. IV.

the current system, the Israeli authorities overrule local decisions made within the scope of the PA's competences, when the Israeli authorities determine that a particular action undermines their obligation and authority under the law of occupation to meet security needs. So, for example, the Palestinian authorities are authorized to make decisions about planning and zoning within certain parts of the West Bank and Gaza,<sup>101</sup> but the Israeli authorities preempt those decisions if they determine that the construction interferes with their security planning,<sup>102</sup> as part of their authority under Article 43 of the Hague Regulations to restore security.<sup>103</sup> Where the Israeli authorities intervene in Palestinian decisions on civil matters in order to promote illegitimate security goals—for example, protecting the ability of Israeli civilians to enter or remain in unlawful settlements in the West Bank—that preemption is illegitimate. But IHL authorizes an occupying power authority to intervene in local decisions, in order to genuinely meet Article 43 obligations. The next Part of this article will argue that in some circumstances, namely the provision of civilian services, such authority includes a responsibility to supplement services that Palestinians need to maintain normal life and to protect their economic and social rights, beyond what the Palestinian authorities have chosen to provide. That part will argue that doing so does not undermine Palestinian self-determination because, in exercising powers delegated to them by Israel, the Palestinian authorities are not acting as sovereign

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<sup>101</sup> Oslo II, art. XI(2)(b) (“All civil powers and responsibilities, including planning and zoning, in Areas A and B, set out in Annex III, will be transferred to and assumed by the Council . . .”).

<sup>102</sup> While the PA is authorized to issue building permits in the 40% of the West Bank classified as Areas A and B, Israel claims authority to override such decisions and to demolish homes if it determines that the construction interferes with its security needs. This was the case in the Sur Bahir neighborhood of East Jerusalem, where the Israeli authorities demolished homes in an area where the Palestinian Authority was responsible for zoning and had issued permits to the homeowners, because the houses were close to the Israeli-built separation barrier. *The Carving of East Jerusalem into Segregated Bantustans: The Case of Sur Bahir*, PALESTINE LIBERATION ORG., NEGOT. AFF. DEP'T (July 16, 2019), <https://www.nad.ps/en/publication-resources/factsheets/carving-east-jerusalem-segregated-bantustans-case-sur-bahir>. In Gaza, where Israel no longer is responsible for issuing building permits, the Israeli authorities withheld permission to transfer of building materials into Gaza for construction of a school, pending a commitment to change the location of the school, which, the Israeli authorities said, could interfere with their ability to attack a nearby military installation. Yaakov Katz, *Exclusive: 'No' to UNRWA School 'Near Hamas Base'*, JERUSALEM POST (Oct. 22, 2010), <http://www.jpost.com/Israel/Article.aspx?id=192368>. See also Sari Bashi, *Controlling Perimeters, Controlling Lives: Israel and Gaza*, 7 L. & ETHICS HUMAN RTS. 243 (2013).

<sup>103</sup> Hague Regulations, art. 43.



entities or as national liberation movements but rather as sub-central political units, implementing authority held by Israel under the law of occupation. For that reason, this article argues that requiring Israel to do more to assure economic and social rights is consistent with IHL and does not unduly subvert Palestinian self-determination.

### III. HUMAN RIGHTS IN THE MEANTIME

With recognition of the potential pitfalls of making more robust human rights claims in the context of the occupation of the Palestinian territory, this section will argue that doing so is justified as a matter of law and, as a practical matter, can lead to better protections whilst minimizing the extent to which bright-line IHL rules are undermined. I argue for respecting human rights in the interim, including protections against discrimination, cognizant of the fact that the term “interim” has become indefinite. I will explore how certain features of the Israeli occupation, especially its duration and its colonial character, influence the interpretation of the content of Israeli IHL obligations. Israel’s willful blurring of the lines between its own territory and the OPT, I argue, undermines otherwise legitimate Israeli objections to ensuring certain baskets of goods and rights to Palestinians living under occupation, objections grounded in the distinction between an occupying power’s de jure sovereignty over its own territory and de facto sovereignty over the occupied territory. Examples include an obligation to allocate Israeli money for Palestinian services and to permit Palestinians to enter Israeli territory. I will argue for a norm-specific approach<sup>104</sup> to applying human rights standards, incorporating elements of federalism, to minimize the encroachment on the agency of Palestinian local authorities. I will illustrate how this model might work in three spheres of human rights: economic and social rights that parallel IHL obligations for service delivery to civilians; the right to freedom of movement; and the social, cultural, and economic aspects of the right to self-determination.

#### *A. Human Rights in an Indefinite Occupation*

There is a strong case to make for applying stronger human rights protections in light of an occupation that has become indefinite, including the norm of nondiscrimination. First, in a long-term occupation, the occupying power has a greater ability, and therefore a greater

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<sup>104</sup> See Lubell, *supra* note 61, at 324 (arguing for a case-by-case approach to applying human rights obligations in situations of occupation).

obligation, to undertake security measures that minimize restrictions on fundamental rights and freedoms. This is so even in a case like the OPT, in which, arguably, the security risks to Israel as an occupying power have increased since 1967, in light of the development of armed resistance to the occupation. A foreign army occupying a village for a week may be limited in the sophistication of the security measures it adopts, for lack of time and resources. A foreign army occupying a territory for fifty-three years, on the other hand, has the time and opportunity to develop responses to recurring security threats that minimize restrictions on rights and freedoms. For example, the army might develop sophisticated and highly efficient scanning procedures to facilitate the movement of goods into and out of the occupied territory without imposing burdensome requirements on local buyers and sellers. It might build an above-ground highway or underground tunnel to facilitate passage between Gaza and the West Bank, or simply designate ordinary roads for the passage, with some police presence, as Israel did in 1999-2000 when it operated the “safe passage.” It would have time to develop superior training, strategic planning, and technological tools to protect its troops while respecting the right to freedom of expression and assembly, including at anti-occupation demonstrations. In general, a half-century long occupation assumes an established and experienced administration, with the ability to engage in long-term strategic planning to optimize the balance it is required to strike between addressing military necessity and facilitating normal life, including rights protections. The obligation to restore normal civilian life is one of means.<sup>105</sup> The passage of time gives the occupier a chance to develop less draconian ways of achieving its military needs while fulfilling its duties to the civilian population.

Second, as the occupation becomes prolonged and normalized, the content of an occupying power’s obligation under Article 43 of the Hague Regulations to restore and maintain “public life” becomes more robust.<sup>106</sup> That is because the needs of a civilian population over the

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<sup>105</sup> Article 43 of the Hague Regulations requires an occupant to take “all the measures within his power” to restore public life “as far as possible.”

<sup>106</sup> Expert Opinion by Théo Boutruche & Marco Sassòli for the Norwegian Refugee Council on the Occupier’s Legislative Power over an Occupied Territory under IHL in Light of Israel’s On-going Occupation 2, 16 (June 2017), <https://www.nrc.no/globalassets/pdf/legal-opinions/sassoli.pdf> (last visited July 19, 2019); Vaios Koutroulis, *The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time*, 94 INT’L REV. RED CROSS 179 (2012); Arai-Takahashi, *supra* note 29, at 145 n.129. The French text of the Hague Regulations is authoritative and it uses the phrase “la vie publique,” meaning “public life.”

long-term become increasingly complex,<sup>107</sup> and they include protections for human rights. A foreign army occupying a village for a week would not be expected to establish an administration for the protection of endangered species, to research preservation needs, and to promulgate rules for picking flowers and wild herbs. On the other hand, an occupier present in a foreign territory for decades would be expected to do so (as Israel has done in the OPT<sup>108</sup>), because in the long-term, facilitating public life includes long-term needs such as environmental conservation.<sup>109</sup> Similarly, the medium and long-term health of a society requires protections for the full spectrum of human rights, which are part of the normal public life that an occupier has an obligation to restore and maintain, to the extent possible. Suspending the right to freedom of assembly for a month is far less harmful to the development of a society than is indefinite suspension. The former is an interruption of normal public life while the latter is its distortion.

Third, as noted in the previous section, an occupying power's international human rights obligations bind it in all jurisdictions in which it exercises effective control, including the occupied territory, and some of those obligations increase with time. Parties to the International Covenant on Economic, Social and Cultural Rights, including Israel, are obligated to take steps to progressively realize the rights guaranteed by the treaty.<sup>110</sup> An occupying power is expected to demonstrate improvement in the guarantee of economic, social, and cultural rights throughout an occupation. The longer the occupation, the more progress is expected.<sup>111</sup> Any regression in protections for economic, social, and cultural rights requires careful scrutiny to determine its cause. Regarding civil and political rights, as an occupation perpetuates, the forward-looking obligation of an occupying power to

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<sup>107</sup> As early as the 1970's, the Israeli Supreme Court recognized that time expands the Article 43 obligation to facilitate normal civilian life. H CJ 69/81 *Abu Aita*, 37(2) PD 197; H CJ 393/82 *Jam'iat Iscan*, 37(4) PD 785; H CJ 337/71 *Christian Soc'y for the Sacred Places*, 26(1) PD at 582.

<sup>108</sup> ISR. DEF. FORCES, ORDER FOR THE PROTECTION OF NATURE (JUDEA AND SAMARIA) (No. 363) 1969-5730.

<sup>109</sup> See generally, H CJ 393/82 *Jam'iat Iscan*, 37(4) PD at ¶18.

<sup>110</sup> ICESCR art. 2.1 requires a state "to take steps . . . 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."

<sup>111</sup> See e.g., U.N. Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990).

prepare the population for the end of the occupation increases.<sup>112</sup> Indefinite suspension of civil and political rights does quite the opposite as it prepares people to be subjects, rather than autonomous, self-governing agents.<sup>113</sup> There are inherently more restrictions on the exercise of civil and political rights under belligerent occupation, which by definition displaces expression of the right to self-determination.<sup>114</sup> However, the occupying power has a responsibility to respect, protect, and fulfill civil and political rights to the maximum extent possible within the framework of a military occupation.

