The ABC of the OPT
A Legal Lexicon of the Occupation of the Palestinian Territory

INTRODUCTION
Orna Ben-Naftali, Michael Sfard & Hedi Viterbo

1. THE OCCUPATION OF THE PALESTINIAN TERRITORY AS A LEGAL LABORATORY

A. Subject Matters

The Israeli control over the Occupied Palestinian Territory (OPT) is possibly the most legalized belligerent occupation in world history. This is mainly evidenced by four interrelated factors: The first is Israeli government lawyers’ extensive involvement in designing and carrying out the occupation, since its beginning. The second is the Israeli military legal system, which tries thousands of Palestinians each year, and which has produced thousands of enactments governing Palestinians’ lives. A third factor is the unprecedented decision of the Israeli Supreme Court, operating in its capacity as a High Court of Justice (HCJ), to open its gates to petitions emanating from the OPT, and to determine such petitions in the light of international law as well as Israeli law. Lastly, at the time of writing, the Israeli occupation is well into its fifth decade, making it the longest – and accordingly the most entrenched and institutionalized – belligerent occupation in modern history. Taken together, these facts have generated a profusion of law and, concurrently, voluminous legal scholarship.

Yet, it seems that more laws, arming to the teeth trailing troops of lawyers, legal advisors, judges and scholars, have not operated to limit state violence. Instead, more often...

---


2 See entry M: Military Courts.

3 Basic Law: Judicature, 38 LSI 101 (1984), art 15(c) provides that the Supreme Court of Israel may also sit as a High Court of Justice, and “when so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court”.

4 This decision was first made in 1972. See HCJ 337/71 The Christian Society for the Holy Places v The Minister of Defence, 26(1) PD 574 (1972) (For an English summary see (1972) 2 Isr YB Hum Rts 354-357).

5 International Humanitarian Law [hereinafter: IHL] in general; the law of belligerent occupation in particular; and, to a lesser extent, international human rights law [hereinafter: IHRL]. While Israel’s official position has been that IHRL does not apply to the Palestinian territories, since 2002, the HCJ has occasionally applied it as a complementary source to IHL. See HCJ 7957/04 Mara’abe v The Prime Minister of Israel (15 September 2005) <http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf> accessed 27 September 2014.

6 Israeli administrative law and, to the extent Jewish settlers are involved, constitutional law. In HCJ 1661/05 Hof Aza Regional Council v The Knesset of Israel, 59(2) PD 481 (2005) §§78-80, the court decided that the Israeli Basic Laws (which comprise the nascent Constitution of Israel), including the Basic Law: Human Liberty and Dignity apply in personam to Israelis in the occupied territories, leaving open the question of the application of these laws to the Palestinian residents of the same territories.

7 A search in on-line data bases supports this assessment. E.g., the term “Israeli Occupation” generates some 19,000 results in the ‘Google Scholar’ interdisciplinary database <http://scholar.google.co.il/scholar?hl=iw&q=%22israeli+occupation%22&btnG=>, and more than 1,300 in the law journal database ‘HeinOnline’ <http://home.heinonline.org/content/list-of-libraries?c=1&sn=journals> accessed 27 September 2014.
than not, law has enabled this violence, cloaking the use of force required to sustain the occupation regime with a mantle of legitimacy.\textsuperscript{8} Judicial review exercised by the HCJ, for example, has rejected the overwhelming majority of the petitions challenging the legality of various decisions and actions of the occupying power.\textsuperscript{9} The very few, though highly publicised rulings in favor of petitioners have had no significant long-run impact on Israel’s conduct in the OPT, other than, in some cases, “legalising” oppressive state practices or propelling Israel to pursue alternative legal justifications.\textsuperscript{10} Scholarly work, in the main, has followed the footsteps of the judiciary and other state agents, engaging in an assessment of the legality of specific decisions and institutional practices rather than in analyzing, in their light, the role of law in structuring and sustaining the regime. Such an analysis is at the heart of this study.

\textbf{B. The Aims of the Study}

This study is designed to accomplish several objectives. First, it sets out to offer a detailed account of the ways in which international and domestic law has been implicated in the multitude of measures taken by the occupying power to establish and maintain its control over the OPT. The first decades of the twenty-first century have witnessed a resurrection of the concept of “belligerent occupation”, with the 2003 military occupation of Iraq by the U.S.-led coalition forces, Ethiopia’s 2006 occupation of parts of Somalia, Nicaragua’s occupation of Isla Calero in 2010, and Russia’s occupation of certain areas of Georgia in 2008 and later its occupation of Crimea in 2014. There have also been similar regimes, even if undertaken by ostensibly less disturbing names, such as “transformative/humanitarian occupations” or “post-bellum regimes”. Against the backdrop of these developments, a careful scrutiny of the experiments carried out in Israel’s legal laboratory may well generate lessons that are relevant to other situations, and indeed to the course of the development of international law itself.

