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What Role for Law in the Palestinian Struggle for Liberation?

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Overview

Is international law part of the solution in the Palestinian quest for self-determination and human rights – or part of the problem as a number of voices now argue? Al-Shabaka Policy Advisor Noura Erakat provides insights into the positions of those who argue the law is the problem and then discusses the ways in which law can be made to work for the Palestinian people. She shows why the "triumph of human rights does not necessarily lead to justice" and argues for a political program that uses the law rather than letting a legal strategy define politics.

Getting the Question Right

In recent months the role of international law and human rights has come under increasing scrutiny. This introspection has involved, among other things, questioning whether Palestinians should continue to bring their claims to Israeli civil and military courts; whether occupation law is a part of the problem or part of the solution; and, if legal claims are to be brought before international tribunals,

what should they allege?

What these conversations have in common is an assumption that law can serve a positive function. However, in other conversations, discussants ask whether or not the law itself is the problem. It is important to consider the merits and implications of each approach to elucidate the proper role of international law and human rights in the Palestinian struggle for liberation. This policy brief attempts to do just that. It asserts that while the law is generally a tool of the powerful, it can be used to counter hegemony if it is deployed strategically in furtherance of a broader political project.

The question is not whether the law is good or bad. International law and human rights do not exist in an apolitical vacuum, as if they are tablets sitting on a shelf, with known and absolute values, waiting to be invoked and applied. To the contrary, the law can cut in multiple directions depending on the movements with which it is associated, the manner in which it is deployed, and by whom. The fact that aggressor states often use the law to justify their behavior is a case in point. The value, and potential benefit of international law, is wholly contingent on the broader political framework that gives it meaning. A political framework that challenges the balance of power is necessary to avoid descending into the illusion of progress based on the approximation of rights without substance.

International law, human rights, and their associated discourse are not a panacea for Palestinian self-determination; they are merely tools to be used in tandem with a robust set of other tools.
Without the national organizing structures and representational bodies able to create a political vision and strategy for Palestinian self-determination, international law and human rights can be confused for the political framework itself.

Of course, Palestine is a human rights issue, but it is foremost a national liberation

struggle. Self-determination is itself a human right, and theoretically Palestinian demands and grievances can be refracted through a discourse of law. That, however, assumes a virtue that the law does not embody. Law and justice do not go hand-in-hand, and law usually serves the status quo or those in power. This necessitates a complementary approach that includes using the law when justice can be served and political avenues when the law itself entrenches unjust outcomes.

Dependence on international law and human rights without a clear political framework also risks setting up a discourse of "competing rights" in which the rights of the Palestinians "compete" with those of Jewish-Israelis, or even those of Jewish persons writ large. A political framework diminishes this risk by ascribing value to the law and using it to help advance a political movement that addresses the future of Jewish-Israelis as well. The answer, therefore, is a political program that leverages the law, not a legal strategy that defines politics.

This essay does not attempt to provide such a political framework; rather, it explores the question of law and politics with an eye on the Palestinian question. It attempts to problematize the debate and invites further research on the various issues raised. This essay begins by laying out a few of the basic theoretical controversies associated with international law and legal strategies. It then examines the robust critique that Palestinian scholars have leveraged against the law. The final section considers the benefits of using legal discourse and strategies and how those benefits can be fully realized.

I Got 99 Problems and the Law is One

The issue of the utility of law in relation to social justice movements is not unique to the question of Palestine. Below is a summary a few of the more theoretical controversies about international law, legal strategies, and human rights.

1) Western powers created international law in a colonial context to regulate their intrastate relations as well as to reinforce their domination and exploitation of natural resources within their colonial holdings. As such, any invocation of international law entrenches this asymmetric relationship that structurally disadvantages post-colonial nations and impedes their economic and political self-determination at the global level.

Even the surge of newly independent states within the United Nations did not remedy this structural condition as the sole enforcement authority of international law remains within the UN Security Council. This has also severely limited the efficacy of law, especially humanitarian and human rights law, as veto-wielding powers and their allies have been able to stymie attempts aimed at holding powerful nations to account within the Security Council as well as the International Criminal Court.

2) Legal remedies are inherently limited because they seek to reform rather than to revolutionize. As such, a rights-based solution guarantees a non-revolutionary outcome that tolerates the structural inequalities that gave rise to conflict in the first place. Moreover, striving for piecemeal legislative reforms threatens to transform a collective struggle into an individualized one. When persons or groups can demand remedial measures within the bounds of the law, the enforcement of these legal outcomes depends on existing security arrangements. Thus, the state's monopoly over violence is never adequately challenged, and individual grievances supplant those of society in ways that absolve the state.