### *B. Norm-Specific Approach to Human Rights Protections*

This sub-section will explore making more robust claims of the Israeli occupation authorities in three spheres: economic and social rights; the right to freedom of movement; and the social, economic and cultural aspects of the right to self-determination. The goal is to minimize the tension between IHRL and IHL in a targeted way, maximizing protections for Palestinians living under occupation without undermining the integrity of the law of occupation. This sub-section focuses on the relationship between the specific IHRL or IHL norm in question, rather than on the relationship between the two regimes as a whole, as the outcome is context-specific.<sup>115</sup> Each of the three areas suggested below is a sphere in which I hope to avoid the pitfall of equating the rights of protected persons with those of civilian nationals of the occupying power unlawfully present in the occupied territory. That is a calculus to be avoided because, as a matter of IHL, those two groups of people should be treated quite differently, and, as a matter of practice, an occupying power will almost always give preferential treatment to its own citizens and residents, especially in circumstances

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<sup>112</sup> Benvenisti argues that the obligation to invest in the infrastructure of the territory and prepare it for transition to indigenous rule increases as the occupation becomes prolonged. BENVENISTI, *supra* note 4, at 87.

<sup>113</sup> See e.g., U.N. Human Rts. Comm., *General Comment No. 34: Article 19: Freedoms of Expression and Opinion*, ¶ 2, U.N. Doc. CCCPR/C/CG/34 (Sept. 12, 2011) (calling freedom of expression necessary for the full development of a person).

<sup>114</sup> ICCPR art. 1; ICESCR art. 1.

<sup>115</sup> See MILANOVIC, *supra* note 62, at 232-35.

when it is colonizing the occupied territory with its own civilian population.<sup>116</sup> I have also chosen spheres in which, for the most part, IHL and IHRL norms do not directly contradict each other, so the IHRL norm can be used to interpret its IHL counterpart.<sup>117</sup> These are not exclusive spheres but rather illustrate an approach that may apply to additional contexts. In presenting a partial framework, I do not question the indivisibility of human rights,<sup>118</sup> but rather acknowledge that the interaction between IHRL and IHL will produce different outcomes, depending on the nature of the norms in question and the extent to which they conflict.

### 1. Economic and Social Rights

The IHL obligation to facilitate, to the extent possible, the proper functioning of civilian life in an occupied territory is parallel to the IHRL obligation to realize economic and social rights. For example, the Hague Regulations' Article 43 obligation to restore public order includes facilitating a properly functioning economy, adequate infrastructure, and a decent standard of living, all of which are also needed to realize social and economic rights protected by the ICESCR.<sup>119</sup> The Fourth Geneva Convention's protections for health<sup>120</sup> and education<sup>121</sup> also have a parallel component in the ICESCR. I suggest interpreting the IHL protections in light of Israel's human rights obligations, taking into account the length and nature of the occupation. As Cordula Droegge suggests, "human rights law (within its application limits) can reinforce the applicable provisions of humanitarian law, especially where there is detailed soft law or jurisprudence to flesh out the obligations."<sup>122</sup>

The general obligation to facilitate normal civilian life, and many of an occupying power's specific obligations in the field of health, education, and food supply, are obligations of means that are responsive

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<sup>116</sup> See e.g., H CJ 10356/02 *Hass*, 58(3) PD 443 (authorizing the requisition of private Palestinian property and demolition of Palestinian-owned structures to create a path for Jewish worshippers to access a holy site in the occupied West Bank).

<sup>117</sup> See MILANOVIC, *supra* note 62, at 236.

<sup>118</sup> See, e.g., DANIEL WHELAN, *INDIVISIBLE HUMAN RIGHTS: A HISTORY* (2010).

<sup>119</sup> ICESCR art. 6, 11.

<sup>120</sup> Fourth Geneva Convention art. 55-57.

<sup>121</sup> *Id.* at art. 50.

<sup>122</sup> Droegge, *supra* note 50, at 344.

to the needs of the civilian population. An occupying power, for example, is to “take all measures in his power” to restore public life<sup>123</sup> and must “to the fullest extent of the means available to it” ensure and maintain the food and medical supplies of the population<sup>124</sup> and medical services, public health, and public hygiene<sup>125</sup>

How might we evaluate the means available to the occupying power to provide these services as well as the level of need? This article proposes interpreting the IHL obligation to ensure the proper functioning of the health system, adequate provision of food, public health and hygiene, and a properly functioning economy by reference to the level of services that Israel provides its own citizens and residents. The nondiscrimination and progressive realization clauses of the ICESCR require a state to take steps, “to the maximum of its available resources” without discrimination, to progressively realize the full panoply of economic and social rights.<sup>126</sup> Using the principle of complementarity between IHL and IHRL norms,<sup>127</sup> those IHRL principles can be used to determine the extent of the occupying power’s IHL obligation to provide for the welfare of the civilian population. The standard Israel provides its own citizens is a minimum benchmark for what is both feasible (because the government of Israel has the capacity to provide it for its own people) as well as necessary (because the Israeli authorities decided that level of service is appropriate for Israeli citizens and residents, living in close geographical proximity and under relatively similar physical conditions). In the OPT and in other long-term occupations, this article argues that the proposed interpretation is an appropriate means of harmonizing IHRL and IHL norms, because

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<sup>123</sup> Hague Regulations art. 43.

<sup>124</sup> Fourth Geneva Convention art. 55. For a discussion of Israeli repudiation of responsibility for health services, see Aeyal Gross, *Litigating the Right to Health Under Occupation: Between Bureaucracy and Humanitarianism*, 27 U. MINN. J. INT’L L. 421 (2018) [hereinafter Gross, *Litigating the Right to Health under Occupation*]. For a discussion of IHL and IHRL obligations regarding food supply in Gaza, see Aeyal Gross & Tamar Feldman, “We Didn’t Want to Hear the Word ‘Calories’”: *Rethinking Food Security, Food Power, and Food Sovereignty—Lessons from the Gaza Closure*, 33 BERKELEY J. INT’L L. 379 (2015).

<sup>125</sup> Fourth Geneva Convention art. 56.

<sup>126</sup> ICESCR art. 2(1).

<sup>127</sup> See, e.g., Hathaway, *supra* note 53, at 1899. Droege, *supra* note 50, at 340-43. Droege also discusses the decision not to include nondiscrimination as a non-derogable right under the ICCPR, out of skepticism that a belligerent power would treat so-called enemy citizens on par with its own. *Id.* at 319.

of the opportunity that time affords the occupying power to guarantee a better basket of social and economic rights and also because of the “normalcy” that a long-term occupation creates, making it less tolerable to abridge social and economic rights indefinitely.<sup>128</sup>

The suggestion is not to compare resources between Palestinians living under occupation and Israeli settlers unlawfully present in the West Bank. The ICESCR and IHL obligation would exist whether or not Israel unlawfully transferred civilians into the occupied territory. Instead, I suggest adopting a rebuttable presumption of nondiscrimination in service provision, where the basis for comparison is, as a minimum, the level of services Israel provides to all its citizens and residents. If equalizing services to Palestinians depletes the overall resources available, then service delivery should be re-calibrated based on the principle of nondiscrimination. I propose this benchmark as a non-exclusive standard, similar to the litmus test that Yoram Dinstein proposed for making changes to the law of an occupied territory. He suggests that the existence of a parallel law in the occupying power’s domestic system can help determine the sincerity of the occupant’s claim that change is necessary for the benefit of the occupied population, although there may be differences in circumstances that justify the law’s existence in one place but not the other.<sup>129</sup> Therefore, there may be security arguments against providing more and better services in the OPT, which would need to be evaluated, as well as differences in the base-line levels of the two populations which might require initially allocating more resources to the Palestinian health care system. There may also be differences in the way the societies are organized, which create different needs and capacities.<sup>130</sup> For instance, if Israeli service provision to its own citizens falls short of its IHRL obligations,

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<sup>128</sup> Noam Lubell has made a similar argument regarding Israel’s positive obligations under the ICESCR, claiming that “if the circumstances are that of an occupation that does not adhere to the expectation of temporariness—for example, Israel remaining an Occupying Power for more than four decades—the context may then require a more expansive approach to positive duties.” Lubell, *supra* note 61, at 333.

<sup>129</sup> DINSTEIN, *supra* note 14, at 133. Of course this litmus test is not immune from abuse. *See, e.g.*, H CJ 69/81 *Abu Aita*, 37(2) PD 197 (in which the court accepted the military government’s dubious argument that imposing a value added tax in Gaza and the West Bank identical to the value added tax imposed in Israel was for the benefit of the civilian population. Petitioners argued that it was designed to benefit the Israeli economy by keeping Gaza and the West Bank as markets for Israeli products, without risking competition from untaxed Palestinian goods.).

<sup>130</sup> Lubell, *supra* note 61, at 322.

the remedy would be to provide better services to both Israelis and Palestinians, subject to the principle of progressive realization.

For example, the Israeli authorities delegated responsibility for electricity, water, and other services to the PA in the context of the Oslo Accords.<sup>131</sup> The terms of the agreement, intended to expire in 1999, transfer responsibility of civilian affairs in Gaza and forty percent of the West Bank to the PA, including a system in which the PA purchases water, electricity, and fuel from Israel, for the benefit of Palestinian residents of the OPT.<sup>132</sup> If the PA does not fund adequate provision of electricity, water, and the other services it purchases from Israel—either because the PA is unable or unwilling to do so—the Israeli authorities should be accountable for doing so. The benchmark is the level of electricity and quantities of water that the Israeli authorities provide to Israeli citizens and residents. In the case of water supply,<sup>133</sup> there is a particularly strong case for using the quantities of water supplied to Israelis as a standard, given that the mountain aquifer common to Israel and the West Bank is a primary source of the Israeli water supply.<sup>134</sup> However, Israel allocates water disproportionately in favor of Israeli consumers, including Israelis living in Israel and in unlawful settlements in the West Bank.<sup>135</sup> Regardless of whether the problem is the inability or the unwillingness of the Palestinian authorities to assure sufficient supply, the Israeli authorities should supply sufficient water and 24-hour a day electricity to residents of Gaza and the West Bank, as they do for Israeli citizens and residents.<sup>136</sup>

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<sup>131</sup> See Oslo II, *supra* note 96.