Second, the study seeks to highlight the nexus between the normative legal text and the narrative context within which it is written and that endows it with meaning. While decisions on the legality of a specific measure affecting the occupied population often accept the normative relevance of international law, they are neither made in abstracto nor by abstracted decision-makers. The legal text is written in a national context by domestic decision-makers (judges, legal advisors and legislators) and, in most case, its argumentation is directed primarily at the national constituency.\textsuperscript{11} The interaction between an international legal norm

\begin{itemize}
\item \textsuperscript{8} See, e.g., Judge Alex Kozinski: "In the end, we do not believe that more law makes for better law", in \textit{Hart v Massanari} 266 F 3d 1155, 1180 (9th Cir 2001). This notion can be traced to Cicero’s dictum “The more law, the less justice” (Cicero, \textit{De officiis} i (44 BC, OUP 1994) 10, 33).
\item \textsuperscript{9} Ronen Shamir, “‘Landmark Cases’ and the Reproduction of Legitimacy: The Case of Israel’s High Court of Justice’ (1990) 24 Law & Soc’y Rev 781, 783 provides data on judgments rendered by the HCJ between the years 1967-1986, indicating that 99% of Palestinian petitions were rejected. Yoav Dotan, ‘Judicial Rhetoric, Government Lawyers, and Human Rights The Case of the Israeli High Court of Justice during the \textit{Intifada}’ (1999) 33 Law & Soc’y Rev 319, 334, provides data according to which in the years 1986-1995, 98.5% of Palestinian petitions were wholly rejected, and some additional 3% were 3% partly accepted. He further notes that during the first Oslo Accord negotiations (1991-1993), the Israeli Military Attorney General’s office tended to treat Palestinians differently according to their factional affiliation: those affiliated with factions supporting the negotiations were treated relatively leniently while those affiliated with factions actively trying to undermine the negotiations were handled as harshly as possible. Throughout the 1990s, the Israeli military continued arresting and prosecuting Palestinians for actions committed during the \textit{Intifada}. Lisa Hajjar, \textit{Courting Conflict: The Israeli Military Court System in the West Bank and Gaza} (UC Press 2005) 124-26. Our own data up to 2014 indicates that some 99% of Palestinian petitions were rejected.
\item \textsuperscript{10} Shamir (n 9) 797.
\item \textsuperscript{11} As a general rule, judgments of the HCJ are written and published in Hebrew. Some landmark decisions – notably those that are based on a sophisticated application of international law coupled with an evocative narrative about the subjection of the executive to legal restraints even
\end{itemize}
and a national narrative is among the key factors determining the nomos of the regime. Insofar as “[n]o set of legal institutions exists apart from the narratives that locate it and give it meaning”,\(^{12}\) it is necessary to elucidate this nomos in order to understand the role international law has played in instituting and maintaining the occupation.

Third, by analyzing specific cases, measures, institutions and legal concepts, this study aims to provide insights into the immensely convoluted legal architecture of the occupation regime. The book thus offers not merely a comprehensive but also a meticulous study of law’s role in constructing and maintaining the occupation, tracing the Ariadne’s thread woven by legal dentellières into the fabric of the regime.

Finally, the study delves into the relationship between the rule, the norm, and the exception, and the ways in which this relationship informs and is affected by the occupation regime. This issue, whose relevance exceeds well beyond the Israeli occupation, is discussed in detail in the following section.

2. THE LAW-RULE-EXCEPTION RELATIONSHIP

A. General Overview

The law-rule-exception triad has been at the core of a rich jurisprudential literature. Carl Schmitt conceptualized an exceptional situation as one that poses a threat to the existence or survival of the state. Legal norms cannot fully foresee every exceptional situation, nor can such situations, which are never self-evident, be simply grounded in fact. Therefore, according to Schmitt, in order to enable the state to overcome the exception the sovereign must be entrusted with deciding on the existence of an exception, and subsequently, with suspending the law previously in force.\(^{13}\) Many have drawn on this formulation of the law-exception relationship (while rejecting Schmitt’s authoritarian prescription) to examine various situations that either constitute, or are comparable to, a state of emergency.\(^{14}\) This section touches upon central themes of the jurisprudential discourse on the exception, including reference to Walter Benjamin and Giorgio Agamben, whose highly influential writing on this topic both engages with, and substantially diverges from, Schmitt’s thinking.\(^{15}\)

In particular, this book sheds light on law’s role in shaping or transforming distinctions between the rule and the exception in relation to the occupied territories, as well as on the architecture and effects of specific rules and exceptions deployed by the Israeli occupation. Two overarching lines of critique, through which the book’s entries address these themes, will now be described.

The first, which enshrines concepts such as “the rule of law” and “legal normalcy”, largely comports with a mode of thinking and operating that Patricia Ewick and Susan Silbey

---

in the face of terrorism – are published in English as well as Hebrew. It is interesting to note that while Arabic, not English, is both an official language in Israel and the petitioners’ language, the judgments are not translated into Arabic.


\(^{13}\) Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab tr, University of Chicago Press 1988).

\(^{14}\) However, in Schmitt’s own writing, the state of exception (Ausnahmezustand in German) is not simply equivalent to a state of emergency. Samuel Weber, ‘Taking Exception to Decision: Walter Benjamin and Carl Schmitt’ (1992) 22 Diacritics 5, 9.

\(^{15}\) On the dialogue (actual and ideational) between Benjamin and Schmitt see Weber, ibid. Agamben’s writing refers to Schmitt and Walter extensively, as discussed, e.g., in Daniel McLoughlin, ‘The Fiction of Sovereignty and the Real State of Exception: Giorgio Agamben’s Critique of Carl Schmitt’ Law, Culture and the Humanities (forthcoming) <http://lch.sagepub.com/content/early/2013/05/16/1743872112469863.abstract> accessed 27 September 2014.
have labelled “before the law”. This approach generally tends to treat legal norms (here, especially international legal norms) as “distinctive, yet authoritative and predictable”, as “a formally ordered, rational, and hierarchical system of known rules and procedures”. In this critique, legality appears, more often than not, “as something relatively fixed”, if not in practice then in principle. In so doing, and in investigating law’s operation in light of the premises of the dominant international legal discourse, this critique tells international “law’s story of its own awesome grandeur …. Objective rather than subjective,” international legal norms are “defined by [their] … impartiality.”

