THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

TWAILR: Dialogues ~ August 2019

International Law and the Question of Palestine: Imperial Exceptionalism, Third World Resistance & the Entanglement of Law and Politics

Noura Erakat in conversation with John Reynolds on Noura's book Justice for Some: Law & the Question of Palestine (Stanford University Press, 2019)

John: What motivated you to write this book?

Noura: The seeds of inquiry for this project were planted in the course of my human rights advocacy. I went to law school with the naive vision that legal advocacy could overcome the political and diplomatic intransigence that has impeded Palestinian freedom. After graduation, I worked on litigation attempts to bring war crimes suits against Moshe Ya'alon and Avi Dichter in US federal courts under the Alien Torts Claims Act. Both cases were dismissed on non-justiciability grounds, on the basis that they concerned political questions about Palestine/Israel that should not be subject to US judicial oversight. This put my entire vision into question. Then, in the course of strategic litigation mapping I was doing, I discovered something strange: other similarly "political" cases were not being dismissed even where they invoked the Palestinian question. The difference here was that the plaintiffs were Israeli and the defendants were Palestinians or Arabs. That research ultimately became my first law review article.[1] I continued to search for ways to use law to advance Palestinian rights in my work with the BADIL Resource Center for Refugee and Residency Rights and with the National Lawyers' Guild Fact-

[1] Noura Erakat, 'Litigating the Arab-Israeli Conflict: The Politicization of U.S. Foreign Courtrooms' (2009) 2 *Berkeley Journal of Middle Eastern & Islamic Law* 27.

Finding Mission to Gaza following Israel's 2008/09 offensive. I kept encountering the same political hurdles. My desire to understand the relationship between law and politics began in this context, and shaped my inquiry in the book.

John: What is the central claim you are making in the book?

Noura: I am arguing that the law is politics - which is not a bold claim for critical legal scholars - but I am nuancing this understanding by adding that it can be used on behalf of progressive causes if used in the sophisticated service of a political movement. In particular, I am using Duncan Kennedy's work to show that the utility of law depends on the strategy of those harnessing it, together with the historical context in which that strategy is being pursued. So rather than overemphasizing the content of the law to demonstrate its indeterminacy and susceptibility to manipulation, I focus on the historical junctures in which the law is put to work across a century-long arc between 1917 and 2017. It this vista, we see one legal instrument or principle taking on different meanings across time and space - as was the case for instance with the principle of self-determination and with UN Security Council Resolution 242. Ultimately, I demonstrate that the law is both a site of oppression as well as resistance for Palestinians but has, on the whole, been more advantageous to Israel's interests.

John: Presumably the first of these key junctures revolves around the Balfour Declaration and the creation of the League of Nations Mandate. To what extent was this a juridical moment? What work was law doing in shaping the question of Palestine at that point, in those contexts of diplomacy, geopolitics and imperial governance?

Noura: Absolutely. The Balfour Declaration and its incorporation, verbatim, into the preambular text of the Mandate for Palestine in 1922 established the legal structure of exception that continues to shape the question of Palestine. This Declaration - a commitment by Britain's Foreign Secretary to the head of the Zionist Federation in Britain, later endorsed by Britain's Parliament - committed to establish a Jewish national home in Palestine where a native population sought to govern itself. The Balfour Declaration refers to the native Palestinian population, some ninety percent of the whole, as 'non-Jewish communities'. They are not recognized as a nation and to the extent that they have rights, those entitlements are 'civil and religious' but not national, thereby negating a right to self-determination. The Declaration marked the juridical erasure of Palestinians as a political community.

And in 1922, after four years of diplomatic negotiations, the League of Nations incorporated the Balfour Declaration into the Mandate for Palestine, thus enshrining the commitment to settle Jews there as a matter of international law and policy .

While some critical scholars may argue that this was exemplary of colonial hubris, I argue that such an interpretation is both a misunderstanding about the nature of law and too forgiving of it. The Balfour Declaration constitutes a form of sovereign exception whereby a unique fact pattern (the cause of establishing a Jewish national home together with a racist rejection of Palestinian peoplehood) justified the establishment of a specialized legal regime (the Mandate for Palestine). The fact-pattern and the legal regime were co-constitutive: the unique fact pattern justified the specialized legal regime and the regime reified the unique fact pattern.

John: Much of the conceptual debates around states of exception have grappled with the relationship between norm and exception, and have theorised the state of exception as a type of liminal space that is both within and beyond the realm of law. In colonial contexts though, the law has typically been front and centre in the construction of exceptional circumstances and the execution of exceptional governance measures. Where does the exception that you are describing here fall in this sense?

