COMMENTARY

Palestine, International Law, and a Radically Just Future

By: Noura Erakat · April, 2019

Introduction

In her new book, *Justice for Some: Law and the Question of Palestine*, Al-Shabaka Policy Analyst Noura Erakat breaks new ground in her approach to international law as it pertains to Palestine. Analysts have generally considered the law in this context as either essentially beneficent if deployed properly, or fundamentally harmful because of its relationship to power. Erakat, however, makes a more nuanced argument: Law is politics, she says, and though it can be used as a tool of domination by powerful states, it can also be used strategically to advance progressive causes – including that of Palestinian liberation.[1]

"Many of the texts about law and Palestine have been framed with the idea that if the law is allowed to operate, we will see a more just outcome," Erakat explains. "But the law is functioning as it's supposed to function. We need to be more critical about it." She argues that law has no set meaning, but is contingent on process and interpretation. "It's not merely a question of legal analysis," she says. "The law reflects a balance of power, strategy, and historical contingencies." Yet power has its limits. Though other texts on law and Palestine argue that law is subject to power, Erakat reasons that if this argument is taken to its logical end – that is, that power determines the law – the law is a fiction. "If law is just an apology for power, we would have long abandoned it," she says. "It would be a site of protest. But historically we know that law is not only a tool of oppression, but also a tool of

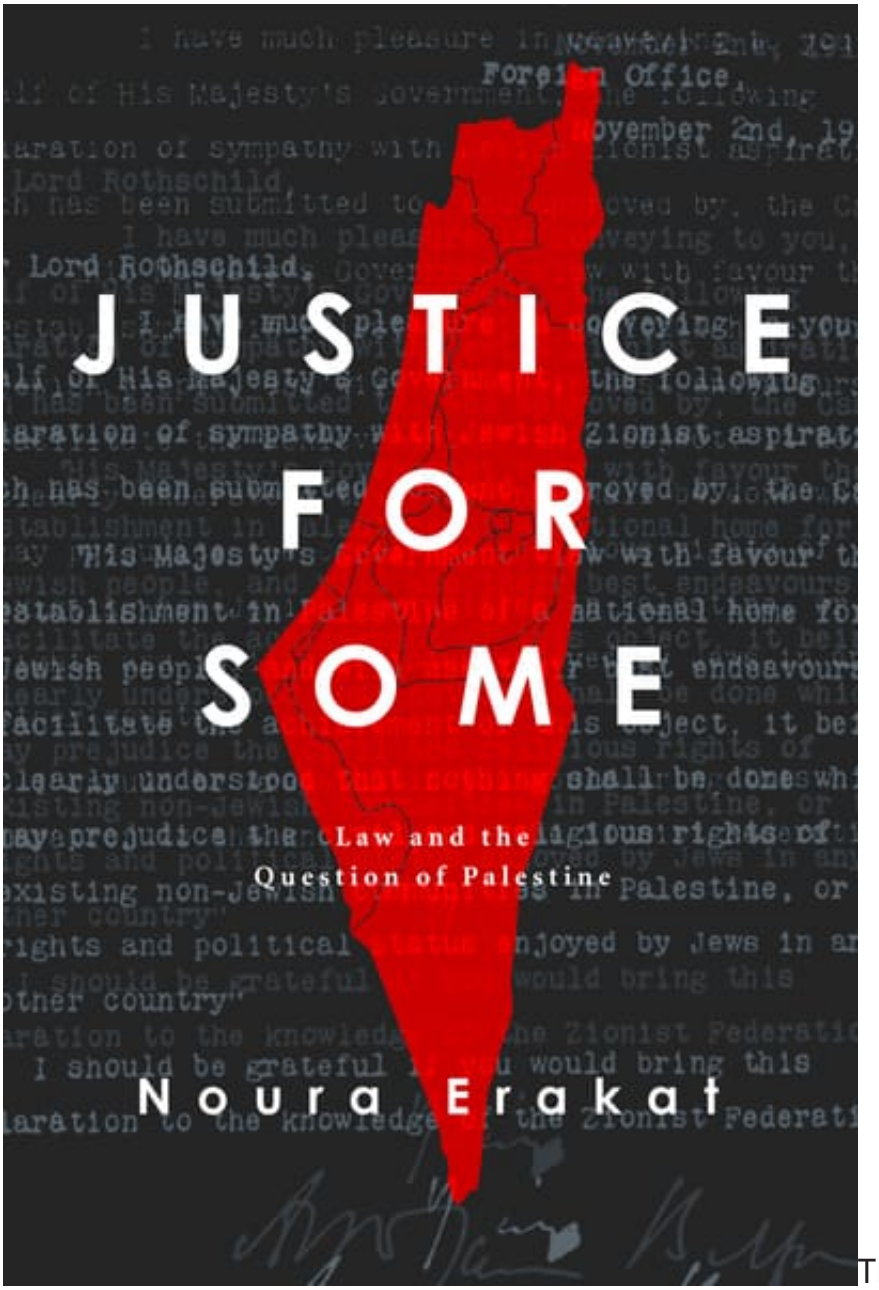
resistance." Al-Shabaka recently spoke with Erakat about what her approach to international law means for Palestine and the Palestinians – and what kind of futures can be envisioned through its deployment.