The second line of critique amalgamates two other modes of thinking and acting. The first, toward which this critique primarily leans, can be termed, following Ewick and Silbey, “critiquing against the law”. It includes what they have described as “explo[it]ing the interstices of conventional social practices to forge moments of respite” – ideationally and concretely – “from the power of law. … [P]art of the resistance inheres in … passing the message that legality can be opposed, if just a little.” The second mode, which on the basis of Ewick and Silbey’s terminology can be called “critiquing with the law”, involves “playing” law “as a game, … in which pre-existing rules can be deployed and new rules invented to serve the widest range of interests and values.” The concern is less with protecting or respecting (international) “law’s power than [with] … the power … to successfully deploy and engage with the law.”

By juxtaposing and/or combining these critiques, this study aims to produce a multilayered analysis, richer than would have been possible through a single perspective.

**B. Critiquing Before the Law**

The normative point of departure for this line of critique is the foundational principle of the Westphalian international order: namely, a presumption of sovereign equality between States, each exercising effective control over its territory and people. Under current international law, while said sovereignty is still attached mostly to States, it is increasingly understood as vested in the people, giving expression to their right to self-determination. The latter is conceived as the *sine qua non* for realizing freedom in its negative (freedom from coercion) and positive (freedom of choice) senses. From this normative perspective, a situation of

---

16 This use of this phrase clearly differs from its use in Franz Kafka ‘Before the Law’ in *Wedding Preparations in the Country and Other Stories* (Willa Muir & Edwin Muir trs 1978) 127.


18 UN Charter art 2(1).


belligerent occupation is the exception that suspends the norm: it consists of a foreign military force exercising effective control over a territory despite having no sovereign title over that territory and without the sovereign’s volition — thus severing the link between sovereignty and effective control and ultimately suspending the normal order concerning the occupied territory. When the suspension of the norm loses its temporariness, the exception becomes normalized. The normalization of the exception severely affects the occupied population’s fabric of life, the occupying power’s legitimacy, and indeed, the very notion of the rule of law.

As Giorgio Agamben has observed, the space where the temporary suspension of the rule is indistinguishable from the rule has generated the conditions of possibility for the concentration camp, but is not limited to Nazi Lagers. It is paradigmatic of every situation where the political machinery of the modern nation state finds itself in a continuous crisis and decides to take it upon itself to defend the nation’s biological life, collapsing human rights into citizens’ rights, subsuming humanity into citizenry and making the former the “exceptionless exception”. In such a situation, the enemy, stripped of human rights, is also stripped of his humanity. Having been excluded from the body-politic, he has only his own body as a political tool and it is through this political body that he interacts with the body-politic that has thus reified him. This may well be the situation of a non-citizen hunger-striking prisoner.

The reason for the indeterminacy of the state of exception – Agamben has argued, adapting Schmitt – is the absence of any necessary relation between the decision on the state of exception and its factual existence. This allows for an indefinite suspension of the norm, explains how the Nazis produced an ostensibly “normal” constitutional structure characterized by the legal indeterminacy of the emergency situation, and also explains why the sovereign cannot distinguish between the norm and the exception, thus failing to meet the task Schmitt’s Political Theology assigned to it. In Schmittian terms, the result may be conceptualized as blurring the line between law and fact: the law continues to operate despite its suspension but has no meaning. Those subject to the state of exception are stripped of the legal rights that would protect them, yet are still subject to law’s violence: “insofar as law is

---

23 This notion of suspension was already recognized in the first attempt to codify the law of belligerent occupation in the Brussels Declaration. See Final Protocol and Project of an International Declaration Concerning the Laws and Customs of War (Brussels, 27 August 1874) reprinted in Dietrich Schindler & Jiří Toman (eds), The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents (3rd edn, Martinus Nijhoff 1988) 25.
24 Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life (Daniel Heller-Roazen tr, Stanford University Press 1988) 166-68.
25 ibid 126-131 and 174-176. Agamben, noting the very ambiguity of the title “Déclaration des droits de l’Homme et du Citoyen”, refers in this context to Arendt’s discussion of the paradox wherein “The Conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships — except that they were still human”. See Hannah Arendt, The Origins of Totalitarianism (Harcourt Brace 1973) 299. Thus, says Agamben, in the nation-state system, human rights that are considered inalienable have become meaningless once they cannot be attached to the citizens of a nation-state. The refugee, the person who was supposed to be the “human rights” person par excellence has thus become the paradigm of “bare life”.
maintained as pure form in a state of virtual exception, it lets bare life... subsist before it". 29 The Goldstone Report captured this problem when noting, in one of its concluding observations, that “a line has been crossed, what is fallaciously considered acceptable ‘wartime’ behavior has become the norm”. 30

International law has contributed significantly to the blurring of this line. And so has Israel’s use of this law over the years, with regard to a wide range of measures designed to sustain, expand and deepen the Israeli control over the OPT (while simultaneously perpetuating Israel’s self-perception and external image as a law abiding “defensive democracy” fighting “with one hand tied behind its back”). 31 Against this backdrop, the central proposition this line of critique advances is that once law becomes implicated in obfuscating the rule-exception relationship, it becomes itself infected and its legitimacy is jeopardized. This proposition rests on several observations this critique seeks to substantiate. First, the application of law to individual cases would typically resort to various sophisticated interpretative techniques and methodologies designed to advance the occupying power’s interests at the occupied people’s expense. More often than not the result would frustrate the original purpose of the rule at hand and would operate as a legitimizing device, encouraging a discourse of various specific violations of human rights carried out in the name of security to be perceived as exceptional, thereby concealing the reality wherein said violations have become the rule, not the exception. Second, such application of the law would contribute to and facilitate the formation of an environment, indicative of a State policy of tolerance towards systemic violations of human rights and the institutionalization of a culture of impunity. Third, the resulting chain of specific anomalies would generate overtime the perception among the occupied population, that the justice system itself is an instrument not merely of power but of unpredictable violence, of arbitrariness, where the absence of law is carried out under the name of law. Constant exposure to law’s violence would engender violence.

