

Gendering the Law of Occupation



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Abstract

One glaring limitation in addressing the experiences of women in situations of armed conflict is the absence of a sustained analysis of the structural limits and capture of the law of occupation. In almost all the major writing on the law of occupation, women and the relevance of gender analysis to understanding the limits of the law and the experience of living under occupation has been marginalized or entirely absent. This working paper draws on the experiences of a number of sites of occupation, but is significantly directed at the experiences of women living under occupation in the Israeli-Palestine context. This working paper addresses the presence and absence of gender in the making, oversight and ending of occupations. The singular exclusion of women from most of the negotiation processes working towards a political settlement of the conflict, underscores the marginality of women's presence in the conversations around conflict ending and transition. Even as it is valuable to note the absence of women from sites of negotiation, there is also danger in viewing the political settlement process and peace negotiations as the panacea for the range of challenges women have faced during occupation, many of which are likely to sustain in any 'post-occupation' reality. As Carol Smart has so aptly noted, there is the problem "of challenging a form of power without accepting its own terms of reference and hence losing the battle before it has begun". This working paper, as with prior work seeks to simultaneously challenge and remediate the power frames of the Law of Armed Conflict.

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About Us

The Political Settlements Research Programme (PSRP) is centrally concerned with how political settlements can be made both more stable, and more inclusive of those affected by them beyond political elites. In particular, the programme examines the relationship between stability and inclusion, sometimes understood as a relationship between peace-making and justice.

The programme is addressing three broad research questions relating to political settlements:

1. How do different types of political settlements emerge, and what are the actors, institutions, resources, and practices that shape them?
2. How can political settlements be improved by internally-driven initiatives, including the impact of gender-inclusive processes and the rule of law institutions?
3. How, and with what interventions, can external actors change political settlements?

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Gendering the Law of Occupation

"Occupation as a concomitant of war; temporary state of affairs pending a peace agreement".¹

One glaring limitation in addressing the experiences of women in situations of armed conflict is the absence of a sustained analysis of the structural limits and capture of the law of occupation.² In almost all the major writing on the law of occupation, women and the relevance of gender analysis to understanding the limits of the law and the experience of living under occupation has been marginalized or entirely absent.³ A couple of years ago, I was aware that while I had advanced significant personal research on multiple aspects of international law and gender and theorized in multiple ways around the relationship between gender, conflict and transitions,⁴ my research had not addressed both the specificity of gender under occupation and gendering transition from occupation. I was broadly struck by the lack of engagement by feminist scholars with the law of occupation and felt that the time was ripe to think through in theory and practice a number of the doctrinal and theoretical commitments that have shaped my work in other areas.

This working paper is my foray into broadly exploring this body of legal norms and political practice. It draws on the experiences of a number of sites of occupation, but is significantly directed at the experiences of women living under occupation in the Israeli-Palestine context.⁵ As conversations ebb and flow about a political agreement between the Palestinian Authority and the state of Israel,⁶ the extreme and structural violence persists. On the fringes of the formal political 'talks about talks', there have been nascent discussions of a role for transitional justice processes to address systematic violations of human rights, yet criminal accountability remains rhetorically invoked to meet the demands of victims of conflict and occupation.⁷ This working paper addresses the presence and absence of gender in the making, oversight and ending of occupations. The singular exclusion of women from most of the negotiation processes working towards a political settlement of the conflict,⁸ underscores the marginality of women's presence in the conversations around conflict ending and transition. Even as it is valuable to note the absence of women from sites of negotiation, there is also danger in viewing the political settlement process and peace negotiations as the panacea for the range of challenges women have faced during occupation, many of which are likely to sustain in any 'post-occupation' reality. As Carol Smart has so aptly noted, there is the problem "of challenging a form of power without accepting its own terms of reference and hence losing the battle before it has begun".⁹ This working paper, as with prior work seeks to simultaneously challenge and remediate the power frames of the Law of Armed Conflict (LOAC).

1 Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. OF INT'L L., 580, 583 (2006).

2 Obvious caveats to this include Judith Gardham, *War, Law, Terror, Nothing New For Women*, 32 AUSTL. FEMINIST L. J. 61, 61 (2010).

3 See e.g., EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* (2d ed. 2012).

4 See e.g., FIONNUALA NÍ AOLÁIN, DINA FRANCESCA HAYNES & NAOMI CAHN, *ON THE FRONTLINES: GENDER, WAR AND THE POST CONFLICT PROCESS* (2011).

5 For commentary on the Israeli occupation of Palestinian territory, see ALLAN GERSON, *ISRAEL, THE WEST BANK, AND INTERNATIONAL LAW* (1978); *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP* (Emma Playfair ed., 1992); *HUMAN RIGHTS, SELF-DETERMINATION, AND POLITICAL CHANGE IN THE OCCUPIED PALESTINIAN TERRITORIES* (Stephen Bowen ed., 1997); Benvenisti, *supra* note iii; DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (2002).

6 See e.g., Jonathon Cook, *The Role of the Quartet and Its Envoy Tony Blair*, 42 J. of Palestinian Stud., 44, 44-60 (2012).

7 Mark Osiel, "Transitional Justice" in *Israel/Palestine? Symbolism and Materialism in Reparations for Mass Violence*, ETHICS AND INT'L AFF. (2015).

8 Notably, Israel was the first country to adopt Resolution 1325 as national law. In August 2010, the Supreme Court required the Prime Minister and an appointed Commission of Inquiry (Turkel Commission) to expand the panel of appointees in order to include a female representative, as required by law (specifically the domestication of 1325). This affirmed the legal traction of representation in UNSCR 1325 at the domestic level. SARAI AHARONI, *WOMEN, PEACE, AND SECURITY: UNITED NATIONS SECURITY COUNCIL RESOLUTION 1325 IN THE ISRAELI CONTEXT* (Deborah Schwartz ed., Esther Hecht trans., 2010) available at https://il.boell.org/sites/default/files/women_peace_and_security_in_the_israeli_context-_summary.pdf

9 CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989) at 5.

There have been significant developments in international law and the law of armed conflict regarding the status, recognition, agency, vulnerability and positioning of women in the past two decades.¹⁰ However, despite substantive augmentation in international criminal law¹¹ and jurisprudential advances applying the law of armed conflict to women's experiences, little serious attention has been paid to the gendered dimensions of occupation. Turning to address occupation law is a natural and overdue move by feminist international law scholars. Doing so, however, is not unproblematic. There is "ongoing feminist ambivalence towards the legal 'project'" of international law.¹² As Sari Kovo comments in the context of addressing feminist engagement with international criminal law that:

It remains a project of resistance, based on an understanding that sex always matters, and that gender and power are intimately linked in both law and life.¹³

Gender considerations, and more particularly the experiences of women, have generally been at the margins of doctrinal and policy conversations concerning occupation.¹⁴ If considered at all, women are generally "added in" to the generic assessment of civilian protection.¹⁵ More recently we have seen a move, in part prefigured by the pressures of the Women, Peace and Security Agenda to give recognition to gender/women as an "analytical category".¹⁶ This gives some limited space to address women's needs as victims of violence or address the conundrums when women appear as perpetrators of violence, but does little to fundamentally engage with the overarching gender dynamics of occupation.

As I explore below, the rules related to occupation were not constructed with needs and experiences of women to the forefront nor do they envisage what rules, structures, institutions and methods of intervention might follow as a result. This working paper starts from the premise that the gendered dimensions of occupation in general and the Israeli/Palestinian conflict in particular have substantially underreported and under-represented the needs of women living under sustained occupation as well as the harms experienced by them.

The working paper is structured in three parts. The first maps the historical evolution of the law of occupation, paying particular attention to the gendered dimension of the content and pre-occupations of these norms. The second section is primarily ethnographic drawing on my own fieldwork in Israel-Palestine as well as the empirical work carried out by other scholars and non-governmental organizations mapping the lived experiences of women under occupation. The third charts some preliminary conclusions pertaining to the limitations of the existing frameworks and what normative and institutional changes might remedy the deficiencies.

10 See e.g., Helen Kinsella, *Gendering Grotius: Sex and Sex Difference in the Laws of War*, 34 POL. THEORY 161, 161-191 (2006).

11 Charlotte Lindsey, *International Committee of the Red Cross, Women Facing War: ICRC Study on the Impact of Armed Conflict on Women* (2011).

12 Louise Chappell & Andrea Durbach, *The International Criminal Court: A Site of Gender Justice?*, 16 INT'L FEM. J. OF POL. 533, 535 (2014).

13 Id. at 536. See also Doris Buss, *Performing Legal Order: Some Feminist Thoughts on International Criminal Law*, 11 INT'L CRIM. L. REV. 409-423 (2011).

14 In non-legal fields including sociology and political science, one finds some attention paid to the experiences and subjectivities of occupation, but it remains marginal to human rights and international law analysis and practice. See e.g., SIMONA SHARONI, *GENDER AND THE ISRAELI-PALESTINIAN CONFLICT: THE POLITICS OF WOMEN'S RESISTANCE* (1995).

15 This "add women and stir" formula has a long history in international law. For example, in the context of the post WWI negotiations, the "Spanish Resolution," so-called because it was introduced by the Spanish delegation, was adopted by the 12th Assembly of the League of Nations on September 24, 1931. It read: "The Assembly, convinced of the great value of the contribution of women to the work of peace and the good understanding between the nations, which is the principle aim of the League of Nations, requests the Council to examine the possibility of women cooperating more fully in the work of the League." This presumed overlap between the feminine and the civilian has been the subject of stringent feminist analysis, including Helen Kinsella's exposure of: "... [how]the practices of and referents for our current wars partially descend from, are governed by, the binary logics of, most immediately, Christianity, barbarism, innocence, guilt, and sex difference articulated in Grotius's text. These binaries are implicated in our contemporary distinction of "combatant" and "civilian," troubling any facile notion of what "humanitarian" law is or what "humanitarian" law does, and posing distinct challenges to theorizations of war and the laws taken to govern." Kinsella, *supra note x*.

16 Nicola Pratt & Sophie Richter-Devroe, *Critically Examining UNSCR 1325 on Women, Peace and Security*, 13 INT'L FEM. J. POL., 489-503 (2011) (citing *Women and War in the Middle East: Transnational Perspectives* (Nadje Al-Ali & Nicola Pratt, eds., 2009) at 1-31).

1. Mapping the Law of Occupation

Practices of occupation have long and troubled histories and the locales of occupation, since the beginning of the 20th century include (and are not limited to) Albania, Nicaragua, Belgian, France, Luxemburg, parts of Russia, Serbia, Namibia, Haiti, Cuba, Manchuria, Finland, Poland, Greece, Denmark, and Cambodia. Contemporary sites of occupation are multiple and have included the long-standing and largely ignored Moroccan occupation of Western Sahara,¹⁷ the occupation of Northern Cyprus by Turkey, the occupation of Iraq by the United States and its allies, parts of the Democratic Republic of Congo by multiple states, South Ossetia, Crimea and the Occupied Palestinian Territories. Exploring the geographical and political genealogy of occupation law gives unique insights into the presence and absence of gender in occupation law doctrine and practice.

