



JPS “Hidden Gems” and “Greatest Hits”: The Law and Palestine

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ABSTRACT

This essay examines *JPS*'s fifty-year archive of law-related content from the prism of its contribution to the author's own thinking (and writing) about the relationship between law and politics in the context of the Palestinian question. Noura Erakat identifies as a “greatest hit” Hanna Dib Nakkara's “Israeli Land Seizure under Various Defense and Emergency Regulations” (1985) for its meticulous documentation of the Israeli legal regime established to confiscate Palestinian lands. Erakat's “hidden gem” is “Juridical Characteristics of Palestinian Resistance: An Appraisal in Law,” coauthored by W. T. Jr. and S. V. Mallison. Published in 1973, the article argues for the treatment of captured fedayeen as prisoners of war four years prior to the amendment of the Geneva Convention recognizing national liberation struggles as international conflicts.

KEYWORDS

Israeli legal regimes;
Palestinian resistance;
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international law; politics
as law

THE DELIBERATE ERASURE OF THE PALESTINIAN PEOPLE began with the issuance of the Balfour Declaration in 1917, which referred to 90 percent of the population of Palestine as “non-Jews.”¹ In 1967, the United Nations Security Council (UNSC) reified that colonial erasure when it unanimously passed Resolution 242 describing Palestinians as a “refugee problem.”² The erasure of the Palestinian people has been part of the kind of hegemonic logic that enabled Israeli prime minister Golda Meir to declare in 1969, that there was “no such thing as Palestinians” and that “they did not exist”—an enduring Zionist myth.³ Palestinians have challenged this violent mythology politically, legally, socially, and intellectually. The *Journal of Palestine Studies* (*JPS*) has constituted a cornerstone of this effort in the realm of knowledge production.

In the five decades of its existence, *JPS* has provided a unique space to produce knowledge on our (the Palestinians') own terms, rather than pander to dominant institutions to be recognized. Perusing *JPS* tables of contents from the first issue in 1971 to the present is a portal into Palestinian social and intellectual history. Not only do these some three hundred pages of titles tell a story about the various turns in Palestinian national thinking, they also bring into vivid view the many individuals who have kept Palestine alive and the Palestinian struggle for freedom unbowed. I have had the distinct honor and pleasure of reviewing *JPS*'s legal scholarship over this half-century period. Since 1971, *JPS* has published forty-four peer-reviewed articles regarding law. This does not include other material like legal documents, interviews with legal experts, or essays pertaining to legal topics. In covering legal questions as a non-specialized law journal, *JPS* has bridged significant disciplinary silos. More than that, it has made the law accessible to a broader audience, including some of those most impacted by the legal ramifications of the question of Palestine.

Law: A Site of Domination and Resistance

In a 1981 article, Sabri Jiryis, a Palestinian Citizen of Israel (PCI), lawyer, and scholar, wrote that the law could “be considered an instrument of domination rather than the expression of justice.”⁴ I have sustained this cynicism about the law in my own work and have balanced it with an infallible optimism about the potential of political movements. In my book, *Justice for Some: Law and the Question of Palestine*,⁵ I use the relationship between law and politics to trace a history of the Palestinian struggle for freedom in the century between 1917 and 2017. I demonstrate that while the law is indeed a tool of domination, it can also be, and has been, a tool of resistance. The law’s ability to advance progressive causes is contingent on the balance of military, economic, and moral power in any particular context. In regard to Palestine, I write, “In order to serve an emancipatory function, the law must be wielded in the sophisticated service of a political movement that can both give meaning to the law as well as directly challenge the structure of power that has placed Palestinians outside the law.”⁶ Over a century-long arc, I highlight the moments when Palestinians have been most successful at wielding the law to advance their cause for freedom. Unsurprisingly, these moments have all corresponded to high points of Palestinian resistance, including during the Great Revolt (1936–39); at the apogee of what Palestinians know as *al-thawra*, or the Palestinian revolution (1968–82);⁷ and during the First Intifada (1987–91).