Noura: Far from establishing a legal void, the sovereign exception designated Palestine as a sui generis mandate and justified the creation of new law where no other law could apply. It was on this basis that the Permanent Mandate Commission rejected Palestinian legal arguments that the designation of Palestine as a Jewish settlement violated multiple articles of the League of Nations Charter. The Palestinian argument included most notably Article 20, which prohibited a Mandatory Power (Britain) from undertaking an obligation (establishing a Jewish national home in Palestine) in contravention of the terms of the Covenant (ushering a native population to independence). Though the Permanent Mandate Commission was vexed, it ultimately concluded that the Mandatory Power was obliged to accomplish both goals, and that the more urgent task was facilitating Jewish settlement. Later, when the UN Special Committee on Palestine considered a solution to the Question of Palestine, it recognized that the Mandate for Palestine violated the principle of self-determination but that this was consistent even with the League of Nations Covenant which did not *command* the 'recognition of certain communities of the Turkish empire as independent nations' but only *permitted* such recognition, and the League chose not to recognize Palestinians as a nation in order

to fulfill the terms of the Balfour Declaration. This was a legal analysis, not merely a political dictate.

This legal structure of exception is not unique to Palestinians but, in fact, characteristic of nearly all settler-colonial regimes where native sovereignty impeded colonial settlement and settler sovereignty. And it is why legal argument alone is insufficient to overcome Palestinian juridical erasure, since it is a legal argument that justified their elision. I establish this in the first chapter of the book, which is a survey chapter spanning fifty years from 1917 to 1966. The four subsequent chapters each trace how Israel has used this legal structure to facilitate their territorial ambitions or how the Palestinian Liberation Organization (PLO) resisted and overcame the exception and later established a new exception when it entered into the Oslo negotiation process.

John: One compelling part of the story you tell here is about how the Palestinians do use legal tactics to counter Israeli domination (albeit in a somewhat haphazard and short-termist manner, rather than as part of a coherent strategy for political and economic emancipation) in sometimes quite interesting and reasonably successful ways?

Noura: Indeed. What makes the story interesting is that, in spite of some significant structural obstacles, Palestinians do also manage to use the law as a tool of resistance. This is most clear during the 1970s, when the PLO turns to the United Nations and international law more generally. During this time, the PLO successfully inscribes the juridical status of Palestinians in international legal documents and institutions (UNGA Resolutions 3236 and 3237 in 1974); when it condemns Zionism as a form of racism and racial discrimination as part of the Decade Against Racism (UNGA Resolution 3379 in 1975); and when it helps bring guerilla warfare within ambit of legitimate violence (First and Second Additional Protocols to the Geneva Conventions in 1977).

John: This period in the 70s where you are talking about the PLO turning to the UN and international law is a really interesting moment. How would you describe the role of the Third World there? By this point the Non-Aligned Movement had emerged out of the Bandung conference, OPSAAAL out of the Tricontinental conference, and the majority of colonial territories had achieved national liberation, at least in the formal sense which allowed them access to the UN arena. After the anti-colonial declarations by the General Assembly in 1960, the texts of UN documents focused a lot on condemning colonialism, apartheid, and military

occupation, and in the early 1970s specifically pointed to 'the unholy alliance between Portuguese colonialism, South African racism, zionism and Israeli imperialism' (General Assembly Resolution 3151 in 1973). How much of this was general anti-imperial symbolic name-checking, or were there deeper relationships of solidarity there that the PLO was tapping into and that were reflected in the crafting of UN texts and the additional protocols? Could the Third World have done more to build on this with the PLO to shape a more coherent strategy?

Noura: I consider this period of decolonization - featuring national liberation armed struggles - as third world upheaval against an imperial order. As Adom Getachew shows in her lucid work, this was not merely a bid for independence and membership in the international community but one of worldmaking.[2] The global battle was over the future of the world and not just a negation of colonial domination. The PLO aligned itself with several new formations including the Non-Aligned Movement to combat racism. The first global human rights treaty was the Convention on the Elimination of All Forms of Discrimination. They also legislated new treaties legitimating guerilla warfare in the First and Second Additional Protocols, changed UN rules in order to unseat South Africa as a member state, advanced the New International Economic Order in a bid to supplant a global neoliberal order that had been ushered in by Bretton Woods. The PLO, because of its commitment to worldmaking and its role in combating US-Israeli imperialism in the Middle East was often at the center of these efforts.