3) The law, and particularly human rights law, preaches universalism, depoliticizes conflict, and supplants it with a framework of "competing rights." Political claims and historical grievances are erased for the sake of achieving equality vis-à-vis the state's administrative bodies. Such an achievement, however, does not prescribe whether privileged groups should relinquish their privileges and/or whether and how historically disadvantaged groups should be redressed for the

wrongs that they have suffered.

In the case of post-apartheid South Africa and post-Civil Rights Act United States, the achievement of human rights amounted to the removal of obstacles for blacks without implementing re-distributive policies and rehabilitative measures such as reparations aimed at creating a more just society. Moreover, the wealth and privilege of whites, built upon, and facilitated by, slave and indentured labor, remained intact, as doing otherwise would have violated the human rights of the white populations under existing applications of the law. Thus, the triumph of human rights does not necessarily lead to justice.

Palestine and Empty Promises

In light of these controversies what then do Palestinians have to gain from international law and human rights? Several esteemed scholars and writers have insisted that there is in fact nothing to gain and much to lose by insisting upon a legal framework that depends on the structure of international law. In her lecture, "In the Land of the International: Palestine, Revolution and War," Samera Esmeir scrutinizes how the Palestine Liberation Organization's (PLO) turn to diplomacy and international law in the early seventies transformed an anti-colonialist movement into a bid for statehood. She argues that this has created a tremendous disconnect between the magnitude of Palestine in the international arena relative to the actual condition of Palestine and Palestinians on the ground. This disparity skews the scope of the conflict and diminishes the urgency required to achieve Palestinian liberation.

In their article, "Against the Law," Mezna Qato and 24449 critique the reliance on international law and on a rights-based approach in particular. They insist that such an approach fails to build a robust anti-colonial solidarity movement that does not merely demand the rerouting of the separation wall, for example, but calls for its removal all together.

From a different perspective, in "The Limits of International Law Legalese," Lama Abu-Odeh cautions that the law encourages advocates to make maximalist arguments, which an arbiter then reconciles by "splitting the difference." The result is a slightly better outcome for Palestinians but one that remains vastly distant from actual justice. Similarly, in his contribution to the *Jadaliyya* roundtable, *Occupation Law: Part of the Solution or the Conflict?*, Nimer Sultany enumerates the law's inability to approximate justice in any context. In particular regard to Palestinians, the law treats Israeli violations as behavioral aberrations rather than as fundamentally constitutive of Israel's character. This framework is exacerbated by the fact that Palestinian claims under international law are inescapably compartmentalized and therefore incapable of representing a unified claim against Israeli settler-colonialism.

In these examples, the authors make two related claims: one is that legal strategies are insufficient to lead Palestinians to emancipation, and the other is that a rights-based approach downplays or completely erases a legacy of ongoing settler-colonialism. Together, the strategic approach and the legal discourse normalize Israel and, in their most radical form, merely seek the state's reformation. And what is the value of legal reform within Israel if the premise upon which it is based is not challenged? This is especially dangerous if the Palestinian question is disaggregated into several non-contiguous parts. For instance, what if Israel affords its Palestinian citizens greater access in employment, better education, health care, integration into the military – an already creeping trend – at the expense of recognizing its indigenous minority's national claims? What if the right of return is recognized but Israel insists on facilitating return, compensation, rehabilitation, and integration into society in ways that preserve the privileges it affords to its Jewish citizens by concentrating Palestinians into ghettos?

The law itself does not sufficiently address these issues, which are political matters more closely associated with the process of decolonization. Decolonization does

not necessitate the removal of the settler, as demonstrated by various historical models. It does, at the very least, require acknowledging a history of colonial dispossession and committing to building a society that affirms the centrality of an indigenous population to that society. What that means and what that should look like is beyond the scope of this brief, but the point here is two-fold: one, to demonstrate that the law itself is not the problem, and two, to suggest that national organizing structures, formal or informal, can offer the political framework needed to employ the law in service of Palestinian self-determination.

With or without a political framework, international law and human rights are tools, much like media, solidarity delegations, sister city projects, or grassroots demonstrations. Without a political framework, they can be used as tools to highlight Israeli violations, to enable the Palestinian leadership to resist political capitulation, or to resist the dictates of military, diplomatic, and economic power. However, within a political framework, these tactical gains can be used to advance a vision for decolonization.