<sup>132</sup> See Oslo II, *supra* note 96, Art. III (regarding the Protocol Concerning Civil Affairs).

<sup>133</sup> International Covenant on Economic, Social and Cultural Right, Jan. 3, 1976, art. 11.

<sup>134</sup> See generally U.N. Econ. & Soc. Comm'n for Western Asia, *Western Aquifer Basin*, in SHARED WATER RESOURCES IN WESTERN ASIA (2013), <https://waterinventory.org/sites/waterinventory.org/files/chapters/Chapter-19-Western-Aquifer-Basin-web.pdf>.

<sup>135</sup> See generally ELISABETH KOEK, WATER FOR ONE PEOPLE ONLY: DISCRIMINATORY ACCESS AND 'WATER-APARTHEID' IN THE OPT (Al-Haq, Apr. 3, 2013), <http://www.alhaq.org/publications/8073.html>. See also WORLD BANK, SECURING WATER FOR DEVELOPMENT IN WEST BANK AND GAZA (June 15, 2018), <https://documents.worldbank.org/curated/en/736571530044615402/WP-P157979-Securing-Water-for-Development-in-West-Bank-and-Gaza-PUBLIC.pdf>.

<sup>136</sup> If necessary, arrangements could be made for charging consumers for use, including appropriate subsidies and through arrangements for collection with the relevant Palestinian utilities. Currently, consumers in Gaza pay high prices for use of



Similarly, where the Palestinian health care system is inadequate to meet needs, Israel, as the occupying power, should be held accountable for its proper functioning, as per Article 43 of the Hague Regulations. I propose evaluating what is “proper” by reference to the (first class) Israeli health system, because it reflects a determination by the Israeli authorities about the kind of health care people need and indicates the Israeli authorities’ capacity to provide it. If the PA is unwilling or unable, for example, to pay for referrals to Israeli hospitals for care unavailable in the West Bank and Gaza, Israel as the occupying power should step in and provide access to the Israeli health care system while simultaneously taking active steps to develop (and cease de-developing)<sup>137</sup> the Palestinian health care system. Fulfilling these obligations can be done while taking into account the dynamic nature of Israeli control over Palestinians, using a functional approach.<sup>138</sup> Despite delegations of authority to the PA, Israel as the occupying power retains residual overall responsibility for the welfare of the population, and no agreement reached with Palestinian representatives can strip the civilian population of the protections of IHL.<sup>139</sup> The interim Oslo Accords that govern this delegation of authority specify that Israel remains bound by its international law obligations.<sup>140</sup>

How might this work in practice? Let’s take the example of electricity supply to Gaza. Israeli actions to undermine the electricity infrastructure in Gaza and the Palestinian economy in general have made it difficult for the Palestinian authorities to meet the humanitarian needs of the population,<sup>141</sup> and the rival Palestinian factions—Fatah

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generators during the frequent power outages. *See* Press Release, Al Mezan Center for Human Rights, Al Mezan’s Research Shows that Smart Meters Can Help Alleviate the Impact of the Electricity Crisis on Gaza (Nov. 4, 2018, 7:28 AM), <http://www.mezan.org/en/post/23310/Al+Mezan%E2%80%99s+Research+Shows+that+Smart+Meters+Can+Help+Alleviate+the+Impact+of+the+Electricity+Crisis+on+Gaza>.

<sup>137</sup> SARA ROY, *THE GAZA STRIP: THE POLITICAL ECONOMY OF DE-DEVELOPMENT* (3d ed. 2016); PHYSICIANS FOR HUMAN RIGHTS-ISRAEL AND GISHA, *REALIZING POTENTIAL: PROSPECTS FOR THE DEVELOPMENT OF THE PALESTINIAN HEALTH SYSTEM AND ECONOMY IN THE GAZA STRIP* (Feb. 2012).

<sup>138</sup> GROSS, *supra* note 14; Bashi & Feldman, *supra* note 33, 26-46.

<sup>139</sup> Fourth Geneva Convention art. 47.

<sup>140</sup> Oslo II art. XVII(4)(b). *See also* Boutruche & Sassòli, *supra* note 106, at 22.

<sup>141</sup> The aquifer under the Gaza Strip has been over-pumped, rendering the water undrinkable, and since 2006 — the year Israel bombed Gaza’s power plant — a chronic electricity shortage creates power outages of up to twenty hours per day. *See* U.N. Country Team in the Occupied Palestinian Territory, *Gaza in 2020: A Liveable*

and Hamas—have fought over payment of services and control over Gaza.<sup>142</sup> From June to December 2017, the PA refused to pay for the full amount of electricity that the Israel Electric Company contracted to supply to Gaza, leading to a 30% reduction in the Israeli supply and lengthening Gaza's existing power outages to eighteen hours per day.<sup>143</sup> Under the framework I propose, Israel would be obligated to provide twenty-four hours of electricity supply to Gaza, just as it does to its own residents and citizens, irrespective of whether or not the Palestinian Authority pays for it. There is no security reason not to do so, and Palestinians living in densely populated, urbanized, and mechanized Gaza have as much need for constant electricity supply as do Israelis in Tel Aviv.

This approach raises a number of objections, which I will address. First, the Israeli authorities argue that they have transferred the obligation to provide services to the PA through the Oslo Accords,<sup>144</sup> and therefore are not responsible for the general welfare of Palestinian

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*Place?* (Aug. 2012), <https://www.unrwa.org/userfiles/file/publications/gaza/Gaza%20in%202020.pdf>; Gisha, *The Gaza Electricity Crisis—FAQs*, [https://gisha.org/UserFiles/File/publications/Electricity\\_FAQ/Electricity\\_FAQ\\_EN.pdf](https://gisha.org/UserFiles/File/publications/Electricity_FAQ/Electricity_FAQ_EN.pdf) (last updated Jan. 3, 2018).

<sup>142</sup> Gisha, *supra* note 141; *Position Paper on Aggravation of the Electricity Crisis in the Gaza Strip*, PALESTINIAN CTR. HUMAN RTS., (June 30, 2010), <https://pchrgaza.org/en/?p=5354>; Press Release, Al-Mezan Ctr. for Human Rts., Al Mezan Calls for: Solution to Electricity Crisis, End to Detention for Peaceful Assembly and Immediate Release of Detainees (Jan. 14, 2017, 5:12 PM), <http://www.mezan.org/en/post/21740/Al+Mezan+Calls+for%3A+Solu-tion+to+Electricity+Crisis%2C+End+to+Detention+for+Peaceful+Assem-bly+and+Immediate+Release+of+Detainees> [hereinafter Press Release, Al-Mezan Center for Human Rights, Al Mezan Calls for: Solution to Electricity Crisis]; Gisha, *Electricity Shortage in Gaza: Who Turned out the Lights?* (May 2010), <https://www.gisha.org/UserFiles/File/publications/ElectricityReportEng.pdf>; Sari Bashi, *Can Gaza Survive*, in MOMENT OF TRUTH: TACKLING ISRAEL-PALESTINE'S TOUGHEST QUESTIONS 117 (Jamie Stern-Weiner ed., 2018).

<sup>143</sup> Avi Issacharoff, *Hadilemma shel Yisrael: Heshmal Lirashei Hamas O Sakanat Milhama Ba'Darom [Israel's Dilemma: Electricity to Hamas Leaders or Danger of War in South]*, WALLA (May 5, 2017), <https://news.walla.co.il/item/3062123> (Isr.); Nidal al-Mughrabi, *Palestinian Authority Says Resuming Payment for Gaza's Israeli Electricity*, REUTERS (Jan. 3, 2018, 11:55 AM), <https://www.reuters.com/article/us-israel-palestinians/palestinian-authority-says-resuming-payment-for-gazas-israeli-electricity-idUSKBN1ES1HB>. Similar power struggles have taken place over payments for treatment of Gaza residents in Israeli hospitals. Gross, *Litigating the Right to Health under Occupation*, *supra* note 124, at 470-01.

<sup>144</sup> Oslo II, ann. III, Protocol Concerning Civil Affairs.

residents or the functioning of Palestinian infrastructure.<sup>145</sup> The Oslo accords created a structure in which Israel continues to collect taxes from the occupied population, mostly in the form of value added and customs tax, but turns those tax revenues over to the PA as funds for service provision. An occupying power may lawfully collect taxes in order to pay for government services,<sup>146</sup> and there is no explicit requirement for it to supplement those funds from its own civilian budget, should they prove inadequate. My suggestion is to read into the content of the IHL norm: the ICESCR expectation that a state party will expend resources to progressively realize economic and social rights and fulfill them without discriminating between those subject to its sovereignty, *de facto* or *de jure*.<sup>147</sup>

There is ample precedent for disrupting the system created by the Oslo Accords in which Israel collects tax moneys on behalf of the PA, and the PA uses some of that money to purchase services from Israel. On numerous occasions, some lasting several months, Israel refused to transfer tax moneys to the PA in response to political developments, including Palestinian accession to the Rome Statute of the International Criminal Court<sup>148</sup> and moves toward reconciliation between the Fatah faction, which controls the PA, and its rival, Hamas.<sup>149</sup> From its side, the PA has also at times refused to receive the tax money that Israel collects. This was the case between February and October 2019, for example, in response to an Israeli decision to deduct about 6% of the funds from the amount transferred. That amount, the Israeli government says, is money that the PA uses to pay families of people suspected of committing acts of violence against Israelis and prisoners convicted of committing violent acts against Israelis.<sup>150</sup> More recently, PA refusal to accept Israeli-collected tax revenues has become sweeping, as part of suspension of coordination with Israel. The Palestinian Central Council, part of the Palestine Liberation Organization

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<sup>145</sup> Bashi & Feldman, *supra* note 33, at 42 n.76.