The lack of a coherent strategy is due to a few factors. One, the PLO itself was internally fractured as the Middle East peace process that began after the October 1973 War created new opportunities for diplomacy. This catalyzed a split between a Pragmatist camp that sought to establish a Palestinian state as an interim or final resolution through negotiations, and the Rejectionist Front which sought to continue a revolution through armed struggle. Two, the consensus international position following the 1967 War and, which became reified after the 1973 War, was one that sanctified Israel's settler sovereignty. Throughout the 1970s, this remained an implicit and unaddressed tension that contributed to a lack of a coherent strategy - one that vascillated between articulating Palestinian self-determination as a state on the one hand, and the toppling of Zionist settler sovereignty on the other. This tension ran through the PLO and on the international level and was not resolved

[2] Adom Getachew, *Worldmaking after EmpireThe Rise and Fall of Self-Determination* (Princeton University Press, 2019).

until 1988 when the Palestinian National Council (PNC) endorsed a Palestinian state in the West Bank and Gaza.

John: These tensions and this lack of coherent strategy that you are pointing to have been quite visible, and quite debilitating, in the oscillations over time of the Palestinian position on recognition of Israel and the 1967 borders in general, and specifically in terms of law through the way in which discourse on Security Council Resolution 242 has mutated?

Noura: That's actually a very interesting story. When it is first passed in 1967, Palestinians regard it as a dismal Arab failure. The Resolution reified the juridical erasure of Palestinians by referring to them as a "refugee problem" and conditioned Israel's withdrawal from Arab lands on normalization of relations with Israel thus enshrining it a political reality. In fact, the PLO passes UNGA Resolution 3236 as a corrective to 242. Palestinians condemned 242 for twenty-one years until November 1988, when the PNC declared that a Palestinian state would be established in the West Bank and Gaza. At that point, the PLO retooled 242 to be a tool of resistance affirming their right to national self-determination in the Occupied Palestinian Territories. We see, at about this same time, Israel begin to put the meaning of 242 into question as well as diminish its prescriptive function.

The haphazard nature of Palestinian legal tactics becomes most acute after the Oslo peace process begins in 1993 because the agreement was predicated on a stark bifurcation of legal norms and political negotiations by design. There is no mention of the law in the documents, save for reference to UNSC Resolutions 242 and 338, and even then the Resolutions serve a descriptive rather than a prescriptive function - meaning that the parties will consider the mandate of 242 fulfilled once the PLO and Israel reach a permanent agreement. In fact, after Oslo, Israel and the United States frame all invocation of law and legal tools by Palestinians as tantamount to "lawfare" or a move to "undermine peace efforts", as we saw during the ICJ submission regarding the route of the separation barrier in 2004 or during the 2011/12 UN statehood bid. During this era, Palestinians have invoked legal tactics haphazardly as a threat or as an ad-hoc effort, but without a clear strategy.

John: In response to this you have been trying to think seriously about how Palestinians can get out of the sovereignty trap and fixation on this particular form of statehood that they've been stuck in since Oslo. What kind of alternative frameworks and futures are you imagining?

Noura: I end the book by highlighting how Israel's successful use of law has helped fulfil its territorial ambitions. In 2019, Israel exercises complete control from the Mediterranean Sea to the Jordan River and has destroyed the possibility of a Palestinian state. This outcome, however, is also Israel's Frankenstein as it now controls the lives of six million Palestinians that it neither wants to recognize as sovereign nor as citizens. Continuing this arrangement is literally maintaining an apartheid regime. And yet, Israel has been able to continue it because the Palestinian leadership continues to participate in the farcical "peace process". Even though the leadership has refused to resume negotiations since the Trump Administration moved the U.S. embassy from Tel Aviv to Jerusalem, it is still hopeful that an incoming U.S. administration will reverse course and offer better options. But regardless of the administration, continuing within the Oslo framework is a sovereignty trap: a political arrangement whereby good native behavior assessed by a settler sovereign is rewarded with limited autonomy without the promise of independence, thus enshrining a condition of permanent subjugation.

While I do not have precise answers as to what is *the* alternative, what I suggest is that we need to approach the question in a completely different way. Rather than think through different political outcomes - statist outcomes that balance native and settler sovereignty - I suggest that we begin to think in terms of belonging, about how different peoples can belong in shared spaces in a framework that is not necessarily mutually exclusive. I ask the reader to imagine the return of Palestinian refugees, not as an optimal outcome of struggle but as the first step to begin to imagine new futures. How does the return of nearly six million Palestinian refugees open up new possibilities to imagine ourselves? How, for example, would this help us think about the place of Jews from the Middle East who have had to bifurcate their Arab and Jewish identities in order to become Israeli? How does this process help us imagine Israel as a part of the Middle East rather than as a satellite state in the Middle East? I think that if Palestinians can answer these questions for themselves, they will not only pave the path for their freedom but offer the world new futures as well.