Justice for Some: Law and the Question of Palestine. Noura Erakat. Stanford University Press, 2019

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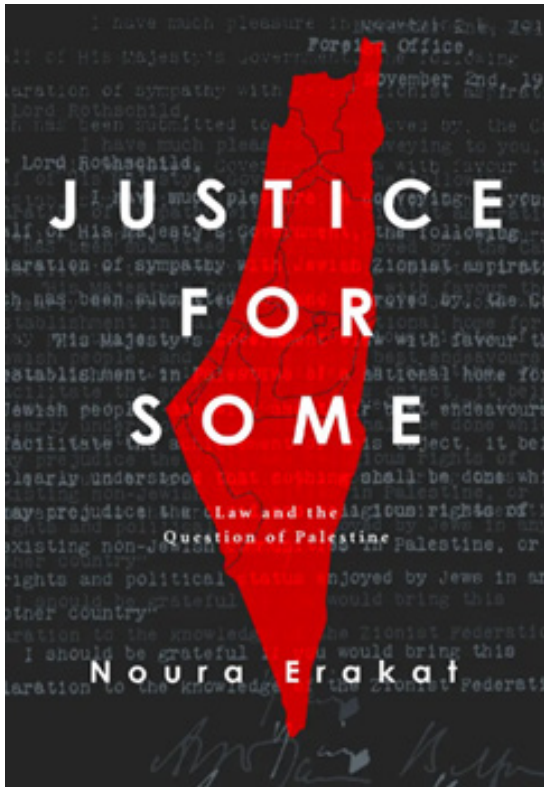

A direct and consequential outcome of the past 19 months of hell experienced by the people of Gaza is that the Palestinian cause is very much back on the international agenda. As we have watched helplessly, a genocide conducted with the tacit or explicit support of the supposed 'leaders' of the 'rules-based order', many of us have been driven to educate ourselves on the history of the so-called 'Israel-Palestine conflict'. We have sought to understand both how we got here, and what might be possible ways forward. In proposing answers to both, Noura Erakat's book is vital reading.

A US-Palestinian legal scholar and activist, Erakat sets out to track the role of international law in producing and resisting the dispossession, disenfranchisement, and dehumanisation of the Palestinian people from the early 20th century to the present. In the preface she makes clear: "This book does not advance legal prescriptions nor make exhaustive legal arguments" (xii). Rather – following the activist legal tradition of 'movement lawyering' – she examines how legal developments related to Palestine have been made possible as a result of particular actions/actors at particular historical junctures. In the process she offers an invaluable resource to those interested in the modern political history of Palestine, the colonial roots and residues of the international legal system, and the limits and possibilities of using law in emancipatory politics.

This is timely not just as a response to the dire situation in Palestine. It is also a useful intellectual offering at a moment when the entire global political and economic order is being called into question. Reading Erakat in the context of Sri Lanka, I also see some of her reflections as potentially productive for local debates about justice, equality, and human rights.

From temporary Mandate to permanent Occupation: The birth of Israel and the exclusion of Palestine

The book starts with the Mandate period during which Palestine came under British control following the post WWI dismantling of the Ottoman Empire. Drawing

on archival material Erakat details the process through which British colonial authorities sought to reconcile their obligations to the Palestinian population seeking self-rule with their commitment to establishing a Jewish state. She notes that the path charted at that time set the stage for all that would follow. Drawing on the idea of the 'state of exception' (associated with the Nazi political theorist Carl Schmitt and further developed in the contemporary context by Italian philosopher Giorgio Agamben), Erakat shows how the creation of Israel was made possible by the erasure of Palestinian sovereignty and the establishment of a *sui generis* (exceptional) legal regime. It is the struggle to overcome both of these conditions that have shaped Palestinian politics and resistance ever since.

In Chapter 2, Erakat documents the establishment of the Palestinian Liberation Organisation (PLO). She shows how Palestinian political leaders sought to combine internal resistance to Israeli rule (including targeted political violence) with international diplomacy and legal activism. In the process they managed to establish (some) recognition of their sovereignty claims and undermined Israeli legitimacy on the international stage. Erakat examines the factors that made this possible: both internal to the Palestinian movement and externally within the global political order.

Unfortunately, for Erakat the gains of the 1970s and 1980s were largely lost following the beginning of what is known as the 'Oslo Peace Process' (referring to an agreement signed by Israel and the PLO in 1993). This she explains is the result of a separation of the legal process from a larger political strategy (including the possibility of armed resistance). Again through a combination of internal and external factors, Erakat shows how the minimal gains made through the establishment of the Palestinian Authority (PA) undermined a more revolutionary self-determination project. Palestinian sovereignty was strategically used by Israel and the US to create an illusory parity between the negotiating parties: something that masked the very severe power imbalance that in fact shaped their bargaining positions. This narrative was accepted by a Palestinian leadership fearful of losing its authority and eager to establish even the most superficial semblance of statehood.