International law seeks to regulate the interruption created by belligerent occupation. Such regulation signifies the need to distinguish both order from chaos and the rule from the exception. In distinguishing between order and chaos, its function is to govern the situation; to prevent anarchy by entrusting the occupying power with governing the occupied territory. In distinguishing between the rule and the exception, its function is to establish the conditions that would enable as swift as possible a return to the normal order of the international society.

This, according to the present line of critique, is the role of the law of belligerent occupation, a body of law that bears strong structural resemblance to the normative framework applicable to an emergency regime. This regime, the roots of which date back to the Roman-Commissarial model, rests on three precepts: exceptionality; limited scope of powers; and, temporary duration. 32 The assumption on which this model is based is that a situation of emergency is exceptional, hence separated from the ordinary state of affairs. For this reason, its duration must be limited and it must not generate permanent effects. This is also the reason for regarding the norm as superior to the exception: the existing legal order defines the terms under which it is suspended, and the powers granted in such a situation are

29 Agamben – Homo Sacer (n 24) 55 (and the discussion 50-55).
31 This is a recurrent narrative in the judgments of the HCJ pertaining to the OPT. See, e.g., HCJ 7015/02 Ajuri v IDF Commander in the West Bank 56(6) PD 352 <http://elyon1.court.gov.il/Files_ENG/02/150/070/A15/02070150.A15.pdf> accessed 27 September 2014.
to be used for the purpose of an expeditious re-establishment of normalcy.\textsuperscript{33} Indeed, as modern studies of emergency situations concerned with the derogation from human rights law thereby occasioned have concluded, “[a]bove and beyond the rules … one principle, namely, the principle of provisional status, dominates all others. The right of derogation (of human rights) can be justified solely by the concern to return to normalcy”.\textsuperscript{34}

The basic tenets of the normative regime of occupation largely conform to this constitutional model, transporting it to the international arena: the normal order is based on the principle of sovereign equality between states that are, at least to some extent, presumed to be founded on the ideas of self-government and self-determination. The severance of the link between sovereignty and effective control, and life under foreign rule – both features of occupation – constitute an exceptional situation. The law of occupation recognizes it as an exception to be managed so as to ensure expeditious return to normalcy. This is why the occupant has only limited powers in terms of both scope and time, and is not permitted to act in a manner designed to generate permanent results.

As noted above, this mode of critique takes as its normative framework the law of belligerent occupation, consisting of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land;\textsuperscript{35} the Fourth Geneva Convention Relative to the Protection of Civilians Persons in Times of War\textsuperscript{36} and Additional Protocol I of 1977.\textsuperscript{37} Over the past decades it has been accepted that IHL provides the specific – though not exclusive – law governing occupation (\textit{lex specialis}), and that it is complemented by IHRL.\textsuperscript{38} Three basic tenets, extractable from this body of law, will now be articulated.

(1) \textit{Sovereignty is distinct from occupation and occupation does not confer title}

Effective control by foreign military forces suspends, but does not transfer sovereignty. The prohibition on annexing an occupied territory is the normative consequence of this principle.\textsuperscript{39} Under current international law, and in view of the principle of self-determination, sovereignty remains vested in the occupied people. This principle is currently undisputed. Its development merits attention primarily because history, that is, change over time is hardly ever a linear process of progression; regression to imperial domination remains an ever present possibility. It is thus worthwhile to take count, albeit briefly, of this development.

\begin{footnotesize}
\textsuperscript{33} For the essential features of the traditional model of emergency powers, see Gross (n 26) 1836-1839.
\textsuperscript{35} Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) 205 CTS 277 [hereinafter Hague Regulations].
\textsuperscript{36} Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949, 75 UNTS 287) [hereinafter: GCIV].
\textsuperscript{37} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), (8 June 1977, 1125 UNTS 3) [hereinafter: API].
\textsuperscript{39} Surya P. Sharma, \textit{Territorial Acquisition, Disputes and International Law} (Kluwer Law International 1997) 148.
\end{footnotesize}
The roots of the principle of the inalienability of sovereignty date back to the post-
Napoleonic wars and the restoration of a European order designed to protect the ruler’s
sovereignty from intervention by another state. Given that the political legitimacy of
European rulers at the time was based on either dynastic monarchy or popular democracy, the
principle was designed to accommodate both systems and minimize disruption by preventing
one from overthrowing the other. In the relationship between the European and the non-
European world, conquest remained a legally valid way to acquire sovereignty until the
twentieth century. The international community’s gradual renunciation of the use of force as
an acceptable policy coupled with decolonization processes and the ensuing right to self-
determination, have internationalized this hitherto exclusively European order. Accordingly,
the prohibition on annexation of territory, differentiating between occupation and sovereignty,
coheres with the corpus of general international law core principles of sovereign equality,
self-determination and non-intervention.