There are a number of qualifying adjectives to the term occupation. They include “belligerent”, “wartime” and “military”. Each of these terms signals the masculine and militarized context in which occupation arises, the synergy of the legal box with the ordering of male lives and men’s priorities. It seems self-evident, but I record that occupation occurs as a by-product of war, never necessarily the primary goal of hostilities. That stated, the law of occupation was historically a “key component” in the “[h]ostile army’s strategic tools in the quest for victory”.¹⁸

a. Historical Evolution

The core imperative of occupation law comes from the premise that belligerent occupiers maintain the “status quo vis-à-vis the legislative and economic structure in the occupied territory [ensuring at the same time] humane treatment by all parties of the inhabitants during the period of occupation”.¹⁹

Occupation is not an historic anomaly—contemporary armed conflicts also demonstrate that temporary occupation often follows from armed conflict.²⁰ Most classic definitions of occupation underscore the temporality of its status. Occupation is conceptually considered an aberration, a temporary state of affairs, a holdingposition until the physical territory in question (and those inhabiting it) are returned to their original political status and territorial control reverts to the legitimate sovereign. Applicable bodies of legal norms are the Hague Regulations and the Fourth Geneva Conventions as well as free standing customary international law norms.²¹

Many of our existent legal rules regarding occupation developed in parallel to and overlap with the norms governing trusteeship. Trusteeship was born in the nascent making of the post-WW1 collective security system, whereby the concept of “mandate” was crafted to enable international oversight and control of Ottoman and German territories seized by the Allied powers.²² Trusteeship held “sovereignty in abeyance” pending the eventual

17 Khoury, Rana B., *Western Sahara and Palestine: A Comparative Study of Colonialisms, Occupations, and Nationalisms*, 1 NEW MIDDLE EASTERN STUDIES (2011).

18 Benvenisti, *supra* note iii at 8, 20, 56.

19 *Id.* at 69.

20 The obvious and recent examples include the occupations of Iraq and Afghanistan. Kaiyan Homi Kaikobad, *Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq*, April/May 2003-June 2004, 54 INT’L & COMP L.Q. 253 (2003); R. Dobie Lagenkamp & Rex J. Zedalis, *What Happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields*, 14 EUR. J. INT’L L. 417 (2003).

21 Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention Respecting the Laws and Customs of Land Warfare, Oct. 18, 1907, 36 Stat. 2277. See Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS (2005). Note that Article 43 of Hague Convention required that the laws of the occupied country be respected unless the occupier was “absolutely prevented” from doing so. There has been some subsidiary regulation of occupation by state administrations. This includes the 1949 Occupation Statute established by the three Western Allies in 1949. See Occupation Statute Defining the Powers to be detained by the Occupation Authorities Apr. 8, 1949 (entered into force Sept 21, 1949 (T.I.A.S. No 2066, 140 U.N.T.S. 202).

22 Britain gained the mandate over Palestine, Iraq, Tanganyika and parts of Togo and Cameroon, France the mandate over Syria, Lebanon, and the rest of Togo and Cameroon, Belgium over Rwanda and Burundi, South Africa that over South West Africa, Australia that over German New Guinea and (on behalf of the British Empire) Nauru, New Zealand that over Western Samoa, and Japan the mandate for the former German islands north of the equator. Written texts were agreed dividing the mandates into three groups (‘A’, ‘B’, and ‘C’, distinguished supposedly by their “civilizational” stage) and committing the mandatory power to various humanitarian ideals or administrative norms. The mandatory powers were given full governing authority, however, and oversight was kept to a minimum. See generally Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and its Implications in International Politics*, 13 EUR. J. INT’L L. 1037-1052 (2002).

evolution of the territories to full independence, with the characteristic that administration was to benefit the population and that it was subject to external oversight.²³ Understanding the masculine ordering and the patriarchy that infuses both systems gives us deeper insight into the centrality of a gendered order to the rulebook of occupation.

The mandate system was welcomed, paradoxically perhaps, by significant elements within the transnational women's movement at the time of its creation.²⁴ This, despite overlapping motifs of patriarchal paternalism, tropes of civilized and uncivilized status, and the unrestricted hand given to the controlling power by mandate control over dependent territory. Women were involved in the mandate system in a number of remarkable ways. Self-evidently, women in mandate territories were subject to the administration of mandates, and their experiences mirrored many of the myriad experiences of women living under occupation. Historically relevant to the transformation required of occupation law to better serve women's interests under occupation regimes, is the work of international women's organizations that intensively lobbied the first League of Nations Assembly in 1920 to include 'at least one woman' among the proposed nine members of the Permanent Mandates Commission. Despite feminist protests that one was not enough, the Commission consistently included one woman.²⁵ Notably, women consistently lobbied within and without the mandate system raising specific grievances, exposing abuses, as well as seeking redress and reform. The early recognition of overarching systems of supervision offers some clues to rethinking the oversight component of contemporary occupation regimes.

However, it remains true that distinct differences between occupation and trusteeship are evidenced by the greater legal limitations posed on an occupying power. This distinction draws on the self-interest and reciprocity strains of the LOAC wherein the great powers envisaged occupation as a likely outcome of hostilities affecting their territories, but saw trusteeship as a status reserved only for uncivilized (read non-Western) powers. More recently, Wilde and others have identified the overlap between traditional trusteeship and the contested administration of territories by "international territorial administration," including the prominent example of the United Nations Interim Administration Mission in Kosovo (UNMIK).²⁶ These are multiple points of convergence—overlapping patriarchal resonance, stunted governmental autonomy and a conspicuous politics of tutelage.²⁷ An obvious concluding point is to affirm the similarity of women's experiences across trusteeship, occupation and international territorial administration and the lack of legal recourse and recognition for their needs and rights both then and now. Understanding that there has been virtually no substantive augmentation of occupation law to enhance its protections for women since the signing of the Geneva Conventions in 1949 should provoke a distinct pause and underscore the necessity of doctrinal amplification.

b. Principles and Rules

The principle *ex injuria jus non oritur*, or "law does not arise from injustice," functions as a central concept within the law of occupation.²⁸ It is inherently linked to the obligations of occupiers to the territory and the civilian population they control, and affirms that unjust acts do not create law. The United States Report at the Hague Peace Conference explains, "The law of postliminium was founded on the principle that the fact of war is not sufficient to

23 International Status of South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Advisory Opinion, 1950 I.C.J. Rep.128, 143 (July 11) (noting the language of Judge McNair).

24 Susan Pedersen, *Metaphors of the Schoolroom: Women Working the Mandates System of the League of Nations*, 66 Hist Workshop J., 188-207 (2008). Specifically, the International Council of Women and the International Women's Suffrage Alliance saw an opportunity to help shape and influence the co-operative dimensions of the post-war order.

25 Including Anna Bugge-Wicksell, who had played an important role in feminist and social reform movements in her native Norway. She was replaced by Norwegian Valentine Dannevig, Director of the Vestheim Girls' School, a prominent figure in educational circles who had also been one of the founders of the Norwegian branch of the Women's International League for Peace and Freedom. Both women raised a variety of feminist issues including education, women's status, and sex trafficking throughout their time on the Commission.

26 Ralph Wilde, *From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers*, 31 LOY. L.A. INT'L & COMP. L. REV., 85 (2009).

27 SÉVERINE AUTESSERRE, PEACELAND: CONFLICT RESOLUTION AND THE EVERYDAY POLITICS OF INTERNATIONAL INTERVENTION (2014).

28 In practice one might argue that in transformative occupations its opposing principle is being advanced *ex factis jus oritur* (the law arises from the facts).

destroy legitimate rights.”²⁹ This Roman law concept continues to hold sway supporting the general proposition that free persons or objects taken in war will return to original state control (or status), with capture being a temporary state of affairs.³⁰

These brief threads illustrate that, historically, the principle of sovereign equality has supported limitations on the exercise of power within occupied territories and ultimately permitted “only the authority necessary for meeting the immediate needs of the occupation.”³¹ This general rule is derived from “the consolidation of three principles.” These are as follows:

- (1) “all communities’ need for a governing body;” (2) the need to “enable the entity of that governing body to exercise public authority;” and (3) the principle that the “entity that exercises public authority in an occupied territory must do so without dispossessing the actual sovereign completely and definitively.”³²

Generally, only for the duration of the occupation, an occupant may change the laws in force in the country if one or more of these five ends require such changes to be made:

- (1) The security of the occupying power and of its forces,
- (2) The implementation of IHL and of International Human Rights Law (as far as the local legislation is contrary to such international law),
- (3) The purpose of restoring and maintaining public order and civil life in the territory; and
- (4) The purpose of enhancing civil life during long-lasting occupations; or
- (5) Where explicitly so authorized under UN Security Council Resolutions.³³

Reflecting on the core gender imperatives driving the law of occupation is to appreciate the centrality of territory and temporality in the construction of the legal rules. Thus, militaries (read men) who are aware of potentially losing power in the form of territorial control and political dominance to other men, are securing the external manifestations of that power (family, property, and preservation of communal identity) in a form that enables their safe return at an unspecified future point. Occupation law was historically a compact between male military elites, a quid pro quo on masculine influence and a materialization of complimentary patriarchy that functioned to sustain the symbolic value of existent political form notwithstanding a temporary loss of territorial control during military hostilities. The reciprocity dimensions of occupation law reflects not only broader reciprocity frameworks in the law of armed conflict, but the specific benefits of maintaining political and military status quo arrangements notwithstanding the loss of territory during armed conflict.

The 1907 Hague Convention sets out a series of rules on the methods and means of warfare and annexed to the IV Hague Convention – the Hague Regulations – which include important parts of the Law of Occupation. Section III of the Regulations entitled “Military Authority over the Territory of the Hostile States”, is considered to constitute customary international law and forms the basis for our contemporary law of occupation. It includes the following provisions:

- Art. 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.³⁴

²⁹ Benvenisti, *supra* note iii at 29

³⁰ Pomponius (Dig. 49. tit 15. s. 14.): “There are two kinds of postliminium, for a man may either return himself or recover something”. Note that in this context, women were treated specifically. George Long notes that “As to a wife, the matter was different: the husband did not recover his wife postliminium, but the marriage was renewed by consent”. Dictionary of Roman and Greek Antiquities (1878).

³¹ Benvenisti, *supra* note iii at 30.

³² *Id.* at 30 (citing PASQUALE FIORE, NUOVO Diritto Internazionale Pubblico (2nd ed., Charles Antoine trans., 1885), Vol. III at 177).

³³ Marco Sassòli, *Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century* (2004).

³⁴ Other relevant provisions include: art. 42. (Stating that territory is considered occupied when it is actually placed under the authority of the hostile army); art. 43 (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); and art. 50 (No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible).

Art. 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Article 46 is the provision that most commentators view as being directly relevant to women's needs and protection under occupation.³⁵ The emphasis on family, the right to life, private property and religious tolerance comport to classical liberal assumptions about which values and rights have a hierarchical status during armed conflict, and form the basis of responsibility for the occupying state.³⁶ The motif of paternal responsibility is sustained throughout.

