2020

The Gender of Occupation

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Article

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"*[...] occupation as a concomitant of war and a temporary state of affairs pending a peace agreement*."[1]

"*If we keep on speaking sameness, if we speak to each other as men have been doing for centuries, as we have been taught to speak, we'll miss each other, fail ourselves. Again . . . Words will pass through our bodies, above our heads. They'll vanish, and we'll be lost. Far off, up high. Absent from ourselves.*"[2]

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[1] Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 582 (2006).

[2] LUCE IRIGARAY, THIS SEX WHICH IS NOT ONE 205 (1985).

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 sufficiency 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 have been marginalized or entirely absent.[3] This Article bridges that gap with a particular focus on the Occupied Palestinian Territories,[4] addressing selected aspects of the experience of occupation from a gender perspective and offering a new vision on the substance, interpretation, and application of the law.

Gender considerations, and more particularly the experiences of women, have generally been at the margins of doctrinal and policy conversations concerning occupation, particularly in the legal realm.[5] If considered at all, women are generally "added in" to the generic assessment of civilian protection in conflict.[6] Since 2001, we have seen a move, in part prefigured by the pressures

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[3] With some notable exceptions. *See, e.g.*, Nadera Shalhoub-Kevorkian, *The Politics of Birth and the Intimacies of Violence Against Palestinian Women in Occupied East Jerusalem*, 55 BRIT. J. CRIMINOLOGY 1187 (2015).

[4] Nomenclature of the Occupied Territories remains highly contentious. Various terminologies are used in Israeli Jewish discourse, including the term "administered" rather than "occupied," and the biblical place names Judea and Samaria are also used in political and religious discourse. However, as a matter of international law, these terms have no legal relevance, and the standard terminology for this occupation, like any other, is "belligerent occupation." *See* ORNA BEN-NAFTALI, MICHAEL SFARD & HEDI VITERBO, THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 2 (2018) [hereinafter THE ABC OF THE OPT]. I use the term based on its adoption in United Nations Security Resolutions and as applied by the Office of the United Nations High Commissioner for Human Rights. *See Occupied Palestinian Territory*, U.N. HUM. RTS. OFF. HIGH COMM'R, http://www.ohchr.org/EN/Countries/MENARegion/Pages/PSIndex.aspx (last visited May 21, 2020).

[5] Helen M. Kinsella, *Gendering Grotius: Sex and Sex Difference in the Laws of War*, 34 POL. THEORY 161, 164 (2006) [hereinafter Kinsella, *Gendering Grotius*]. In non-legal fields, including sociology and political science, one finds some attention paid to the experiences and subjectivities of occupation, but they remain 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). *See* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991), for a discussion regarding international law and women's marginality.

[6] This "add women and stir" formula has a long history in international law. For example, in the context of the post-World War I 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, [r]equests the Council to examine the possibility of women cooperating more fully in the work of the League." *Resolutions Adopted on the Reports of the Third* Committee, 92 LEAGUE OF NATIONS OFFICIAL J. SPEC. SUPP. 23, 27 (1931). This presumed overlap between the feminine and the civilian has been the subject of stringent feminist analysis, including Helen Kinsella's explanation:

> [T]he 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, *Gendering* Grotius, *supra* note 5, at 164.

of the UN Security Council-led Women, Peace and Security (WPS) Agenda to give recognition to gender/women as an analytical category in conflict settings.[7] This Agenda had the ambitious goal of centering the experiences, needs, and rights of women in the peace and security domain. It gives some limited capacity to address women's needs as victims of violence or address presumed conundrums when women appear as perpetrators of violence, but it does little to fundamentally engage with the overarching gender and power dynamics of occupation. In other disciplines, feminists have paid attention to a wider array of harms experienced under occupation, including the "occupation of the senses" that address how the technologies of occupation manage "language, sight, sound, time and space in the colony; the administration of who acts, who speaks, who gives birth and how, and who walks/moves/drives where and how; and what kind of language, music, smells, marches, colours, cultures and scenes are promoted and inscribed over the spaces, lives and bodies of the colonized."[8] Such insights enable a profound understanding of the harms of occupation but do not address the fundamental question as to whether existing legal frameworks, and primarily the law of occupation, are fit to address those harms.

As I explain in this Article, the rules governing occupation were not constructed with needs and experiences of women at the forefront. Moreover, scholars and practitioners have fundamentally and holistically failed to address what gendered rules, structures, institutions, and methods of intervention might be needed in contemporary occupations or come to terms with how contemporary occupations create new and complex legal conundrums not imagined by the founders of the field. This Article operates on the premise that the gendered dimensions of occupation in general and the Israeli-Palestinian conflict in particular have substantially underreported and underrepresented the needs of, and harms experienced by, women living under sustained occupation. The analysis in Part I gives a brief historical overview of the gender dimensions of belligerent occupation broadly framed. This historical grounding provides the contextual and chronological bases to frame contemporary application of occupation law. Part II follows with a regulatory analysis, addressing the scope and gaps of the relevant treaty frameworks, specifically the Hague Regulations and Geneva Conventions. Part III gives a general introduction to some of the key themes and approaches that are adopted by this analysis of gender and the law of

[7] The United Nations Women, Peace and Security Agenda was established by the adoption of United Nations Security Council Resolution 1325 in October 2000 with the goal, *inter alia*, of mainstreaming women's rights and security into the management, oversight and ending of conflict. *See* Fionnuala D. Ní Aoláin & Nahla Valji, *Scholarly Debates and Contested Meanings of WPS*, *in* THE OXFORD HANDBOOK OF WOMEN, PEACE, AND SECURITY 53 (Sara E. Davis & Jacqui True eds., 2018); *see also* Nicola Pratt & Sophie Richter-Devroe, *Critically Examining UNSCR 1325 on Women, Peace and Security*, 13 INT'L FEMINIST J. POL. 489-503 (2011).

[8] Nadera Shalhoub-Kevorkian, *The Occupation of the Senses: The Prosthetic and Aesthetic of State Terror*, 57 BRIT. J. CRIMINOLOGY 1279, 1279 (2017).

occupation in the Israeli-Palestinian context. Part IV concludes the substantive analysis by honing-in on certain illustrative examples that give context and depth to the broader claims. The conclusion points to the necessity of gendering the legal and political analysis that intersects with occupation practices and procedures, underscoring the costs to women and girls from this intellectual and policy failure.

I. HISTORICAL CONTEXTUALIZATION

Understanding the historical development and driving imperatives of occupation law is essential to assessing its contemporary application in general and to better analyze specific practices of occupation in Israel-Palestine. We cannot fully appreciate the gendered underpinnings of the law without a long historical view. As one of the longest running contemporary occupations, the legal management of the Occupied Palestinian Territories is illustrative of core gendered problematics of the applicable legal regime of occupation, and that regulation of the territories has equally shaped the general law of occupation in unique ways, many of which are also profoundly gendered.

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."[9] Occupation is not a historic anomaly. Practices of occupation have long and troubled histories. The locales of occupation, since the beginning of the twentieth century, include—and are not limited to—Albania, Nicaragua, Belgium, France, Luxembourg, 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,[10] 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. Contemporary armed conflicts also broadly affirm that temporary occupation often follows from armed hostilities between States.[11] The

[9] Judith Gardam, *War, Law, Terror, Nothing New for Women*, 32 AUSTL. FEMINIST L.J. 61, 69 (2010).
[10] Rana B. Khoury, *Western Sahara and Palestine: A Comparative Study of Colonialisms, Occupations, and Nationalisms*, NEW MIDDLE EASTERN STUD. 1, 1 (2011) ("The Moroccan occupation of Western Sahara draws considerably less attention than the Israeli occupation of Palestinian territories.").
[11] An obvious and recent example is the occupation of Iraq. *See generally* 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 (2005). Contemporary overlap between the law of occupation and international territorial administration has made contemporary application of occupation law tricky, *see* Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence,*16 EUR. J. INT'L. L. 697 (2005).

ubiquity of occupation underscores the value of a gendered analysis and the lack of sustained attention to the experiences of women as a historical and contemporary matter.

Most classic definitions of occupation underscore the temporality of its status. Occupation is conceptually considered an aberration, a temporary state of affairs, a holding position 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, the Fourth Geneva Convention, and Protocol Additional to the Geneva Conventions as well as freestanding customary international law norms.[12] The temporary conception and practice of occupation is belied by long-term occupations, including the half-century-long belligerent occupation of the West Bank and Gaza by Israel.[13] This form of extended and exceptional occupation has been termed a "transformative" occupation[14] to account both for the sustained reality of apparently unending occupation as well as the scope and depth of changes incurred by long-term military control by an occupier. In long-term transformative occupations, driven significantly by the practices of occupation in the Occupied Palestinian Territory, it is broadly agreed that human rights law has parallel application with the law of armed conflict, though what that actually means in practice continues to be robustly debated.[15]

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[12] Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, U.S.T.S. 539, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention (IV)]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC (IV)]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP1]. *See also* 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 175 (2005). Note that Article 43 of the Hague Convention required that the laws of the occupied country be respected unless the occupier was "absolutely prevented" from doing so. Hague Convention (IV), *supra*, art. 43. There has been some subsidiary regulation of occupation by state administrations over a number of post-war occupations. This includes the 1949 Occupation Statute established by the three Western Allies in 1949. *See* Occupation Statute Defining the Powers to Be Retained by the Occupation Authorities, Apr. 8, 1949, T.I.A.S. No. 2066, 140 U.N.T.S. 202 (entered into force Sept. 21, 1949).

[13] Israel's occupation of the West Bank of the Jordan River, the Gaza Strip, the Sinai Peninsula, and the Golan Heights commenced after the six-day war of June 1967. Jewish settlement in the Occupied Palestinian Territories began in 1967. The first settlement was Kfar Etzion. The territory upon which the settlement commenced was seized by the military commander for military purposes. *See* THE ABC OF THE OPT, *supra* note 4, at 1.

[14] *See generally* Roberts, *supra* note 1. Transformative occupation is a concept applied to long-term occupations where occupiers have sought complete restructuring of the political, economic, and social life of the occupied territory.

[15] With respect to Israel, the International Court of Justice has found that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9). The Israeli official position is that international human rights law does not apply to the OPT. Interestingly, however, the High Court of Justice has occasionally applied it as a complementary source to international humanitarian law. *See, e.g.*, HCJ 7957/04 Mara'abe v. The Prime Minister of Israel (2005) (Isr.). *See infra* Section II.A.