Critics caution that, as it is being used today, the law articulates the meaning of justice on behalf of Palestinians thereby usurping Palestinians' political and collective voice. However, while a valid point, this does not capture the enormity of the present-day crisis. At present the language of international law and human rights occupies a disproportionately large space in the discourse on Palestine precisely because no representative Palestinian national body is articulating and representing the will of the Palestinian people. While Palestinians can generally agree on the basic points of unity that define their struggle, the absence of a clear vision for self-determination that offers a blueprint for decolonization has undermined the complementarity between the law and political movements.

Although there have been several attempts to reconstitute a national body with the representational mandate to lead the process of decolonization – incrementally, as in the Palestine Youth Movement and the US Palestinian

Community Network, and more comprehensively, in the effort to elect a new Palestinian National Council – none of these attempts have adequately developed. To date, and since the collapse of a legitimate PLO, the Palestinian Boycott, Divestment, and Sanctions National Committee (BNC) represents the largest swath of Palestinian civil society that includes organizations, individuals, and political parties; it remains the most well placed to call for solidarity on behalf of Palestinians. To adequately represent the interests of a holistic Palestinian national body without supplanting the PLO, the BNC has chosen to explicitly sidestep questions about the appropriate political solution to the Palestinian question and to focus on rights instead. In doing so, it has been sustainable, and it has engendered a decentralized movement that has been less vulnerable to penetration and sabotage. In addition to rehabilitating the singularity of a Palestinian national body, it has emphasized that Palestinian human rights should be upheld regardless of the political solution.

The BNC and its rights-based call for solidarity does not preclude the potential role of other national formations emerging from refugee camps, the West Bank, the Gaza Strip, from within Israel, or beyond. To the contrary, an alternative political structure, with the mandate to lead, is absolutely necessary to transcend the impasse facing Palestinians who will not enjoy freedom riding on the coattails of amorphous legal entitlements. International law and human rights cannot supplant the political demands of a national liberation movement, but they can help advance its goals.

Locating the Law's Potential

Despite the concerns discussed above, the categorical rejection of a legal strategy and/or a rights-based approach runs the risk of losing key opportunities to recalibrate the balance of power. Especially in the politics entrenched by the Oslo Accords and its attendant "peace process," law has emerged as a potential

counterweight to the devastating dictates of naked power.

This happens in three main ways: First, by challenging the political position of an unrepresentative Palestinian leadership, which has dispensed with a resistance strategy in order to benefit from the elusive promises of US-defined pragmatism. Second, by using the substance of the law to expose Israel's manipulation of it in order to provide a veneer of rule-of-law legitimacy. And third, by challenging the legitimacy of Israel's unjust order as a whole and not just within the Occupied Palestinian Territory (OPT). This section will consider the ways that law can be used, and, in some instances, has already been used, to challenge the balance of power between Israel and the Palestinian people.

1. Offsetting the detrimental impact of an unrepresentative Palestinian leadership

The PLO/Palestinian Authority (PA) has relinquished international law claims for the sake of illusory enhanced negotiation positions. Accordingly, it has asked other states to express support for Palestinian freedom by providing diplomatic and financial backing to the peace process regardless of its impact. In this context, for instance, the PLO/PA seems willing to accept settlements as a new reality and to "swap" lands with Israel rather than demand their removal all together. More importantly, accepting settlements misses the opportunity to confront Israel's settler-colonial logic, which has entailed the ongoing forced population transfer of Palestinians. Settlements are not merely physical obstructions, and such pragmatism cannot circumvent Israel's expansionist and supremacist project. This is not simply a legal matter; it is a moral issue that goes right to the heart of the inherent dignity and fundamental rights of the Palestinian people.

Nonetheless, the language of law and its associated mechanisms have empowered civil society actors to intervene in a process that is otherwise dominated by state and quasi-state actors. Repeated references to the Fourth

Geneva Conventions, and specifically the war crime of settling a state's civilian population in the territory it occupies, has enabled challenges to Israel's settlement expansion by asking states to defer to Palestinian demands based on international law as opposed to a co-opted Palestinian leadership. Moreover, insisting that the swaps themselves amount to war crimes reinforces these claims and highlights the history and settler-colonial logic that the Palestinian leadership seems so ready to forego.