In this scheme, a particular status is given to family honor, a concept that is tightly bound to the female body, reproduction, and patriarchal order.³⁷ It is understood that the honor noted in the protective mantra is not the honor of the sexually violated female subject but rather the honor of the man or family to whom she is attached.³⁸ And it is obvious but worth re-emphasizing that the most egregious harms imagined to occur to women are penetrative sexual harms, destroying their purity and chastity.³⁹ The legal imagination as to the harms that might befall a woman in the 18th and 19th century did not stretch much beyond those boundaries. Honor is a sustained motif in the law of armed conflict. There is odd convergence here in that honor both defines the space which women inhabit in the law of armed conflict, and is equally central to the construction of core categories in this legal domain, specifically the distinction between combatant and civilian.⁴⁰ While acknowledging masculinity of the concept, it is also too simplistic in Charlotte Lindsey's terms, to dismiss the overarching and universal dimensions of honor and its significance for and to women:

“... honour is a code by which many men and women are raised, and by which they define and lead their lives. Therefore the concept of honour is more complex than merely a “value” term.”⁴¹

The practical implication of this insight is a subject I will return to in the fieldwork analysis below.

Moreover, by examining the other provisions of the Regulations through women's eyes and the lived experiences of women under occupation in highly patriarchal and stratified societies, then we see the relevance of other provisions. These include general penalties (Article 46) in the context of house demolitions or respecting the laws in place in the territory under occupation (Article 43) with relevance to maintaining inequalities in divorce law, access to property, and access to children. All of these rules have blunt gender dimensions upon forensic examination. How these provisions are interpreted, whether by military commanders or civilian courts, will affect women's experience under and access to law in the context of occupation.

35 Rashida Manjoo & Calleigh McRaith, *Gender-Based Violence and Justice in Conflict and Post-Conflict Areas*, 44 *Corn. Int'l L. J.* 11, 19 (2011); Lindsey, *supra* note xi at 126.

36 See e.g. Kant, Bentham as examples of the application of classical liberal theory to interantional law and international relations. Note the interesting overlap with the Responsibility to Protect doctrine.

37 Joe Lunn, *Male Identity and Martial Codes of Honor: A Comparison of the War Memoirs of Robert Graves, Ernst Jünger, and Kande Kamara*, 69 *J. of Mil. Hist.*, 713-735 (Jul., 2005).

38 Fionnuala Ní Aoláin, *Sex Based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law*, 12 *YALE J. L. & FEMINISM* 43 (2000).

39 The instrumentalism of this narrative is revealed by the use of female vulnerability narratives in the lead up to the Second World War by governmental propaganda in the United Kingdom. See Nicoletta F. Gullace, *Sexual Violence and Family Honor: British Propaganda and International Law during the First World War*, 102 *Am. Historical R.*, 714, 714-747 (1997).

40 SEXUAL VIOLENCE IN CONFLICT ZONES: FROM THE ANCIENT WORLD TO THE ERA OF HUMAN RIGHTS (Elizabeth Heineman ed., 2013). Notably occupation practices in the aftermath of WWI illustrated the danger of honour violations and may well have been in the minds of the drafters of Geneva IV. The French and German occupation of Germany's Ruhr region in 1923 was distinguished by reprisals, brutality, looting and sexual violence. See CONAN FISCHER, *THE RUHR CRISIS 1923-24* (2003)(addressing the conduct of soldiers and noting that “others became involved in prostitution for food or hard currency; or involved in genuine love matches with member of the occupation. These women often fell prey to German reprisals for consorting with the enemy”).

41 i Charlotte Lindsey, 'The Impact of Armed Conflict on Women', in HELEN DURHAM AND TRACEY GURD (EDS), *LISTENING TO THE SILENCES: WOMEN AND WAR* (2005) at 33.

When we shift gear and move to 1949, in the aftermath of the Holocaust and WWII, despite knowledge of the range and depth of sex-based harms experienced by women, the legal regulation of women's lives in the exposed context of occupation remains similarly constructed to that which emerged a half century earlier. Moreover, the limited references to women in the Conventions are overwhelmingly tied to the vulnerabilities of women as expectant or nursing mothers.⁴² Geneva Convention IV is largely constructed from and in response to the Nazi and other Axis regimes' concentration on selective practices of occupation during WWII. As literary narratives of occupation sites reveal, there were distinctly gendered actualities that followed occupation.⁴³ Little of that montage found expression in the law.

The law of occupation after 1945 was an evolution designed to outlaw the right of conquest.⁴⁴ In turn, international law "prohibits such actions, which are based solely on the military strength of the Occupying Power and not on a sovereign decision by the occupied State."⁴⁵ Hence the modern evolution of occupation affirms the role of the occupier as merely an administrator of territory with all the theoretical limits that entails. This evolution from conquest has left traces in the contemporary legal norms.⁴⁶ The traces are found in the link between the loss of the right of conquest and the emergence of the qualified right to selfdetermination, which essentially recognizes the value of the body politic and its rights to independence, recognized territorial space, and political capacity.

The evolution of the law of occupation has also occurred in parallel with the rise and consolidation of human rights norms. As discussed further below, this has created a parallel pressure on the occupiers to address a totality of norms in their treatment of civilian populations. As the ICJ has documented in the decision regarding Uganda's military actions on DRC's territory:

"The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account."⁴⁷

While the goal of Geneva IV was to better regulate the experiences of persons living under military occupation, the specific and distinct experiences of women are barely visible under the law. Article 27 of the Fourth Convention is the provision most often cited when we discuss the legal capture for harms experienced by women in the context of occupation.

Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats

42 Judith Gardam & Michelle Jarvis, *Women, Armed Conflict and International Law*, KLUWER LAW INTERNATIONAL (2001) at 93.

43 ee e.g., KRISTEN DEN HARTOG & TRACY KASABOSKI, *THE OCCUPIED GARDEN: A FAMILY MEMOIR OF WAR-TORN HOLLAND* (2009); AGNES HUMBERT, *RESISTANCE: A FRENCHWOMAN'S JOURNAL OF THE WAR* (Barbara Mellor, trans., 2008); CURTIS WHITFIELD TONG, *CHILD OF WAR: A MEMOIR OF WORLD WAR II INTERNMENT IN THE PHILIPPINES* (2011).

44 Benvenisti, *supra* note iii at 3.

45 Jean S. Pictet, *Commentary on the IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, (1958) at 146

46 See Benvenisti, *supra* note iii at 29.

47 *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116 ¶ 178-9 (Dec. 19).

thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion. However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

The relevant legal framework is important on multiple grounds. First, awareness of the doctrinal limitations of the applicable law alert us to the gaps and silences surrounding the treatment of women and their fundamental lack of recognition under this regulatory framework. The lack of recognition translates into lacunae for women in recognition, accountability, and enforcement when their rights are violated in situations of occupation. Second, the rule deficits are particularly relevant to the ending of conflict and occupation because a sizeable portion of transition is concerned with accountability for fundamental and systematic violations of law, that when 'the law in these parts' is primarily based on the Fourth Geneva Convention (1949) we need to have a thorough grasp on what is permissible and what is not. This is the most direct route to claim making on behalf of women during transitions from occupation. Finally, the inherent limitations in occupation law require us to be cognizant of human rights law applicability during occupation thereby functioning as 'gapfiller'.⁴⁸ In parallel, practitioners must increasingly take account of the application of International Criminal Law (ICL) as an overarching legal regime intersects with the contemporary law of occupation. This overlap is made explicit by the inclusion in the Rome Statute creating the ICC of a war crimes provision that prohibits the transfer of civilian population into occupied territory.⁴⁹ Thus, a contemporary evaluation of the legal rules regulating occupation must take holistic account of three regulatory regimes and be cognizant of the overlapping and layered nature of the legal terrain.

c. Occupation and Human Rights: A Study of Transformative Occupation in the Israel – Palestine Context

*The Abu-Dahar Orchard.*⁵⁰ This story is told as a small victory for Zouharia Abu-Dahar, the owner of a small property 1.5 square kilometers which consisted primarily of trees. She had been informed by the Israeli military commander in charge of the Occupied Palestinian Territories (OPT) in July 2004, that the trees on her property would be cut down entirely because they were situated in immediate proximity to the private residence of Shaul Mofaz, the newly appointed Israeli Defence Minister, whose house was right on the edge of the Green Line separating Israel from the OPT. Abu-Dahar took legal proceedings. Initially she was informed that the military order was "incorrectly drafted". The result a second decision mandating that along the property boundary a "compromise" would be that only 60-70% of her trees would be cut. An appeal to the Supreme Court ensued. Applying a proportionality test the Supreme Court found that only the dry bushes needed to be cut, the trees trimmed and the trunks of the trees left alone.

On the one hand this is a story that can be told as a victory and a validation of the legal constraints placed on belligerent occupiers. The orchard is saved by a resourceful mother and property owner. The Israeli High Court takes seriously the review of the home-based security of the Defence Minister for as long as he stays in office, and finds a medium way to satisfy both parties by applying a sophisticated balancing test. But that really only tells

48 *Aziz v. Cyprus* (No 69949/01), 41 Eur. Ct. H.R. 11, 28-9 (2005). This ECHR decision affirms that states cannot deny political rights and use occupation as an excuse to avoid their overarching human rights' obligations. See also, *Prince Hans-Adam II of Liechtenstein v. Germany*, App. No. 42527/98, Eur. Ct. H.R. at 46-8, 59, 68 (June 27, 2001). I. Ziemele, *Case-Law of the European Court of Human Rights and Integrity of International Law*, in *L'Influence des Sources sur l'Unité et la Fragmentation du Droit International* 199 et seq., (R. H. Vainaux and K. Wellens (dir.), 2006), (Outlining the ECHR's approach to occupation).

49 Under the War Crimes provisions, Article 8 (viii); the statute specifies that "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" constitutes a war crime. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).