A. *In Historical View—The Limited Powers of the Occupier*

The principle *ex injuria jus non oritur*, or "law does not arise from injustice," functions as a central concept within the law of occupation.[16] It is inherently linked to the obligations of occupiers to the territory and the civilian population they control, and it 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 destroy legitimate rights."[17] 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.[18]

These threads illustrate that, historically, the principle of sovereign equality 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."[19] 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."[20]

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;

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[16] 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).
[17] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 29 (2d ed. 2012).
[18] *See* Pomponius (Dig. 49. tit. 15. s. 14.): "There are two kinds of postliminium, for a man may either return himself or recover something.", as translated in George Long, *Postliminium, in* A DICTIONARY OF ROMAN AND GREEK ANTIQUITIES 949, 949 (William Smith ed., 1875). Note that in this context, women were treated in a specific manner. George Long notes that "[a]s to a wife, the matter was different: the husband did not recover his wife postliminiumjure postliminii, but the marriage was renewed by consent." *Id*., at 950.
[19] BENVENISTI, *supra* note 17, at 30.
[20] *Id*. (citing PASQUALE FIORE, NUOVO DRITTO INTERNAZIONALE PUBBLICO, VOL. III 177 (Charles Antoine trans., 2d ed. 1885).

(2) The implementation of International Humanitarian Law 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.[21]

Reflecting on the core gender imperatives driving the law of occupation, one appreciates the centrality of territory and temporality in the construction of the legal rules. Thus, militaries (read generally 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 complementary 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 reflect not only broader mutually beneficial exchange frameworks in the law of armed conflict, but also the specific benefits of maintaining political and military status quo arrangements notwithstanding territorial loss during armed conflict. While protection is clearly a dominant element of occupation law, the essential point is that it is not a "best interest" of the civilian population that drives that protection interest. Rather, the long-term interest of the State to whom the territory will be returned, or the self-governance interests of the dominant polis is what shaped the law's approach to protection in occupied territory. In both approaches, women's rights and interests will be shaded negatively, particularly as the law of occupation bolsters traditional and self-serving patriarchal interests.

B. *The Legal Companions to Occupation*

Occupation is a highly regulated legal space and the law of occupation has a long and distinguished genealogy. Many of our existent legal rules regarding occupation developed in parallel to and overlap with the norms governing trusteeship, and Palestine was one of the territories that inaugurated

[21] MARCO SASSÒLI, ARTICLE 43 OF THE HAGUE REGULATIONS AND PEACE OPERATIONS IN THE TWENTY-FIRST CENTURY 1 (2004).

the mandate system of the League of Nations.[22] Understanding the ideologies and political imperatives driving the trusteeship system is a means to better appreciate the parallel and overlapping developments in occupation law and practice. Trusteeship was born in the nascent making of the post-World War I 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.[23] Trusteeship held "sovereignty . . . in abeyance" pending the eventual evolution of the territories to full independence, with the characteristic that administration was to benefit the local population and that it was subject to external oversight.[24] The conceptual bones of trusteeship borrowed on nascent occupation law framings found in Hague Law and provided the basis for the expansion of that law in the aftermath of World War II.[25] The dubious distinction of being variously subjected to trusteeship and occupation for almost nine decades creates a distinct legal landscape in Israel-Palestine, framing contemporary legal practices in uncharted ways. 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 masculinity of trusteeship derives from the inbuilt assumptions of tutelage, infantilization, and patriarchal ordering that defined both the colonial order and its inheritors.[26] Colonialism was a highly gendered process, reflecting the gender order of the metropole. As its successor, trusteeship's assumption of

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[22] Subsequently recrafted by the UN General Assembly. *See* Draft Trusteeship Agreement for Palestine: Working Paper Circulated by the United States Delegation, U.N. Doc. A/C.1/277 (Apr. 20, 1948).

[23] Britain gained the mandate over Palestine, Iraq, Tanganyika, and parts of Togo and Cameroon; France gained the mandate over Syria, Lebanon, and the rest of Togo and Cameroon; Belgium over Rwanda and Burundi; South Africa over South West Africa; Australia over German New Guinea and (on behalf of the British Empire) Nauru; New Zealand over Western Samoa; and Japan over the former German islands north of the equator. Written texts were agreed upon, 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* RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY (2008); Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics*, 13 EUR. J. INT'L L. 1037, 1037-52 (2002) (discussing the opportunity to increase the transparency and accountability of international transitional administrations as the possibility of a future crystallization of suspended sovereignty in international law arises).

[24] International Status of South-West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Advisory Opinion, 1950 I.C.J. Rep. 128, 150 (July 11) (separate opinion by McNair, J.).

[25] 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).

[26] *See generally* Vrushali Patil, *Contending Masculinities: The Gendered (Re) Negotiation of Colonial Hierarchy in the United Nations Debates on Decolonization*, 38 THEORY & SOC'Y 195 (2009). Tracing the history of tutelage through Roman law gives important insights into its function, operation, and maintenance of this doctrine over time. *See* John Andrew Couch, *Women in Early Roman Law*, 8 HARV. L. REV. 39 (1894). Tutelage exercised primarily over women found parallel expression in the legal doctrine of Patria Potestas, giving fathers unfettered authority over children. *Id.* at 41.

limited indigenous capacity, combined with the dogmas of civilized versus uncivilized communities,[27] entrenched legal doctrines harnessing notions of trust and protection to administer territories that were rhetorically defended as advancing the interests of native peoples but never included those subjects in the negotiation of legal norms.[28] In these multiple dimensions, modern occupation law and trusteeship, developed in similar timeframes, engaged the same legal and political actors and showed the same fault lines and preferences, including gender dogmas. The overlap and symbiosis of both legal regimes in Israel-Palestine is both striking and relevant to understanding the compressed and interconnected nature of the structural exclusion of women's and girls' lives from the dominant regulatory regimes.

II. REGULATORY FRAMEWORK

The law of occupation is one of the oldest bodies of legal norms practiced with some regularity between nation-states. It is composed of treaty law, customary law, and soft law norms that set out the obligations and expectations applied to belligerent occupiers. Treaty law remains the most significant source of law for defining and managing occupations. Specifically, the 1907 Hague Convention sets out a series of general rules on the methods and means of warfare and annexed to the Fourth Hague Convention are the Hague Regulations, which include important parts of the law of occupation.[29]

A. *The Genealogy and Content of General Rules Regulating 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 of particular relevance to this analysis:

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[27] ALEXIS HERACLIDES & ADA DIALLA, HUMANITARIAN INTERVENTION IN THE LONG NINETEENTH CENTURY: SETTING THE PRECEDENT 31-38 (2015).

[28] As feminist and post-colonial scholars have long noted, such participation was assumed impossible on the very basis of the presumed impediments that enabled trusteeship to emerge in the first place. *See* Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM & THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg, eds.) (1988).

[29] Hague Convention (IV), *supra* note 12; *see also* MAARTJE ABBENHUIS, THE HAGUE CONFERENCES AND INTERNATIONAL POLITICS, 1898-1915 (2019). It is notable that the first Hague Treaty negotiation had a significant presence of transnational women's organizing, specifically from the International Council of Women (ICW), the Women's Christian Temperance Union (WCTU) and the *Ligue des femmes pour le désarmement*. ABBENHUIS, *supra*, at 52-53.

> 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.
> 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.[30]

Article 46 is the historic provision most directly relevant to women's needs and protection under occupation before the passage of the 1949 Geneva Conventions, with a more comprehensive focus on the regulation of civilian life under occupation.[31] The emphasis on family, the right to life, private property, and religious tolerance comport with 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.[32] 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.[33] It is understood that the honor noted in the protective mantra is not the honor of the unequal or sexually violated female subject but rather the honor of the man or family to whom she is attached.[34] And it is obvious but worth re-emphasizing that the most egregious harms imagined to occur to women are penetrative sexual

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[30] Hague Convention (IV), *supra* note 12, arts. 46, 55. Other relevant provisions include art. 42 (stating "[t]erritory 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."). *Id.* art. 42, 43, 50.

[31] JUDITH GAIL GARDAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 58 (2001) (discussing the Hague Regulations and historical development of law relevant to women in armed conflict). *See also* Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence*, 46 INT'L & COMP. L.Q. 55 (1997).

[32] This has a parallel to the application of classical liberal theory to international law and international relations. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1996); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992). Note the contemporary overlap with the Responsibility to Protect doctrine. *See* INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), THE RESPONSIBILITY TO PROTECT (2001).

[33] 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. MIL. HIST. 713-35 (2005) (comparing "the memoirs of three combatants during the First World War" and discussing the similar concepts of male identity and military duty in each memoir).

[34] Fionnuala Ní Aoláin, *Sex-Based Violence and the Holocaust—A Reevaluation of Harms and Rights in International Law*, 12 YALE J.L. & FEMINISM 43, 66 (2000) [hereinafter Ní Aoláin, *Sex-Based Violence*].

harms, destroying their purity and chastity.[35] This conflation of dignity harms for women with sexual penetration has had an insidious effect on the protection of women in armed conflict,[36] not least because it has had a reductive effect conflating female harms to sexual violence and thereby expunging other conflict-related harms from view. Under occupation, this means that sexual violence occupies disproportionate attention, given its undulating and patriarchal connection to male status and male honor. In this reading, the presence of sexual violence will clearly signify harms to women, but often in a disaggregated and incomplete way, ignoring the layered and intersectional experience of violence that defines harm for women in extremis. The lack of recognition in the early treaty provisions for sustained or systematic penetrative sexual violence may also be incorrectly read as signifying the absence of gender-based harms under occupation historically, including extreme violence in other forms. To state the very obvious, the lack of recognition in law has little to do with the historical experience of sustained sexual harms by women in war generally, and under occupation in particular.

Examining the Regulations through women's eyes and the lived experiences of women under occupation in highly patriarchal and stratified societies makes it possible to see the relevance of other provisions. These include viewing general penalties (Article 46) in the context of house demolitions or respecting the laws in place in the territory under occupation (Article 43) as relevant to maintaining inequalities in divorce law, access to property, and access to children.[37] All of these rules have blunt gender aspects when closely and forensically examined. 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. Women's legal protection has a distinct historical genealogy, which I turn to here.

In 1949, in the aftermath of the Holocaust and World War II, 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 the rules that emerged a half century earlier. Sexual violence aside, the legal imagination as to the types of harms that women might experience generally or disproportionately on account of their gender is

[35] 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 generally* Nicoletta F. Gullace, *Sexual Violence and Family Honor: British Propaganda and International Law During the First World War*, 102 AM. HIST. REV. 714 (1997).
[36] Fionnuala Ní Aoláin, *The 'War on Terror' and Extremism: Assessing the Relevance of the Women, Peace and Security Agenda*, 92 INT'L AFF. 275, 279 (2016) [hereinafter Ní Aoláin, *War on Terror*].
[37] This is an issue I have addressed at length elsewhere. *See* Fionnuala Ní Aoláin, *Gendering the Law of Occupation: The Case of Cyprus*, 27 MINN. J. INT'L L. 107, 128-36 (2018).

notably constrained. Moreover, the limited references to women in the Geneva Conventions are overwhelmingly tied to the vulnerabilities of women as expectant or nursing mothers.[38] Geneva Convention IV is largely constructed from and in response to the Nazis' and other Axis regimes' concentration on selective and abhorrent practices of occupation during World War II. As literary narratives of occupation sites reveal, there were distinctly gendered experiences and traumas that followed occupation.[39] Little of that montage found expression in the law.

While one of the goals of Geneva IV was to better regulate the experiences of persons living under military occupation, the specific and distinct experiences of women are not reflected in—and are in fact obscured by—the law. Article 27 of the Fourth Geneva Convention is the provision most often cited when we discuss the legal consideration of 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 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.