The Palestinians’ greatest success in using the law to advance their cause took place during the period of the Palestinian revolution. Against a backdrop of anti-colonial revolts throughout the Third World, featuring armed national liberation struggles alongside a cogent anti-imperialist global movement, not to mention an automatic majority of non-Western countries at the United Nations General Assembly (UNGA), in 1974 the Palestine Liberation Organization (PLO) entered the UN as a site of battle. That year, Yasir Arafat became the first non-head of state to address a plenary session of the UNGA. The UNGA recognized the Palestinian right to self-determination in Palestine (Resolution 3226) and the PLO as the sole legitimate representative of the Palestinian people (Resolution 3237) during the same session, thus reversing decades-long colonial erasures by the international community. Only one year later, the PLO would help amend the Decade for Action to Combat Racism and Racial Discrimination (commonly known as the Decade against Racism) and declare that Zionism, like apartheid, was a form of racism and racial discrimination (Resolution 3379). And by 1977, the PLO would join with the Non-Aligned Movement and the G-77 at the UN to legislate new laws of armed conflict recognizing guerrillas as legitimate combatants with the right to fight.⁸

Researching this historical period—and providing a more complex framework for understanding it—was particularly challenging, as there were few or no sources available on the PLO’s legal strategy. In addition to interviewing interlocutors in the field, I had a wealthy resource available to me in *JPS* and its mother organization, the Institute for Palestine Studies (IPS). At the IPS libraries in Beirut and Ramallah, I found encyclopedias of original documents organized by year. These documents included statements, speeches, Palestine National Council resolutions, interviews, analyses, and news clippings that all provided critical context for the PLO’s UN legal advocacy. And in the quarterly issues of the *Journal*, I found articles that provided rich insight and analysis. I could not have completed my book project without the unencumbered knowledge produced and published in the pages of *JPS*.

A History of Resistance

This wave of gratitude flowed over me again as I sifted through nearly fifty years of *Journal* issues to complete the task of highlighting one “greatest hit” and one “hidden gem” in *JPS*’ law-related archive. Familiar articles that filled significant gaps in my research jumped from the pages. Others I had never before come across made clear that I had had even more resources at my disposal than I originally realized. Among the most significant pieces I relied on for my book was Matthew Hughes’s 2010 article, “From Law and Order to Pacification: Britain’s Suppression of the Arab Revolt 1936–1939.”⁹ The article traces Britain’s use of emergency regulations to quash Palestinian resistance to partition, in particular, and settler colonialism, more generally. Britain’s emergency framework had become a tried and true part of its repressive arsenal—deployed from Ireland, to Jamaica, to India, and beyond—before its implementation in Palestine. For five days in October 1938, the British Mandate authorities lost control of many parts of Palestine, including the Old City of Jerusalem, despite deploying twenty-five thousand troops. In tracing the imperial scope of Britain’s legal and military repression during the Great Revolt, Hughes brings to light the potential of Palestinian resistance and the historical contingencies that could have changed the course of history as we know it. His work encouraged me to forefront Palestinian resistance in the history of the Palestinian struggle rather than rehearse, yet again, a story of loss and defeat.

Similarly, Michael Lynk’s 2007 article, “Conceived in Law: The Legal Foundations of Resolution 242,”¹⁰ helped to illuminate the uncertain foundations of that Security Council resolution. When I began my research on the drafting history of Resolution 242, I was aware of the Israeli legal arguments—namely the missing definite article “the” or “all the” preceding “occupied territories”—that opened to controversy from which parts of the occupied territories Israel would ultimately withdraw. Upon closer inspection, however, it became clear that this legal argument was not an inevitable outcome. In fact, even Israel’s primary allies in 1967—the United States and the United Kingdom—supported Israel’s *complete* withdrawal from the Arab territories with only slight border modifications. Lynk gestures toward this complexity as he draws on memoirs to show how U.S. lawmakers were blindsided by Israel’s revelations of its territorial ambitions. He recounts that when Secretary of State Dean Rusk reminded Abba Eban, then Israel’s UN ambassador, about Prime Minister Levi Eshkol’s pledge to withdraw from the occupied territory, “Eban shrugged his shoulders and said, ‘We’ve changed our minds.’”¹¹ I quoted this passage in my book chapter titled “Permanent Occupation,” first published in the pages of the *Journal* as “Taking the Land without the People: The 1967 Story as Told by Law,” in a 2017 special issue marking fifty years of Israeli occupation.¹²