Given, however, that such principles have not been inscribed on a tabula rasa, it is little
wonder that the very occurrence of an occupation echoes the sorry story of the “civilizing
mission”, and that “alien occupation” of whatever type has been grouped together with
colonial domination, racist regimes, and related practices of subjugation, domination and
exploitation. This sensibility runs through the divide between sovereignty and foreign
occupation, and implies that the very phenomenon of occupation is viewed with suspicion and
is likely to generate resentment and resistance. This is a fortiori the case with prolonged
occupations and with “transformative occupations”, that is, occupations that purport to
replace the socio-political system of the occupied territory with a system akin to that of the
occupying power. The association between such attempts and imperialism may well explain
why the various international interventions of the 1990s shied away from either describing
themselves as occupations or indeed from referring to the law of belligerent occupation. From
this perspective, former president George W. Bush’s admission that the American and British
troops occupying Iraq were “welcomed, but it was not a peaceful welcome” should not have
come as a surprise, nor should the subsequent resurgence. Foreign occupation connotes
subjugation, not liberation. Reflecting this understanding are the distinction between
sovereignty and occupation, as well as the consequential limits placed on the occupant’s
governmental authority, both of which are discussed below.

(2) An occupation is a form of trust precluding the introduction of major systemic change

The basic rule regulating the occupant’s governmental authority is articulated in Article 43 of
the Hague Regulation. Under this rule, the occupant is vested with the authority “to take all
the measures in his power to restore, and ensure, as far as possible, public order and
safety/civil life, while respecting, unless absolutely prevented, the laws in force in the
country”. This rule, thus, imposes two categories of obligations on the occupant: (a) to

721.
41 Sharon Korman, The Right of Conquest: The Acquisition of Territory by Force in International
Law and Practice (OUP 1996) 9.
42 See UN Charter arts (2); 2(1); 2(4); 2(7) & 55.
43 API (n 37) art 4.
44 See Declaration on Principles of International Law Concerning Friendly Relations and Co-
operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625
(24 October 1970) 25th session.
45 In an interview with Brian Williams, NBC News, 12 December 2005, cited in Adam Roberts,
46 For the discussion between the French and the English versions of Article 43 of the Hague
Regulations (n 35), see Yoram Dinstein, ‘Legislation under Article 43 of the Hague Regulations:
protect the inhabitants’ life, property and livelihood and (b) to respect the existing legal, economic and sociopolitical institutions in the territory.

The first category reflects humanitarian concerns. It has evolved over time to incorporate the concept of trusteeship, the beneficiaries of which are the inhabitants of the territory. Admittedly, this is a *sui generis* form of trust insofar as it carries with it a potential conflict of interests between the occupant’s security needs and the inhabitants’ welfare. In the nineteenth century, this framework produced two primary rules: the occupant was mainly incumbent with the negative duty of refraining from infringing on the inhabitants’ most basic rights, while the latter were incumbent with a duty of obedience to the occupant. Over time, the scale began to tip to the inhabitants’ side: the GC IV seems to reject the idea that the occupied population was under any obligation to obey the occupant. In parallel, it has considerably expanded the protection due to the inhabitants, in respect of both negative and positive duties. This process has culminated with the co-application of IHL and IHRL to occupied territories. Nevertheless, the GC IV explicitly subjects some of the guarantees afforded to the population to military necessity and conditions and empowers the occupant to take various measures against “protected persons”. It is thus clear that situations where the occupation either is met with strong resistance in general (such as the occupation of Iraq), or produces such resistance (the occupation of the Palestinian territory being the quintessential example), threaten the viability of this precarious balance.

The second category of obligations, which prohibits the occupant from instituting major changes in the occupied territory, has its origins in the above discussed preservation of the sovereignty (inclusive of the domestic governmental system) of the ousted rulers in Europe. This limitation on the occupant’s authority was incorporated and further detailed in the GC IV. Currently known as the “conservation principle”, it highlights the distinction between temporary occupation and sovereignty. Given that the latter is attached to the occupied people, the principle protects local self-determination. In this context too, both transformative and prolonged occupations threaten the viability of this principle: the former because the objective of redesigning the existing system stands in direct conflict with its conservation; the latter because the occupation either is met with strong resistance in general (such as the occupation of Iraq), or produces such resistance (the occupation of the Palestinian territory being the quintessential example), threaten the viability of this precarious balance.


47 Originating in the principle of distinction between civilians and combatants, see Benvenisti (n 40) 624-27.

48 *Construction of a Wall* (n 38) §88; Separate Opinion of Judge Koroma §2, explicitly stated that occupied territories "constitute … a sacred trust, which must be administered as a whole in the interests both of the inhabitants and the legitimate sovereign or the duly constituted successor in title.”; cf Separate opinion of Judge Higgins §2; Separate opinion of Judge Kooijmans §33.


50 E.g., the terms ‘war rebellion’ and ‘war treason’ were not incorporated in the Convention. Furthermore, while providing the occupant with the right to take measures against “protected persons” who carry out acts detrimental to the occupant’s security (GCIV (n 36) arts 27 & 64), it nevertheless preserves most of their rights under the Convention (ibid arts 5 & 68).

51 E.g., ibid arts 27, 49, 51, 53.

52 Promulgating penal laws (ibid art 64); assigning residence (ibid art 78) and internment (ibid art 42).

53 ibid art 64.