50 Drawn from the example given in Guy Davidov and Annon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35 L. & SOC. INQ. 919, 919-921 (2010).

part of the story. As projects of feminist judgment from multiple countries tell us,⁵¹ this is a muted judicial story, abstracted from the life and reality of the woman forced to seek a judicial remedy. Feminist method mandates that we focus on the omnipresent power in making the initial choice, a military voice that 'calls' out security needs every day in the Occupied Territories from the perspective of the occupier's security needs and not the security of the civilian whose life experiences occupation. The military demand profoundly implicates the life, quality, and experiences of ordinary Palestinians. The globally insignificant battle over trees and bushes exposes a broader set of pressure points on the right to security, home, privacy and family life and are fully bounded in the Abu-Dahar decision. Abu-Dahar is unusual because the female protagonist wins a concession: she keeps her trees subject to the oversight of size, maintenance and requirement of the security demands of her military neighbor and occupier. Notably, in the Supreme Court decision this is not a case that hinges on rights per se — a clash of one set of rights over another. Rather the balance is one of security and rights, in a way that obscures and diminishes the totality of the rights quotient in play, and entirely disallows for the inherent power disparities of the woman defending her trees versus the rights of her neighbor who is both at the apex of the military hierarchy and the perceived subject of resulting personal risk.⁵²

As other scholars have noted, many of the cases concerning the daily regulation of occupation in Israel-Palestine never get to court. The informal mediation increasingly encouraged by the Israeli Supreme Court to settle disputes between the military and the civilian population creates legal "grey zones", where the absence of judicial review and the inherent imbalance of power between the military and the populace works to the advantage of the belligerent occupier, resulting in partial or poor remedies that give the illusion but not the substance of justice.⁵³ The imbalances may be greater when the informal mediation is taking place between women and military commanders given the omnipresent realities of culture, status and social norms in play. As such, human rights oriented judicial review is partial and as my interviews with leading human rights organizations in Israel consistently affirmed, it remained entirely unclear whether the resort to law operated to entrench and legitimate the occupation rather than interrogate it.⁵⁴ In my preliminary review of the Israeli Supreme Court jurisprudence related to occupation, the phrases gender, female and sex were not found.⁵⁵ The term woman appears on occasion, including in the context of terrorist targeting (a failure to adhere to the principle of distinction affecting women and children),⁵⁶ the appropriateness of the placement of a portion of the wall and its effect on women and children,⁵⁷ protection of pregnant mothers.⁵⁸ However, there is no systematic attention to women's experiences under occupation, nor are the measures under review before the Israeli Supreme Court scrutinized from the perspective of gender harm as part of a military necessity or proportionality test. In these circumstances, women face a triple bind. The relevant legal framework may not recognize the harms they experience under occupation; when women try to make the harms "fit" recognized treaty and customary law categories they lose the specifically gendered dimensions of the

51 *Feminist Judgments: From Theory to Practice* (Rosemary Hunter, Claire McGlynn & Erica Rackley, eds. 2010).

52 Commentators on the legalization of the Israeli occupation have argued that the level of deference shown by the Israeli Supreme Court to military decisions has changed over time, and infers that substantive rule of law consciousness, specifically human rights law is responsible. *Id.*

53 David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy in THE PROCESS OF ADMINISTRATIVE LAW*, 279-307 (Michael Taggart ed., 2006).

54 Interviews with Beit T'selam & ACRI. See also DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (2002)

55 Israel, Ministry of Foreign Affairs, *Judgments of the Israel Supreme Court: Fighting Terrorism Within the Law* (2005) (I note that my search was limited to English language translated decisions, and that my review (including of Hebrew only available decisions) is ongoing. I also note there is one reference to sex, in the context of a reference to Jewish law (Tosefta, Shabbat 16, 14 [21]) (348), but not directly to a female plaintiff or subject of the administrative regime in the occupied territories).

56 i H CJ 201/09 Physicians for Human Rights et al. v. Prime Minister et al. PD 1, 93, 105 (Jan.2009)(Terrorists failed during second intifada to distinguish between combatants and civilians, women, men, or children.).

57 H CJ 1748/06, H CJ 1845/06, H CJ 1856/06, Mayor of Ad-Dhahiriya et al. v. IDF Commander et al., (Dec. 14, 2006) (noting that an Israeli security barricade effectively denied passage to women with children) at (163-164, 178). In this case, the Court held that the barricade was constructed for legitimate purposes, namely counter-terrorism, but was a disproportionate measure because it was not the "least harmful measure that was capable of achieving the security purpose."

58 *Supra* note Ivi at 339-340. The Court considered fundamental protections of distinction, noting, the duty to allow "free passage of humanitarian medical supplies, as well as consignments of essential foodstuffs and clothing for children, pregnant women and mothers at the earliest opportunity, subject to several restrictions.

experience as law neutralizes its gendered content; and if recognition on these compromised terms is forthcoming it may operate to entrench and sustain the meta-framework of occupation even as the appearance of partial remedy is provided.

d. Occupation and Human Rights Jurisprudence

Occupation law has substantively strayed into international human rights regulatory terrain for decades. Objections to its applicability based on the dual claims of extraterritorial conduct and the view that the *lex specialis* of the law of armed conflict functioned to ouster human rights have now largely been overcome.⁵⁹ For example, in a series of cases, the European Court of Human Rights (ECtHR) has affirmed that human rights law is relevant and applicable to a range of human rights violations committed under occupation.

Specifically, the long running Turkish occupation of Northern Cyprus has spawned a number of cases to the ECtHR.⁶⁰ In an early decision *Loizidou v. Turkey*,⁶¹ the Court validated the general principle that occupation could create enduring violations, thereby overtaking the strict time limits of the Convention. The Court upheld violations of the right to life and the right to be free from torture regarding the non-resolution of disappearances cases and the violation of property rights. While not directly surfacing the gender dimensions of occupation, the case is noteworthy because the applicant was a woman, born in Kyrenia in Northern Cyprus. She had married in 1972 and moved with her husband to Nicosia. With proof of her ownership of multiple land plots denied, she had participated in a march organized by a women's group ("Women Walk Home"), the goal of which was to assert the right of Greek Cypriot refugees to return home. The applicant was arrested and detained for 10 hours when the march came into a standoff with Turkish soldiers. Her story inadvertently surfaces the trenchant and sustained role women play in their families and communities in confronting occupation and its harms. These aspects are not raised in the judgment.

Notwithstanding unequivocal confirmation that human rights norms continue to be applicable during occupation,⁶² plus the emerging consensus that the longer the duration of occupation the greater the weight of those human rights obligation become,⁶³ there has been virtually no attention to women's experiences under occupation in occupation jurisprudence by international courts and tribunals.

A distinct literature has emerged among international law scholars seeking to pin down the scope and specificity of generic human rights norms during occupation. This work has canvassed the distinctions between positive and negative rights, between applicability and modes of application and between effective control under IHL and scope of human rights' obligations. None of these literatures pays attention to the ways in which these tests may produce different outcomes for the protections of women versus men, or how the tests themselves inherently promote notions of security and the rule of law that have an inherently masculine bias. In the limited regulation of

59 On the claim of ouster, see G. I. A. D. Draper, *The Relationship between the Human Rights Regime and the Law of Armed Conflicts*, 1 ISR. Y.B. ON HUM. RTS. 191-207 (1971); On the response of international courts and tribunals, see Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 106 (9 July) (hereinafter Wall case); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 ¶ 216 (Dec. 19); Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. Ct. H.R., Report No. 55/97, OEA/Ser.L/V/II.95 Doc. 7, ¶ 271 (1997); 'General Comment 29: States of Emergency, Human Rights Committee, UN Doc. CCPR/C/21/ Rev.1/Add.11, ¶ 3 (2001). However, some degree of 'grey' arises in the context of extra-territorial application and the extent to which the 'effective control' test continues to play a part in the extent of human rights obligation that can be determined.

60 E.g., *Cyprus v. Turkey*, App. No. 25781/94, ECHR ¶ 71 (May 10, 2001).

61 *Loizidou v. Turkey*, Admissibility, App No 15318/89, Case No 40/1993/435/514, A/310 (1995) ECHR (1995), 20 EHRR 99, (1996) 21 EHRR 188, IHR 3133 (ECHR 1995), 23rd March 1995.

62 Wall case, *supra* note *ix* at ¶ 112. An example of this can be found in the ICJ Advisory Opinion on the Wall, where the following is stated: "[T]he territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

63 See Noam Lubell, *Human Rights Obligations during Military Occupations*, 94 INT'L REV. RED CROSS, 317 (2012).

occupation by human rights' courts, the rights and needs of women under occupation have been invisible. A recent gap-filler in that regard has been General Comment 30 issued by the Convention on the Elimination of all Forms of Discrimination Against Women. At paragraph 12, the Committee directly addresses occupation to note the obligations of states during inter alia occupation holding that states have an obligation to "[r]espect, protect and fulfill the rights guaranteed by the Convention, which applies extraterritorially, as occupying power, in situations of foreign occupation."

2. The Lived Lives of Women under Occupation

Researching women's lives under occupation poses distinct methodological challenges. The challenge of method is fundamentally connected to how one goes about ascertaining the experience of a gendered life lived under deep and oppressive realities. There is a plethora of practical challenges; access to occupied territory being the most immediate and pertinent. Occupations take on different hues in different places. At the height of the military conflict in Iraq where full-scale inter-state war, internal armed conflict between the military loyal to Saddam Hussein and opposition forces, as well the bedding down of occupation by western forces who had conquered and had effective control of parts of Iraqi territory co-existed in one geographical space, access to the theatre of war and occupation was limited and dangerous. In Israel-Palestine, despite the normalization of almost 50 year of military occupation, access to the territory is highly challenging and requires the external researcher to run a gauntlet of security controls as well as the fear of compromising the lives of those interviewed.⁶⁴

Beyond the 'classical' application of occupation law we are increasingly in the terrain of what Adam Roberts has termed "transformative occupations," particularly in the Israel-Palestine context.⁶⁵ This follows from almost 50 years of Israeli occupation in the West Bank of the Jordan Valley, and in the view of leading international legal scholars such as Andres Zimmerman the ongoing applicability of the law of occupation to Gaza in the aftermath of the Israeli military withdrawal.⁶⁶ The lack of analysis in charting the effects of 'transformative' occupations on the lives of women underscores the conceptual and practical difficulties of taking bodies of law created in periods when there was much less attention to the experiences, rights and interests of women. With such legal lacunae, there is a real danger that these harms will be obscured or ignored in the regulation and oversight of situations of occupation as well as in the accountability mechanisms that may follow negotiated settlement between the male military protagonists.

This working paper now turns to address in a preliminary way the experience of women living under occupation.⁶⁷ The goal is to assess the extent to which the daily, lived experience of occupation is regulated (or not) by existing

64 This is leaving aside the question as to whether Gaza is occupied under international law and including Gaza within the geographical terrain of occupation. Moreover, for any researcher including myself, as Schutte has asserted, "unless exceptional measures are taken to promote a good dialogue" it is extremely difficult to have a nonhierarchical dialogue. Schutte refers to this as "incommensurability". Her analysis is based on the relations between dominant and subaltern people across borders, but is equally applicable to addressing the harms of women under occupation from an external perspective. It also underscores the importance of grounded research as a means of acknowledging and revealing those hierarchies and differences.

65 Roberts, *supra* note xx; See also, Gregory H. Fox, *Transformative Occupation and the Unilateralist Impulse*, INT'L REV. RED CROSS, VOL. 94 NO. 885 (Spring 2012).

66 Note in particular the position of the ICRC as articulated in its Report *Humanitarian Law and the Challenges of Contemporary Armed Conflict* (2015) with respect to occupation, and specifically functional occupation (with obvious application to Gaza)

"The ICRC considers, however, that in some specific and rather exceptional cases – in particular when foreign forces withdraw from occupied territory (or parts thereof) but retain key elements of authority or other important governmental functions usually performed by an occupying power – the law of occupation may continue to apply within the territorial and functional limits of such competences. Indeed, despite the lack of the physical presence of foreign forces in the territory concerned, the retained authority may amount to effective control for the purposes of the law of occupation and entail the continued application of the relevant provisions of this body of norms. This is referred to as the "functional approach" to the application of occupation law. This test will apply to the extent that the foreign forces still exercise, within all or part of the territory, governmental functions acquired when the occupation was undoubtedly established and ongoing.