2. Exposing the veneer of rule of law legitimacy

Israel bases all of its actions in law, because the globalized system in which states exist reveres the rule of law. For example, the wholesale destruction of Gaza is done in the name of self-defense. In another example, Israel denies families housing permits, thereafter declares the homes illegal, and *then* bulldozes them. The Jewish National Fund, for instance, is considered a non-state entity and can therefore legally discriminate against non-Jews. Its representatives deliberately constitute nearly half of the Israel Land Authority, which administers state land to facilitate racially discriminatory urban and state planning that privileges Jewish Israelis. In another case, the Israeli military declares particular roads in the Jordan Valley closed military zones and then fines Palestinians for crossing them – even though these roads separate Palestinians from their lands, schools, and families thus leading to the disintegration of their communities and/or their forced displacement. Israel employs the law at every juncture in its quest for legitimacy as a democracy based on the rule of law.

Yet, although what is legal is not necessarily legitimate, Israel explicitly uses legality to provide a veneer for legitimacy. Part of the Palestinian struggle for liberation involves removing that veneer and exposing Israel's blatantly violent and discriminatory nature. Using the substance of law (e.g. the Convention on the Suppression and Punishment of the Crime Against Apartheid, Forced Population Transfer as a war crime, International Covenant on the Elimination of All Forms of

Racial Discrimination) is a useful tool to challenge Israel's manipulation of law.

3. Challenging the legitimacy of Israel's settler-colonial project and apartheid regime

In an earlier era, where several state and non-state actors struggled to define legitimate and illegitimate violence in the context of several decolonization movements, the Palestinian struggle had greater moral salience. In a world dominated by the U.S., the Palestinian struggle has been subsumed by a discourse of terrorism and counter-terrorism and has obscured the morality of the Palestinian question. Human rights discourse, together with growing mass popular movements, has steadily exposed the bankruptcy of this security framework and helped to reframe the Palestinian question as an indigenous struggle against colonial domination in the global north.

What, for example, does Israel stand to gain in terms of its security by the Judaization of East Jerusalem? How does planting a forest atop the homes of 70,000 Palestinian Bedouin citizens enhance its qualitative military edge? How does the application of two sets of laws for two sets of people distinguished only by religion and nationality increase the safety of anyone between the Mediterranean Sea and the Jordan River?

In asking these questions and steering Palestine away from a discourse of security to one about humanity and rights, human rights and international law are serving their most significant function: putting the legitimacy of Israel's settler-colonial and apartheid regime into question. There is a reason that Howard Kohr, chief executive officer of the American Israel Public Affairs Committee (AIPAC), describes BDS as the second most significant threat to Israel after a nuclear-capable Iran. It is not because the movement threatens to bankrupt Israel, but because it can isolate it and make it, in the words of Justice Minister Tzipi Livni, "a lone settlement in the world." This is what Richard Falk, outgoing UN special

rapporteur to the OPT, describes as a "war of legitimacy." This war moves the confrontation over the legitimacy of Israel's dispossession, displacement, and exclusion of Palestinians, for whatever political purpose, to a global battlefield.

The utilization of a human rights discourse has helped to highlight Israel's most blatant contradictions. For example, Israel touts itself as the only democracy in the Middle East and yet considers equality for its non-Jewish citizens as tantamount to its destruction. Similarly, its identity is constructed as a state for refugees, yet Israel forces the ongoing exclusion of a refugee population that it created and a dispossession project it continues.

These arguments can be made rhetorically without the weight of law and rights. However, their invocation as universal principles demonstrates that Israel is indeed being singled out: it enjoys the status of equality with all other states when in fact it acts above the law. Using a universal framework demonstrates the illegitimacy as well as the exceptional and abnormal nature of Israel's settler-colonial and apartheid regime. And yet, the lack of a political framework aimed at decolonization risks empowering the law to stand in for Palestinian demands rather than simply serving as a tool to advance them. Complementarity, in this instance, demands the establishment of a political program that is able to use the law to its best effect.

The main challenge facing Palestinians today is not the abundance of law and legalese but the absence of organizing structures and representative bodies able to create the political vision, strategies, and leadership necessary to advance the aspirations of all Palestinians. What is needed is a compelling framework for complementarity: developing a political program and a leadership that is representative of Palestinians as a people can imbue the law with particular meaning and allow it to serve its proper role in advancing the movement. Until then, political activists and legal advocates alike should strategically use international law and human rights in order to expose Israel's racist and

oppressive nature. While it may be tempting to target the law as the cause of dysfunction, Palestinians should refrain from doing so. The law and its associated strategies are rife with problems, but they are not the source of them.

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