55 Viewed from the perspective of the conservation principle, a "transformative occupation" mocks the law. When measured against the idea that an occupation is distinct from sovereignty and that, therefore, it is necessary to preserve the sovereign’s decision-making capacity in matters pertaining to its socio-political and economic profile, that is, its right to self-determination, the very concept of "transformative occupation" is an oxymoron which challenges the basic assumptions of the law of belligerent occupation. See Bhuta (n 40); Nehal Bhuta, ‘New Modes...
the latter because maintaining the status quo may well become a mandate for stagnation and defy the obligation to promote the inhabitants’ welfare. This point invites a discussion of the third tenet of the law of belligerent occupation.

(3) An occupation is a temporary form of control

The idea that an occupation is a temporary form of control that may not generate permanent results is undisputed. Indeed, it is implicit in both the principle that occupation does not confer title and in the conservation principle. The notion of limited duration further coheres with the exceptionality of the regime and highlights the need to resume as quickly as possible the normal international order of sovereign equality.

The greatest challenge to this principle comes not only from reality, but from law itself: the law of occupation, while providing for the provisional status of the occupation regime, does not set time limits on its duration. In this particular regard, the present critique departs from its overall location “before the law”, as described above. This absence of time limits has been construed to mean that an occupation can continue indefinitely. This construction obfuscates the crucial distinction between the “temporary” and the “indefinite”: a temporary situation definitely has an end; an indefinite situation may, or may not have an end. Indeed, if an occupation could continue indefinitely, the interests it is designed to protect would all become meaningless: (i) the inhabitants’ interest in regaining control over their life and exercise their right to self-determination; (ii) the interest of the international system in resuming the normal order of sovereign equality between states; and (iii) the interest of the international rule of law in maintaining the distinction between and the norm (the principle of sovereign equality) and the exception (occupation).

C. Critiquing Against/With the Law

Another critical approach, interwoven throughout some of this book’s entries, presents various challenges to dominant legal frameworks, while refraining (unlike the former approach) from committing itself to any totalizing normative agenda. This critique differs


Viewed from the perspective of human rights, however, “transformative occupations”, designed to substitute a democratic for a despotic form of government, arguably create the conditions of possibility for self-determination. From this perspective, the argument has been made that a law that fails to advance this objective is anachronistic and should be updated. See, e.g. Gregory H. Fox, “The Occupation of Iraq” (2004-2005) 36 Geo J Int’l L 195. A somewhat less radical variation of this view holds that resort to dynamic interpretations, which reads broadly the “unless absolutely prevented” proviso, allows for the reconciliation of transformative objectives with the conservation principle without a legislative reform. See, e.g., Roberts (n 45) 620-622.

Shamgar (n 1) 43.

GCIV (n 36) art 6, is the only provision that tackles directly the issue of the duration of an occupation. It does so, alas, in an implausible manner, providing for the continued applicability of only some of the Convention’s provisions. This may well be construed by occupying powers as limiting their obligations towards the inhabitants precisely in situations where greater protection is needed. Indeed, the text indicates the drafters’ assumption that occupations would normally be of short duration. Once it became clear that this assumption was defied by reality and that it may generate counter-productive results, the provision was abrogated: API (n 37) art 3(b), provides for the application of the law of belligerent occupation until the termination of the occupation. It does not, however, provide for time limits for its duration. See Construction of a Wall (n 38), Separate Opinion of Judge Elaraby §3.1; Separate Opinion of Judge Koroma §2; Orna Ben-Naftali, ‘”A La Recherche du Temps Perdu”: Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Construction of the Wall Advisory Opinion’ (2005) 38 Isr L Rev 211.

This position is also influenced by the post-structuralist skepticism toward totalizing grand-narratives. See, e.g., Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge (Geoff Bennington & Brian Massumi trs, University of Minnesota Press 1984). On post-structuralism generally see, e.g., Ian Buchanan, A Dictionary of Critical Theory (OUP 2010) 381.
from the former one in at least five respects. While these differences raise complex theoretical questions, a succinct overview suffices for the purpose of this introduction.

First, for the present line of critique, concepts such as “legal” and “norm” – and their counters, “illegal” and “exception” (or “fact”) – are not self-evident givens from which conclusions can be deduced, but are complex, elusive, and contestable products of legal discourse and action. Consequently, the rule-exception distinction is treated as an object of inquiry rather than as a point of departure. The task therefore becomes to carefully scrutinize the construction, deployment, and interplay of the (so-designated) “rule” and “exception”, and the effects thereof.

Second, a conceptual distinction between “the exception” and “the rule” can be maintained while acknowledging, at the very least, that these terms are neither historically nor structurally antithetical. Historically, as Walter Benjamin famously observed, “the tradition of the oppressed teaches us that the state of emergency in which we live is not the exception but the rule”. Indeed, for at least a century now, the apparent exception has been anything but exceptional. Across the globe, emergency powers have drastically increased in scope, and the definition of “emergency” has been broadened far beyond military conflicts to justify routine governmental powers serving the interests of socio-economic elites. Structurally, the state of exception is powerfully tied to the legal rule. For Carl Schmitt (and later, Giorgio Agamben), the state of exception retains a link to the suspended legal order by establishing the conditions for its re-application after its suspension, thereby maintaining law’s authority. A critique “against/with the law”, however, construes this link as is even stronger, in two interrelated respects: first, far from being a lawless or extralegal space, the state of exception brims with law – with legal texts, procedures, mechanisms and discourses; second, to a large extent, many of the oppressive practices and policies associated with the (assumed) exception actually reproduce or originate from practices and policies in the supposedly normal legal order.