<sup>146</sup> See Hague Regulations arts. 48-49.

<sup>147</sup> ICESCR art. 2.

<sup>148</sup> See *Israel Freezes Palestinian Tax Funds*, AL JAZEERA (Jan. 4, 2015), <https://www.aljazeera.com/news/middleeast/2015/01/reports-israel-freezes-palestinian-tax-funds-20151318526717391.html>.

<sup>149</sup> See *Israel Suspends Cash to Palestinians After Hamas Deal*, BBC NEWS (May 1, 2011), <https://www.bbc.com/news/world-middle-east-13254155>.

<sup>150</sup> Mohammed Daraghme, *Palestinian Authority Refuses Tax Revenues from Israel*, ASSOCIATED PRESS (Feb. 27, 2019), <https://www.ap-news.com/71513b8cacfb4d7d9cda91d942dac456>.

“PLO”), voted to end cooperation with Israel under the Oslo framework, and in May 2020, the PA implemented that decision, in response to Israel’s declared intention to annex parts of the West Bank. As of June 2020, the PA is no longer accepting the tax revenues that Israel collects on its behalf, which constitute half its operating budget.<sup>151</sup> The PA has stopped paying its electricity bill to the government-owned Israel Electric Company, but the Israeli authorities continue supplying electricity to Gaza and the West Bank anyway. So, while the Oslo framework for purchasing services from Israel exists, it is also routinely disrupted, usually to the detriment of Palestinian civilians, and at the current time, it is indefinitely suspended.

There is no IHRL concern about holding Israel financially accountable for service provision in Gaza and the West Bank. States are expected to spend money in order to progressively realize economic and social rights, including where their obligations apply extraterritorially.<sup>152</sup>

In addressing objections to using funds from the Israeli civilian health budget for Palestinian health services—blurring the line between sovereign and occupied territory—this article proposes taking into consideration Israeli conduct to obfuscate the boundaries between lawful sovereign territory (i.e., Israel within the 1949 armistice lines) and the occupied territory, through settlements and annexation, de facto and de jure, as well as statements expressing the position that the West Bank is Israeli territory. These activities are unlawful and cannot change the legal status of the West Bank and Gaza as occupied territory. However, that position by Israel weakens an Israeli objection to using civilian budgets to fund services for Palestinians, through the principle of estoppel or at least preclusion.<sup>153</sup> The Israeli authorities

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<sup>151</sup> See *PCC Decides to Suspend Recognition of Israel*, MA’AN NEWS AGENCY (Oct. 30, 2018), <https://www.maannews.com/Content.aspx?id=781638>; International Crisis Group, *CrisisWatch, Middle East and North Africa (June 2020)*, <https://www.crisisgroup.org/crisiswatch/july-alerts-and-june-trends-2020#israel-palestine>.

<sup>152</sup> See U.N. Comm. on Economic, Social and Cultural Rights, *supra* note 111 at ¶ 9 (requiring “full use of the maximum available resources”). Ralph Wilde argues that, beyond Israel’s direct responsibility for economic, social, and cultural rights in the OPT, the ICESCR also imposes a generalized obligation on Israel, as a relatively wealthy country, to use international cooperation to work for the realization of economic, social, and cultural rights in the OPT. Wilde, *supra* note 50, at 32.

<sup>153</sup> See Part II(2) *supra*.

argue that they are required, for example, to take all measures necessary to provide for the welfare of all those living in the West Bank, including Palestinian residents and Israeli citizens,<sup>154</sup> and that discrimination between Palestinians and Jewish settlers in the West Bank is illegitimate.<sup>155</sup> While these arguments may not have created detrimental reliance, they do weaken the Israeli argument that it is not required to spend money to finance services for Palestinians.

A second objection is undermining Palestinian agency, in this case overruling or interfering with Palestinian decisions. In a prolonged occupation, the obligation to consult the local population for governance decisions grows.<sup>156</sup> Arguing that Israel should provide electricity, water, and health care to Palestinian residents at a level approximating what Israeli citizens and residents receive, irrespective of how much the PA is willing or able to purchase, would efface Palestinian autonomy over budget and service provision. A related concern is deepening reliance on Israel for service provision, as opposed to developing the Palestinian health care system or energy sources, for instance.<sup>157</sup>

For example, Ralph Wilde has argued in a recently issued opinion that, while Israel retains responsibility for securing social and economic rights in Gaza and the West Bank, it should avoid intervening in decisions made by the Palestinian authorities that may negatively affect human rights, because such intervention violates the right to self-determination, a norm of *jus cogens* status. Such intervention could be justified, Wilde argues, only to prevent the violation of another *jus cogens* norm. According to Wilde, Israel should “defer to local Palestinian authorities in decision-making. Even though Israel may have the capacity, pursuant to its exercise of overall control, to intervene in such decision-making to ensure human rights compliance,

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<sup>154</sup> See HCJ 1308/17 *Silwad Municipality*, State Response of Aug. 21, 2017, *supra* note 80, at ¶ 291.

<sup>155</sup> See, e.g., Letter from Tzvi Mintz, *supra* note 81.

<sup>156</sup> See Emma Playfair, *Playing on Principle? Israel's Justification for its Administrative Acts in the Occupied West Bank*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 205 (Emma Playfair ed., 1992); BENVENISTI, *supra* note 4, at 247-48; See Boutruche & Sassòli, *supra* note 106, at 18.

<sup>157</sup> See Jack Khoury, *Palestinian Authority to 'Take Practical Steps' to Reduce Dependency on Israeli Economy, Minister Says*, HAARETZ (July 3, 2019), <https://www.haaretz.com/israel-news/palestinian-authority-to-reduce-dependency-on-israeli-economy-minister-says-1.7436061>.

the jus cogens self-determination imperative to enable self-administration, requiring restraint, prevails as the operative substantive requirement.”<sup>158</sup>

Substituting the decisions of the occupying power for that of the local authorities undermines the agency of those who claim to represent the local population. However, Israeli decisions to provide more and better services, such as water, electricity, and health care, would minimize infringement on the Palestinian right to self-determination while maximizing benefit to Palestinian civilians, both in terms of the IHL obligation to restore normal life as well as the IHRL obligation to progressively realize social and economic rights. That is because, I argue, the Palestinian authorities, in their capacities as local administrators, are not exercising sovereign powers but rather performing functions delegated to them by the occupier, as part of a devolution of power, as described above.<sup>159</sup> There is reason to distinguish the “State of Palestine,” which ratified human rights and other treaties, from the Palestinian Authority, a local government whose authority derives from a delegation of power by the occupier. The State of Palestine may arguably embody the Palestinian people’s right to self-determination, but the PA was created as a sub-contractor to fulfill the responsibilities of the occupying power in the context of an interim agreement that did not alter the fact of occupation nor restore de facto sovereignty to Palestinian hands.<sup>160</sup> The PA’s mandate under the Oslo Accords was to expire at the end of the interim period, in 2000, although both the Palestine Liberation Organization and Israel have, at least until recently chosen to extend its framework indefinitely for matters governing the

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<sup>158</sup> Wilde, *supra* note 50, at 15.

<sup>159</sup> See Part II(3) *supra*.

<sup>160</sup> See Bashi, *supra* note 142 (the Oslo Accords noted that Israel maintains authority over security, borders, and foreign relations, for example, which are critical elements of de facto sovereignty); Oslo II art. IX(5)(a) (noting that the Palestinian Authority “will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.”); see also Eyal Benvenisti, *Responsibility for the Protection of Human Rights under the Israeli-Palestinian Interim Agreement*, 28 *ISR. L. REV.* 299-307 (1994) (discussing the PA’s authority as stemming from the de facto authority of Israel as an occupying power).

Palestinian civilian population.<sup>161</sup> No national elections for the PA have taken place since 2006.<sup>162</sup> The PA and the “State of Palestine” are led, for the most part, by the same individuals, but they are acting in different capacities and thus are treated differently under international law. In the specific context of purchasing services from Israel, the Palestinian government is acting not as a sovereign body, but rather as a local authority providing services pursuant to an agreement with the occupying power (the Oslo Accords) that delegates responsibility for civilian affairs. So while there may be situations in which Israeli intervention in decisions made by the Palestinian government or governments would infringe on the Palestinian right to self-determination, providing services to the civilian population when the PA cannot or will not pay is unlikely to be one of them.

The Israeli authorities, which maintain overall responsibility for civilian life in the occupied territory, should fill in gaps when the PA is unwilling or unable to provide an adequate basket of goods and services needed to fulfill two related obligations: the progressive fulfillment of economic, social, and cultural rights in the OPT and the obligation of the occupying power to provide services. As in a federal system in which local or regional authorities provide certain services but the central government steps in to ensure they do not fall below a certain minimum,<sup>163</sup> Israel would be required to fill in gaps to ensure that Palestinians do not fall below a certain standard of living. In the limited context of service provision, Israeli supplementation does not explicitly override Palestinian decisions about service provision but rather adds another layer of protections and resources. Equalizing service provision would not require Israel to take over governmental capacities that have been delegated to and exercised by the Palestinian

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<sup>161</sup> See Declaration of Principles on Interim Self-Government Arrangements, Isr.-PLO, art. I, Sept. 13, 1993, 32 I.L.M. 1525 [hereinafter Oslo I]; Oslo II pmbl. (creating the Palestinian Authority for a transitional period of no more than five years from May 4, 1994). On the PA cessation of coordination with Israel declared in May 2020, see *supra* note 151.