Article 27 has some notable gendered fault lines. The motif of honor remains trenchantly tied to a patriarchal understanding of honor as belonging to a man and the woman as its vessel. Importantly, while rape is mentioned in

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[38] GARDAM & JARVIS, *supra* note 31, at 96 (2001).

[39] *See generally* KRISTEN DEN HARTOG & TRACY KASABOSKI, THE OCCUPIED GARDEN: A FAMILY MEMOIR OF WAR-TORN HOLLAND (2009); AGNES HUMBERT, RÉSISTANCE: A WOMAN'S JOURNAL OF STRUGGLE AND DEFIANCE IN OCCUPIED FRANCE (Barbara Mellor trans., 2008); CURTIS WHITFIELD TONG, CHILD OF WAR: A MEMOIR OF WORLD WAR II INTERNMENT IN THE PHILIPPINES (2011).

Article 27 of Geneva IV, it was not included in the Grave Breaches provisions of the Conventions, thereby marking it out as a crime of lesser importance and limited consequences.[40] Women and children remain inextricably tied together, fueling the "women and children" motif that has made it exceptionally difficult for women to claim autonomous harms under the law of armed conflict, including in the context of occupation.

The relevant legal framework is important on multiple grounds. First, awareness of the doctrinal limitations of the applicable law alerts 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 distinct regulatory gaps for women in recognition, accountability, and enforcement when their rights are violated under occupation. Second, the rule deficits are particularly relevant to ending conflict and occupation. When a territory transitions from occupied to representative and free-standing political status, accountability for fundamental and systematic violations of occupation law invariably persist. However, when "the law in these parts" is primarily based on the Fourth Geneva Convention, we need to have a thorough grasp on what is permissible and what is not, so that the law's regulatory scope is ascertained. This is the most direct route to claim-making on behalf of women during transitions from occupation. When there are no formal acknowledgments of obligations or harms, the accountability gaps are obvious, not only in the extant materiality of occupation but also, and significantly, in the transition to non-occupation.

Finally, the inherent limitations in occupation law require us to be cognizant of human rights law's applicability during occupation as a "gap-filler." [41] In parallel, practitioners must increasingly take account of the application of international criminal law (ICL) as an overarching legal regime that intersects with the contemporary law of occupation. This overlap is made explicit by the inclusion in the Rome Statute of a war crimes provision prohibiting the transfer of civilian population into occupied territory.[42] This

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[40] Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783, 820 (1995).

[41] *See* Aziz v. Cyprus, App. No. 69949/01, 2004-V Eur. Ct. H.R. 1, ¶¶ 34-38 (2004) (affirming 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 Liech. v. Ger., App. No. 42527/98, 2001-VIII Eur. Ct. H.R. 1, ¶¶ 46-48, 59, 68 (2001); Ineta 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*., (Rosario H. Vinaixa & Karel Wellens dir., 2006) (outlining the ECtHR's approach to occupation).

[42] Under the War Crimes provisions, Article 8.2(b)(viii), the statute specifies ,"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

provision also lends itself to reflection on the gender-specific harms that have followed settlement establishment and the enforcement of the protection, values, and needs of settlers over and above the needs of the local civilian population. In sum, 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.

B. *Specific Application of General Rules to the Occupied Palestinian Territories*

There is broad and consistent agreement among international lawyers that the normative framework of belligerent occupation has applied and continues to apply to the West Bank, including East Jerusalem.[43] Many prominent international lawyers view the law of belligerent occupation as applicable to the Gaza Strip, though there is a higher degree of doctrinal and normative debate on that issue.[44] Gaza was captured from Egypt in 1967, and remained under Israeli military occupation until 1994. In pursuance of the Oslo Peace Accords, the Palestinian Authority assumed management of civilian life in Gaza while Israel retained control of airspace, territorial waters, and borders. A unilateral disengagement plan was implemented in 2005, and settlers were forcibly evicted from the territory. Since 2006 and the election of Hamas to govern Gaza, the territory has been the subject of a blockade maintained by Israel and Egypt.[45] Tensions and violence between Israel and Hamas remain constant, leading to high civilian casualty tolls and the complete annihilation of basic infrastructure; daily life conditions for civilians living in one of the most densely populated areas in the world are severe and horrifying.

The overwhelming consensus on the status of this occupation, notwithstanding a half-century occupation, poses a number of conceptual and legal quandaries in practice. To state the obvious, the length of the occupation is *per se* inconsistent with the overriding imperative of the law, namely short-term control over a territory and a transition to non-occupation. The transition is to

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this territory" constitutes a war crime. Rome Statute of the International Criminal Court art. 8.2(b)(viii), July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002).

[43] *See generally* BENVENESTI, *supra* note 17; YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION (2009).

[44] *Compare* BENVENESTI, *supra* note 17, at 211-12, *and* Adam Roberts, *Appendix 2: The Termination of Military Occupations*, *in* EXPERT MEETING ON OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 41-49 (Tristan Ferraro ed., 2012) [hereinafter Expert Meeting], *with* S.C. Res. 1860 (2009), *and* G.A. Res. 64/92 (Jan. 19, 2010), *and* DINSTEIN, *supra* note 43, at 277-80, *and* Tristan Ferraro, *Determining the Beginning and End of an Occupation Under International Humanitarian Law*, 94 INT'L REV. RED CROSS 133 (2012).

[45] *See* Andrew Sanger, *The Contemporary Law of Blockade and the Gaza Freedom Flotilla*, 13 Y.B. INT'L HUM. L. 397 (2010); *Egypt Criticized for Gaza Blockade*, MIDDLE EAST POL'Y COUNCIL, https://mepc.org/commentary/egypt-criticized-gaza-blockade (last visited May 21, 2020).

enable some normality for the protected civilian population within a relatively short time frame. Second, breaches of occupation law in the territory continue to pose sustained challenges for the usefulness, relevance, and meaning of the law to the civilians who live under sustained occupation.[46] Despite a highly legalized occupation regime, the lack of consequential and consistent remedies for breaches of the law of occupation for Palestinian civilians is a parallel occupation anomaly. Third, perhaps paradoxically, accountability deficits for breaches of the legal framework are an obvious but not *per se* fatal blow to the relevance of the law. More challenging is the "de facto incorporation of the West Bank (but not its Palestinian residents) into Israel, and the broader political and legal porosity of the borders between 'Israel' and 'Palestine.'"[47] Here the "facts on the ground" indicate that the highly exceptional control regime of occupation in the OPT has far transgressed the normative bounds of occupation, introducing intentional indeterminacy between occupation and non-occupation and between occupied and administered territories. [48] The nebulousness has distinct consequences for the civilian population as a whole, but very particular outcomes for women living under occupation.

As I explore further below, while the occupation is characterized by extreme formal legality with layered treaties, legislation, jurisprudence, and administrative measures simultaneously sharing legal space, few of those enactments specifically address gender or women's rights or pay heed to women's needs and entitlements. In parallel, the overabundance of rules coexists with few or meaningless remedies when the civilian population in general or women in particular experience harm as a result of actions taken by the belligerent power, by private actors (settlers), non-state violent actors, or non-state intimate actors.[49] For example, both Israeli and Palestinian human rights organizations have noted that settler violence, threats, intimidation, and a pervasive impunity for settlers' actions frame the ongoing day-to-day life of women in the Occupied Territories.[50] This entrenched aspect of the occupation exists in a universe of limited or no accountability. In parallel, the lack of a functional Palestinian authority, the absence of meaningful security sector reform within the Palestinian polity, and the dearth of legal and cultural sanctions

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[46] *See generally* JERUSALEM LEGAL AID & HUMAN RIGHTS CTR., SETTLER VIOLENCE & IMPUNITY IN THE OCCUPIED PALESTINIAN TERRITORY; FROM THE ICCPR STANDPOINT (2014); Ronen Shamir, *"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 L. & SOC'Y REV. 781 (1990) (discussing an analysis of a data set from 1967-86 indicating that 89% of Palestinian petitions were rejected by the Court). The data trend appears to hold consistently to the present. *See* THE ABC OF THE OPT, *supra* note 4, at 4 n.16.

[47] *See* THE ABC OF THE OPT, *supra* note 4, at 2.

[48] *See* AEYAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION 38-51 (2017).

[49] *See generally* WOMEN'S CTR. FOR LEGAL AID & COUNSELLING, WOMEN'S VOICES: IN THE SHADOW OF THE SETTLEMENTS (2010) [hereinafter WOMEN'S VOICES].

[50] *Id.* at 21-29.

for domestic and intimate partner violence also squeeze Palestinian women's lives in multiple, intersectional, and oppressive ways.[51]

It is this squeeze between multiple oppressions that further exacerbates women's experience of harm in the highly fragmented but legally dense Israeli occupation. A number of scholars have recognized the complexity and deliberate fluidity of legal regimes that operate in respect of the West Bank and Gaza Strip.[52] This corresponds to constructive ambiguity in terminology and layered legal regimes deployed by Israeli military authorities, civil administration, courts, and policy makers.[53] As a result, while my analysis is focused primarily on the application of international treaty and customary rules to the occupation, it is important methodologically and conceptually to acknowledge that the legal framework is dense. It includes judicial decisions from the Israeli Supreme Court;[54] enactments from the military commander; legal opinions from within the Israeli government; local, religious and customary law as applied to the regulation of family life; and the outcome of thousands of legal decisions emanating from military courts each year. The density adds to the intricacy and variability of navigating gender and makes surfacing women's rights and entitlements more arduous and competitive with other claim-making, which may be viewed as more compelling.

III. GENDER AND TRANSFORMATIVE OCCUPATION: EXPLORING THE COMPLEXITY OF GENDERED OCCUPATION IN THE ISRAEL-PALESTINE CONTEXT

A. *The Abu-Dahar Orchard: Rights and Security Viewed through a Feminist Lens*

In the tradition of feminist narrative storytelling, my analysis turns to relate the story of a particular woman and a particular experience of claiming

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[51] *Palestine: Authorities Crush Dissent: Arbitrary Arrests, Torture Systematic*, HUM. RTS. WATCH (Oct. 23, 2018), https://www.hrw.org/news/2018/10/23/palestine-authorities-crush-dissent.
[52] Compare BENVENESTI, *supra* note 17, at 211-12, *with* Expert Meeting, *supra* note 44.
[53] An early example of this is found in the writing of Meir Shamgar. *See* Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government-The Initial Stage*, *in* 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISR. 1967-1980: THE LEGAL ASPECTS (Meir Shamgar ed., 1982).
[54] The Supreme Court operates as a High Court of Justice on petitions from the OPT. *See e.g.* HCJ 337/71 Christian Society for the Holy Places v. Minister of Defence 26(1) PD 574 (1972) (Isr.). While it is unusual in an occupation setting to have judicial access guaranteed in this way, this form of access has a long colonial pedigree, again conflating other forms of domination with the legal framework that oversees the OPT. *See generally* Shuli Ben-Nathan, *The Supreme Court and the Territories: The Last Diamond in the King's Throne, in* 50 CONCEPTS, TESTIMONIES & REPRESENTATIONS OF OCCUPATION (I. Menuchin ed., 2017). Interestingly, that Court may also apply Israel law, including the Basic Law: Human Liberty and Dignity to Israelis (settlers) in the Occupied Territories, though it remains entirely unclear if such law would be applied to Palestinian civilians under Israeli control.

rights under occupation. While this narrative could be relayed as a finding of law and fact from a contentious court decision, the power of the story lies in focusing on the small details that betray the gendered dimensions of claiming rights under occupation. This includes the fact that the right-claimant is female, an owner of trees and land, and makes claim against a powerful (military) man. The case reveals the possibilities of using litigation as a tool for challenging the fundamental intrusions on family, economic, and social life from belligerent occupation. But it also reveals the deep collaboration of the law in the ordering of occupation as well as the normalizing and legitimizing effects of legal ordering, enabling and facilitating the harms of occupation on the lived lives of women and their families.

