

The ABC of the OPT

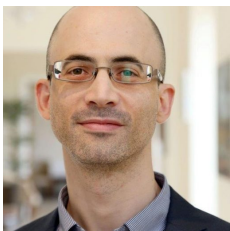
Response: Critiquing in the Light of The ABC of the OPT

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SHOW ALL ARTICLES OF Orna Ben-Naftali



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SHOW ALL ARTICLES OF Hedi Viterbo



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SHOW ALL ARTICLES OF Michael Sfar

We are grateful to Verfassungsblog for dedicating a symposium to *The ABC of the OPT*; to Anne Peters and Alexandra Kemmerer for their generosity of mind, indeed the contextual mindfulness in which they held a launching event for the book in Berlin (sponsored by both the Max Planck Institute for Comparative Public Law, International Law's Berlin Office and *Recht im Kontext* (Humboldt-Universität zu Berlin) and wrote the introduction to this symposium; and to the contributors – Yael Berda, Michael Lynk, Nadija Samour, and Yuval Shany – for their thoughtful and munificent comments. Interwoven across the contributions to this symposium are two central themes: first, the use of conceptual frameworks as critical tools, and second, international law's relationship with state violence. In what follows, we will reflect on the contributors' comments regarding each of these themes.

1. Conceptual frameworks as critical tools

In their contributions to the symposium, Yael Berda and Nadija Samour focus on two concepts crucial for critiquing the Israeli control regime: "colonialism" (specifically "settler colonialism") and "apartheid." Regarding the former concept, **Berda** highlights the book's relevance for understanding Israel's colonial dimensions. As she puts it, by "fleshing out the concepts, doctrines and toolkits" of the Israeli control regime, *The ABC of the OPT* exposes how "the colonial and imperial phantoms that have created international law ... are used today ... against the Palestinian population." While **Berda** focuses on two entries – *Military Courts* and *Nomos* – her analysis could be applied to the entire book, and some of her observations are developed further in other entries. Moreover, the entry *Violence* links **Berda's** own work on "phantom sovereignty," on which her review here builds, to the issue of law's invisibility.

Adding to this, **Samour** notes the discussion, in the entry *Jewish Settlements*, of settler colonialism. In addition, she praises the focus of the entry *Outside/Inside* on connections and parallels between Israel's control over the West Bank and Gaza and pre-1967 laws and policies: Ottoman and British Mandate legal legacies (pre-1948), Israel's military rule over Palestinian citizens (1948-1966), the first Israeli occupation of Gaza (1956-1957), and Israel's devising of legal infrastructure for occupying the West Bank (the early 1960s).

Yet, when it comes to the concept "apartheid," **Samour** levels criticism at *The ABC of the OPT*. While acknowledging the book's discussion of apartheid, she censures it for not developing a fully-fledged critique based on this concept. "I wonder," she writes, "why the suggested approach is incapable of integrating 'apartheid' or 'annexation' as legal terms and as epistemological concepts of systematized characterization of what is going on in Palestine."

Samour's remarks provide a welcome opportunity to clarify three interrelated aspects of *The ABC of the OPT*. The first concerns the importance of the concepts "apartheid" and "settler colonialism" for understanding and responding to Israel's control over Palestinian lives and territories. Not only do we fully agree with this argument, but we have articulated it ourselves elsewhere. Thus, already in 2005, Orna Ben-Naftali, in a 2005 article co-authored with Aeyal Gross and Keren Michaeli, argued that "the Israeli government's actions ... may well [violate] ... the International Convention on the Suppression and Punishment of the Crime of Apartheid. ... [If] practiced as a widespread or systematic policy, apartheid is [also] criminalized in ... the Rome Statute as a crime against humanity." Similarly, Michael Sfar (2018) has observed: "A person would have to be unconscious not to pick up the whiff of apartheid everywhere there is a settlement. Israel has created ... a regime [exhibiting] the very core of the legal definition of apartheid, which is an international crime." As for settler colonialism, Viterbo (2017) has thrown light on the ways in which Israel's "settler-colonial matrix [and its] ... legal and political mechanisms ... target ... the collective subjugated sociopolitical [Palestinian] body ... through a combination of segregation and fragmentation." As **Samour** rightly notes, critiques similar to these can be found in a growing body of scholarship.

The ABC of the OPT, in comparison, was designed to achieve a very particular aim, clarified as follows in its opening pages: "to date, there has been no comprehensive, theoretically-informed, and empirically-based academic study of the role of various legal mechanisms, norms, and concepts in shaping, legitimizing, and responding to the Israeli control regime. This book seeks to fill this gap, while shedding new light on the subject." In his contribution to this symposium, Yuval Shany seeks to convey this aim: "the format of a legal lexicon [is] dedicated to specific legal terms and rhetorical devices (or newspeak)." **Berda's** contribution adds: "the use of the lexicon seeks to cut through the [Israeli regime's] colonial grammar."

Second, for **Samour**, "the lexicon largely remains within Israeli military-judicial thinking, with the editors employing the first letter A

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Israel and occupied territory, Palestine

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instrument for the organization of knowledge,” but also, crucially, “the function of reflecting on this knowledge in a critical manner that challenges and redefines it.” An abundance of examples can be found throughout the book. The entry on Israel’s so-called *Regularization Law*, for instance, describes it as a “cynically but aptly named” statute that ends Israel’s “50-year-old masked ball.” The entry *Combatants* likewise censures Israel’s use of the term “unlawful combatants,” while the entry *Future-Oriented Measures* unmasks sanitized phrases such as “targeted killing” and “roof knocking.” Similarly, the entry *Security Prisoners* not only criticizes this Israeli legal category but also calls attention to the resistant Palestinian term: “political prisoners.” The list could go on. Contrary to **Samour**’s portrayal of discourse as fairly fixed, then, this book’s lexical mapping aims to deconstruct, problematize, and thus subvert Israel’s legal language.