<sup>162</sup> See *Position Paper: Palestinian Elections in Light of the Ongoing Fragmentation*, PALESTINIAN CTR. HUMAN RTS. (Feb. 10, 2011), <https://pchrghaza.org/en/?p=5351>.

<sup>163</sup> See, e.g., Robert F. Rich & William D. White, *Federalism and Health Care Policy*, 1998 U. ILL. L. REV. 861, 880 (1998) (discussion of the federal government intervening to provide health care where state plans fail to protect vulnerable people).

authorities, but rather would follow a functional approach.<sup>164</sup> The Israeli authorities should fulfill their obligations in the spheres they continue to control, especially the services they sell to the Palestinian Authority, directly or through governmental contracts, such as electricity, water, health services, fuel, and others. In the 40% of the West Bank where they exercise administrative control and in Gaza, the Palestinian authorities would continue to make decisions about licensing, budgetary priorities, construction of clinics, and other issues. However, Israel would fill in gaps, including, where needed, providing electricity, water, and access to Israeli hospitals, irrespective of the PA's willingness or ability to pay.

Determining the details of that division of responsibility would circumscribe, to some extent, the autonomy of the PA. But that infringement is relatively minor, and the relationship between the PA's decision-making and Palestinian self-determination is attenuated, as described above.

In contrast, there is an IHL imperative to hold the occupying power accountable where delegation of authority to local authorities has neither protected economic, social, and cultural rights nor fulfilled the occupying power's obligation to facilitate normal civilian life. Insofar as the Palestinian Authority exercises power delegated to it by Israel, Article 47 of the Fourth Geneva Convention applies. That provision protects an occupied population from losing "the benefits" the Convention confers as a result of agreements between the occupant and local authorities.<sup>165</sup> The Fourth Geneva Convention also protects civilians living under occupation from special agreements that might otherwise "adversely affect the situation of protected persons" or "restrict the rights" that the Convention confers on them.<sup>166</sup> The drafters of the Fourth Geneva Convention anticipated situations in which, as was the case during the Second World War, an occupying power would seek to force "the Power whose territory is occupied to conclude agreements prejudicial to protected persons."<sup>167</sup> So, while more

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<sup>164</sup> See GROSS, *supra* note 14, at 219-21; see also Bashi & Feldman, *supra* note 33, at 30-43.

<sup>165</sup> Fourth Geneva Convention art. 47.

<sup>166</sup> *Id.* at art.7.

<sup>167</sup> OSCAR M. UHLER, HENRI COURSIER ET AL., COMMENTARY ON IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR, INT'L COMM. RED CROSS 274-75 (Jean Pictet ed., Maj. Ronald Griffin & C.W. Dumbleton tras., 1958), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/GC\\_1949-IV.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf).



local autonomy is consistent with the ultimate goal of a transition to self-rule, IHL adopts a skeptical view of delegating decisions to local authorities where the occupied population is adversely affected.

Whether a particular agreement adversely affects civilians or restricts their rights may be difficult to determine.<sup>168</sup> That is why the framework suggested here is context-specific. Providing services that have the effect of realizing social and economic rights—infrastructure, health care, water supply—presents fewer difficulties in making that determination than other policies, such as changing the tax system<sup>169</sup> or making interventions into education. More hours of electricity are better than fewer hours of electricity, even if there are concerns about dependence on the Israeli grid. More cubic meters of water of higher quality are better than fewer cubic meters of undrinkable water. While caution is warranted in encouraging the occupying power to interfere in decisions made by local authorities, in the context of service provision there is relatively little tension between IHL protections against agreements between local authorities adversely affecting civilians and the occupying power and the IHRL right to self-determination.

While using the level of services that the Israeli government provides its own people as a standard for its obligations to fulfill Palestinian economic and social rights, the determination should still be done on a case-by-case basis, in which, among other things, we evaluate the challenge it may pose to the IHL prohibition of changing the laws in place and, in the context of the OPT, undermining the autonomy of the Palestinian authorities. The majority of electricity and water supplied to Palestinian residents of the OPT already comes from sources controlled by the Israeli authorities. Using the Israeli standard for water allocation to claim more water and electricity, for example, may be less threatening to Palestinian autonomy than, for example, using Israeli law governing trade unions to determine the content of the right to organize for Palestinian workers.

While this discussion has focused on Israeli responsibilities, the PA and Hamas are also responsible to the Palestinian people under IHRL, because they are exercising control over the lives of Palestinians.<sup>170</sup> Those responsibilities include implementing the human rights

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<sup>168</sup> See Boutruche & Sassòli, *supra* note 106, at 27.

<sup>169</sup> See H CJ 69/81 *Abu Aita*, 37(2) PD 197.

<sup>170</sup> See, e.g., U.N. Human Rts. Council, Rep. On Implementation of Gen. Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council,” ¶ 19 U.N. A/HRC/2/7 (Oct. 2, 2006); Bashi & Feldman, *supra* note 33, at 62 (both Hamas, which controls the government in Gaza, and Fatah, the faction controlling the PA in

treaties ratified by the State of Palestine, because both authorities claim to be the legitimate government, and neither has denied the applicability of international human rights treaties to their conduct. Those obligations include the progressive realization of social, cultural, and economic rights in the spheres in which they are exercising authority.<sup>171</sup> Using payment for services for Palestinians in Gaza as a weapon in factional disputes over control of Gaza is inconsistent with those obligations.<sup>172</sup>

A related objection to the principle of nondiscrimination between Israelis and Palestinians in service provision is that such an approach pre-judges a political resolution to the occupation by collapsing the distinction between Israel and the OPT and treating all inhabitants as “citizens” of a single state. My response is that law plays a critical role in protecting people during the interim stage of a belligerent occupation, a stage that has lasted two generations and shows no signs of ending. IHRL and IHL protections apply to the current situation of belligerent occupation and creeping annexation. They do not prevent the parties from partitioning the land into one, two, or three states or any other political structure in the future, should they decide to do so.

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the West Bank, claim to be the legitimate Palestinian government, following a 2007 factional split. If we consider the governmental authorities in Gaza and/or the West Bank to be non-state actors, they would still be bound by human rights law in their exercise of control). *See also* HUMAN RIGHTS WATCH, *TWO AUTHORITIES, ONE WAY, ZERO DISSENT: ARBITRARY ARREST AND TORTURE UNDER THE PALESTINIAN AUTHORITY AND HAMAS* 76 (Oct. 23, 2018), [https://www.hrw.org/sites/default/files/report\\_pdf/palestine1018\\_web4.pdf](https://www.hrw.org/sites/default/files/report_pdf/palestine1018_web4.pdf) (both Hamas and the Palestinian Authority accept the international human rights obligations that the State of Palestine assumed when it ratified international instruments, although Hamas has expressed some reservations. For that reason, it is appropriate to hold both Palestinian governments accountable for upholding the human rights obligations that the State of Palestine undertook).

<sup>171</sup> *See* Bashi & Feldman, *supra* note 33, at 62-65.

<sup>172</sup> *See, e.g.*, Press Release, Palestinian Ctr. for Human Rts., PCHR Calls Upon Palestinian Government to Continue Funding Healthcare Institutions in Occupied Jerusalem and Concerned that al-Mutala' Hospital Stopped Receiving Gaza Patients Referred for Treatment (Oct. 23, 2017), <https://pchr.org/en/?p=9662>; *see* Press Release, Al Mezan Center for Human Rights, Gaza Healthcare Update: Conditions Worsen (Aug. 8, 2017), <http://mezan.org/en/post/22018/Gaza+Healthcare+Update%3A+Conditions+Worsen>; Press Release, Al-Mezan Center for Human Rights, Al Mezan Calls for: Solution to Electricity Crisis, *supra* note 142.

## 2. Freedom of Movement

Two of the rationales stated in the previous sub-section—greater concern over indefinite abridgement of rights and the enhanced ability of a long-term occupier to take security measures that minimize rights infringements—would also lead to more robust claims to protect the right to freedom of movement, including where doing so requires entry into Israel. Freedom of movement is both an independent right and a precondition for fulfilling additional human rights such as the right to access education,<sup>173</sup> the right to protection of the family unit,<sup>174</sup> and the right to health.<sup>175</sup> It is also necessary to fulfill the IHL obligation to facilitate normal civilian life, which depends on the ability to travel, choose one's place of residence, and transport goods.<sup>176</sup> The right to freedom of movement has an IHL parallel not only in the obligation to facilitate normal life in an occupied territory but also in specific IHL provisions prohibiting deportation and forced transfer<sup>177</sup> and limiting restrictive measures against the local population to assigned residence or detention.<sup>178</sup> The right to freedom of movement may be restricted, but not suspended, during an occupation.<sup>179</sup> In a long-term occupation, respecting the right to travel and choose one's place of residence takes on special importance, as long-term suspension of the right contradicts the occupant's growingly robust duty to restore normal civilian life.<sup>180</sup> Indefinite suspension of the right to freedom of movement contradicts

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<sup>173</sup> See ICESCR art. 13.

<sup>174</sup> ICCPR arts. 17, 23; ICESCR art. 10.

<sup>175</sup> ICESCR art. 12.

<sup>176</sup> See *The Wall Case*, 2004 I.C.J. at 188, ¶ 128 (on the applicability of the right to freedom of movement within an occupied territory); U.N. Human Rts. Comm., Comment No. 27: Art. 12 (Freedom of Movement) U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999).

<sup>177</sup> Fourth Geneva Convention art. 49.

<sup>178</sup> *Id.* at art. 78.

<sup>179</sup> See OSCAR M. UHLER, HENRI COURSIER ET AL., COMMENTARY ON IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR, *supra* note 167, at 201-02 (commenting on Art. 27 of the Fourth Geneva Convention).