> *The Abu-Dahar Orchard.*[55] *This story is told as a small victory for Zouharia Abu-Dahar, the owner of a small property of 0.37 acres, which consisted primarily of trees.*[56] *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.*[57] *The trees were situated in immediate proximity to the private residence of Shaul Mofaz, the newly appointed Israeli Defense Minister, whose house was right on the edge of the Green Line separating Israel from the OPT. She was then informed that the military order was "incorrectly drafted."*[58] *The result was a second order mandating a "compromise" that the trees would not be cut in their entirety but rather that sixty trees be cut down to one foot above ground.*[59] *A petition to the Israeli Supreme Court ensued. Applying a proportionality test, the Supreme Court found that only a thicket of dry bushes close to the ground needed to be cut, the sixty trees trimmed, and their trunks left alone.*[60]

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 Defense Minister for as long as he stays in office and finds a medium way to satisfy both parties

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[55] *See* HCJ 7862/04, Abu Dahar v. IDF Commander in Judaea and Samaria (Isr.) [hereinafter Abu Dahar case]. *See generally*, Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35 L. & SOC. INQUIRY 919, 919-21 (2010).
[56] Abu Dahar case, *supra* note 55, ¶ 1.
[57] *Id*., ¶ 1.
[58] *Id*.
[59] *Id*.
[60] *Id*., ¶ 15.

by applying a balancing test.[61] But that really only tells part of the story. 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, which 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. Balancing does not allow the inherent power disparities of the woman defending her trees versus the rights of her neighbor to be visible. Her neighbor is both at the apex of the military hierarchy and the perceived subject of correlated security risks, and his position shapes the meaning of security and thus sculpts the balance that follows.[62] As projects of feminist judgment from multiple countries tell us,[63] 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.

B. *Gender and Occupation in Israeli Supreme Court Decisions*

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.[64] The imbalances may be greater when the

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[61] *See generally* Stuart Macdonald, *The Unbalanced Imagery of Anti-Terrorism Policy*, 18 CORNELL J.L. & PUB. POL'Y 519 (2009); Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, 32 J. L. & SOC'Y 507 (2005) (critiquing balancing tests in the context of rights and security analysis).

[62] 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 they have inferred that substantive rule of law consciousness, specifically human rights law, is responsible. *See generally* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES (2002).

[63] *See generally* FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter, Clare McGlynn, & Erika Rackley eds., 2010).

[64] David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy*, *in* THE PROCESS PROVINCE OF ADMINISTRATIVE LAW 279–307 (Michael Taggart ed., 1997).

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 operates to entrench and legitimate the occupation rather than interrogate it.[65]

In a review of the Israeli Supreme Court jurisprudence related to occupation, the phrases "gender," "female," and "sex" were not found.[66] 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),[67] the appropriateness of the placement of a portion of the wall and its effect on women and children,[68] and protection of pregnant mothers.[69] 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. Here it is important to site military necessity itself as a profoundly gendered doctrine, which constructs and enables the relative value of lives, structurally validating military bodies and objects (invariably men) over the civilian (invariably civilian and female).[70] In these circumstances, women face a triple bind. First, the relevant legal framework may not recognize the harms they experience under occupation; second, when women try to make the harms "fit" recognized treaty and customary law categories, they lose the specifically gendered dimensions of the experience as law neutralizes its gendered content; and third, if recognition on these compromised terms is forthcoming, it may

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[65] Interviews with Beit T'selam & Association of Civil Rights in Israel (ACRI) (on file with Author); *see also* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 190-98 (2002); MICHAEL SFARD, THE WALL AND THE GATE: ISRAEL, PALESTINE, AND THE LEGAL BATTLE FOR HUMAN RIGHTS 136, 425-56 (2017).

[66] MINISTRY OF FOREIGN AFFAIRS OF ISRAEL, JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW (2005). The search was limited to English-language translated decisions, and 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]), but not directly to a female plaintiff or subject of the administrative regime in the occupied territories. *Id.* at 348.

[67] HCJ 201/09 Physicians for Human Rights et al. v. Prime Minister et al., [2009] Isr. L. R 1, 17 (2009) (Isr.) (noting that terrorists failed during the second intifada to distinguish between combatants and civilians, women, men, or children).

[68] HCJ 1748/06, HCJ 1845/06, HCJ 1856/06 Mayor of Ad-Dhahiriya et al. v. IDF Commander et al., [2006] Isr.LR. 603, 604, 615 (2006) (Isr.) (noting that an Israeli security barricade effectively denied passage to women with children). 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."

[69] *Id*. 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." GC (IV), *supra* note 12, art. 23.

[70] Judith Gardam, *A Feminist Analysis of Certain Aspects of International Humanitarian Law*, 12 AUSTL. Y.B. INT'L L. 265, 277 (1992)

operate to entrench and sustain the meta-framework of occupation even as the appearance of partial remedy is provided.

C. *Surfacing Occupation, Seeing the Gender of Occupation*

One deeply challenging aspect of addressing the gender of occupation in the long-term OPT occupation is the antecedent 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 that 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.[71] 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. In parallel, the terminology of occupation is distinctly missing in Israel's civic, political, and social discourse. The word is absent, and the nomenclature used to describe the geography of occupation is equally ambiguous. Thus, the abstracted term "territories" (detached from all those who inhabit them) is regularly invoked; or the descriptive "West Bank"; or the biblical invocation of "Judea and Samaria." In all associations, "Palestinian" as a people, a concept, or a claim disappears. The double invisibility of engaging "Palestinian" first before one gets to the first base of female experience of occupation is a fatal first cull on engaging the gender dynamics of the occupation. It also corresponds to the well-documented invisibility of women in legal discourses, even as the law ostensibly protects their interests.[72] In reality, visible invisibility remains the dominant experience of women under law, including the law of occupation.

Based on a series of interviews in Israel during ongoing fieldwork over eight years (within the 1967 borders), it was notable that mainstream Israeli 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.[73] 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

[71] This maps onto Stanley Cohen's analysis of denial and its role in sustained human rights abuses on a systematic scale within a body politic. *See generally* STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).

[72] *See generally* Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989).

[73] Interviews with the Association for Civil Rights in Israel and B'Tselem, both leading human rights' organization addressing *inter alia* violations of the rights of the Arab minority in Israel or Palestinian Rights in the Occupied Territories (October and November 2011) (on file with Author).

general, some skepticism was mooted as to how such violations could be incorporated and what the added value of this move would be.[74] There was a consistent thread in all conversations that gender violence was "not part of this conflict zone." In particular, generally with a prompt from the interviewer, the emphasis by interviewees on a 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.[75] Non-reporting as evidence of non-occurrence has a very particular fault line in the context of sex-based violence, particularly its propensity to underestimate the costs of reporting. In parallel, exploring the broader patterns of sex-based violence in conflict/occupation in a further series of interviews with domestic 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.[76] Research in conflict jurisdictions elsewhere has demonstrated that the linkage between intimate violence, coercive control, and other forms of sex-based harm is elevated and produced by a broader conflict landscape as well as by specific triggering incidents.[77] In sum, the overall takeaway, at least from the vantage point of the occupation, is to minimize or ignore the extant forms of sex-based violence and harm in the context of this occupation, both as to the women experiencing the occupation and more broadly the patterns of sex-based violence linked to extended occupation and conflict within the occupying state.

By contrast to my interviews in Israel, in a series of interviews with Palestinian organizations, gendered experiences and gender harm were at the forefront of civil society and non-governmental occupation analysis.[78] Women were viewed as bearing substantial burdens under the occupation regime,

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[74] *Id.*

[75] 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 "were raped by Indonesian soldiers, exposed to sexual discrimination and were frequently used as sexual slaves." Susanne Allden, *Internationalising the Culture of Human Rights: Securing Women's Rights in Post Conflict East Timor*, 8 ASIA-PAC. J. HUM. RTS. & L. 1, 11 (2007).

[76] Interviews with Rape Crisis Ctr. Staff, in Tel-Aviv & Jerusalem, Isr. (Nov. 2011) (on file with Author). The Director of the Rape Crisis Center in Tel-Aviv noted that rates of calls to domestic-violence hotlines were noticeably higher during times of enforced shelter (e.g., Scud missile attacks from Lebanon).

[77] Monica McWilliams & Jessica Doyle, *Violent Conflict, Political Settlement and Intimate Partner Violence: Lessons from Northern Ireland* 1-9 (Transitional Justice Inst., Research Paper No. 19-04, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3121693 (building on prior work by MONICA MCWILLIAMS & JOAN MCKIERNAN, BRINGING IT OUT TO THE OPEN: DOMESTIC VIOLENCE IN NORTHERN IRELAND (1993)).

[78] *See, e.g.*, Interviews with Al Haq while a Scholar in Residence (April 2017) & Women's Ctr. for Legal Aid & Counselling (April 2017) (on file with Author).

highlighting the distinctly gendered dimensions of the system.[79] In particular, the gendered impacts of fundamental restrictions imposed by occupation were keenly felt. These include profound constraints on freedom of movement, stop and search, family life, marriage, birth, and death. The effects of stop-and-search practices particularly at checkpoints, crossings, and airports were viewed as deeply gendered experiences with specifically articulated gendered injuries following. Nadera Shalhoub-Kevorkian has strikingly illustrated the way in which the dynamics of conflict and occupation have resulted in a "frontline" role for Palestinian women in confrontation with the state of Israel as public space has been closed to or contains detention and other challenges for men.[80] 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. The sample underscores the pervasive problem of conflating harm to women in armed conflict with the scale of penetrative sexual violence, ignoring the sustained harms across other fundamental rights. Moreover, it enables a pervasive disavowal of harm and can perpetuate a sense of proprietary benignancy about the effects of occupation, which the specific examples *infra* illuminate further.