Lynk’s article appeared in the 2007 special issue of the *Journal* that marked forty years of occupation, further highlighting *JPS*’s consistent critical interventions over time. That special issue also featured contributions by Richard Falk, Jamil Dakwar, Omar M. Dajani, and John Quigley—all giants in the field of international law—who each make their own unique contribution to the special issue. In his piece reflecting upon the viability of a Palestinian state, Falk considers the canonical status of Resolution 242 and concludes, “It is questionable whether, on this fortieth anniversary of UNSC 242’s adoption, the resolution retains much benefit for the Palestinians either by way of pointing to a solution or providing the UN with benchmarks to assess the behavior of the parties. As argued, geopolitics and Israel’s creation of facts on the ground have cast doubts on whether a two-state solution can still be the basis of a sustainable peace or a reasonable outcome of the Palestinian struggle for national self-determination.”¹³

Dakwar, for his part, draws on his experience as a PCI to scrutinize the potential for land swaps, which would exchange populations and territories between Israel and the inchoate Palestinian state. In doing so, he recenters the Palestinians who became citizens of Israel in the conversation about Palestinian freedom. He concludes by dismantling Zionist talking points boasting that PCIs would prefer to remain in Israel because they prefer Israeli to Palestinian governance. Dakwar writes, “The choice is not between living in a democracy (even as second-class citizens) and living in a ‘dictatorship’ (for the Palestine Authority [*sic*], ‘despite all its liabilities,’ has never been one), but between second-class citizenship in Israel and living in an entity that may be called a state, but which is in fact a modified form of Israeli military occupation.”¹⁴

Like Falk, Dakwar also calls into question the viability of establishing a Palestinian state—nearly a decade and a half before U.S. president Donald Trump unveiled his so-called deal of the century, outlining the permanent subjugation and enclosure of Palestinians within a series of noncontiguous Bantustans.¹⁵ In fact, *JPS* has regularly featured analysis that was ahead of its time. For example, it published at least two articles highlighting the similarities between Israeli domination and South African apartheid well before the comparison became widespread following the collapse of the Camp David talks in 2000. Alfred T. Moleah published “Violations of Palestinian Human Rights: South African Parallels” in 1981,¹⁶ and Mark Marshal’s “Rethinking the Palestine Question: The Apartheid Paradigm” appeared in 1995,¹⁷ underlining the *Journal’s* role in paving the way to bold ideas to frame the question of Palestine.

Greatest Hit and Hidden Gem

Of knowledge production on law and Palestine emanating from *JPS*, the “greatest hit” (and another foundational article for my work) is Hanna Dib Nakkara’s “Israeli Land Seizure under Various Defense and Emergency Regulations.”¹⁸ Published in 1985, the article meticulously documents the legal regime Israel established to confiscate Palestinian lands. What makes the piece unique is that it goes beyond an analysis of the law itself to document the actual process of dispossession. Nakkara was a PCI and a lawyer by training. His familiarity with the law and the process of dispossession is thus very personal and perhaps a story that only he could tell in the way that he does. For example, Nakkara eviscerates the idea that voluntary land sales to Israelis could be fair and explains the rationale for Palestinians’ refusal to accept compensation from parastatal institutions like the Jewish National Fund. His argument is, as he states simply, “There were no market prices for land. There were no free sellers or free purchasers. Land was not a commodity at that time,” and all monetary sums offered to Palestinians were insignificant and certainly not commensurate with the material and sentimental value of the land.¹⁹ Significantly, Nakkara also documents Palestinian resistance to these policies, including petitions, lobbying the Knesset, press conferences, and protests, demonstrating once again that Palestinian history is a history of resistance.