<sup>180</sup> Roberts, *supra* note 15; Koutroulis, *supra* note 106, at 200.

the ICCPR requirement that any derogation from human rights obligations be exceptional and temporary.<sup>181</sup>

Respecting the right to freedom of movement, and the obligation to facilitate normal life, may require entry into Israel in three kinds of circumstances. First, the right to travel and choose one's place of residence within Gaza and the West Bank, recognized as a single territorial unit by Israel and the rest of the world, may require transit via Israel.<sup>182</sup> Second, because Israel does not allow Palestinians to operate their own airport or deep-water seaport, realizing the right to leave one's country may also require transit into Israel.<sup>183</sup> Third, given the dependence that the Israeli authorities fostered for Palestinians on jobs and services inside Israel, Israel's failure to adequately develop the OPT throughout the duration of the occupation, and the extent of Palestinian family ties throughout historic Palestine<sup>184</sup>, entry into Israel may be needed to fulfill the IHL obligation to facilitate normal civilian life. It may also be needed to realize social and economic rights, such as the right to health, the right to education, protection for the family unit, the right to work, and the right to improve one's living conditions.<sup>185</sup> The Israeli government, however, minimizes Palestinian entry or transit into Israel, citing security risks and Israeli prerogatives as reasons to limit the entrance of "foreigners" into its sovereign territory.<sup>186</sup>

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<sup>181</sup> U.N. Human Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Israel*, ¶ 7, U.N. Doc. CCPR/C/ISR/CO/3 (Sept. 3, 2010).

<sup>182</sup> See ICCPR at art. 12. See also Bashi & Diamond, *supra* note 7, at 16-23 (discussing the right to freedom of movement in the context of the OPT, and especially related to Gaza-West Bank access); U.N. Human Rts. Comm., General Comment No. 27, *supra* note 176, at ¶ 9.

<sup>183</sup> See ICCPR art. 12. See also SARI BASHI & KENNETH MANN, *DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA* 47-49 (2017), [https://www.gisha.org/UserFiles/File/publications\\_english/Publications\\_and\\_Reports\\_English/Disengaged\\_Occupiers\\_en.pdf](https://www.gisha.org/UserFiles/File/publications_english/Publications_and_Reports_English/Disengaged_Occupiers_en.pdf) (explaining Israel's refusal to permit the operation of a Palestinian airport or seaport).

<sup>184</sup> See, e.g. Gisha, Survey summary, Family ties between the Gaza Strip and the West Bank, (Sept. 2013), <https://gisha.org/UserFiles/File/publications/familyties-2013/Family-ties-survey.pdf>

<sup>185</sup> See ICESCR art. 6-7, 10-13.

<sup>186</sup> ISR. MINISTRY OF DEF., COORDINATOR FOR GOV'T ACTIVITIES IN THE TERRITORIES, UNCLASSIFIED STATUS OF PERMISSIONS FOR PALESTINIANS TO ENTER ISRAEL, TRANSIT BETWEEN JUDEA AND SAMARIA AND THE GAZA STRIP AND TRAVEL

I suggest that the length of the occupation and the de facto annexation of parts of the territory undermine these arguments against letting Palestinians enter Israel. First, given the sophistication of Israeli technology, intelligence, and logistics, and the fifty-three years of experience in addressing security concerns related to travel between Gaza and the West Bank, the Israeli authorities can and should find ways of meeting their security needs that minimize infringement on Palestinian travel. After more than a half century, Israel should be accountable even for a so-called long term investment, such as an elevated road or underground passage, much as the Israeli authorities invested millions of dollars and more than ten years of construction in creating a “temporary” separation barrier that runs into the West Bank, with the stated intention of protecting security needs.<sup>187</sup> With no end to the occupation in sight, the Israeli authorities should be accountable for investing the time, resources, and ingenuity to come as close as possible to normalcy in travel arrangements for Palestinians, commensurate with the robust obligations of a prolonged occupation.<sup>188</sup>

Second, the willful blurring of Israel’s own boundaries, accompanied by claims that the West Bank is part of Israel and that Israelis have a right to settle it,<sup>189</sup> weaken the objection that admitting non-Israelis into Israel infringes on Israel sovereignty over its own territory. These assertions that the West Bank is part of Israel and the de facto annexation of the West Bank may even preclude Israel from

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ABROAD, *supra* note 79, at 3 (citing “security risks due to terror organizations exploiting and abusing movement of people” and noting that “a Palestinian resident does not have a vested right to enter Israel”).

<sup>187</sup> See H CJ 2056/04 Beit Sourik Village Council v. Gov’t of Israel 58(5) PD 807, ¶ 29 (2004) (citing the military commander’s submission that the separation barrier is temporary).

<sup>188</sup> See Hague Regulations art. 43; see also Koutroulis, *supra* note 106, at 193 (discussing the role of time in limiting what might be included under “military necessity”).

<sup>189</sup> See H CJ 1308/17 *Silwad Municipality*, State Response of Aug. 21, 2017, *supra* note 80, at ¶ 97 (argument by Israeli Government) (“Jewish settlement in all of the Land of Israel, always and especially since the beginning of the history of the Jewish people in the modern era, is a Zionist value of utmost importance. There is no question that Israeli governments, or at least the vast majority of them, throughout the generations, have seen Israeli settlement of the area [the West Bank] as a value that should be advanced or at least preserved . . . Whatever the final status of the area’s territories, the fact that the Jewish people are deeply connected to those areas is not in controversy.”).

claiming a sovereign right to exclude Palestinians, through the doctrine of estoppel. That doctrine precludes a party from taking inconsistent positions, where the detrimental reliance of another party can be found. The estoppel argument is especially strong when it comes to permission to enter Israel for work purposes or to move goods between Israel and the Palestinian territory, because Palestinians relied on assertions of the Israeli policy of integration, to their detriment. For the first two decades of the occupation, the Israeli authorities developed the Palestinian economy to be dependent on the Israeli economy. Palestinian laborers were encouraged to work in Israel, raising the standard of living and also prices in the West Bank and Gaza, and Palestinian industries were encouraged to purchase raw materials from Israeli suppliers and sell finished products and agricultural goods in Israel and throughout Gaza and the West Bank, with transport via Israel.<sup>190</sup> At the same time, trade and professional opportunities with other countries were limited by restrictions on external borders.<sup>191</sup> Therefore, Palestinian workers, farmers, manufacturers, and others relied on access to Israel and on access between Gaza and the West Bank, as one component of Israel's blurring of the boundaries between its sovereign territory and its occupied territory. Even when the Israeli authorities restricted travel of Palestinians and Palestinian goods into and out of Israel and between Gaza and the West Bank, they gave reassurances, including in the form of internationally-brokered agreements, that such restrictions were temporary responses to security threats and that access to Israel, including for purposes of transit between Gaza and the West Bank, would be restored.<sup>192</sup> The declarations and legal commitments to permit entry into Israel created a reasonable expecta-

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<sup>190</sup> See SHLOMO GAZIT, *THE CARROT AND THE STICK: ISRAEL'S POLICY IN THE ADMINISTERED TERRITORIES, 1967-68* 168 (1995); SHLOMO GAZIT, *TRAPPED FOOLS: THIRTY YEARS OF ISRAELI POLICY IN THE TERRITORIES* 122 (2003); Sari Bashi, *Can Gaza Survive?*, JACOBIN (Apr. 25, 2018), <https://www.jacobin-mag.com/2018/04/gaza-strip-palestine-israel-occupation-blockade>.

<sup>191</sup> Roy, *supra* note 137.

<sup>192</sup> Oslo I, ann. II, art. 3(7); Oslo II, ann. I, art. X (providing for a "safe passage" between Gaza and the West Bank). See also Agreement on Movement and Access, Isr.-P.A. (Nov. 15, 2005) (committing to reopening passage between Gaza and the West Bank).

tion of access, upon which Palestinians relied in establishing governmental, academic, cultural and civil society institutions, and businesses in both parts of the Palestinian territory.<sup>193</sup>

The Israeli authorities currently keep Israel's internationally-recognized borders porous in one direction—for Israelis outward to the Palestinian territory. Yet Palestinians have a strong claim to be permitted to enter Israel, either through the doctrine of estoppel precluding Israel from taking inconsistent positions regarding the sanctity of those borders to the detrimental reliance of Palestinians, or at least through a related argument that the inconsistency weakens claims of excluding Palestinians, even where no detrimental reliance was present.<sup>194</sup> This principle does not imply acquiescence to Israeli settlements or de facto annexation, but rather acknowledgement of the consequences of the blurring of boundaries between Israel and the occupied territory. The legal consequence, it is argued, is a limitation on the discretion of the Israeli government to bar residents of the occupied territory from entering Israel, where such entry is needed to fulfill Israeli IHRL and IHL obligations toward Palestinians. The Israeli authorities would still maintain discretion to limit travel for security reasons, but restrictions imposed in order to protect Israeli settlers unlawfully present in the West Bank would continue to be invalid.<sup>195</sup> An occupying power's broad mandate to take actions that are militarily necessary does not include the authority to restrict the movement of protected persons, in order to protect individuals unlawfully present in the West Bank.<sup>196</sup> Those individuals should be safely removed from the settlements and protected within the boundaries of the State of Israel or any other place in which they are lawfully present.