IV. ILLUSTRATING THE GENDERED DIMENSIONS OF TRANSFORMATIVE OCCUPATION

This Part now turns to canvass some of the gendered dimensions of living under belligerent occupation in long-term transformative occupations. That broader theme has been canvassed elsewhere by this author,[81] and this final Part provides a small number of concrete illustrations of gendered effects. In doing so, the analysis is driven by a life-span analysis to reveal the depth and

[79] 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[es] not appear to have direct individual victims." Eugene Kontorovich, *When Gravity Fails: Israeli Settlements and Admissibility at the ICC*, 47 ISR. L. REV. 379, 379 (2014). 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." *Id.* at 387. 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. *Id.* at 382-83, 389. In his controversial view, according to "many" authorities, which remain unnamed, the settlement activity may be "purely consensual." *Id*. at 389.

[80] *See generally* NADERA SHALHOUB-KEVORKIAN, SECURITY THEOLOGY, SURVEILLANCE AND THE POLITICS OF FEAR (2015). Moreover, given the importance of security to the legal ordering of occupation, it is not insignificant that Palestinian newborns have been labelled a "demographic threat," and the regulation of birth for Palestinians under occupation has undergone a process of "deep securitization." Uriel Abulof, *Deep Securitization and Israel's "Demographic Demon,"* 8 INT'L POL. SOC. 396, 396, 404 (2014).

[81] *See* Ní Aoláin, *War on Terror*, *supra* note 36.

complexity of women's lives under occupation. In short, this means examining the span of women's lives from birth to grave to assess the specificity of occupation's harms at pivotal points. The examples illuminate the following contexts. What does it mean to be a female 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?

A. *Essentially Gendered: Regulating Movement Under Occupation*

For the purposes of this analysis, I focus on one specific but pervasive aspect of life for Palestinian women living under occupation, namely the ongoing complexity of 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 Palestine Liberation Organization's Fatah, resulting in physical, political, and economic isolation for the Strip's inhabitants.[82] International isolation heightened in the aftermath of Operations Cast Lead and Protective Edge, exacerbated by the continued intransigence of Fatah-Hamas reconciliation moves, ongoing hostilities including rocket launches into Israel from Gaza, 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 on multiple indicators.[83] Access between both geographies is cut off, with marked consequences for family and community connections, including marriage, death, birth, community and family integration, and inter-generational relationships.

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[82] *The Gaza Cheat Sheet: Real Data on the Gaza Closure*, GISHA–THE LEGAL CTR. FOR FREEDOM OF MOVEMENT (Aug. 10, 2016), http://www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf.

[83] Gaza has one of the highest unemployment rates of any economy in the world (41.5% overall, 58% for youth). *See* NO EXIT? GAZA & ISRAEL BETWEEN WARS, INT'L CRISIS GROUP 7 (2015), https://d2071andvip0wj.cloudfront.net/162-no-exit-gaza-israel-between-wars.pdf. 80% of the population relies on donor aid, and 39% is below the poverty line. *Id.* Operation 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. *Id.*

In the West Bank, the security wall dominates the access arena, with particular and highly regulated checkpoints as the entry and exit spaces, where heightened scrutiny and the capacity of being subject to military questioning and detention frequently affect 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.[84] 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. The exceptionality of that temporary agreement has not been translated into a permanent status quo. 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. The landscape of spatial separation may be further fragmented, including by unilateral annexation by Israel or in pursuance of opportunities to expand the occupation perimeters.[85] 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,[86] 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

[84] Observations from the Author's field notes in 2011, 2012, and 2016 (documenting the disproportionately high number of women, girls, and young children standing in lines at checkpoint seeking access into Israel from the OPT or returning into the Occupied Territories from Israel, primarily East Jerusalem) (on file with Author).

[85] The *Prosperity to Peace* (January 2020) proposal published by the Trump Administration offers the possibility of substantial further fragmentation of the limited contiguous Palestinian geographical terrain by consolidating and legitimizing settlements and affirming absolute Israeli sovereignty over Jerusalem (including East Jerusalem). *See* PEACE TO PROSPERITY (2020), https://www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf.

[86] The most obvious of which is the highly complex terrain of administrative permits allowing access (or not) to parts of the Occupied Territory. *See* YAEL BERDA, LIVING EMERGENCY: ISRAEL'S PERMIT REGIME IN THE OCCUPIED WEST BANK 2000-2006 (2012).

women, with some notable exceptions from non-governmental sources.[87] Moreover, as I have articulated elsewhere, the privileging of knowledge in human-rights discourses imbued with hierarchies of harm, which 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.[88] 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, and estoppel in access to education, health, and family may have staggering social, economic, and physical effects on women.[89] Equally, the right to relationship with kin and family is so primordial and essential, its absence so staggering, that its denial can be viewed as a fundamental violation of human dignity.[90] The right to family life is protected in all major human-rights treaties, subject to derogation and limitation but only if requirements of non-discrimination, necessity, and proportionality can be satisfied.[91] Obligations in respect of family life have a long genealogy in international humanitarian law, referenced in both the Lieber Code and the Brussels Declaration.[92] The obligation to respect family life "as far as possible" is a customary norm in both international and non-international armed

[87] PALESTINIAN WOMEN'S RESEARCH & DOCUMENTATION CTR., 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, "IF I WERE GIVEN THE CHOICE": PALESTINIAN WOMEN'S STORIES OF DAILY LIFE DURING THE YEARS 2000 TO 2003 OF THE SECOND INTIFADA (2007); WOMEN'S VOICES, *supra* note 49.

[88] Interviews with Rape Crisis Ctr. Staff, *supra* note 76.

[89] Such cumulative violations may also directly impinge on the full protection of the right to life for women. *See* Agnes Callamard (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report on a Gender-Sensitive Approach to Arbitrary Killings*, ¶¶ 75-95, U.N. Doc. A/HRC/35/23 (June 6, 2017); *see also* Tiziana Leone et al, *Maternal and Child Access to Care and Intensity of Conflict in the Occupied Palestinian Territory*, 36 CONFLICT & HEALTH 13 (2019).

[90] Notably, the Israel Basic Law: Human Dignity and Liberty affirms the right of all persons to the "protection of their life, body and dignity." Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391 p. 60 (Isr.), https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm. Despite the epic length of the occupation, and the consensus on the application of human-rights norms by international legal bodies, this law does not apply to the OPT, except perhaps to settlers as Israeli citizens.

[91] International Covenant on Civil and Political Rights art. 23(1), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 10(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[92] Instructions for the Government of Armies of the United States in the Field art. 37, Apr. 24, 1863 [hereinafter Lieber Code]; Project of an International Declaration Concerning the Laws and Customs of War art. 328, Aug. 27, 1874 [hereinafter Brussels Declaration].

conflicts.[93] It is codified in Article 46 of the Hague Regulations[94] and expounded upon in Article 27 of the Fourth Geneva Convention, providing that "protected persons are entitled, in all circumstances, to respect for . . . their family rights."[95]

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.[96] The lack of standing under occupation law for the protection of movement also points to the importance of parallel application for human-rights law under occupation, given the more extensive protection to free movement and assembly under that body of law.[97] In parallel, restrictions on family life and family relationships are a defining dimension of the occupation regime embedded in the OPT and constitute a formative reality for civilians living under occupation. As this Section explores, these two essential aspects—movement and family life—are inextricably linked to one another.

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 decried by the Israeli Supreme Court as a violation of international treaty and customary law to which the state is bound,[98] other lesser status violations have received less notice and less attention.

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[93] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. I: RULES 379-83 (2009) [hereinafter CUSTOMARY IHL VOL. I]; CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. II: PRACTICE 2525-36 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY IHL VOL. II].

[94] *See* GC IV, *supra* note 69, arts. 24, 49(3), 82(3). The latter is the basis for the specific rules relating to family unity, in Article 4(3)(b) of Additional Protocol I (1977). Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API].

[95] *See* API, *supra* note 94, art. 27.

[96] *See generally* HAGAR KOTEF, MOVEMENT AND THE ORDERING OF FREEDOM: ON LIBERAL GOVERNANCE OF MOBILITY (2015).

[97] *See, e.g.*, ICCPR, *supra* note 91, art. 12; Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement) (Nov. 2, 1999), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en.

[98] HCJ 5100/94 Public Committee Against Torture v. Government (1999) (Isr.) (holding that the methods sought for use by the General Security Services of Israel were not authorized). However, the Court left open that a "necessity" defense could be used post facto by GSS agents if such methods were deployed. *Id.* Regrettably, a December 2017 the Israeli Supreme Court decision in the case of Assad Abu Gosh appears to walk back the trenchant repudiation of torture by exempting security agents from criminal investigation despite their undisputed use of "coercive pressure" against a Palestinian detainee. The interrogation included severe physical and mental violence, including beatings, being thrown against a wall, stress positions, arching and tying the body in the "banana" position, bending back fingers, sleep deprivation, and extreme psychological pressure. HCJ 5722/12 As'ad Abu Gosh et al. v. Attorney General (2017) (Isr.).

If the face of torture in the context of the occupation was the young male Palestinian, the female face of occupation may best be captured by the long lines of women and children standing and waiting for processing each day at Qalandia checkpoint, one of the largest military checkpoints in the OPT, situated approximately ten minutes from the center of Jerusalem.[99] Israeli estimates have varied over time, but some official estimates found that 80,000 Palestinians or residents of East Jerusalem pass through this checkpoint each week, compared with other sources that find 26,000 Palestinians a day passing through this access point.[100] Having spent many days passing through this checkpoint while researching in the territory, I 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 the undulating daily transfer from one territory to another, but the purpose of this analysis is to reflect on the complexity of female-centered harms that occur in these spaces, and what it reveals about the broader set of social, political, economic, communal, and individual harms occasioned by the realities of separation, access, dissolution, and negation of the right to move freely.

The law of occupation enables the occupier to restrict the capacity of protected persons to move within an occupied territory. Limitations on movement are subject to necessity and security tests, both of which as a formal matter within the law of occupation are not merely constructed from the point of view of the belligerent occupier, but rather include a responsibility to protect and ensure the safety and best interests of the civilian population. A key point about security considerations within the frame of occupation law is that the concept of security is differently calibrated[101] and contrasts with other legal constructions of security, for example as articulated within the bounds of international human rights law.

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[99] Notably, a network of roads has been established through the occupied territories ostensibly for security purposes, but for practical purposes, it enables settlers and Israelis to travel freely through portions of the Occupied Territories. *See, e.g.*, Guy Harpaz & Yuval Shany, *The Israeli Supreme Court and the Incremental Expansion of the Scope of International Law Under Belligerent Occupation Law*, 43 ISR. L. REV. 514 (2010) (discussing the legality of the road expansion and use).

[100] "On average, 80,000 residents cross through the Qalandia Crossing on a weekly basis." *Get to Know the Activities of the Jerusalem Envelope District Coordination and Liaison*, COORDINATION OF GOV'T ACTIVITIES IN THE TERRITORIES, http://www.cogat.mod.gov.il/en/Judea_and_Samaria/Pages/OtefJerusalemCLA.aspx (last visited Apr. 21, 2020). "Around 26,000 Palestinians pass through Qalandia daily on foot, by bus, or by car and they must follow Israeli authorities' instructions." Nihal M. Nagamey, Limor Goldner & Rachel Lev-Wiesel, *Perspectives on Social Suffering in Interviews and Drawings of Palestinian Adults Crossing the Qalandia Checkpoint: A Qualitative Phenomenological Study*, FRONTIERS IN PSYCHOL. (Aug. 28, 2018) at 3*; see also* Helga Tawil-Souri, *New Palestinian Centers: An Ethnography of the 'Checkpoint Economy,'* 12 INT'L J. CULTURAL STUD. 217, 224 (2009); 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).