In another section of the article, Nakkara exposes the oppressive edge of Israel’s judiciary. He writes, “The Arab property in question automatically becomes the property of the Development Authority. The name of the Arab owner is obliterated in the Land Register [in] the blink of an eye, and the name of the Development Authority is entered as the lawful and rightful owner. This takes place in a country which claims to be a democratic country, a country under the law, a country which respects private ownership and human rights.”²⁰ Nakkara buttresses his argument about the phenomenon of judicial oppression by quoting a 1953 letter

that Dr. Israel Carlebach, the founder and editor-in-chief of the daily *Maariv*, wrote to his daughter explaining the futility of appealing to the Israeli judiciary. In the most damning passage, Carlebach responds to one of her queries by saying, “If the law decides against the thief, and the thief is very powerful, then he makes another law supporting his view.”²¹

The one article I could not believe I had missed in the original research for my book, and one that most certainly qualifies as a “hidden gem,” is W. T. Mallison Jr. and S. V. Mallison’s coauthored piece, “The Juridical Characteristics of the Palestinian Resistance: An Appraisal in International Law.”²² I was familiar with the husband-wife authorial team, as W. T. Mallison was a George Washington University law professor, and they were both champions of the Palestinian cause. I had even cited W. T. Mallison’s testimony before U.S. Congress in the late 1970s regarding the illegality of Israel’s settlement enterprise. Still, I had not seen this article, which is an unabashed defense of the legitimacy of the Palestinian right to use force. Published in the Winter 1973 issue of the *Journal*, the article precedes by four years the publication of the first Additional Protocol to the Geneva Conventions, which elevated national liberation struggles to the status of “international conflicts.”²³ The Mallisons lay out a formidable argument about the nature of Palestinian guerrilla fighters, demonstrating that these satisfy the requirements of Article 4A(2) of the Prisoners of War Conventions, rendering them organized combatants with the right to use force, and enjoy the status of POWs upon capture, as well as the right to request the intervention of third parties on their behalf. “If status in law can be obtained for the entity and the institution, the entire resistance is strengthened,” they write, almost as if addressing the Palestinian national liberation movement.²⁴ Indeed, the PLO obtained such legal status the following year under UNGA Resolution 3237. In my book, I document the history of the drafting of Resolution 3237, as well as the 1977 protocols recognizing the right to fight of Palestinians, but the entire history I recount would have benefited greatly from the Mallisons’ work. Yet another reminder that a scholar is never really done with doing the research.

JPS’s coverage of matters of law and Palestine has been vast and thorough. Of the forty-four relevant articles since the *Journal*’s establishment, however, forty-two have dealt with international or Israeli law. The two exceptions are articles by Emilio Dabed and Lynn Welchman, each of which addresses legal regimes overseen by the Palestinian Authority (PA). While the disproportionate attention to international and Israeli law makes sense—since the latter have had the greatest impact on Palestinian lives—it is critical to continue to study other legal regimes as well. In addition to formal and informal law overseen by the PA, legal regimes governing the lives of Palestinians in the diaspora from the United States to Chile and Lebanon are worthy sites of future research.

In its five decades of existence, the *Journal of Palestine Studies* has laid down an exceptional foundation for the study of law and Palestine. I am honored to be a part of that legacy, indebted to its impact on my own scholarship, and humbled to be a member of the *JPS* Editorial Board charged with continuing such an esteemed legacy.

About the Author

Noura Erakat is an assistant professor in the Africana studies department and the Program in Criminal Justice at Rutgers University—New Brunswick. She is the author of *Justice for Some: Law and the Question of Palestine* (Stanford, CA: Stanford University Press, 2019), which won the 2019 Palestine Book Awards Academic Award and the 2020 Independent Publisher Book Award’s bronze medal in the current events/foreign affairs category.