63 Schmitt (n 13) 12-15; Agamben – State of Exception (n 28) 58. It is also a significant element of the inclusive exclusion characteristic of the Israeli occupation. See the aptly titled Adi Ophir et al (eds), The Power of Inclusive Exclusion: Anatomy of Israeli Rule in the Occupied Palestinian Territories (Zone Books 2009).


65 See entry O: Outside/Inside. For discussion beyond the Israeli-Palestinian context see, e.g., James Forman, Jr., ‘Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible’ (2009) 33 NYU Rev L & Soc Change 331; Ernesto Hernández-López,
A third difference is that the present critique, rather than regarding international law (and law generally) as its normative basis, treats it as inherently violent. Put explicitly, violence is viewed as integral to the so-called “normal” legal order, not as an aberration from this order. It is in line with this violence, and also due to law’s malleability to diverse (and often competing) interpretations, that law provides a framework not only for engaging with the limits of belligerent occupation, but also for continuing war and state violence by other means. Indeed, states all too often rely on, and resort to, international law to shape and legitimize their violent actions.

Fourth, in this account, the so-called “normal” political order is no less perilous than the “normal” legal order to which it is inextricably tied. Therefore, this critique does not share the previous critique’s lament over the purported suspension of the international order by the prolonged belligerent occupation. Nor does is share the tendency of legalistic approaches to fetishize the principle of state sovereignty, upon which the international order is based. In short, from this critical perspective, neither state-centrism nor a reversion to the dominant international order should be extolled as an ideal solution to the ills of occupation.

Lastly, just as legal and political norms are not necessarily praiseworthy, so the exception is not, by definition, deplorable. Moreover, in certain circumstances, the exception can open a space for justice. This insight follows Walter Benjamin’s assertion that in normal situations, the state employs oppressive “law-preserving violence” to protect its monopoly on violence, whereas in the state of exception the bell tolls for the oppressed: “pure violence” erupts, destroying or suspending the law. An example of such “pure violence”, Benjamin claimed, is the proletarian general strike, which – unlike the instrumental violence of partial and political general strikes – demands radical transformation of the state-enforced capitalist labour system. Giorgio Agamben and Jacques Derrida have each developed this notion in different, but potentially related, directions. Agamben advocated a “real” state of exception, neither statal nor juridical, which would obliterate, or at least undermine, the normalized (and in this regard “fictitious”) state of exception that has been imposed on humanity. Derrida, in comparison, defined responsibility as, among other things, “the experience of absolute decisions made outside of … given norms, made therefore through the very ordeal of the undecidable”;

\[\text{it must … conserve the law and also destroy it or suspend it enough to have to reinvent it in each case … Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.}\]


See especially entries L: Lawfare and V: Violence.

See, e.g., Kennedy (n 60).


Agamben – Homo Sacer (n 24); Agamben – State of Exception (n 28) 59. For discussion of this aspect of Agamben’s writing see McLaughlin (n 15).

Jacques Derrida, The Gift of Death (David Wills tr, University of Chicago Press 1995) 5. For discussion of the U.S. detention facility at Guantánamo Bay through the prism of Derrida’s notion of responsibility, see Johns (n 64) 615, 633-34.

This critical approach aims to pursue this perhaps-impossible yet imperative ideal of simultaneously conserving and destroying the law.

D. Convergence and Divergence

The question of how these two lines of critique relate to each other is open to interpretation. On the one hand, given the different angles from which they address the Israeli occupation, some may regard them as mutually exclusive, at least in some senses. On the other hand, in many respects, they can be viewed as potentially complementary, and in some cases seemingly contrasting views are merely differences of emphasis. This book leaves room for these different interpretations, with some entries endeavouring to tie these lines of critique together, whereas others lean exclusively toward one or the other. Whichever way one interprets the interrelation of these critiques, their important commonalities are undeniable, including the realization, discussed above, that the Israeli occupation, far from being a space of lawlessness, is in fact filled to the brim with legalism. The book’s conclusion chapter revisits the question of the relation between these different critical perspectives.

Neither of these lines of critique – it is important to stress – is simply “internal” or “external” to law, especially considering the porosity, elasticity, and contestability of law’s (imagined) boundaries. Instead, these critiques exemplify different types of “legal consciousness” – “before”, “with”, and “against” the law – as defined in Ewick and Silbey’s insightful, if inevitably schematic, writing on the subject. Ewick and Silbey explain:

Legality is not inserted into situations; rather, through repeated invocations of the law and legal concepts and terminology, as well as through imaginative and unusual associations between legality and other social structures, legality is constituted …. We use the phrase ‘legal consciousness’ to name participation in the process of constructing legality. … The production [of legality] may include innovations as well as faithful replication. … Consciousness is not merely a state of mind. Legal consciousness is produced and revealed in what people do as well as what they say.

Seeing law and legality as ever-changing products of discourse, imagination, and practice – a view long shared by prominent jurists – also sheds light on the nature of law in the Israeli occupation. In addition to Israel’s formal legal institutions and texts, there are also, no less importantly, Israeli soldiers on the ground. While not professionally lawyers, they too engage in the sort of activity Ewick and Silbey would characterize as “legal consciousness”. Among other things, soldiers produce various, and at time concurrent, narratives of legality and illegality in the OPT, narratives that largely revolve around the question of the ability, or the authority, to locate and identify the rule and the exception. Thus, in testimonies of Israeli ex-soldiers, the OPT is sometimes described as a space of lawlessness, where “there is no law, only Jewish interests”. According to another narrative, the OPT is in fact replete with law, but since soldiers “only follow orders” they are somewhat distinguishable and remote from that law. In yet another narrative, soldiers do not only perform but actually embody the law, a dynamic that finds its ultimate manifestation whenever a soldier asserts: “I am the law”.