[101] The protective focus of the law of occupation, deriving from responsibilities to protected persons, in theory shapes the balances differently.

B. *Checkpoints: Pervasive Regulation and Undulating Intrusion*

Checkpoints are fraught and contested spaces of interface between the military and the civilian population. There have been births (women giving birth at checkpoints as they seek to access medical care in Jerusalem from the OPT), deaths, gendered verbal harassment, and agitated interface with young male and female soldiers who view and treat the other women as objects of threat, the consistent experience of being considered 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 at checkpoints. These cumulative harms are daily and constant—and framed by a legal and political narrative of security. One could engage in a separate analysis of security and liberty trade-offs, but as Gross has argued, the process of optimizing trade-offs between "security – liberty" are likely to be biased in ways that "result in a systematic undervaluation of one interest (liberty) and overvaluation of . . . security so that the ensuing balance would be tilted in favor of security concerns at the expense of individual rights and liberties."[102] What is invisible to the law of occupation is the long-term effect of prolonged occupation with consistent daily limitation on the freedom of movement. A fundamental challenge for the feminist international 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.

C. *Separation*

Unsurprisingly, in highly traditional societies, the roles women play in their families are determined by cultural expectations, family practices, and an adherence to traditional caregiving responsibilities. The inability to discharge these responsibilities, the lack of capacity to live fully within the claims and expectations of the culture one belongs to, exposes the specificity of occupation for Palestinian women. Critically, these life-cycle limitations are embedded in legal practices and legal rules accompanying the occupation that have been refined over decades. The right to marry, to give birth, to found a family, and to live in meaningful connection with family is the bedrock of the right to family life as expressed and protected by humanitarian and human rights law.

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[102] Oren Gross, *Security vs. Liberty: On Emotions and Cognition*, *in* THE LONG DECADE: HOW 9/11 HAS CHANGED THE LAW 46-47 (David Jenkins et al. eds., 2014).

1. Physical Barriers and Birthing Under Occupation

Under occupation, family unification and family access remain a constrained and limited reality for Palestinian women and their families. These limitations have tightened despite the fact that legal regulation of family coherence and unity has evolved internationally over many decades, particularly with respect to admission for non-citizens to engage in family unification of parents and children.[103] For example, 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 mean that the experience of pregnancy for women in Occupied East Jerusalem is fraught with layered and toxic insecurities.[104]

Criminologist scholar Shalhoub-Kevorkian has focused particularly on birthing experiences as a means to reconceptualize the harms that can result from the regulation of a highly intimate part of a woman's life under occupation.[105] Birthing brings together the regulatory regimes of identification, spatial restrictions, and regulation of the most intimate aspects of one's life for a woman, her reproductive choices, and limitations. The regulation of birthing exposes the everyday lives of women under occupation, not only as victims but as agents and resisters; the latter of course can easily be missed in a focus on victimhood. 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 not only to enable complementary patriarchies to exercise control over women's reproductive and sexual lives, but also underscores the extent to which the regulatory

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[103] *See, e.g.*, Council Directive 2003/86/EC, pmbl., § 2 ("Measures concerning family unification should be adopted in conformity with the obligation to protect the family and respect family life."); *see also* Juridical Conditions and Rights of the Undocumented Migrant, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R (Sept. 17, 2003).

[104] The right to health is relevant in this context. The general principle of equality in Geneva law establishes duties and minimum standards and requires that with respect to any measures with regard to health, "any discriminatory measure . . . is banned, unless it results from the application of the Convention." OSCAR M. UHLER ET AL., COMMENTARY ON IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 206 (Jean S. Pictet et al. eds., 1958); *see also* API, *supra* note 94, art. 75(1). It is also generally agreed that the general norms of health and healthcare in the Occupied Territories cover and recognize immediate and basic needs. THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1475 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); *Appendix 1: "Effective Control": A Situation Triggering the Application of the Law of Belligerent Occupation*, in Expert Meeting, *supra* note 44, at 36-40; Sylvie Vité, *The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: the Examples of Food, Health and Property*, 90 INT'L REV. RED CROSS 629, 636 (2008).

[105] *See* Shalhoub-Kevorkian, *supra* note 3.

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, and spatial deprivations barring women's access to spouses, family, and clan. Moreover, the mobility of women is greatly affected by conflict: "[W]omen's mobility in general is lower than that of men, due to their responsibility for children, the elderly and disabled relatives, as well as societal restrictions upon travel without male accompaniment."[106]

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

> 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.[107]

Pregnancy and childcare deliver 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.[108] There is a singular gap between the elevated and specific protection given to pregnant and nursing mothers in the Geneva Conventions and the absence of protection for Palestinian pregnancies and

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[106] *Id*. at 1190.

[107] Yakin Ertürk (Special Rapporteur on Violence Against Women, Its Causes and Consequences), Report on Yakin Ertürk's Mission to the Occupied Palestinian Territory, U.N. Country Report, E/CN.4/2005/72/Add.4 (Feb. 2, 2005). This study, conducted in 2005, estimated that between 2000 and 2002, fifty-two women gave birth and nineteen women and twenty-nine newborns died at military checkpoints. *Id.* at ¶ 24. 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 3, at 1195. "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 devices] 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 1194. "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 1199.

[108] *The Politics of Birth* undertook qualitative data collection, examining twenty-two stories of birth 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 3, at 1191. *See* NIRA YUVAL-DAVIS & FLOYA ANTHIAS, WOMAN-NATION-STATE (1989), for a discussion on women as the biological reproducers of ethnic and national collectives.

mothers. The existence of this gap has been noted by the United Nations CEDAW Committee.[109]

2. Marital, Family, and Sexual Control

Intimacy regulation directly linked to spatial access and control includes the right to marry (or not). This issue was brought into sharp relief by decisions 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 on the basis that the ban did not violate rights enshrined in the country's basic laws.[110] A second Supreme Court decision affirmed the first in 2012.[111] Notably, this temporary law consistently extended to form a "permanent impermanence" in the law; it forbids Israeli citizens and permanent residents who marry women under the age of twenty-five or men under the age of thirty-five from the OPT, Iran, Iraq, Lebanon, and Syria from bringing their spouses into Israel, thereby excluding them from the right to acquire Israeli citizenship or residency rights.[112] The law is a mirror image of the permanent impermanence of occupation itself: technically temporary but, in reality, a permanent fixture and understood as such by all the relevant regulatory actors.

Israel's rationale for the law is officially grounded in the prevention of terrorism.[113] But the regulation of terrorism is not a norm- or rights-free zone, and national and international courts have consistently held that any measure taken must be non-discriminatory, proportionate, and necessary to be consistent with a state's legal obligation under international law.[114] It is an exceptionally blunt and ethnically/religiously-constructed tool to carry out such an objective:

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[109] Cmte. on the Elimination of All Forms of Discrimination Against Women, List of Issues and Questions Prior to the Submission of the Sixth Periodic Report on Israel, ¶¶ 21, 23, U.N. Doc. CEDAW/C/ISR/QPR/6 (2017), https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx.

[110] HCJ 03/7052 Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior (2006) (Isr.). This decision was a 6-5 outcome. *Id*. Such laws appear to run afoul of international human rights standards in Article 23(1) of the ICCPR as elucidated by the Human Rights Committee. *See* Human Rights Committee, CCPR General Comment No. 19: Article 23 (The Family) (July 27, 1990), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6620&Lang=en.

[111] HCJ 466/07 MK Zahava Gal-on (Meretz-Yahad) v. Attorney General (2012) (Isr.).

[112] The extension of the law to citizens of "enemy states" was enacted in 2007. *See* The Nationality and Entry into Israel Law (Temporary Order) (Amendment No. 2), 5767–2007, ¶ 8 (Isr.).

[113] Note the view of the United Nations Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism, namely that the use of racial and religious profiling in the context of counter-terrorism is contrary to the international law obligations of states. *Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. OHCHR, https://www.ohchr.org/en/issues/terrorism/pages/srterrorismindex.aspx (last visited Apr. 21, 2020).

[114] *See generally* Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Human Rights Council Report on Recent Developments and Thematic Updates*, U.N. Doc. A/HRC/34/61 (Feb. 21, 2017).

for one group (non-Jews), forsaking individual and nuanced assessment of claims to reside on the basis of marriage in a territory, when any spouse of a Jewish Israeli national is entitled to the status of citizenship as a generic regulatory matter. 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, cutting off an essential and fundamental right of marriage, familial reunification, and the capacity to live out the most essential aspects of a fulfilled and dignified life. This law intersects with other legal norms enacted since the early regulation of the state, including the application of the 1952 entry law.[115] In applying this 1952 law, Jerusalemite Palestinians were legally categorized as "newcomers" to Israel and granted residency status, and only Palestinians who "were physically counted within the annexed area of East Jerusalem were entitled to legal status in the city."[116] The cumulative effect on women and children in particular has been devastating, further inculcating a life of uncertainty that extends from impacted individuals to kin and community.[117]

The specific and gendered effects of the citizenship law is conspicuously related to the patterns and culture of marriage and family structure within the Palestinian community. Israeli Arab citizens living within Israel who marry within family strictures, including wedding Palestinian kin from the West Bank and Gaza, are not entitled to exercise the foundational right to marry and live with a spouse and, when they do, they may have limited physical access to their spouse and to their children.[118] Given the patriarchal and traditional structures of marital life within the Palestinian polity, and the centrality of marital status and family integrity to communal status, the consequences do not fall equally on women and men. When women are cut off from their spouse (or alternatively from their families) by virtue of these legal regulations, their losses

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[115] *See* Permission of Entry and Residence No. 5712 (1952) (Isr.). The 2002 Freeze on Palestinian Family Reunification can also be included in this chronology.

[116] U.N. WOMEN, IN THE ABSENCE OF JUSTICE: EMBODIMENT AND THE POLITICS OF MILITARIZED DISMEMBERMENT IN OCCUPIED EAST JERUSALEM 7 (2016), https://www2.unwomen.org/-/media/field%20office%20palestine/attachments/publications/2016/in%20the%20absence%20of%20justice_report.pdf?v=1&d=20161204T175958. Note also that "permanent residency" does not confer a nationality or full civil and political rights protection under law.

[117] "Oh, the burning of my heart . . . if this is what will happen, how will I get married? I can't find love. I'm always living anxiety, constant anxiety. What will happen if he is from Qalandiya [a refugee camp occupied West Bank]? What will happen if he is from the Old City (East Jerusalem) How long will it take me to reach my parents to see them? What will happen to me . . . how am I going to see him?" [Hiba, 12 years old]. *Id* at 16.