When have Palestinians best used international law to their advantage?

Palestinians used the law most effectively in the 1970s. UNSC Resolution 242 of 1967 solidified Israel's status as a political reality in the Middle East by stating that Israel would return Arab lands to their rightful owners in exchange for them normalizing relations with Israel. Israeli settler sovereignty was thus enshrined and protected, and the erasure of Palestinians as a nation was affirmed. The resolution did not state that Palestinians were a people or that they would have a state. It only refers to them as a "refugee problem." In 1974, the PLO helped craftUNGA Resolution 3236, which was a corrective of 242. It affirmed Palestinians as a people and stated that they have a right to self-determination and some kind of peaceful outcome, without making the outcome dependent on recognizing Israel. Here we have Palestinians who do not even have a state, and they're using the law to achieve their desired outcomes. In this case, the law is a tool of resistance. Of course, the law can only go so far. But short of complete upheaval, it remains a means for people to resist and advocate for themselves.

Are there cases outside of Palestine that demonstrate the benefits of using international law?

We can learn from other cases of law and settler colonialism. These cases exhibit the same type of juridical erasure, with settlers establishing sovereignty over indigenous communities and those communities struggling for self-determination. In regard to a case study of colonialism, the example of the Namibian struggle against South African domination shows how international law can be used on behalf of progressive causes.



The Namibian liberation movement leadership was sophisticated in its use of international law to gain its freedom from South Africa. Organized as the South West Africa People's Organization (SWAPO), it never allowed itself to come under South Africa's influence. Unlike the Palestinian leadership, which has acquiesced to Israel and its benefactor the United States, SWAPO relied on an international negotiating process without its oppressor as a driver of those negotiations.

SWAPO also never lay down its arms. This isn't to say that armed struggle is the

only possible way forward for Palestinian liberation, but to note that laying down arms is effectively an abdication of a source of power that can bolster a negotiating position. (It must be noted that SWAPO had the advantage of the support of Cuban forces in Angola. The Reagan administration ultimately established a policy that linked South African withdrawal from Namibia to Cuban withdrawal from Angola.)

In the case of Namibia, the law was deployed in a piecemeal strategy that culminated in a larger legal argument equivalent to independence. This, together with the fact that the leadership refused to relinquish a multilateral peace process for a bilateral one – with South Africa – or to relinquish its armed struggle, helped Namibia use the law to its advantage.

What should the Palestinian leadership learn from the Namibian case?

The Palestinian leadership has not used the law strategically as Namibian leaders did. A strategy is comprised of multiple tactics that culminate in an outcome, and the PLO leadership has only pursued ad-hoc and erratic international legal tactics. We've seen the leadership go to the UN to prosecute Israel under the Rome Statute in the International Criminal Court or advocate for its juridical status as a state, while simultaneously abandoning those same legalstrides as soon as the United States offers better negotiating terms for a "peace plan."

The Palestinian leadership needs a real strategy – one that challenges the political structure that subjugates Palestinians. We're in a sovereignty trap, a framework of derivative sovereignty premised on Palestinians forever proving their eligibility for self-rule. The Oslo Accords established that trap: Nothing in the terms of Oslo promises a state or eventual independence. Rather, it is an autonomy agreement whereby fragmented and limited self-rule is contingent on Israeli approval indefinitely. Israelis succeeded in 1993 in legitimizing their colonial takings with Palestinian acquiescence. Even the PLO has described its belief that Oslo would

lead to independence as "good faith." We must reject Oslo and reject the United States as a broker. There's no other way around it, regardless of whether a two-state solution or otherwise is desired.

Does the grassroots Boycott, Divestment, and Sanctions Movement (BDS) provide such a strategy?