67 More of this data will be presented in a monograph length consideration of the topic. My field work has been conducted through multiple visits including the Autumn/Winter 2011 and December/January 2015. Throughout, I sought to explore the connections between occupation/conflict harms with broader issues of gender violence and gender exclusion in both societies by interviewing a range of women's and human rights organizations in Israel and in the OPT.

legal norms, and how changes to the modalities of occupation have (or have not) been managed by law. Throughout, connections are made between occupation/conflict harms with broader issues of gender violence and gender exclusions present for women in their communities. An entry point to this analysis is to understand the complexity and compounded nature of the harms experienced under occupation, through an intersectional analytical approach.⁶⁸

a. "Surfacing" Occupation

One deeply challenging aspect of addressing the gender of occupation in the long-term OPT occupation, is the prior obstacle of 'surfacing' occupation itself. As numerous scholars and policy makers have noted in the Israeli-Palestinian context, the normalization of occupation within the 'green' line, means that civil society, as well as political and legal discourses in Israel are primarily focused on a wide spectrum analysis that prioritizes broadly defined security threats, terrorism, settler expansion and military responses to enable containment. In this securitized space there is a form of legal and political erasure to the fact and consequences for the civilian population of occupation.⁶⁹ This form of shifting means that it remains a challenge to address occupation per se much less to observe and account for the gendered consequences of occupation.

Based on a series of interviews in Israel during ongoing fieldwork (within the 1967 borders) it was notable that mainstream human rights organizations do not address or substantially include gender concerns or experiences in their reporting on conflict/occupation related human rights or humanitarian law violations.⁷⁰ Gendered experiences of occupation or gendered interfaces in the conflict zone were viewed as peripheral or marginal in the discourse of human rights/humanitarian law harms being addressed. In general some skepticism was mooted as to how such violations could be incorporated and what the added value of this move would be.⁷¹ There was a consistent thread in all conversations that gender violence was 'not part of this conflict zone'. The emphasis on the lack of rape complainants through the various interfaces between Palestinian populations and Israeli soldiers was a position from which to negate the gender dimension to the occupation/conflict entirely.⁷² In parallel, a series of interviews with Israeli organizations whose mandate addresses intimate violence (primarily assault, rape, domestic violence) within the state of Israel revealed little 'seen' connection between rates, forms, and patterns of intimate violence and the context of broader conflict/occupation in the jurisdiction.⁷³

By contrast, in a series of interviews with Palestinian Organizations, gendered experiences and gender harm were at the forefront of occupation analysis.⁷⁴ Women were viewed as bearing substantial burdens containing distinct gender dimensions.⁷⁵ In particular, the gendered impacts on freedom of movement, family life, marriage, birth, death, stop and search (particularly at checkpoints, crossings and airports were viewed as deeply gendered experiences with specifically articulated gendered harms following). Nadera ShalhoubKevorkian has strikingly illustrated the way in which the dynamics of conflict and occupation have resulted in a 'frontline' role for Palestinian

68 My colleague Eilish Rooney at the Transitional Justice Institute has pioneered this approach to intersectionality in conflict.

69 This maps onto Stan's Cohen analysis of denial and its role in sustained human rights abuses on a systematic scale within a body politic.

70 Interviews with staff at B'tselem and ACRI (2011). Fieldnotes on file with author.

71 *Id.*

72 The contrast lies with other high profile occupations such as the Indonesian military occupation of East Timor in which Timorese women were the victims of sexual violence. A truth process (CAVR) established in 2001 found significant evidence that throughout the years of occupation women "[w]ere raped by Timorese soldiers, exposed to sexual discrimination and were frequently used as sexual slaves". See Susanne Allden, *Internationalising the Culture of Human Rights: Securing Women's Rights in Post Conflict East Timor*, 1 Asia Pac. J. on Hum. Rts. & L., 1, 11 (2007).

73 2011 Interviews with Rape Crisis Center staff in Tel-Aviv & Jerusalem.

74 See e.g. interviews with Al Haq, Women's Center for Legal Aid and Counselling.

75 It is useful here to note the literature that broadly dismisses the effects or harms of occupation. Kontorovich argues, for example, that one sustained practice of the occupation settlements "do not appear to have direct individual victims". His analysis is located in the gravity assessment of the ICC statute (Article 17 (1) (d) of the Statute), drawing selectively on the position papers of the ICC prosecutor and claiming that the primary criterion is the 'number of victims', particularly the number of deaths. Eugene Kontorovich, *When Gravity Fails: Israeli Settlements and Admissibility at the ICC*, 47 ISR. L. REV., 379-399, 379, 387 (2014). His argument is part of a broader claim that the ICC would not have jurisdiction over the "settlement enterprise" as such, and that the 'transfer' crime does not involve murder or direct physical violence. In his view, according to "many" authorities, the settlement activity may be "purely consensual". *Id.* at 389.

women in confrontation with the state of Israel as public space has been closed to or contains detention and other challenges for men.⁷⁶ This disconnect in the perceptions of a small though key sample of human rights and gender organizations, exposes some of the difficulties that exist in bringing gender into any conversation addressing violations of the law of occupation as well as in creating a deeper and more nuanced understanding of women's lives under occupation.

b. The Intimacy of Occupation for Women

A growing picture of women's experiences of harm under occupation is emerging bottom up – from narrative based research and oral history projects articulating the experiences of harm drawing on the subjects' own voices. For example, small scale studies of Palestinian's women's experiences from 2000-2003 during the Second Intifida illustrate the indescribable and invisible ways in which women as the mothers of children killed during the Intifida both managed the experience of having lost a child, the difficulties of accessing the body of the deceased, and the barriers to burial of the dead in the context of occupation;⁷⁷ the complexity for women of accessing family members and spouses across the Oslo agreements' defined control areas A, B and C, and the ongoing challenges to women of living in the shadow of the settlements, the wall and the myriad of new and under construction routes in the OPT to which Palestinians have limited or no access.⁷⁸

By using a life-span analysis, this section of the working paper gives some insight into the depth and complexity of women's lives under occupation. What does it mean to be a girl child born into occupation, a female child living under occupation, a woman coming into adulthood under occupation, a woman seeking to marry and have a family under occupation, a woman giving birth under occupation, a woman raising children under occupation, a woman trying to work under occupation, a woman traveling from one place to another under occupation, a woman undertaking family and communal roles under occupation, a woman who is ill under occupation, a woman who dies under occupation? What does the law of occupation say to the life-cycle of a woman who can expect to be born and has lived or lives all of her adult life under occupation?

Births, Deaths and Marriages

A small number of scholars have opened up new vistas on the experiences of women under occupation. Nadera Shalhoub Kevorkian's book *Security Theology, Surveillance and the Politics of Fear* takes as its departure point a theorization of the colonial regime of living and dying in Israel-Palestine.⁷⁹ The book addresses securitization, surveillance, colonial action, the geography of fear, genocide and sociocide. In particular, her work provocatively addresses the ways in which the exercise of biopower is intertwined with race and colonialism in a context of occupation. Shalhoub Kevorkian's interweaving of birthing experiences offers feminists the means to re-conceptualize the harms that can result from the regulation of a highly intimate part of a woman's life under occupation. Here the assignment or revocation of permanent residency ("Jerusalem ID") does not allow the unconditional right to reunite with family members and is not passed on to children. In parallel the denial of building permits, house demolitions and the denial of birth certificates to Palestinian newborns means that the experience of pregnancy for women in OEJ is fraught with layered and toxic insecurities. Shalhoub Kevorkian's focus on the politics of the everyday remains an important thematic thread avoiding the generic pitfall of a focus on victimhood but also leaving space to address resistance and agency. Thus the experience of pregnancy and birthing is framed by the occupation practices of spatial control, and the underlying politics of demographic insecurity. It states the obvious to note that occupation law does not speak directly to the 'private' regulation of women's lives. This is another international law regime in which the distinction between public and private operates

76 NADERA SHALHOUB-KEVORKIAN, *SECURITY THEOLOGY, SURVEILLANCE AND THE POLITICS OF FEAR* (2015)

77 Faiha'Abdul Hadi, *Women's Centre for Legal Aid and Counselling If I Were Given a Choice Palestinian Women's Stories of Daily Life during the Years 2000 To 2003 Of the Second Intifida* (2007).

78 Women's Centre for Legal Aid and Counselling, *Women's Voices: In The Shadow Of The Settlements A 2010 Report On Israel Human Rights Violations Against Palestinian Women* (2010).

79 NADERA SHALHOUB-KEVORKIAN, *THE POLITICS OF BIRTH AND THE INTIMACIES OF VIOLENCE AGAINST PALESTINIAN WOMEN IN OCCUPIED EAST JERUSALEM* (2015).

not only to enable complimentary patriarchies to exercise control over women's reproductive and sexual lives, but also underscores the extent to which the regulatory preoccupations of the law are entirely divorced from the lived realities of women's lives.

Giving birth in a situation of conflict is characterized by scarcity. This includes an absence of material resources, limits or destruction of public health access and support, spatial deprivations depriving women of access to spouses, family and clan. Moreover, the mobility of women is greatly affected by conflict.

... women's mobility is in general lower than men's, due to their responsibility for children, the elderly and disabled relatives, as well as societal restrictions upon travel without male accompaniment.⁸⁰

In the context of occupation the "intricate and complex" system of military checkpoints and closures throughout the OPT has self-evidently affected women's experiences of childbirth. Thus,

Military occupation not only renders journeys to medical centers exceedingly difficult but also, in some instances, results in women being forced to give birth at checkpoints.⁸¹

Pregnancy and childcare delivers heavy gender tolls on women living under occupation. A focus on the pregnant woman offers an unusual entry point into the embodiment of structural and direct violence under occupation. The vulnerability of the pregnant female body combined with its potent symbolism as the carrier of the 'nation', makes the woman carrying a child a unique target for direct and indirect violence.⁸²

In parallel to the control and constraints exercised on birthing, there is co-existent control resulting from the interface of occupation with the private and intimate lives of women and men. This has been termed by Shalhoub Kevorkian's as "bedroom" security. Specifically she exposes the ways in which issues of residency status and the monitoring of intimate relationships exposes the layered nature of occupation practices as well as the treatment of particular groups in contested polities.⁸³ This can range from the direct surveillance of homes, the violation of home space for the purposes of house raids, search, seizure, arrest and detention – often timed for early morning when the household is likely to be present and startled (and less resistant).⁸⁴ These security practices, part and parcel of the occupation regime exposes women and children to the visible gaze of male soldiers, often in various stages of dress and undress. The Women's Centre for Legal Aid and Counseling conservatively estimates that the Israeli military conducts close to 1,400 night raids on Palestinian communities each year. The report, which was based on 100 testimonies collected from women in 34 locations who experienced raids in 2014 and 2015, also notes that the Palestinian communities most affected by night raids are on average located within 2 kilometers of an Israeli settlement built in violation of international law. The result is the undoing of the home as a safe space: a phenomenon that has been recorded in conflict zones as far apart as Northern Ireland and India.⁸⁵

80 *Id.* at 4.