Thus, the Israeli occupation on the one hand, and this study, on the other hand, engage in and produce different legal formations. To reflect the occupation’s particular legal

74 Ewick & Silbey (n 17) 43-46.
75 See, e.g., Cover (n 12); Robert M. Cover, ‘Violence and the Word’ (1986) 95 Yale LJ 1601.
patchwork, this book is organized in the form of a legal lexicon, as explained in the following section.

3. THE LEXICON FORMAT

The book is structured in a lexical format, comprising twenty-six alphabetically ordered entries. Each entry, from “A: Assigned Residence” to “Z: Zones”, focuses on a legal, administrative, and/or military term/concept that is central to the modus operandi of the regime of occupation. Each entry begins descriptively, providing a definition or description of the term/concept as a terminus a quo for the ensuing discussion. The latter focuses on the actual use, or role, of the term/concept under examination, and on its impact on life under occupation. This format thus encompasses both the traditional function of a lexicon as an instrument for the organization of knowledge and the function of reflecting on this knowledge in a critical manner that challenges and redefines it.

These analytical and deconstructive moves take place at both the level of each separate entry and also, through abundant cross-references, 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 discussed in this book. 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”. According to Wittgenstein, certain words acquire their meaning not by standing for certain objects but by the relationship between their different uses.77 Derrida’s argument is more far-reaching: that meaning always entails an endless movement/play of differences, in which words are defined by appealing to their (ever unstable) differences from other words that have been, or will be, used.78

A lexical format has been adopted in and adapted to a wide variety of genres, covering the whole gamut from autobiographies79 to televised documentaries,80 literary criticism,81 journals of political philosophy82 and international human rights law,83 to name a few. This format was also used, already in the 1980s, to provide information on facts, agencies and institutions affecting life in the West Bank.84

The methodological choice to opt for the format of a lexicon for the study of law’s role in the making and shaping of the occupation regime rests primarily on the centrality of language to law and, more specifically, on the performative nature of legal language.85 Legal

---

77 Wittgenstein (n 60).
78 Jacques Derrida, ‘Différance’ in Margins of Philosophy (Alan Bass tr, University of Chicago Press 1982); Derrida – Writing and Difference (n 60). Derrida was not the first to argue that terms acquire meaning through their relation to other terms; but one of the differences between him and, for example, structuralist linguist Ferdinand de Saussure, is his emphasis on the inherent instability of conceptual differences, distinctions, and oppositions. cf Ferdinand de Saussure, Course in General Linguistics (Wade Baskin tr, Philosophical Library1959).
79 E.g., Czeslaw Milosz, Milosz’s ABC (Madeline Levine tr, Farrar, Straus and Giroux 2002).
80 L’Abécédaire de Gilles Deleuze, avec Claire Parnet (1996) (A French documentary television program produced in 1988-89, consisting of an eight hours series of interviews with Deleuze, organized from Animal to Zigzag).
language does more than describing reality and even more than enabling or limiting action: it creates reality and shapes both experience and consciousness. The alphabetical order that serves as the organizing principle of this book underscores both the centrality of language to law and the performativity of a (local) dialect of the (international) legal language, in two nuanced ways.

First, the occupation itself maintains an order that at times may seem arbitrary and at times carefully designed. To an extent, the lexicon reflects and responds to this highly complex order: its alphabetical structure is somewhat arbitrary, but the terms and concepts under examination have been carefully selected and interlinked. At the same time, as Michel Foucault has shown generally and as this book demonstrates in relation to the Israeli occupation, an apparently arbitrary order, if closely inspected, can be highly valuable for revealing the dominant epistemic forces at play.

Second, the lexicon allows for attention to details: its formality may be analogized to a fisherman’s net, which yields definitive shapes from what otherwise appears to be an infinite and indefinite river. At the same time, the fish and other treasures caught in the net do come from the same river, opening the possibility to learn about the environment in which they were bred and cultivated. The lexicon format does just that: focusing on specific terms and concepts and pointing to their interconnectedness, it offers an opportunity to consider the nomos of the regime, that is, law’s interrelation to the vocabularies that constitute and traverse it in the OPT.

---

86 It is little wonder that such discursive practices characterize the world of law: performative speech acts are made, for the most part, by reference to a law or a convention (that is, in conventionally designated circumstances), by authorized people exercising their authority in conformity with the relevant conventions. See Kent Bach, ‘Speech Acts’ Concise Routledge Encyclopaedia of Philosophy (1999).

87 Michel Foucault, ‘Preface’ in The Order of Things: An Archaeology of the Human Sciences (Pantheon Books 1970) xvi (using the example of the seemingly arbitrary, fantastic, and fictitious taxonomy of animals depicted by Jorge Luis Borges in his The Analytical Language of John Wilkins as a point of departure for discussing the epistemic structures of the human sciences). For a critique of the post-modern mistrust of structural classifications in reference to Foucault's example, see Anne Peters and Heiner Schwenke, 'Comparative Law Beyond Post-modernism' (2000) 49 Int’l and Comp LQ 800, 825-826.

88 A metaphor used by Israeli novelist, Dan Tsalka, in the introduction to his alphabetically structured autobiography, see Dan Tsalka, Sefer Ha’Alef-Beit [Book of ABC] (Hargol 2003) [Hebrew].