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<sup>193</sup> An Israeli non-profit, Gisha, has used legal advocacy to promote the rights of Palestinians, and especially their right to movement between the West Bank and Gaza. See, e.g., *Split Apart: Palestinian Society in Its Own Words on the Impact of the Separation Policy and the Potential Should the Policy Be Reversed*, GISHA (Mar. 2016), [https://gisha.org/UserFiles/File/publications/civil\\_society/Split\\_apart\\_en.pdf](https://gisha.org/UserFiles/File/publications/civil_society/Split_apart_en.pdf); *A Costly Divide: Economic Repercussions of Separating Gaza and the West Bank*, GISHA (Feb. 2015), [https://gisha.org/UserFiles/File/publications/a\\_costly\\_divide/a\\_costly\\_divide\\_en-web.pdf](https://gisha.org/UserFiles/File/publications/a_costly_divide/a_costly_divide_en-web.pdf); *Damage to Trade between the Gaza Strip and the West Bank as a Result of the Separation Policy*, GISHA (May 2010), <https://gisha.org/UserFiles/File/safepassage/InfoSheets/English/trade.pdf>.

<sup>194</sup> *Supra* Part II(2).

<sup>195</sup> See, e.g., H CJ 2056/04 *Beit Sourik* 58(5) PD 807; H CJ 7957/04 *Mara'abe* 60(2) PD 477.

<sup>196</sup> See *The Wall Case*, 2004 I.C.J. Rep. at 189-92, ¶131-35.

### 3. Social, Economic and Cultural Aspects of Self-Determination

Although the political aspects of the right to self-determination are, by definition, suspended during a belligerent occupation, in a prolonged occupation an occupying power has an obligation to allow exercise of the less political aspects of the right to self-determination to the maximum extent possible. These include the right of Palestinians to pursue common social, economic, and cultural endeavors,<sup>197</sup> for which realization of rights such as the right to freedom of movement, the right to freedom of assembly and the right to freedom of speech are necessary.<sup>198</sup> An occupying power has both the authority and obligation to administer the territory on a temporary basis, but within those limitations it should allow maximum expression of the right to self-determination. That obligation flows from an occupier's general duty to respect and promote human rights as a means of respecting the temporariness of the occupation and as recognition that, in a long-term occupation, normal civilian life includes expression of autonomy and self-rule.<sup>199</sup> Although it can suppress challenges to its own de facto control, an occupying power should nonetheless refrain from taking steps that would prejudice the ability of the de jure sovereign to reassert sovereignty at the conclusion of the occupation.

An occupying power should facilitate the non-political aspects of self-determination by cultivating the growth of communal cultural institutions, an integrated educational system expressing national values, and the freedom of movement needed to foster cohesion among the various parts of the occupied territory. It also should be especially cautious in restricting the kinds of civil and political rights that are the backbone of self-determination, including freedom of expression and freedom of assembly. These civil and political rights can be fulfilled even in a situation of foreign military rule, and they help create the institutions and habits that are necessary for self-rule in the future. By

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<sup>197</sup> Both the ICCPR art. 1 and the ICESCR art. 1 protect the right of peoples to "freely pursue their economic, social and cultural development."

<sup>198</sup> The U.N. Human Rights Committee has noted that freedom of expression and opinion is necessary for participation in public affairs and for exercising the right to vote. U.N. Human Rts. Comm., *General Comment No. 34*, *supra* note 113, at ¶ 20.

<sup>199</sup> See, e.g., Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT'L L. 661, 677-78 (2005) (noting an occupying power's duty to avoid infringing the right of self-determination in its administration of the territory); VON GLAHN, *supra* note 14, at 31-33 (noting the occupant's duty to respect the transitional nature of the occupation and the need to restore de jure sovereignty).



respecting such rights, an occupying power can take steps to fulfill its forward-looking obligation to prepare the occupied population for the transition to self-governance that should signal the end of the occupation.<sup>200</sup>

The forward-looking obligation to help protected persons prepare for self-determination adds another consideration in favor of respecting the rights to freedom of expression and freedom of assembly and facilitating the freedom of movement needed to engage in common cultural, social, and economic endeavors. We might carefully scrutinize any security arguments raised against exercise of those rights, expecting the authorities to minimize restrictions as much as possible, given the cumulative damage of suppressing rights that are the backbone of self-determination.<sup>201</sup> In sharp contrast to the current policies of cracking down on free expression and association,<sup>202</sup> fragmentation and movement restrictions,<sup>203</sup> and punitive measures taken whenever the rival Palestinian factions, Fatah and Hamas, move toward reconciliation,<sup>204</sup> the Israeli military authorities should facilitate travel and access among all parts of the OPT and adopt policies that encourage and cultivate common cultural, economic, and social endeavors.

For example, the Palestinian national football (soccer) league includes teams from Gaza and the West Bank, and Israeli permission is required to allow players and staff to travel between the two parts of the territory.<sup>205</sup> Preventing that travel not only violates the right to freedom of movement and the obligation to restore normal civilian life, but also the obligation to respect the right to self-determination by facilitating joint endeavors such as a national sporting cup.<sup>206</sup> If the Israeli authorities have security concerns about the transit of players

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<sup>200</sup> Bashi & Diamond, *supra* note 7, at 25-29.

<sup>201</sup> See Koutroulis, *supra* note 106, at 197-200 (Koutroulis suggests that in a prolonged occupation in which active hostilities have ceased, IHRL norms might displace IHL norms where there is a conflict between them).

<sup>202</sup> See *Born without Civil Rights*, HUMAN RTS. WATCH (Dec. 17, 2019), [https://www.hrw.org/report/2019/12/17/born-without-civil-rights/israels-use-draconian-military-orders-repress\\_](https://www.hrw.org/report/2019/12/17/born-without-civil-rights/israels-use-draconian-military-orders-repress_)

<sup>203</sup> *What is the "Separation Policy"?*, GISHA (June 2012), <https://www.gisha.org/UserFiles/File/publications/Bidul/bidul-infosheet-ENG.pdf>.

<sup>204</sup> BASHI & MANN, *supra* note 183, at 56; *Israel Suspends Cash to Palestinians After Hamas Deal*, *supra* note 149.

<sup>205</sup> See *District Court Upholds State Position, Preventing Palestine Cup Final*, GISHA (Sept. 23, 2019), <https://gisha.org/updates/10433>.

<sup>206</sup> *Id.*

via Israel, they should take measures to address those concerns without frustrating the travel; for example, by providing a police escort if they feel it is necessary for transit via Israel. Furthermore, as noted above, Israel's arguments about its sovereign privilege to exclude non-nationals from entering its territory are weakened by actions it has taken to obfuscate the boundary between Israel and the West Bank.

As an illustration of how this might be enforced in the context of reporting sessions before U.N. treaty bodies, in diplomatic and political fora, and in public discussions, the Israeli authorities should be asked what they are doing to facilitate these common endeavors, especially between Gaza and the West Bank and among the various fragmented sections of the West Bank (including East Jerusalem). The Israeli authorities should report on the measures they are taking to facilitate the activities of a robust Palestinian civil society<sup>207</sup> and to protect the right to freedom of expression and assembly.

#### IV. ENFORCEMENT: DO HUMAN RIGHTS CLAIMS MATTER?

Occupation law is the dominant framework governing the conduct of the Israeli authorities vis á vis Palestinian residents of the West Bank and Gaza Strip. It is, however, one of a number of normative frameworks that apply. This article has thus far outlined an approach to utilizing a more robust framework of human rights while minimizing the dangers of overly extending a legal framework, designed to govern relations between a government and its people during "normal" times, to an abnormal situation of prolonged occupation. This last section will suggest five reasons why making more robust human rights claims of the Israeli authorities has the potential to improve current efforts to protect Palestinians living under occupation. It will also suggest concrete courses of action for international bodies and third party states.

First, by raising the expectation that the Israeli military develop less restrictive ways of meeting its security needs, advocates might avoid the difficult task of challenging the military's security assessments—a sure loser in most fora—and instead create expectations based on sophisticated military and technological resources available to the Israeli authorities. So, if there is a need for better scanners to inspect shipments, more analysts to conduct background checks on those seeking to transit through Israel, or money to build an overpass or secure existing roads for transit between Gaza and the West Bank,

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<sup>207</sup> See *Split Apart*, GISHA, *supra* note 193.

the Israeli authorities should allocate the necessary resources to do so. The burden is on the Israeli authorities to meet their security needs without the excessive abridgement of Palestinian human rights. Focusing the political discussion on money as opposed to security creates more space for negotiation, especially given the high costs that donors pay in humanitarian assistance and development aid to Palestinians, much of which is wasted due to restrictions on Palestinian economic development, destruction of Palestinian construction, and restrictions on moving goods into and out of Gaza.<sup>208</sup> Indeed, at least some restrictions on transferring goods from Gaza appear to be based in an unwillingness to allocate resources. Israel currently allows farmers from Gaza to sell up to 400 tons per month of tomatoes and eggplants only, and each month the quota is met.<sup>209</sup> If Israel can make security arrangements to allow that sale to take place, why can't it make arrangements to allow 4,000 tons of tomatoes and eggplants to be transferred into Israel? That quantity would still be just a fraction of the amount of produce that residents of Gaza buy from Israel. If the Israeli authorities can check and approve transit for tomatoes and eggplants—why not strawberries and sweet peppers, too?

Second, the approach described above provides more tools to address the nature of the occupation of the West Bank and Gaza Strip, including the systematic IHL violations that characterize it, such as settlements, abdication of responsibility for the civilian population, and more. The approach suggested here would require Israel to maintain consistency in its legal position by estopping Israel from claiming a strict distinction between itself and the OPT when it comes to paying for services or permitting Palestinians to travel into and through Israel while treating the occupied territory as part of Israel for purposes of settlement and annexation. In doing so, it offers partial redress for some of these IHL breaches while creating a disincentive to perpetuate them.

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<sup>208</sup> NIKSIC ET AL., *supra* note 42; *Palestine's Economic Update—April 2019*, WORLD BANK (Apr. 1, 2019), <https://www.worldbank.org/en/country/west-bankandgaza/publication/economic-update-april-2019>; *Humanitarian Operations Undermined by Delegitimization, Access Restrictions, and Administrative Constraints*, U.N. OFF. COORDINATION OF HUMANITARIAN AFF. OCCUPIED PALESTINIAN TERRITORY (Jan. 16, 2019), <https://www.ochaopt.org/content/humanitarian-operations-undermined-delegitimization-access-restrictions-and-administrative>.