BDS is a framework that shatters taboos, encourages discussion, and puts Israel in a defensive posture; these are all positive developments. But BDS is not a political movement, and it does not offer a political vision for the future. Its leaders maintain that only the PLO can make such decisions. So while BDS has created a political space, no Palestinian political actors have taken up that space to leverage the BDS movement's accomplishments into political demands. It is also good that BDS articulates a rights-based analysis, but again, there's no political vision to give meaning to what the realization of human rights would look like in Israel and Palestine. For example, settlers are very clear that it's their human right to stay in their homes. Moreover, this raises issues about whether the demand is the dismantlement of the settlements or their integration. That's just the tip of the iceberg in thinking critically about the limits of a rights-based framework. It's necessary but insufficient; we need something more politically-based and concrete.

Al-Shabaka's mission is to educate and foster public debate on Palestinian human rights and self-determination within the framework of international law. What should our policy analysts keep in mind given your research?

What Al-Shabaka analysts need to do – as all Palestinians need to do – is not focus on reconstituting the PLO or returning to 1947. We need a vision of the future, and we have to be more political in our claims and nurture and encourage people to come up with new political visions. Ultimately this means all agreeing on

a national liberation framework. BDS is not that; it's a solidarity framework. So what is our national liberation framework?In fairness to the Palestinian Authority, they're very clear on their vision – they still want two states. But for those who reject the two-state solution, saying you want one state is not enough. What happens with the process of decolonization? Where do Israelis fit in the future? When Palestinians endorsed a truncated state in 1988 it was a revolutionary turn for the national liberation movement. Its original enthusiasts, including Mahmoud Darwish, Edward Said, and many others, did not imagine it would become so perverted as it has under the aegis of Oslo. The same risks are possible in the case of a one-state solution: It can be equally perverted to reify Jewish-Zionist settler sovereignty and the subjugation of Palestinians. Because a two-state solution is much simpler, in our imaginations it seems easier to achieve, but in fact both are equally formidable and both cannot be accomplished without a decolonization process.

You end the book with potential visions for the future. What do these involve?

Imagine Palestinian refugees have returned. Now let us use that as a way to envision the future. Instead of demanding the right of return as the optimal outcome, we must ask how return opens possibility and opportunity. How does it function as a prerequisite element for a solution rather than as a conclusion?

This leads me to consider: How could this help transform Israel into a state that is *part of the Middle East*, rather than a satellite state for settlers that happens to be *in the Middle East*. This might sound like blasphemy, but I engage in this thought exercise to imagine how it is that Palestine can be a site of belonging for all. Consider that a major part of Jewish-Israeli society is also Arab. They're from places like Iraq and Syria and Morocco and Algeria, and they are severely oppressed within Israel because Israel was, and remains, a white supremacist project. Arab Jews have had to negate their Arab identity in order to make the white supremacist project succeed. We Palestinians need to be able to offer a

future for Jewish Israelis that's better than what Israel is offering them right now. It's scary, as it's easier to highlight what's wrong with Israel and its relationship with the United States. But what is it that we can envision that offers an optimal future?

This is not about normalizing Israel. Israel is a settler-colony predicated on Palestinian elimination, and this should not be normalized. But the colonial establishment structuring native-settler relations can, and should be, transformed in a process of decolonization. This is also about recognizing the rich ethnic, religious, and linguistic diversity of the Arab world. We have always been diverse – Christian, Jewish, Muslim – but as Ussama Makdisi has pointed out, statist-led political interventions, not least of which is Zionism, have been the most significant sectarian drivers in the Middle East. We are not in inter-communal conflict because we are different, but because colonial powers and states have made those differences politically significant. How do we overcome those divisions? How do we begin to rehabilitate and envision a future of not just where Palestinians belong, but where Arab Jews belong as well? This is meant to be an invitation to imagine a future rather than long for the past.

We must drop the framework of sovereignty and adopt a framework of belonging. We can all belong, but there is a limit to how many of us can control and govern. This is radical dreaming and imagination. Even if I haven't come up with the right formula, at least let me come up with something that inspires you to exercise your radical imagination, too.

1. To read this piece in French, please click here. Al-Shabaka is grateful for the efforts by human rights advocates to translate its pieces, but is not responsible for any change in meaning.

Al-Shabaka: The Palestinian Policy Network, is an independent, non-profit organization. Al-Shabaka convenes a multidisciplinary, global network of Palestinian analysts to produce critical policy analysis and collectively imagine a new policymaking paradigm for Palestine and Palestinians worldwide.

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