In the final two substantive chapters of the book Erakat shows how the promise of Palestinian statehood has acted as a trap through which Israeli sovereignty and territorial ambitions have in fact been strengthened. The "Two State Solution" framework has allowed Israel to use international law to re-establish its legitimacy even as Israeli actions—in particular its expansion of settlements and partitioning of Palestinian land—have made the reality of a Palestinian state more and more impracticable. At the same time, through creative and highly politically strategic interpretations of international law, Israel has managed to both establish a complex regime of legalised discrimination against Palestinians *and* undermine legal challenges to that regime.

While Erakat's book concludes in 2018, her warnings about the dangerous directions Israel and the US have sought to steer the international law of armed conflict are disturbingly prescient when viewing the situation in Gaza since October 2023. She identifies the ways in which these two states have sought to shift customary legal norms related to self-defence, proportionality and 'legitimate targets'. This, combined with the international community's endorsement of 'combating terrorism' as a key priority have provided the perfect foundation for Israeli actions in Gaza.

At the same time, some of the parts of the struggle Erakat identifies as significant but marginalised since the 1990s have seen a resurgence in the past 19 months. For example, while the framing of the Israeli regime as analogous to Apartheid South Africa (a PLO strategy in the 1970s) had remained a feature of international human rights and legal discourses, the PA had itself not endorsed this frame after its transformation from a resistance movement (the PLO) into the bureaucratic administrative structure (the PA) established through the Oslo agreement. This led Erakat to conclude in 2018 that, "the Palestinian leadership has become a part of the Palestinian problem" (217-218). This is because, "the buy-in and collaboration of the Palestinian leadership is central both to Israel's apartheid regime and to the enduring denial of its existence". With the complicity of the PA, Israel has been able to fragment the Palestinian population into many differently categorised and geographically separated groups. However since October 2023, Israeli actions and activist discourse has demonstrated the illusory nature of these distinctions. The impotence of the PA has also opened up space for revisiting the question of who can and should represent Palestinian liberation.

We have also seen a momentous surge in both knowledge of and participation in the Boycott, Divestment, Sanctions (BDS) movement. This movement Erakat identifies as hugely important for both mobilising a grassroots global community and reframing the discussion away from resolving two competing states' territorial claims (the dominant framework developed since Oslo) towards accountability for mass systemic human rights violations by Israel. This has also

been without the backing of the PA. Erakat therefore expressed a fear that an appeal to equal human rights without being able to link to a broader political agenda for Palestine, may lose the settler colonial dimension of the problem.

Again in the current moment we see a clear return to an earlier anti-imperial discourse not dissimilar to that Erakat documents in Chapter 3. Not only has it been made clear that Palestinians are not safe under Israeli control, but the grassroots mobilisation of peoples in various parts of the world has led to a reconnecting of the question of Palestine with broader questions of Indigenous rights and self-determination and the unfinished business of decolonisation. If, as Erakat argues, "In 2018, the official Palestinian leadership has a clear political vision aimed at establishing a Palestinian state but has abandoned a politics of resistance" (234), that politics of resistance is now re-emerging through the diversity of voices demanding freedom for Palestine. This includes armed resistance groups within Palestine, Palestinians both in Palestine and the diaspora, and activist groups across the world. In the process, questions of sovereignty, self-determination, rights and freedom are all being reopened. Into this chaotic, unpredictable but hopeful space Erakat's book offers important historical grounding, potential lessons learnt and sites for further reflection, exploration and development.

Oppressed people and international law: The importance of "legal work" and "legal opportunity/ opportunism"

The first striking take-away from the book for me was the catch-22 that oppressed groups – be they small states or non-state entities – appear to face. On the one hand, the realities of the global political order are such that using international law to their advantage is very hard without the support of powerful states. On the other hand, the ubiquity of international law within that order makes it almost impossible for them to escape engaging with it. From the earliest days of the British mandate in Palestine, Palestinians have been forced to engage from a position of constant disadvantage with a vast legal apparatus mobilised to legitimate their dispossession. Unable to opt out, they have often been made complicit in the development of a legal regime founded on their exclusion.

This appears to support the argument of critical legal scholars that international law is at best useless and at worst complicit in the oppression of the world's most marginal. Reading the obvious manipulation and in some cases overt fallacy of Israeli claims and legal arguments it is hard not to feel a sense of futility. One is left with a strong impression that it is ultimately brute force rather than sophisticated legal arguments that will trump. Even when international law has come down on the side of Palestine—for example the 2004 International Court of Justice advisory opinion on the Israel wall—without political will it has been incapable of changing the situation on the ground (the occupation continues and settlements have expanded).

Erakat is not naïve in this regard. She is clear that international law in itself does not offer solutions. Indeed she explicitly states: "The language of law should not displace, direct or supplant politics" (19). However, she seeks to make an important distinction between the law itself and its use. By providing a chronological account of international law in relation to Palestine she tries to demonstrate that, "while the content of the relevant legal norms did not change across time and space, their meaning changed significantly" (5). And this is why the domain of law cannot and should not simply be abandoned but must be approached as a strategic political site of struggle. This leads to the crux of her argument: while the law itself is indeterminate, it is through *legal work* and *legal opportunity/ opportunism* that particular political ends are achieved.