81 Yakin Erturk, *Mission to Occupied Palestinian Territory*, U.N. Country Report, E/CN.4/2005/72/Add. 4, United Nations Economic and Social Council, Commission on Human Rights. This study, conducted in 2005, estimated that between 2000 and 2002, 52 women gave birth and 19 women and 29 newborns died at military checkpoints. In Shalhoub-Kevorkian's work, she includes several quotes, that thematically and literally document this harm, including: "My daughter was born 17 months ago, and I still dream that I lost her while at the checkpoint" Shalhoub-Kevorkian, *supra* note ixix at 9; "Do you know any pregnant woman who needs to cross checkpoints, ride a bus, leave her kids alone at the mercy of soldiers throwing tear gas bombs, under their [surveillance] that are surrounding our area ... to make sure the new baby is born in Jerusalem ... for only if she is born here can she survive the terror". *Id.* at 8; "They treated me like a criminal; they prevented me from reaching the hospital when I was in dire need just to see a doctor and make sure I was not losing my son ... All this while I was alone, for my mother could not get a permit and my husband was already in Jerusalem waiting for me at the hospital..." *Id.* at 13.

82 THE POLITICS OF BIRTH undertook qualitative data collection, examining 22 birth stories and 118 questionnaires from pregnant women to give voice to the experiences of childbirth under situations of insecurity, surveillance, and uncertain status. Shalhoub-Kevorkian, *supra* note ixix. See also Yuval-Davis and Anthias (1989) on women as the biological reproducers of ethnic and national collectives. NIRA YUVAL-DAVIS, WOMAN-NATION-STATE (Floya Anthias ed., 1989)

83 *The Politics of Birth and the Intimacies of Violence Against Women in Occupied East Jerusalem*, BRIT. J. CRIMINOLOGY 1 (2015); Nadera Shalhoub-Kavorkian, *Terrorism and the Birthing Body in Jerusalem*, in AT THE LIMITS OF JUSTICE: WOMEN OF COLOUR THEORIZE TERROR (Suvendrini Perera and Sherene H. Razack eds., 2014) at 38-56.

84 An interview yielded the following observation:

... that Israeli soldiers were in the village every other night, waking mothers up, terrifying children, conducting searches, arresting people, and instilling fear, to the point that mothers believe it is not a question of whether their house will be raided and their children arrested, but rather a question of when. If this does not cause insecurity.

85 Colm Campbell & Ita Connolly, *A Model for the "War Against Terrorism"? Military Intervention in Northern Ireland and the 1970s Falls Curfew*, 30 J. L. & Soc'y 341, 372-73 (2003).

Intimacy regulation includes the right to marry (or not). This issue was brought into sharp relief by the 6-5 decision of the Israeli Supreme Court when reviewing The Citizenship and Entry into Israel Law (Temporary Order) 2003, barring Palestinians from living with an Israeli spouse inside Israel—family unification—on the basis that the ban did not violate rights enshrined in the country's basic laws. The law denies spouses from the OPT who are married to Israeli citizens or permanent residents the opportunity to acquire Israeli citizenship or residency rights. In general, foreign nationals married to Israeli citizens undergo a graduated process of residency status with security checks along the way, and citizenship is generally processed within four years. If the foreign spouse is Jewish, Israeli citizenship can be granted immediately. The law's impact is significant on potentially thousands of Palestinian spouses and their children. Despite the impact of a law organically connected to the occupation and the legal regulation of population movement, occupation law in general does not speak to the complexities of regulating family and marital life. One complex deference point in occupation regimes has been the formal abrogation of responsibility for private and family affairs to the 'local' religious regimes. In practice, occupation zones are not rule free on family, marital and intimacy regulation. A complex web of rules crisscross the domestic (occupied territory) regulation of marital and familial status with the law of the occupying state, allied with a network of sub-regulation involving various religious hierarchies operate as a form of directed fragmentation – designed in part to avoid coherent challenge to rules that operate in gender, ethnic and religiously discriminatory ways.

Finally, the regulation of the rituals and practice of death and dying in occupied territory have come starkly into view in recent times. In parallel, attention to the gendered dimensions of death and dying under occupation have been surfaced by Palestinian feminist scholars, drawing attention to these neglected spaces in which power, domination and structural control are played out.⁸⁶ The burial of the dead is a family affair, but is also a gendered practice, with women and men respectively playing out important ritualistic, communal and individual roles as burial remains a touchstone on the maintenance of community identity. Awareness of the necropolitics of space in sites of transformative occupation reveals that the politics of erasure, control and vulnerability pervade all aspects of human life and life ending. Exercising control over dead bodies and their burial has been described by Mbembe as creating “new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of living dead”.⁸⁷ When women are at the forefront of burial practice, or denied the rights to bury their dead in traditional and accepted ways within their communities, they take on the “frontline” role of challenging occupation through female practices of grieving motherhood, shame, confrontation and guilt.⁸⁸

c. Daily Life: Negotiating Territory and Space under Occupation

The spatial challenges of occupation are multiple and have highly distinct gender implications. Specifically, at the macro level in Israel-Palestine, there is the territorial split between Gaza and the West Bank. Gaza was first occupied by Israel in 1967. Israel disengaged from Gaza in 2005, and the following year Hamas won a legislative victory over the PLO's Fatah, resulting in physical, political and economic isolation for the Strip's inhabitants.⁸⁹ International isolation heightened in the aftermath of Operations Cast Lead and Protective Edge, exacerbated by the continued intransigence of Fatah-Hamas reconciliation moves, deep security reliance between Israel and Egypt and regional instability making this densely populated area highly unstable and the lived lives of those who inhabit it awful

86 See e.g., Nadera Shalhoub-Kevorkian, *Criminality in Spaces of Death the Palestinian Case Study*, BRIT. J. OF CRIMINOLOGY (2015).

87 Achille Mbembe, *Necropolitics*, 15 PUBLIC CULTURE, 11-40, 40 (Libby Meintjes trans., 2003) (emphasis in the original).

88 Human Rights Watch, among others, has documented the prevalence of disappearance in Mexico as well as the continuing harm to families and mothers, in particular, unable to bury their deceased. HRW, *Mexico's Disappeared: The Enduring Cost of a Crisis Ignored*, (Feb. 20, 20). See also Regina M. Edmonds, *Transforming Loss Into Action: Mothers from Plaza de Mayo to Juarez, Mexico*, 1 J. OF MOTHERHOOD INITIATIVE (2010) (“While the military attempted to make their victims invisible and anonymous by burying them in unmarked graves, dumping their bodies into the sea or cutting them up and burning them in ovens, the Mothers insisted that the disappeared had names and faces. They were people; people did not simply disappear; their bodies, dead or alive, were somewhere; someone had done something to them.”); Sylvia Karl, *Missing in Mexico: Denied Victims, 3 Neglected Stories*, Cult. & Hist. Dig. J. 18 (2014); and Sylvia Karl, *Rehumanizing the Disappeared: Spaces of Memory in Mexico and the Liminality of Transitional Justice*, 66 AM. Q. 727, 727-748 (Sept. 2014).

89 GISHA—THE LEGAL CENTER FOR FREEDOM OF MOVEMENT, *The Gaza Cheat Sheet: Real Data on the Gaza Closure* (2015) available at: http://www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf.

on multiple indicators.⁹⁰ Access between both geographies is cut off, with marked consequences for family and community connections, including marriage, death, birth, community and family integration, and intergenerational relationships.

In the West Bank, the security wall dominates the access arena, with particular and highly regulated checkpoints being the entry and exit spaces, where heightened scrutiny and the capacity of being subject to military questioning and detention impact in high-frequency ways on women's daily lives. There is a distinct female presence in these sites of access—entry and movement into and out of the occupied territories. The masculinity of the space is also notable in the military presence that overshadows control of movement from one space to another.

Aside from the security wall, the OPT is spatially divided based on a formula of (temporary) agreement derived from the Oslo Accords. Under that Accord, an interim agreement designed to lead to Final Status negotiations, all West Bank land, excluding East Jerusalem falls into one of three categories, Area A (currently 18%), which is in theory under full PA security and civil control though there are frequent Israeli incursions; Area B (currently 21%) under mixed PA/Israeli (mostly Israeli) control; and Area C (currently 61%) under full Israeli control of security, civil affairs and building with the PA controlling for the non-Israeli civilian population, civil matters (e.g. family law) that do not impinge on Israeli competencies). These spatial geographies create a microcosm of regulation that creates multiple encounters with military and civilian regulation of individual lives (as well as settlers in multiple forms) for women. The spatial realities create regulatory disjunctions for the population as a whole,⁹¹ but with specific effects on women's lives.

In the Israel-Palestine context there has been a dearth of research exploring the ways in which conflict/occupation specific harms have affected women, with some notable exceptions from non-governmental sources.⁹² Moreover, as I have articulated elsewhere, the privileging of knowledge in human rights discourses imbued with hierarchies of harm, which notably elevates direct physical harms to the body as most egregious, means that the range of experiences women might define as harmful, abusive and the responsibility of the state(s) are excluded from the conversations that predominate in identifying the 'relevant' human rights and humanitarian law violations that 'count' for scrutiny in the context of occupation.⁹³ This has meant that the consistent impediments to free movement will invariably have lower visibility and status than sexual or direct physical harms, even though the cumulative effects of closure, physical containment, estoppel in access to education, health and family may have staggering social, economic and physical effects on women.

A reflection on the limitations placed on free movement within occupied territories underscores the gap between the harms that have visibility and status under the laws of occupation and those gendered harms that are rendered invisible to that body of legal norms. Here one can also take note of the increasing dependence on surveillance and securitization allied with limitations on movement. As Shalhoub-Kevorkian cogently notes:

The Israeli security and surveillance apparatus results in severe spatial restrictions for Palestinian Jerusalemites, limiting their access to family, social services, educational institutions and health facilities.⁹⁴

90 Gaza has one of the highest unemployment rates of any economy in the world (41.5 percent overall, 58 percent for youth). 80% of the population relies on donor aid, 39% is below the poverty line. Operational Protective Edge destroyed what there was of an agricultural sector, there are virtually no exports and the territory is sealed off from external movement in and internal movement out. See International Crisis Group, *No Exit? Gaza and Israel between Wars* (Aug. 2015) at 7 available at <http://www.crisisgroup.org/en/regions/middle-east-north-africa/israel-palestine/162-no-exit-gaza-and-israel-between-wars.aspx>

91 The most obvious of which is the highly complex terrain of administrative permits allowing access to (or not) parts of the Occupied Territory

92 Palestinian Women's Research and Documentation Center, *Impacts and Challenges Facing Palestinian Families Regarding Residency in the Palestinian Territory: An Exploratory Study with a Gender Perspective* (2010); Women's Center for Legal Aid and Counselling, *Women's Voices: In the Shadows of the Settlements* (2010); Women's Center for Legal Aid and Counselling *'If I were Given the Choice ...' Palestinian Women's Stories of Daily Life During the Years 2000 to 2003 of the Second Intifada* (2007).