Endnotes

1. Arthur James Balfour, “Balfour Declaration 1917,” 2 November 1917, The Avalon Project: Documents in Law, History and Diplomacy, Lillian Goldman Law Library, Yale Law School, http://avalon.law.yale.edu/20th_century/balfour.asp.
2. UN Security Council, Resolution 242, S/RES/242 (22 November 1967), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>.
3. Golda Meir, interview with Frank Giles, *Sunday Times London*, 15 June 1969; reprised as “Golda Meir Scorns Soviets: Israeli Premier Explains Stand on Big-4 Talks, Security,” *Washington Post*, 16 June 1969, p. A15.
4. Sabri Jiryis, “Domination by Law,” *JPS* 11, no. 1 (Autumn 1981): p. 92, <https://doi.org/10.2307/2536047>.
5. Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford, CA: Stanford University Press, 2019).
6. Erakat, *Justice for Some*, p. 4.
7. For more information on *al-thawra*, see the learning and teaching tool, authored by Karma Nabulsi and Abdel Razzaq Takriti, “The Palestinian Revolution,” 2016, <http://learnpalestine.politics.ox.ac.uk>.
8. Erakat, *Justice for Some*, pp. 107–12.
9. Matthew Hughes, “From Law and Order to Pacification: Britain’s Suppression of the Arab Revolt in Palestine, 1936–39,” *JPS* 39, no. 2 (Winter 2010): pp. 6–22, <https://doi.org/10.1525/jps.2010.XXXIX.2.17>.
10. Michael Lynk, “Conceived in Law: The Legal Foundations of Resolution 242,” *JPS* 37, no. 1 (Autumn 2007): pp. 7–23, <https://doi.org/10.1525/jps.2007.37.1.7>.
11. Lynk, “Conceived in Law,” p. 9.
12. Noura Erakat, “Taking the Land without the People: The 1967 Story as Told by the Law,” *JPS* 47, no. 1 (Autumn 2017): pp. 18–38, <https://doi.org/10.1525/jps.2017.47.1.18>.
13. Richard Falk, “Forty Years after 242: A ‘Canonical’ Text in Disrepute?” *JPS* 37, no. 1 (Autumn 2007): p. 47, <https://doi.org/10.1525/jps.2007.37.1.39>.
14. Jamil Dakwar, “People without Borders for Borders without People: Land, Demography, and Peacemaking under Security Council Resolution 242,” *JPS* 37, no. 1 (Autumn 2007): p. 72, <https://doi.org/10.1525/jps.2007.37.1.62>.
15. Titled “Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People,” the purported peace plan was released in two phases: an economic tranche, unveiled by the U.S. president’s son-in-law, Jared Kushner, in July 2019, and the political “vision” announced in January 2020 by the president himself, with Israeli prime minister Benjamin Netanyahu standing at his side.
16. Alfred T. Moleah, “Violations of Palestinian Human Rights: South African Parallels,” *JPS* 10, no. 2 (Winter 1981): pp. 14–36, <https://doi.org/10.2307/2536175>.
17. Mark Marshall, “Rethinking the Palestine Question: The Apartheid Paradigm,” *JPS* 25, no. 1 (Autumn 1995): pp. 15–22, <https://doi.org/10.2307/2538101>.
18. Hanna Dib Nakkara, “Israeli Land Seizure under Various Defense and Emergency Regulations,” *JPS* 14, no. 2 (Winter 1985): pp. 13–34, <https://doi.org/10.2307/2537159>.
19. Nakkara, “Israeli Land Seizure,” p. 22.
20. Nakkara, “Israeli Land Seizure,” p. 21.
21. Nakkara, “Israeli Land Seizure,” p. 24.
22. W. T. Mallison Jr. and S. V. Mallison, “The Juridical Characteristics of the Palestinian Resistance: An Appraisal in International Law,” *JPS* 2, no. 2 (Winter 1973): pp. 64–78, <https://doi.org/10.2307/2535481>.
23. “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),” 8 June 1977, International Humanitarian Law Database, International Committee of the Red Cross, <https://ihl-databases.icrc.org/ihl/INTRO/470>.
24. Mallison and Mallison, “Juridical Characteristics,” p. 70.