<sup>209</sup> *Update: Allowing More Gaza-Grown Vegetables to Be Marketed in Israel Is in Everyone's Interest*, GISHA (Apr. 20, 2017), <http://gisha.org/updates/6068>.

Third, this article offers guidelines, grounded in international law, for a timely discussion of financial responsibility for service provision in the West Bank and Gaza. Since the 1990s, Israel has been relieved of the financial burden of governmental services in the OPT, thanks to the Oslo Accords which allocated that burden to the Palestinian Authority, funded by taxes Israel collects from Palestinians and aid from donor countries.<sup>210</sup> That funding landscape is shifting rapidly: as the United States ends funding for Palestinian refugees and to the OPT generally,<sup>211</sup> the transfer of tax revenues from Israel to the PA undergoes frequent disruptions, and the Palestinian factional dispute exacerbates the accountability crisis in Gaza.<sup>212</sup> Powerful political actors regularly discuss the financial and humanitarian deterioration in the OPT, and donor countries offer stopgap emergency funding, but the question of Israel's financial responsibility is almost completely absent. Getting influential diplomats and funders to make more robust claims of the Israeli authorities—and to pressure the PA to make those claims, as well, in its negotiations with the Israeli authorities on baskets of goods—could help to shift the narrative, especially given the dependence of the Israeli and Palestinian authorities on foreign funding in the OPT. As part of their duties under the Fourth Geneva Convention, states are required to take proactive steps to end violations of IHL, including through diplomacy and political pressure.<sup>213</sup> The

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<sup>210</sup> Omar Dajani & Hugh Lovatt, *Rethinking Oslo: How Europe Can Promote Peace in Israel-Palestine*, EUR. COUNCIL ON FOREIGN REL. (July 26, 2017), [https://www.ecfr.eu/publications/summary/rethinking\\_oslo\\_how\\_europe\\_can\\_promote\\_peace\\_in\\_israel\\_palestine\\_7219](https://www.ecfr.eu/publications/summary/rethinking_oslo_how_europe_can_promote_peace_in_israel_palestine_7219); Omar Dajani & Hiba Hussein, *Past the Point of No Return? A Rights-Based Framework for International Engagement in Israel/Palestine*, NORWEGIAN CTR. CONFLICT RESOL. (Oct. 2014), <https://noref.test.vpdev.no/Publications/Regions/Israel-Palestine/Past-the-point-of-no-return-A-rights-based-framework-for-international-engagement-in-Israel-Palestine>.

<sup>211</sup> *US Ends Aid to Palestinian Refugee Agency UNRWA*, BBC NEWS (Sept. 1, 2018), <https://www.bbc.com/news/world-us-canada-45377336>; Yolande Knell, *US Stops All Aid to Palestinians in West Bank and Gaza*, BBC NEWS (Feb. 1, 2019), <https://www.bbc.com/news/world-middle-east-47095082>.

<sup>212</sup> Press Release, Palestinian Ctr. for Human Rts., *supra* note 172; Press Release, Al-Mezan Ctr. for Human Rts., *Al Mezan Calls for: Solution to Electricity Crisis*, *supra* note 142.

<sup>213</sup> The International Committee for the Red Cross recently interpreted the Common Article 1 obligation to ensure respect for the Geneva Conventions in the following manner: “The positive obligations require States to take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their

framework suggested here provides a program for third party states to revise their policies on providing assistance to Israel and the OPT to bring them into conformity with international law<sup>214</sup> and particularly with the requirement that Israel be accountable for service provision in Gaza and the West Bank.

Fourth, this framework can be applied to evaluating Israeli conduct toward Palestinians living in the Gaza Strip. The standard of non-discrimination it suggests is not a comparison between Palestinians in the West Bank and Israeli settlers in the West Bank, but rather a holistic comparison of two populations, Israeli and Palestinian, living in a land subject to a single sovereign but enjoying very different baskets of rights. Holding Israel responsible for the progressive realization of economic and social rights—without of course exempting the Palestinian authorities from their obligations—provides a useful tool in addressing the abdication of all three authorities—Israel, the PA and Hamas—in providing for Gaza’s two million residents. Rather than making narrow nondiscrimination claims in the West Bank or in Area C of the West Bank, this framework holds Israel accountable for the rights enjoyed by Palestinians in all parts of the Palestinian territory. It challenges the Israeli argument that Gaza is a *sui generis* situation, outside the realm of human rights and IHL protections yet subject to significant Israeli control.<sup>215</sup>

Fifth, re-framing the narrative around accountability for the welfare of residents of the OPT to incorporate stronger human rights claims could mobilize support among different global constituencies. Arguments based on rights and nondiscrimination create a positive message that resonates for many in the international community. Such arguments have the potential to bypass what appear to be layers of legal complexity that obfuscate a basic situation of concern: two peoples living under a single sovereign for an indefinite “interim” period, but enjoying very different sets of rights.

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influence on that Party.” INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 1215 (2d ed. 2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>. See also Boutruche & Sassòli, *supra* note 106; Dajani & Husseini, *supra* note 210, at 3.

<sup>214</sup> Dajani & Husseini, *supra* note 210 at 4.

<sup>215</sup> See Israeli Ministry of Foreign Affairs, *The Operation in Gaza: Factual and Legal Aspects*, ¶ 30 (July 29, 2009), [https://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/Operation\\_Gaza\\_factual\\_and\\_legal\\_aspects\\_applicable\\_legal\\_framework\\_5\\_Aug\\_2009.aspx](https://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/Operation_Gaza_factual_and_legal_aspects_applicable_legal_framework_5_Aug_2009.aspx).

As a practical matter, there are a number of enforcement actions that flow from this framework. First, as noted, donor states should use their engagement with the Israeli authorities to demand Israeli funding of services in the OPT, freeing up donor funds for other needs including development and investment. Second, United Nations committees such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights should ask the Israeli authorities to report on steps taken to progressively realize economic and social rights in the OPT, in order to bring service delivery on par with the level provided to Israeli citizens and residents. They should ask about steps that can be taken to reduce restrictions on the right to freedom of movement, including developing technologies and systems that address legitimate security needs while allowing many more people to travel much more quickly, including into Israel. Moreover, they should ask about progress in facilitating the freedoms needed for communal and social endeavors and expressing dissent, including changes in military legislation and prosecutions for peaceful speech and assembly. Additional U.N. bodies, such as the U.N. Human Rights Council and ad hoc reporting mechanisms, should make similar inquiries. Third, NGOs should consider focusing their shadow reports to the U.N. Committee on Economic, Social and Cultural Rights on comparisons of the level of services available in the OPT with the level available in Israel, with an emphasis on trends of improvement or deterioration. In particular, is service provision improving for Palestinians? Is it deteriorating? Is it improving for Israelis? The obligation to progressively realize social and economic rights would require particular scrutiny of a situation in which service delivery is improving for Israelis but declining for Palestinians.

Implementing these recommendations will contribute to creating a concrete expectation of the Israeli authorities that so long as they exercise control over the Palestinian territory, they should view the safeguarding of human rights, as part of their duties as an occupying power.

## V. CONCLUSION

This article has attempted to provide clarity about the content of the obligations of a long-term occupying power toward civilians, focusing on the convergence between the IHL obligation to provide for civilian welfare and the IHRL obligation to progressively realize economic, social and cultural rights. My argument has been that any such

inquiry should be context-specific, to allow for evaluation of the consequences of the interaction between IHL and IHRL norms in any given situation, and to exercise caution in undermining bright line IHL protections. The discussion is focused on the occupied Palestinian territory and includes concrete recommendations for third party states, UN bodies and civil society.

In that context, the article challenges the deference given to the delegation of responsibility in the Oslo Accords, arguing that an interim political agreement whose terms were to expire two decades ago should not override IHL protections for civilians living under occupation, including the obligation of the occupying power to respect, protect and fulfill human rights. The resulting claim—that Israel should provide more services than the PA is willing or able to purchase and that Israel should equalize service provision between its own civilians and Palestinian residents of the occupation—will raise concerns about undermining Palestinian autonomy and furthering Israeli de facto annexation. Yet this article argues that the balance should tip toward requiring more proactive action of Israel, largely because of the devastating effects of indefinitely deferring realization of economic and social rights.

The arguments made here can be adapted to other situations of prolonged occupation, using the basic principle of using IHRL norms to interpret the content of IHL obligations and taking concerns about deepening or normalizing a long-term occupation seriously. In some cases, it may be hard to pinpoint a precise moment at which it can be determined that an occupation has become prolonged and indefinite,<sup>216</sup> or when delegations of responsibility to local authorities have become ineffective. In the case of the OPT, however, I concur with the judgement of other scholars who argue that such point has been reached.<sup>217</sup> Some of those scholars have argued that the occupation should be ended as a matter of law.<sup>218</sup> Regardless of one's position on the legality of the occupation, there is a need to protect people now, in this permanently "temporary" period of occupation, under which more than two generations have grown up. The framework this article suggests, including its controversial claims to Israeli funding of Palestinian services at a level on par with that provided to Israeli citizens, is

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<sup>216</sup> See, e.g., Azarova, *supra* note 31.

<sup>217</sup> See *id.*; Ben-Naftali, *supra* note 31; GROSS, *supra* note 14; Dajani & Lovatt, *supra* note 210; Dajani & Husseini, *supra* note 210; Wilde, *supra* note 50.

<sup>218</sup> *Supra* note 31.

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one that has the potential to enhance protections. For that reason, I suggest it be integrated into diplomacy and U.N. mechanisms of accountability regarding the OPT, as well as into enforcement mechanisms that may develop in the future.