The ABC of the OPT: Mobilizing the Untapped Capacity of International Law

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It is a particular honour to be asked to contribute to the Book Review Symposium at Verfassungsblog because of the occasion: the arrival of an outstanding work on international law that addresses – dispassionately, authoritatively and comprehensively – one of the most pervasive and most tragic issues of our time: Israel's interminable occupation of Palestine. This book *du jour* – *The ABC of the OPT* – by Orna, Michael and Hedi is truly a singular intellectual and academic achievement.

This book has already proven to be an important boost to my understanding of the many legal, political and human dimensions of the conflict. I read large sections of the book in preparation for my most recent report to the United Nations General Assembly this past October, and I made liberal references to it in this report, which focuses on Israel's inexorable steps towards the annexation of the West Bank.

As I read the *ABC* book, I reflected on the fact that, after the human spirit itself, 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, because international law has constructed a broad global consensus on the central issues of this conflict, and because international law provides the possibility for creating a more level playing field for the parties to the conflict to find durable and just solutions to the issues that afflict them.

I say this also because the Israeli-Palestinian conflict is the most international of international conflicts. The world community, largely through the United Nations, endorsed the creation of the state of Israel, it has cared over the past seven decades for the millions of Palestinians who became refugees following the creation of Israel, it has closely supervised the on-going conflict through hundreds of UN resolutions, and it has been intimately engaged in the region through successive diplomatic peace initiatives, massive arms sales and multiple peacekeeping missions. International responsibility is integral to the conflict.

All of which leads me to the point that I wish to make here, which comes through loudly and clearly in the *ABC* book: the Israeli occupation of Palestine embodies a fateful and troubling paradox regarding international law that we must acknowledge and think our way through.

On the one hand, this conflict – more than any other struggle since the end of the Second World War – has contributed immensely to the progressive development on international rule-making. Many of the core principles of public international law – the laws of war and occupation, the inter-relationship between human rights law and humanitarian law, the centrality of self-determination, the rights of refugees, the scourge of demographic engineering, and the inadmissibility of the acquisition of territory by war, among others – have been significantly shaped, enriched and deepened by the copious UN resolutions, diplomatic statements, legal commentaries and judicial pronouncements on the many features of the conflict.

Yet, at the same time, the efficacy of international law has suffered mightily because the most powerful actors involved in the management of the Israeli-Palestinian conflict have consistently marginalized the promise and power of the rule of law as a political and diplomatic touchstone when constructing the negotiation principles for the Oslo peace process.

Since the establishment of the peace process in 1993, the major agreements and declarations on the conflict have been conspicuously silent on the many cornerstone legal obligations and terms that I just mentioned. We would look in vain through the leading documents and proclamations of the Oslo peace process for any mention of the terms 'occupation', 'illegal settlements', 'unlawful annexation' or the fundamental rights of the Palestinian refugees. In the hands of Israel and the countries and international bodies leading the peace process – the United States, the European Union, the United Nations and Russia – these well-established and irreducible legal principles have disappeared from the page as if written in vanishing ink, and they have instead been recast as issues for further negotiations between two very unequal parties.

This is no oversight. As Professor Victor Kattan has succinctly stated: "the problem is not international law *per se*, but its lack of enforcement; that, in the Middle East, international law is closer to power than to justice." In this conflict, the occupying power has insisted that international law should have no role, the international mediating powers have shown no great interest in infusing the substantive obligations under international law into the peace process, and the occupied people have no real power to demand the application of a rights-based approach. Thus, the tragedy has become that, for all of the substantive body of international law generated by this conflict over the past seven decades, the actual victims in Palestine and Israel have seen precious few of these rights and foundational principles honoured and insisted upon by the international community.

Continuing to marginalize the substantive principles of international law will not bring peace to the Israeli-Palestinian conflict any closer. As a political undertaking, international law provides a baseline for negotiations by acting as the indispensable rights-based foundation for state leaders and diplomatic representatives to actually honour and enforce what they have endorsed and rhetorically supported.

As a moral vision, it has the potential to mobilize the vital energy of NGOs and civil society to articulate and principles of humanitarian protection and human rights as an achievable and inspiring campaign tool.

And as legal principles, the core public international law principles of equality, dignity and justice are, in the absence of a functioning peace process, a productive basis for politics-by-other-means aimed at enforcing humanitarian and human rights norms through global tribunals (such as the International Criminal Court and the International Court of Justice), domestic courts and the forums of the United Nations.

International law possesses the untapped capacity to ameliorate the unequal playing field between the parties to this conflict, so that the grossly asymmetrical bargaining power that presently exists between Israel and the Palestinians will not continue to distort the negotiating process and lead predictably to yet more peace-process failures. To be sure, international law alone will not bring about a just and durable peace in the Middle East – that also requires changes in the international and local popular climate, more engaged political will and a new vision of what a final peace with justice will look like – but the deliberate and unprincipled exclusion of international law from the various stages of the Oslo process over the past quarter-century has contributed mightily to the quagmire that the Israeli-Palestinian conflict is in today.

In my concluding remarks, let me return to the *ABC* book, and let me offer some lavish praise for it.

First, it is an astonishingly well-informed legal treatise. This book is now the definitive go-to handbook – the indispensable guide – on international human rights and humanitarian law as it applies to occupied Palestine. It is substantive, definitive and utterly persuasive. Against the stardust that is regularly thrown up to either attempt to justify the occupation, or to excuse its many excesses, this book stands as a compelling answer, and a thorough refutation, to those shallow and spurious arguments that are rationalizations for impermissible behaviour rather than any true reflection for what the law stands for today.

Secondly, this book is a statement of moral courage. At a time when the scope of political and academic discourse is becoming narrowed in Israel, and when the democratic space for human rights

defenders and engaged civil society is steadily shrinking, it takes an ample amount of personal audacity by Israelis of conscience to engaged in a project that so vigorously challenges the prevailing, and disfiguring, political ethos of the day. At a time when not only Israel, but many other countries as well, seek to act unbound by the laws and values of the modern world, this book reminds us that legal and political exceptionalism is an anathema to a secure and cooperative global society.

And my final point is how greatly I admire the multiple literary references and indeed, the A-Z structure of the book. How rare it is for lawyers to write with such literary imagination and panache. Thomas More, Cicero, Walter Benjamin and many more have found their way into this book, thanks to the authors. Someone once quipped that inside every lawyer lies a dead poet. The authors of this remarkable book have obviously channelled their vibrant and very-much-alive inner poets for the benefit of us all.

To Orna, to Michael and to Hedi, thank you for your arduous and vital accomplishment. Your book reminds us that there is no other real project for the law, but to make the world better. And your book is already doing that.

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