93 Fionnuala Ní Aoláin, *supra* note xxxviii.

94 Nadera Shalhoub-Kevorkian, *E-Resistance and Technological In/Security in Everyday Life*, 52 BRIT. J. CRIMINOLOGY, 55-72, 56 (2012) ("Wherever you go, you discover there is a checkpoint. Their borders are in our homes, lives, bodies and relationships."). *Id* at 61

The spatial limitations that have encroached and grown with the occupation in the OPT have distinct legal implications. While many occupation related human rights violations have garnered international attention in the context of the occupation, most notably the use of torture or ‘moderate physical pressure’ ultimately decry by the Israeli Supreme Court as a violation of international treaty and customary law to which the state is bound, other lesser status violations have received less notice and less attention.

If the face of torture in the context of the occupation was the young male Palestinian, the female face of occupation is best captured by the long lines of women and children standing and waiting processing each day at Qalandia checkpoint, one of the largest military checkpoints in the OPT, situated approximately 10 minutes from the center of Jerusalem. Official Israeli estimates indicate that 23,000 Palestinians or residents of East Jerusalem pass through this checkpoint each day.⁹⁵ Having spent many days passing through this checkpoint while researching in the territory, I can attest to the seething mass of humanity, mostly in female form, that exits and enters its clutches. One could dwell on the humiliation, personal and communal, that accompanies undulating daily transfer from one territory to another, but for the purposes of this analysis my goal is to reflect on the complexity of female centered harms that occur in these spaces. There have been births (women giving birth at checkpoints as they seek to access to medical care in Jerusalem from the OPT), deaths, the gendered verbal harassment of interface with young male and female soldiers who view and treat the other women as objects of threat, the experience of being treated as the othered ‘other’, the constant fear of indefinite detention without charge or trial, the taking of one’s scant legal papers, the fear of being recruited as informers, and the insecurity of not knowing if you will get through. These cumulative harms are daily and constant – and framed by a legal and political narrative of security. One could engage a separate analysis of security and liberty tradeoffs, but as Gross has argued, the process of optimizing tradeoffs between “security – liberty” are likely to be biased in ways that “result in systematic undervaluation of one liberty interests and overvaluation of security so that the balance that results is likely to be tilted in favor of security concerns at the expense of individual rights.”⁹⁶ What is invisible to the law of occupation is both the long-term effect of prolonged occupation with consistent daily limitation on the freedom of movement. A fundamental challenge for the feminist scholar as one accounts for how and where women experience the most consistent harms, is how the law should account for disparate gender impact. One specific recalibration that follows is to recognize and reorder the status of harms (and thus legality of action) to the civilian population based on duration and undue burdens on women.

d. Violence

It is worth observing that the female body under occupation holds both physical and symbolic space. On occupied bodies, Genevieve Lloyd has observed that, “Women qua women [are the] symbol of attachment to individual bodies, private interests and natural feelings”.⁹⁷ For a variety of complex cultural, social and pragmatic reasons women’s bodies may be deployed to public space in occupation settings that the generic patriarchal norms of their own cultural and affinity groups would otherwise disallow. Moreover, the violence that we have to disentangle in occupations is not only the crude and observable physical harms to persons but also the structural violence of everyday life. Here close attention to violence “demands a focus on the mundane, the ordinary rather than the extraordinary”.⁹⁸

Occupation is not benign. It is a form of structural and organized violence, both direct and indirect. There is

95 Press Release, Israeli Defense Forces, An Effort to Ease Travel Conditions for Israeli Arabs at Qalandia Crossing (Jan. 3, 2011), available at www.idf.il/1283-8805-en/Dover.aspx (last visited Apr. 19, 2016); Press Release, General Assembly, Committee on the Inalienable Rights of the Palestinian People, Middle East Situation Remains Critical, Special Committee on Palestinian Rights Told, U.N. Press Release GA/PAL/985 (June 21, 2005); Helga Tawil-Souri, *New Palestinian Centers: An Ethnography of the ‘Checkpoint Economy’*, INT’L J. CULTURAL STUD. 217, 224 (2009).

96 Oren Gross, *Security vs. Liberty: On Emotions and Cognition* (Nov. 1, 2011) in *THE LONG DECADE: HOW 9/11 HAS CHANGED THE LAW* (2012).

97 LLOYD GENEVIEVE, *SELFHOOD, WAR AND MASCULINITY IN FEMINIST CHALLENGES: SOCIAL AND POLITICAL THOUGHT* (Pateman and Gross eds. 1986) at 63, 76.

98 DOBASH, R. E., AND R. P. DOBASH, *VIOLENT MEN AND VIOLENT CONTEXTS RETHINKING VIOLENCE AGAINST WOMEN* (1998) at 142.

more to say on the gendered structure of that violence, yet a preliminary disaggregation would include:⁹⁹ Direct violence by occupying military forces; structural violence as a result of occupation, exacerbated in transformative occupations; the gendered violence of the settler population; and the violence of internal patriarchy within the Palestinian polity.

Direct violence by the occupying military forces

Occupation law's preoccupation with violence against women was historically marshaled by the law and practice related to penetrative sexual harm, or harms of a direct sexual nature. My preliminary analysis here addresses the ways in which normative and jurisprudential developments in the LOAC, ICL and Human Rights law rightly encroach on occupation practices in ways that reveal the gendered and sexual nature of military operations and practices affecting women. These shifts expose the ways in which the acceptability of, for example; coercive interrogation, spatial management, household raids and intimate containment of women may fall foul of the tightening unacceptability of coercive sexual practices in conflict across a range of sites. Thus, as the law related to sexual violence in conflict has augmented and deepened over the past three decades, it has also expanded to include a range of unacceptable crimes that include sexual coercion, forced nudity, sexual harassment as a form of ethnic and religious persecution, and a sustained acknowledgement that the definition of torture includes a range of sexually impressive harms. As noted by the Nuremberg Tribunal, the laws of war "are not static, but by continual adaptation follow the needs of a changing world".¹⁰⁰

Treaty-based prohibitions have increased, and sexual harm, coercion and violence are generally understood as a violation of both customary and international law. It bears reminding that sexual harm is characterized by its infliction "upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim's dignity".¹⁰¹ Equally, the religiously and culturally conservative reality of women's lives that frame their interfaces with military forces in their homes, checkpoints, detention centers and prisons are factually and legally relevant in assessing the claims of sexual coercion and sex-based harms under occupation.

Structural violence as a result of occupation, exacerbated in transformative occupations

Structural violence references the effects and practices of decades of institutionalized dispossession, dehumanization, and the persistent denial of the most basic human rights. One of the most illustrative examples of structural violence is the well-established practice of house demolitions in the occupied territories. For example, on February 3 2016, Israeli newspaper reports indicated that 23 homes were demolished in the Hebron area to make way for an IDF training zone. Initial reports indicated that 60 children and 18 adults were left without homes.¹⁰² The practice has produced an extensive literature, much of it critical.¹⁰³ As Guy Harpaz, notes the "[s]cholarship has established that the practice is immoral, and ineffective, that it is contrary to Jewish morals, and international law, and that it may amount to an international crimes".¹⁰⁴ Notably while an extensive legal literature has emerged on demolitions, little of that analysis reflects on the specificity of gender harm contained in the loss of home, particularly in a society where women's lives operate primarily in the private sphere and the responsibility for children, family, and elder care fall almost exclusively to Palestinian women. In a society where the family is the

99 Robert S. Jansen (1997) ("interlocking ideologies of gender, colonialism and race")

100 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-16 October 1946, vol. 1, p 221

101 ICTY, *Prosecutor v. Milomir Stakić*, Trial Chamber Judgment, IT-97-24, 31 July, 2003, para. 757

102 Amira Hass, Israel Demolishes 23 Homes in Hebron Area to Make Way for IDF Training Zones, Haaretz (Feb. 3, 2016) available at: <http://www.haaretz.com/israel-news/.premium-1.701059>.

103 See e.g., Larry Backer, *The Führer Principle of International Law: Individual Responsibility and Collective Punishment*, 21 PENN. ST. INT'L L. REV. 509 (2002); Shane Darcy, Punitive House Demolitions, The Prohibitions of Collective Punishment, and the Supreme Court of Israel, 21 PENN. ST. INT'L L. REV. 477 (2002).

104 Guy Harpaz addresses and builds upon earlier analysis by Kretzmer and Simon, *supra* notes xx and xx, respectively, who have found the Court's reasoning to be contrary to international law and unpersuasive. In addition, by comparison to the jurisprudence of the Court in comparable areas, Harpaz demonstrates the lack of consistency in the Court's own approach. Guy Harpaz, Being Unfaithful to One's Own Principles: The Israeli Supreme Court and House Demolitions in the Occupied Palestinian Territories, 46 SRAEL L. REV., 401-431 (2014).

predominant site of the gendered division of labor and the value and context of women's lives are home based, home destruction makes the vulnerable ever more exposed.¹⁰⁵ Dislocation in general, but specifically the costs of home destruction, has calamitous effects for Palestinian women.

Intersectional analysis also reveals that the forms of structural violence differ greatly for different groups of Palestinian women. For example, Palestinian Bedouin women surviving in what are officially described as "unrecognized villages" are systematically denied land and resources, deprived of access to the most basic amenities (water and sanitation), and simultaneously critiqued for their lack of modernity and lack of interest in western-style development.¹⁰⁶

The gendered violence of the settler population

Sustained and now increasing attention has been given to the unrestrained violence used by settlers against the civilian population. The victims of such violence include men, women, boys and girls. This violence, which is prohibited under the rules of belligerent occupation, constitutes a separate form of unregulated violence enabled and supported by occupation. Such violence can also be viewed as an informal or tolerated part of the framework of occupation, but different in terms of the power being exercised, the degrees of impunity, and permissibility to that state sanctioned private violence.

Familial, Communal and Intimate Partner Violence

It is also necessary to recognize the co-existent experience of violence against women that comes from their own partners, families and communities. The violence, like VAW around the globe is the product of entrenched internal patriarchy within a highly stratified traditional society where as a matter of practice domestic and intimate violence is significant and ongoing for women. During occupation it is also produced by the interplay of complimentary patriarchies, illustrated via deference to honor codes that selectively affirm the integrity of the occupied population's family and religious codes as a basis for dis-applying the full panoply of legal sanction to intimate partner violence. Specific examples include the deference given by Israeli courts to honor claims (specified in lower sentences for intimate partner violence) effectively allowing for social equilibrium to be maintained between male orders.¹⁰⁷

In this regard, Shalhoub-Kevorkian has substantively addressed the femicide of Palestinian women.¹⁰⁸ She has meticulously documented how the murder of Palestinian women functions within a wider context of colonialization.¹⁰⁹ The deaths of Palestinian women from femicide remains one of the most significant human rights violations, which denies them meaningful security in their own homes and communities. Silences co-exist with such violence—interplay of the intersectional experiences that define women's lives living an interplay of the consequences of living under occupation and patriarchy. As scholars have noted, for Palestinian feminists and ordinary women alike "their activism [is] an intersectional struggle for women's rights and national liberation".¹¹⁰

The causalities of such violence are complex, but are inherently intertwined with the compromised masculinities of Palestinian men who exercise little control over their public, working and external lives, and whose compensatory

105 On gender based violence in general and the structure of Palestinian family life see JAMILEH ABUDUHO, GIVING VOICE TO THE VOICELESS GENDER BASED VIOLENCE IN THE OCCUPIED PALESTINIAN TERRITORIES (2012) at 95-98.