[118] "Look at me, I was married at the age of fifteen, and could not live with my husband. I could not handle living under such constraints, not being able to go out, go back to school, or see my parents." *Id* at 20.

include a range of other dignitary harms, including forfeiture of access to religious, social and cultural life. Marital choices are deeply enmeshed in the cultural life of the community, and the de facto restrictions on marriage via the regulation of movement into Israel are profoundly understood to target the integrity and viability of the community as a whole, with women as their primary quarries.

3. The Role of the Military Commander

The capacity to live within a family and the construction of family life are not autonomous choices when living under occupation. In a long-term transformative occupation, generations of family life and family structure are ordered by the external regulatory choices of the military commander, with minimal autonomy or remedy at the disposal of the family unit or the individuals within it. Palestinian residents of the OPT are protected persons as defined by the Fourth Geneva Convention. In theory, this protected status projects as a valuable commodity in a situation of armed conflict and occupation, shielding civilians from the worst excesses of military practice and ensuring constraint on military forces in their operations. In reality, as numerous commentators have observed in the Israel-Palestine context, the law itself constitutes an impediment to the full and meaningful protection of the civilian population, and it is not fit for its purpose.[119] It further depoliticizes the population, disabling them as political subjects with autonomous capacity to regulate their own lives. While a finite occupation limits this disenfranchisement, a permanent occupation entrenches it. As feminist scholars have long noted, the law itself can do violence to women, and it can extend and deepen the harms it was designed to remedy.[120]

The crux of the layered harm is twofold in this context. First, the treaty content of occupation law is limited by its historical development and by its lack of imagination. As succinctly documented above, the law of occupation was developed in a historical context where women's social and legal status was overwhelmingly checked. The translation of that worldview into Geneva and Hague treaty content imported a set of values to rules that either view women as utterly dependent and vulnerable, thereby enforcing what Sjoberg has laconically described as the "protection racket" for women under international law,[121] or, second, fail to include the protections women needed due to an unwillingness to "see" and incorporate the harms women actually experience in war and under

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[119] GERSHON SHAFIR, A HALF CENTURY OF OCCUPATION: ISRAEL, PALESTINE, AND THE WORLD'S MOST INTRACTABLE CONFLICT 162 (2017).
[120] QUB School of Law, *The Stephen Livingstone Lecture 2018 - Professor Fionnuala Ní Aoláin*, YOUTUBE (Nov. 21, 2018), https://www.youtube.com/watch?v=yb92m12_hus.
[121] Laura Sjoberg & Jessica Peet, *A(nother) Dark Side of the Protection Racket: Targeting Women in Wars*, 13 INT'L FEMINIST J. POL. 163 (2011).

occupation. In parallel, the hegemonic masculinity that defines the occupation in the OPT has shown no evidence of a willingness to view the needs of the female civilian population through a gendered lens, taking account of the particular needs of women living under occupation. This is not to say that the occupation has not evolved in legal and administrative terms. The legal regulation of the occupation has been refined and has evolved considerably over many decades, but overwhelmingly not to the benefit of the civilian population broadly defined. My essential point here is that such evolution has lacked any sustained commitment to addressing the gendered needs of the subjugated population. This freezing on gender issues is in marked contrast with positive evolutions in Israeli society on gender roles, sexual violence, harassment, and protection for sexual preferences under law.[122] It also has an abject disjunction with the acceptance of the Women, Peace and Security Agenda by the Israeli courts as relevant to the political issues within the green line,[123] though entirely of no relevance or application to the place where it is most relevant: the OPT.

In the context of occupation, the rule and decisions of the military commander (generally and not unrelatedly a man) are of critical importance to establishing the lived experience of occupation. Residency, the determination of a right to one's home, and family unification decisions were handed over to the prerogatives of the military commander in the early phase of the occupation.[124] In this context, the military commander has the discretion to decide that persons born and raised in the OPT, but who then reside abroad for a period and subsequently wish to return, have lost their center of life and no longer remain eligible to return.[125] No such negative presumption can be applied to Jews born in Israel, who reside abroad for extended periods for study, acquire citizenship abroad, work overseas, or move for family reasons and desire to return.[126] The choice for Palestinians to work, study, or spend time abroad will always be circumscribed by the unknowability of ascribing what factors will tip them into the realm of permanent separation from territory, rights to reside, and family unification in the territory of their birth. Judicial dicta have affirmed that the right of the military commander exercising security authority supplants local

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[122] *See* Hadas Mandel & Debora P. Birgier, *The Gender Revolution in Israel: Progress and Stagnation in* SOCIOECONOMIC INEQUALITY IN ISRAEL 153-84 (Nabil Khattab et al., eds., 2016); Nancy Strichman, *Past Achievements and Future Directions of Women's and Feminist Organizations in Israel*, NAT'L COUNCIL OF JEWISH WOMEN (March 2018), https://www.ncjw.org/wp-content/uploads/2018/03/Full-Report-of-Research.pdf. *But see* RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN (2003).

[123] SARAI AHARANI, WOMEN, PEACE, AND SECURITY: SECURITY COUNCIL RESOLUTION 1325 IN THE ISRAELI CONTEXT (2015).

[124] This absolute discretion is subject to proof of bad faith or corruption on the part of military commanders. THE ABC OF THE OPT, *supra* note 4, at 226 n.41 (citing to HCJ 209/73 La'afi v. Minister of the Interior 28 PD 13 (1973); KRETZMER, *supra* note 65, at 101–02.)

[125] HCJ 13/86 Shahin v. IDF Commander in Judea and Samaria 41(1) PD 197 (1987) (Isr.).

[126] Law of Return (1950), as supplemented by the Entry into Israel Law (2003).

Jordanian law, which affirmed the rights of local residents to choose their place of residence without losing status.[127] Here, in contrast with other judicial interpretations of prior law's applicability (see below as regards Regulation 119 of the Defence (Emergency Regulations) 1945), the courts' interpretative mode appears to be to choose the legal regime that is least protective of the rights of protected persons, and appears to shade into demographic policies and practices more than strict doctrinal interpretation.[128] Bearing in mind that where the demographic imperatives leak into occupation administration, women's bodies and potentiality as nation carriers hold a particular potency, and the practices of separation have an undeniably gendered hue. This shading follows directly from the life-bearing potential of the woman's body, a facet of demographic power that has been powerfully harnessed by Israel itself as a pro-natalist State encouraging Jewish women to bear children, pioneering in vitro-fertilization techniques, and placing strong cultural and social value on the role of women as mothers.[129] The polar opposite of such policies has been at the forefront of family unification policy in the Occupied Territories, but the organic link between them should not be underestimated, while the framing in purist security terms seeks to occlude the demographic and family regulation that is at play.[130] As Orna Ben-Naftali elucidates on the outworking of Supreme Court review with questions of family reunification, "[t]he judgments construe the entire Palestinian population under Israeli control as enemies not because of an action attributed to an individual, but because of their collective affiliation, and even though the statistical methodology employed for the assessment of risk suggested that it is negligible."[131]

The military commander has an absolute discretion to decide issues of family unification between Palestinians from the OPT and other Palestinians who are not citizens of Israel. Finally, the power of the military commander to limit unification of family extends to unspecified "political considerations" and

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[127] HCJ 500/72 Al-Teen v. Minister of Defence (1972) 27(1) PD 481.

[128] The demographic underpinnings of the law that appear to drive political policy have leaked into the public domain and formed the basis of constitutional challenge to some legal enactments, which were unsuccessful. *See Immigration and Settlement of Foreigners in Israel*, MINISTRY OF THE INTERIOR (May 2002), http://www.hamoked.org.il/items/5760.pdf [Hebrew].

[129] Youssef Courbage, *Fertility Policy in Israel: The Politics of Religion, Gender and Nation* (2000) (book review); YOUSSEF COURBAGE & JACQUELINE PORTUGUESE FERTILITY POLICY IN ISRAEL: THE POLITICS OF RELIGION, GENDER AND NATION (2000); Daphna Birenbaum-Carmeli, *Thirty-five Years of Assisted Reproductive Technologies in Israel*, 2 REPRO. BIOMEDICINE SOC. ONLINE 16 (2016).

[130] The explicitly demographic threat posed by Palestinian birthing has been articulated by the Ministry of Interior. *See, e.g.*, Noga. Kadman & Andrea Szlecesan, *Temporary Order? Life in East Jerusalem under the Shadow of Citizenship and Entry into Israel Law*, HAMOKED (2014).

[131] *See* THE ABC OF THE OPT, *supra* note 4, at 234. The effects of the law at the individual level are found in a study of six Palestinian women separated from their husbands as a result of the law. *See* Y. PLITMANN, *The Story of Six Women: Different Faces of the Family Unification Issue in* LAW, MINORITY AND NATIONAL CONFLICT 335–74 (R. Zarik and A. Saban (eds.), 2017) [Hebrew].

"vital state interests."[132] In this ambivalent legal universe, speculating on the formidable interest of the occupying state in demographic containment is not spurious. In this broader scoping exercise, separation and family unification inevitably involve women's bodies and reproduction in status determination and exclusion in seen and unseen ways. The broader point, of course, is that the translation of Palestinian women into a broader category of enemy invariably engages sex in the occupation frame, in ways that are underacknowledged in the legal determination of what counts and what does not count in the regulation of family life under occupation. The simple paradox is that, as female civilians living under extended occupation, their right to protection and normalcy has been unrooted by the entrenchment of permanent emergency, enabled and supported by the international legal regime intended to protect but instead which functions as a scaffold that bureaucratizes their claims, reverses their status, and provides little safety when the most essential of rights–to family, marriage and reproduction–are muted.