Finally, by no means do the entry headings exhaust the concepts with which the book engages. Apartheid, in particular, is discussed in at least three entries (partly mentioned by **Samour**): *Geneva Law*, *Proportionality*, and *Temporary/Indefinite*. Annexation, the other concept invoked by **Samour**, is discussed at length in seven entries: *Border/Barrier*, *Geneva Law*, *Nomos*, *Proportionality*, *Regularization*, *Temporary/Indefinite*, and *Zone*. In this manner, as noted in the *Introduction*, the book’s “analytical and deconstructive moves take place at both the level of each separate entry and also ... at the level of their interaction. Indeed, to a large degree, the meaning of each term or concept is to be found in its relation to the other terms and concepts... This conception of meaning as relational is inspired in part by Ludwig Wittgenstein’s ‘family resemblance’ theory, and in part by Derrida’s writing on ‘différance.’”

2. International law’s relationship with state violence

As noted in its opening pages, *The ABC of the OPT* “provides insights that are relevant to other situations elsewhere in the world, particularly with regard to ... the law’s role in relation to state violence, and justice.” The contributions by **Michael Lynk** and **Yuval Shany** provide an apt opportunity to contemplate on the ways in which these issues are addressed in and beyond our book.

Lynk, in particular, is an ardent champion of international law: “perhaps the most invaluable asset on the side of those who believe in a compassionate peace in the Middle East is international law, and the rights-based approach towards justice, equality and peace that it represents. I say this because, at its highest and most noble, international law represents impartiality and universal values.” In the *Introduction* to our book, we call views such as **Lynk**’s “critiquing before the law.” This line of critique, we explain in the *Introduction*, “tells international law’s story of its own awesome grandeur ... Objective rather than subjective, international legal norms are defined by ... [their] impartiality.” Some entries in the book share this view with **Lynk**. The entry *Deportations*, for instance, describes customary international law as “reflecting ... an ethos of universally held values.”

Other entries, however, offer what we call “critique against the law,” which, “rather than regarding international law (and law generally) as its normative basis, treats it as inherently violent” (p. 19). This anti-legalistic critique is most extensively developed in two entries – *Lawfare* and *Violence* – the latter of which calls into question the common “equation of violence with illegality” and adds: “part of law’s function is to deny its own violence. ... [Law is] a mode of violence endowed with elevated social legitimacy, a violence that simultaneously denies and affirms physical and symbolic violence.” This casts doubt on whether international law truly is, as **Lynk** portrays it to be, and whether it deserves such praise.

Treading along similar lines to **Lynk**’s, **Shany**’s contribution exhibits what we describe, in our *Introduction*, as another feature of “critiquing before the law”: a tendency to “treat ... international legal norms ... as a formally ordered, rational, and hierarchical system of known rules and procedures ... as something relatively fixed, if not in practice then in principle.” This is apparent when **Shany** characterizes Israel’s “application of the laws of belligerent occupation” as “distorted” and as “undercut[ting] ... [their] underlying principles.” Similar language appears, for example, in the entry *House Demolitions*, which laments the way in which Israel “undercuts the rule of law.”

Yet, from a “critique against the law” perspective, such formalist-legalist language might wrongly exonerate international law – whose so-called “underlying principles” **Shany** depicts as standing in contrast to Israel’s “distorted application” of it. “It is... due to... law’s malleability to diverse (and often competing) interpretations,” we note in the *Introduction*, “that law provides a framework... for continuing war and state violence by other means.” For **Shany**, this “elasticity” is a hallmark of “the laws of belligerent occupation.” However, as revealed in the entry *Military Courts*, one can have no certainty as to how any area of law, even ostensibly clear-cut statutory terms, would be interpreted and applied.

Somewhat similarly, **Shany** speaks of Israel's conduct in terms of a *sui generis*: "What is exceptional about the Israeli occupation ... is that unlike other modern occupiers, Israel attempted to pursue policies which run contrary to the basic tenets of the laws of belligerent occupation while resorting to extensive interpretation and application of these very same laws." Yet again, these accounts shift the blame away from international law. But what if Israel/Palestine presents us with a broader lesson about international law's relationship with state violence? As demonstrated in the entries *Export of Knowledge* and *Combatants* (and noted in the entry *X Rays*), the ideas and policies developed in Israel's "legal laboratory" have been exported to other parts of the globe, including Western counterinsurgencies in places such as Iraq and Afghanistan. Like Israel, though usually to a different degree, other countries have combined legalism with undermining the (mythical) "rule of law." Part of what makes *The ABC of the OPT* so troubling, then, is its relevance for law's relationship with state violence far beyond Israel/Palestine.

In combining critiques "with the law" and "against the law," *The ABC of the OPT* seeks to provide not only an unusually comprehensive and detailed analysis, but also a unique critical framework greater than the sum of its parts. It is precisely conversations such as this symposium that give hope that this critical framework is indeed bearing fruits.



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All the best, *Max Steinbeis*

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