106 NADERA SHALHOUB-KEVORKIAN, ANTONINA GRIECCI WOODSUM, HIMMAT ZU'BI & RACHEL BUSBRIDGE, FUNDINGPAIN: BEDOUIN WOMEN AND POLITICAL ECONOMY IN THE NAQQB/NEGEV FEMINIST ECONOMICS (2014) at 1-23

107 Shalhoub-Kevorkian "In many cases, the police, as substantiated by our interview subjects and by the literature, do not treat the murder of Arab women as homicide cases, but as expressions of a cultural norm or of "traditional" attitudes towards women ... As a source of much of the systematic oppression practised against Palestinian communities, the Israeli police system is not particularly interested in preventing these killings. Shalhoub-Kevorkian, *supra* note cviii at 306

108 Nadera Shalhoub-Kevorkian has insisted on the use of the term 'femicide' rather than 'honour crimes' to refuse the justifications that bestow honour on those who kill and abuse women

109 Nadera Shalhoub-Kevorkian & Daher-Nashif S., *Femicide and Colonization: Between the Politics of Exclusion and the Culture of Control*, 19 VIOLENCE AGAINST WOMEN 295 (2013).

110 Kim Jezabel Zinngrebe, *Open Space Reflections On The Silence On Sexual Violence Among Palestinian Feminists In Israel*, 112 FEMINIST REVIEW, 85, 87 (2016).

practices of exercising control over women in their homes reaffirms patriarchal control and status.¹¹¹ Greater attention to the pressure faced by men under occupation and the sustained de-legitimization of male status and power in Palestinian societies creates a complex dynamic in male exertion of power.¹¹² As comparative research on masculinities in other sites has noted:

...aggressive behavior ... does not reflect a merely psychological distortion of their male personalities, but also learned values that are socially and culturally determined, personally interpreted, and reinforced by the symbolic system in which it occurs.¹¹³

3. Conclusion: Theorizing Occupation from a Feminist Perspective

Fundamentally, the goal of this working paper was to critically explore the nature of gendered harms experienced under occupation. Doing so required working through the experience of being a woman, a mother, a girl child, a grandmother, a combatant, and a victim in a situation of occupation and to see if the vocabulary of harm available under the law of occupations enables the identification of gendered harms in conflict or falls short. This preliminary review has identified salient limitations on the regulation of gender-based harms in situations of occupation, as well as abject silence on the ways in which the regulatory terrain of occupation law is essentially gendered. Given that one overarching goal of international humanitarian protection is to render effective safeguards to those most vulnerable in the maelstrom of conflict, the boundaries of the law reinforce historical and contemporary lacunae and expose the LOAC as an arena in profound need of gender scrutiny.

Exploring the harms women experience under occupation is valuable and long overdue but has some salient limitations. Scholars such as Helen Kinsella have valiantly warned against the danger of merely documenting the ways in which the law of armed conflict operates in a discriminatory fashion against women.¹¹⁴ This emphasis on the naturalness of women as victims is an ostensibly obvious path which ignores the ways in which “these ... natural facts of sex which are taken to explain displays of protection or predation are themselves produced through discourses of gender which give sex and sex difference meaning”.¹¹⁵ My conclusion affirms this salutatory warning, acknowledging that redressing the limitations of the law is not merely a proposition of “add women and stir,” but rather one that engages a critical and transformative approach to the totality of the law of occupation and whether it is “fit for purpose”.

In the Israel-Palestinian context the Post-Oslo period throws up complex questions around categorization of conflict: when conflict starts, ends, and how we define transition points. This has sizeable consequences for the material scope of application for occupation law. The stickiness of occupation, the fuzziness of endings in particular, and the relationship between partial peace agreement settlement and the continued application of the law of occupation remain under-theorized and practically ill-defined. The work of Roger Mac Ginty uses the concept of ‘no war, no peace’ to “conceptualize situations where a stalled and dysfunctional peace process manages to control much of the organized direct violence but fails to deal with the indirect violence of intimidation, ethnic tensions, militarisation, continuing violence, and endemic corruption”.¹¹⁶ This analysis is, I think, particularly cogent to capture

111 Importantly, the mixed and overlapping systems of legal regulation that result from occupation mean that recourse to legal systems are unavailable for women who are under threat. Shalhoub-Kevorkian notes this “generates a complex interrelationship between informal Palestinian systems and the formal Israeli legal system, resulting in the Palestinian community living what could be conceptualized as a hybrid and liminal state of existence” Shalhoub-Kevorkian, *supra* note cviii. at 300

112 Fredy Hernán Gómez Alcaraz & Carlos Iván García Suárez, *Maculinity and Violence in Colombia Deconstructing the Conventional Way of Becoming a Man*, in THE OTHER HALF OF GENDER: MEN'S ISSUES IN DEVELOPMENT at 93-110 (2006) available at <http://promundoglobal.org/wpcontent/uploads/2015/02/The-Other-Half-of-Gender.pdf>.

113 *Id.* at 96. Alcaraz & Suárez note that domestic violence is the result of “... a series of considerations, strategies, ways of communicating, mental assimilation, and contexts which are produced and replicated by culture, social norms, and personal experience, and which also trigger anxieties and voids in men, which they in turn express and solve through violent action”. *Id.* at 98.

114 Kinsella, *supra* note x at 166.

115 *Id.*

116 Carolyn Nordstrom, *Shadows of War: Violence, Power and International Profiteering in the TwentyFirst Century* U. Cal. Press, 373 (2006) (citing Roger Mac Ginty, *No War, No Peace: The Rejuvenation of Stalled Peace Processes and Peace Accords* (2006). Some relevant statistics: A Study from Liberia in the aftermath of the peace process showed in 2007, four years after the end of the conflict found that in Nimba County, 26% of single women and 74% of married or separated women had been raped in the previous 18 months

the experience of women in situations of long-term 'transformative' occupations, and the fuzziness of transition points out of occupation. The fuzziness itself is arguably intentional, a way to undo the strict application of norms, to muddy the geographical frames of control and thereby make the application of the law fraught in multi-layered and highly legalized ways. This regime indeterminacy is, in my view, another form of lawfare in which murkiness of legal standards occludes protection for those who need it most.

It may well be the case that transformative occupations also function as a de facto form of political settlement. The singularity and entrenchment of occupation in the Israel-Palestinian context has left many commentators with a "no exit" view. This sense follows from a status quo that remains complex and entrenched, functioning side by side with fractured and highly dysfunctional partial self-government within the occupied entity. Historically, the law of occupation was precisely designed to stop occupation from becoming a political settlement and to stave off permanency pending the return of territory. One contemporary element of transformative occupation is that it functions as both a legal and political holding device with durability and density, thereby eliding with the kind of political settlements the law of occupation was historically designed to avoid. The complexity is substantial and regime form(s) difficult to disentangle. In Israel-Palestine we are seeing 'hybrids' between occupation regime and the emergent regime (which in other occupation contexts the occupiers are ostensibly working to encourage the establishment of). One might then view transformative occupied territories as distinct forms of political settlement with a form of permanent transitory-ness (or unsettledness) which are distinctly gendered in the encounters they produce – both physical personal and inter-governmental and inter-legal. Here, formal and legal structures are underpinned by the political settlement of 'how power is exercised in formal and informal ways', which distinctly regulates and controls women's lives in ways both anticipated (and not) by the law of occupation. Di John's notes that 'elites concede they have to acquiesce in a framework of power' – a motif which serves our understanding of the Oslo accords and the self-government arrangements it has created. The collective acquiescence in this sort of arrangement is not merely a stop-gap measure, it fundamentally prefigures any additional settlements that follow. It also limits the required realignment of the law of occupation to respond to its contemporary practice.

An important gendered point of conclusion is that despite the disparate characterizations between the occupier and occupied in the Israeli/Palestinian context, one liberal democratic regime poised against a less liberal and emergent regime whose democratic qualities are suspect, the point of convergence between these two entities for women under occupation is their complimentary patriarchy, the sense in which both cede proprietary value to religious doctrine in the regulation of women's lives, and a common lack of liberal thinking when restrictions on women are at issue. There is also the overarching presence and influence of external international male elites to account for in the mix. Here my central contention is that occupation law can serve the patriarchal interest of male elites and the interest convergence of both is unexpected but real. Complimentary patriarchy is evident in the deference to 'family rights', 'honour' and 'manners and customs', which while seemingly neutral and deferential concepts notoriously work against women's interests.¹¹⁷ There is sustained evidence most recently in the occupation of Iraq that cultural imperatives are allowed to limit and constrain the full rigor of occupation law in the case of women.¹¹⁸ Such cultural arguments are not raised as a barrier to protect men's dignity interests in the context of occupation. Although occupiers will stretch interpretation of prior legal norms to the benefits of the protected population and will manipulate legal norms to their own benefit, it remains consistent that interpretation does not bend to accommodate the needs and interests of protected female populations.

Most obvious is a sustained invisibility of women's lived lives in their myriad roles and identities under occupation. The double-layers to this invisibility have internal and external dimensions – connected both to the experience of

117 See Gardham & Jarvis, *supra* note xlii at 107-110 and see Jasen's (1997) study of how women are "subjected to interlocking ideologies of gender, colonialism and race and how dominant beliefs and hegemonic ways of thinking are capable of affecting women's experiences of childbirth in material ways." *Race, Culture and the Colonization of Childbirth in Northern Canada* 10(3) *Social History of Medicine*

118 MADELINE OTIS CAMPBELL, INTERPRETERS OF OCCUPATION: GENDER AND THE POLITICS OF BELONGING IN AN IRAQI REFUGEE NETWORK (2016); Nadjie Al-Ali, *Reconstructing Gender: Iraqi Women between Dictatorship, War, Sanctions and Occupation* 26 *Third World Quarterly* 739 (2005)

communities under occupation, the masculinity of regulation, and of perceived threat as well as to the lower status of women within their own communities. Surfacing women in multifaceted ways in the way of occupation is an essential aspect of this work.

In conclusion, it would be remiss to close this working paper without affirming the agency and resistance practiced by women living under occupation. That resistance is both manifest and subversive. It is revealed in birthing choices, mothering skills and maneuvering, the continued and defining presence of women in public space, in women's movement through and within territory, in community engagement, in solidarity, in challenging both within their communities and directly to the occupation regime. It manifests in the everydayness of women's lives under belligerent occupation where normality and predictability has long been suspended. Paying attention to the everyday has been a fruitful site for feminist scholars to reveal the complexity, beauty and determination of women's lives. Revealing the ordinary, as Palestinian scholars, such as Nadera Shalhoub-Kevorkian, have meticulously done for decades and connecting it directly to the regulatory regime of occupation is a means to demand interrogation of occupation law from a feminist perspective. This work is long overdue and this working paper represents a first effort in that direction.



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