4. The Violability of the Home, the Scattering of Families

Homes are essential to the maintenance of family life. Homes, whether meagre, adequate, or opulent, are the emotional center of family subsistence and connection. Women's connection to the home, notwithstanding the stereotypes and constraints they impose, is particularly potent in traditional and conservative societies, where the home is the gendered center of women's lives.[133] The occupation has exacted a heavy toll on the home as the center of family and communal life for Palestinians. The regulatory role of the military commander has been pivotal in this regard. Punitive demolition served as an illustration of this regulatory power and its gendered effect.[134]

There is a considerable literature on the legality and broader effects of demolition practices, particularly their noncompliance with international humanitarian law and international human rights law.[135] In parallel, the gendered effects of demolition have garnered less attention, but the practice should be understood as a uniquely gendered practice, destroying in a traditional

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[132] HCJ 500/72 Al-Teen v. Minister of Defence (1972) 27(1) PD 481, 486.
[133] *See* Ní Aoláin, *Sex-Based Violence supra* note 34, at 78–80.
[134] The policy of punitive demolition allows the Israeli military (IDF) to impose one of two types of sanctions relating to the home of a suspect in a terrorist act: a demolition order and a sealing order. *See House Demolitions*, HAMOKED: CTR. FOR DEF. INDIVIDUAL (last visited Jan. 10, 2019), http://www.hamoked.org/topic.aspx?tid=main_3. A demolition order is carried out by complete destruction of the home, usually by a bulldozer or explosives. *See e.g.,* B'Tselem, Collective Punishment in Jabal al-Mukabber: Jerusalem Municipality served some 40 demolition orders https://www.btselem.org/press_releases/20170111_collective_punishment_in_jabal_al_mukabber. A sealing order is carried out by sealing the doors and windows of the structure and is theoretically reversible. Thousands of homes have been demolished pursuant to Regulation 119. *See* Statistics, B'TSELEM, https://www.btselem.org/statistics (last visited May 21, 2020).
[135] *See, e.g.*, Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT'L L. 1 (1994).

heteropatriarchal society the center of life for women. Without a home, women are unable to carry out any of the household tasks that are expected of them, and the social, cultural, physical, and emotional harms are dire. Demolitions shatter family life and provoke separation, which is both spatial and emotional in the aftermath of destruction. Commentators have noted the broader lack of judicial empathy for affected families, including the homelessness created for elderly family members,[136] as well as a lack of any sustained reflection in any published judgments on the familial and gendered effects of an official policy of punitive demolitions.[137] Stating the obvious, a well-entrenched policy in a highly legalized regulatory framework such as this occupation does not occur without a deep understanding of and consideration of its multiple effects. This disparate effect on women and family life must, in some sense, be a presumed consequence of the policy of house destruction/sealing, an inevitable if not intended consequence.[138]

Linking to the broader themes of this Article, a couple of wide-ranging observations can be drawn from the practice of house demolitions. First, the power to demolish is a distinct colonial legacy and was used during the British mandate of Palestine,[139] underscoring the ubiquity of continuity between deeply oppressive, exclusionary, and discriminatory regimes with contemporary occupation law practice in the OPT. Second, the power of the military commander to destroy a home is virtually unfettered under the relevant regulation:

> A Military Commander may by order direct the forfeiture to the Government of Palestine of any house, structure, or land from which has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary

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[136] HCJ 779/88 Mahmoud Abd al-Hadi Muhsin al-Fasfous v. Minister of Defense (1989) 43(3) PD 578 (Isr.). Here, the lawyers for Mr. al-Fasfous, arguing against the demolition, noted the age of the father (whose son had been arrested and charged with throwing rocks and Molotov cocktails) and the indignity of being made homeless before Ramadan. *Id.* The judgment is unusual as the gender and frailty of a man is poignantly invoked to appeal (unsuccessfully) to the Court. A terse two paragraphs affirm that none of these factors will be taken into account when upholding the demolition order. Importantly, despite multiple judicial decisions by the Supreme Court on demolition, it has never faced head-on the question—on the merits—that punitive demolitions contradict international law, and particularly, it has not considered the bar on collective punishment.

[137] *See* THE ABC OF THE OPT, *supra* note 4, at 162, 164. By contrast, when scattered illegal outputs have been dismantled, settler and broad commentary associated with the removal of such homes have focused significantly on the harm to family life, to children, and to "home" as a result.

[138] *Cf.*, Helen Kinsella, *Sex as the Secret; Counterinsurgency in Afghanistan,* 11 INT'L THEORY 26 (2019) (addressing the centrality of sex to the counterinsurgency (COIN) strategy, and the focus on homes in COIN, affirming the gender dimensions of the U.S. occupation of Afghanistan).

[139] The Defence (Emergency) Regulations, 1945, *Gaz*: 24.3.37, p. 268 (Isr.), https://www.imolin.org/doc/amlid/Israel/The_Defence_Emergency_Regulations_1945.pdf . *See* COLM CAMPBELL, EMERGENCY LAW IN IRELAND 1918-1925 (1994) (discussing broader overlaps between colonial legal powers and contemporary emergency powers practice).

> article illegally thrown, or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact of the commission of, any offence against the Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything on growing on the land.[140]

In this universe of military assessment, discretion, and enforcement, the power of a woman (any woman) to protect her home, her status, and her way of life is rendered meaningless as a legal matter. Moreover, it renders women vulnerable to domestic partner and intimate violence as insecure housing amplifies tensions and undermines masculinities in ways that deepen women's broader insecurity. The notion of future deterrence,[141] ill-proven on any empirical grounds, is balanced entirely in the military's favor, underscoring the broader point that the balance of protection to the civilian population fares badly in the exercise of military discretion, and disproportionate gender effects play no role at all in determining the policy practices of the occupying state. Finally, the courts have been equally impervious to arguments of compatibility with international law, including the prohibition on collective punishment; ignored empirical evidence as to the negative effects of home destruction; and been entirely deaf to hearing about the disproportionate effects of ruining homes for women, families, and communities. Invoking narrow pedantic deference to the authority of prior local law (the colonial regulation),[142] the Supreme Court has markedly shown selective capacity to be judicially innovative within the green

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[140] The Defence (Emergency) Regulations, *supra* note 139, ¶ 119.

[141] Notably, the efficacy of house demolitions as an effective counter-terrorism tool has been broadly held as unproven by an Israeli committee of review headed by Maj. Gen. Ehud Shani, recommending that the practice be abandoned. Amos Harel, *IDF Panel Recommends Ending Punitive House Demolitions for Terrorists' Families*, HAARETZ (Feb. 17, 2005), https://www.haaretz.com/1.4749075. Despite short moratoriums, the policy remains in effect with no evidence that it works as a counter-terrorism tool and evidence to the contrary showing its negative effects, including radicalization, mobilization, and severe impact on the protected persons the law of occupation was designed to shield.

[142] Importantly, this narrow reading is at odds with the authoritative views of the International Committee of the Red Cross. The prohibition on arbitrary destruction of property as a form of deterrence is well-established in customary international law. *See* [Lieber Code] Instructions for the Government of Armies of the United States in the Field art. 15-16, Apr. 24, 1863; [Brussels Declaration] Project of an International Declaration Concerning the Laws and Customs of War art. 13(g), Aug. 27, 1874; CUSTOMARY IHL VOL. I, *supra* note 93, at 175–77. The relevance of the final clause of Article 53 of the Fourth Geneva Convention cannot be overstated. GC (IV), *supra* note 69, art. 53 ("Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, *except where such destruction is rendered absolutely necessary by military operations*.") (emphasis added); *see also* UHLER ET AL., *supra* note 104, at 302.

line, evolving legal interpretation to keep pace with accepted practice under human rights and international law, and yet remarkably unwilling to do so when the protections of Palestinian civilians are in play.

V. CONCLUSION

The law of occupation was not designed with women in mind, and it has not kept pace with the experiences and challenges that women face under protracted occupation. In parallel, complementary primarily domestic legal regimes have also emerged in situations of transformative occupation, and these regimes have compounded the exclusions and harms faced by women. In particular, the legal regulation of population, community, and movement under occupation law does not speak to the complexities of regulating family, reproductive, and marital life. Relatedly, and not discussed at length above, is a complex deference point in occupation systems to 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, and the histories of local, religious, and communal life remain in play. A complex web of rules crisscrosses 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 that operate as a form of directed fragmentation—designed in part to avoid coherent challenge to rules that operate in gender, ethnically, and religiously discriminatory ways. Attention to legal pluralisms in sites of occupation reveals the ongoing transformation and negotiation between informal and formal areas of law,[143] contextualized by inequality and power gaps where a belligerent occupier holds all the legal cards.[144] This dynamic has indisputable links to colonial legal practice where European law was superimposed on indigenous law, followed by patriarchal, tutelage, and dependency-based systems of trusteeship, all founded on the understanding that a divided legal system served imperialist, extractive, and territorial ends.[145] As has been well documented, gender inequality was solidified in customary and local law through a mutually beneficial partnership

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[143] *See* LAURA GRENFELL, PROMOTING THE RULE OF LAW IN POST-CONFLICT STATES (2013) (discussing legal pluralisms generally); *see also* Rosemary Nagy, *Traditional Justice and Legal Pluralism in Transitional Contexts: The Case of Rwanda's Gacaca Courts*, *in* RECONCILIATION(S): TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES 86 (Joanna R. Quinn ed., 2009).

[144] The legal view that it is not the role of IHL to address roots of discrimination and change cultural and social traditions is often the typical first line of defense to the ongoing existence of patriarchal rules in local legal systems. However, this line of analysis generally tends to ignore the positive ways in which the occupation itself bolsters, maintains, and supports such systems. *See* THE 1949 GENEVA CONVENTIONS: A COMMENTARY, *supra* note 104, at 1290.

[145] *See* MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (Afr. Stud. Ser. No. 45, 1985); MARIE-BENEDICTE DEMBOUR, RECALLING THE BELGIAN CONGO: CONVERSATIONS AND INTROSPECTION (2000); MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM (1996).

of traditional (often religious) authorities and colonial authorities optimizing their own elite interests. Traditional authority (generally male elders) would advance judgments that were in their best interest and strengthened their own (male) positions in highly gendered ways.[146] The same dynamic is in evidence under occupation law in the OPT. The impact of multiple forms of "family" law layered on top of occupation law and practice demands further interrogation of how customary and religious law engages formal legal systems, generally to the detriment of women's rights and autonomy.[147]

An important gendered point of conclusion is that despite the disparate characterizations between the occupier and occupied in the Israeli/Palestinian context–one apparently 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 complementary patriarchy. Here, both regimes cede proprietary value to religious doctrine in the regulation of women's lives, and a common (if selective) lack of democratic 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 serves and extends the patriarchal interest of collective male elites and the interest convergence of both is unexpected but real. Complementary patriarchy is evident in the deference to "family rights," "honor," and "manners and customs," which while seemingly neutral and deferential concepts notoriously work against women's interests.[148] Such cultural arguments are not raised as a barrier to protect men's dignity interests in the context of occupation. Although occupiers may stretch interpretation of prior legal norms to the benefits of the protected population and may 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. Without doubt, the law consistently bends to the interests of male military elites as well as a conservative and masculine settler political pressure.

Most obvious in any assessment of occupation is a sustained invisibility of women's lived lives in their myriad roles and identities they sustain under

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[146] Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 IND. J. GLOBAL LEGAL STUD. 87 (2011).

[147] *See* Holly Dunn, *The Transitional Justice Gap: Exploring 'Everyday' Gendered Harms and Customary Justice in South Kivu, DR Congo*, 25 FEMINIST LEGAL STUD. 71 (2017) (discussing legal pluralism generally and its effects on women in conflict and post-conflict settings).

[148] *See* GARDAM & JARVIS, *supra* note 31, at 107-10; *see also* Shalhoub-Kevorkian, *supra* note 3, at 1189 (citing Patricia Jasen, *Race, Culture, and the Colonization of Childbirth in Northern Canada*, 10 SOC. HIST. MED. 383 (1997)) (discussing 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").

occupation. The double layers to this invisibility have internal and external dimensions connected to the experience of 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 under occupation is an essential aspect of transformative work on the law of occupation. As discussed above, this task of making women's lives and the regulatory impact of apparently neutral occupations laws and practice visible subsists in constant struggle, not least because of the challenge of making the totality of the occupation itself visible, before one can get to the specificity of women's lives within it.

In conclusion, it would be remiss to close 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, in 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 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 have 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. There is much work still to be done in the context of the OPT and other situations of occupation to reveal the fullness of this reality. This analysis is one step in that direction.