Drawing on critical legal scholar Duncan Kennedy, Erakat defines 'legal work' as work done by (legal) actors to achieve particular aims through strategic interpretations and deployments of law. To illustrate, Erakat provides examples of different points in time when Israeli and Palestinian actors have successfully used legal work to achieve certain political outcomes. For example, while the interests of power have clearly been behind Israel in most if not all situations, this has not offered a complete *carte blanche* to Israeli ambitions. As Erakat details in Chapter 2, Israel has in fact had to do considerable legal work—both internationally and domestically—to manufacture a legal framework that would allow it to *appear* to be following international law at the same time as pursuing its political ambitions. It has done this through selectively applying international rules, adopting narrow interpretations of sovereignty (as only meaning statehood), playing on the ambiguity of language in UN resolution text, and developing a domestic legal framework that places Palestinians outside of all existing recognised legal categories.

Meanwhile, despite the terrible disadvantage at which Palestinians have consistently been placed within the international legal order, they have not been completely unsuccessful in making the system work in their interests. Chapter 3 makes for me one of the most interesting and thought-provoking contributions

of the book. Erakat documents an inspiring period of "liberation diplomacy" (99), Third World solidarity, and Global South "lawmaking authority" (122). Examples of Palestinian success include the articulation of Zionism as a form of racism (UN General Assembly Resolution 3379 of 1975): a move that helped isolate Israel internationally before being rehabilitated through the Oslo Accords (following which Erakat sees Israeli legal work as more effective). The PLO in the 1970s successfully made the UN a "locus of battle" (115), by, "placing the Palestine question within a global framework and on behalf of all struggles against imperialism, colonialism and economic exploitation": something Arafat achieved in his first address to the UN General Assembly in 1974 (117).

At the same time, Erakat notes that legal work alone is insufficient as not all factors are within the control of legal actors. They also rely on particular balances of power at particular historical moments. To take the above example of UN GA Resolution 3379, this was made possible not just by sophisticated legal analysis and argument but also by mobilising networks across the Global South in a period of intense decolonisation and national liberation struggles. So too the PLO were able to ride the post-Bandung wave in which a spirit of Third Worldism and a strong Non-Aligned Movement was actively calling into question Western political and economic domination.

This is where the importance of both *opportunity* and strategic use of the opportunity (*opportunism*) become clear. It is this strategic legal opportunism that Erakat identifies as missing in the post-Oslo Palestinian struggle. This may have been due to a number of factors. Externally, the post-Cold War consolidation of US power and the fragmentation of the Non-Aligned Movement led to a reduced opportunity to draw on Global South solidarity (an area requiring further analysis in its own right). Internally, she identifies a crisis of leadership and the failure to resolve the tension between those seeking revolutionary liberation and complete dismantlement of Israel Zionist sovereignty and those willing to accept a truncated Palestinian state in the name of pragmatism.

Whatever the reasons, Erakat identifies a separation of law from political strategy that in her view has been fatal to the Palestinian movement. It has led to an unopposed consolidation of US power and a legitimation of Israeli policies through sustaining the myth of an ongoing diplomatic process between two equal parties. Seduced by the promise of minimal (quasi)state authority, the Palestinian leadership, now in the form of the PA, has abandoned a more radical and revolutionary self-determination struggle. In the process the political leverage gained in the 1970s and 1980s which isolated Israel and offered the possibility for coercive pressure has been lost. In its place the Palestinians have been left in a position of begging for whatever the US will secure for them. Given what we have witnessed in the past 19 months, this raises questions about what sorts of legal opportunities and legal work might now be possible or required, if any. Is there anything to be gained from returning to the law?

Law as a site of political struggle

By focusing on the concepts of 'legal work' and 'legal opportunity/opportunism', Erakat offers a way in which we might understand the law as neither completely useless nor a solution. She writes:

> On its own, the law can neither undo the conditions that engendered the violation nor recalibrate the balance of power that sustains it; it can be used only as a tool in support of a political strategy that aims for this transformation. (19)

This leads her to conclude:

> 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 and also directly challenge the structure of power … (4)

One might ask whether even this strategic approach to law is a misdirection of our limited resources. I am reminded of Robert Knox's (2009) caution about the dangers of investing too much time and energy in law at the expense of other more potentially radical emancipatory forms of action (see also Ben Golder's critique of 'redemptory international law'). By engaging the system are we not reinforcing its legitimacy, when in fact given its internal biases against the oppressed and disempowered we should be tearing it down?

The discomfort caused by Knox's warning is never completely appeased in reading Erakat's book. She herself documents how, in the words of one of the PLO's legal advisors, "no one could answer the question of how the PLO should translate its legal achievements into diplomatic victories" (Erakat 2019: 124). It is also unclear from her documenting of the Oslo peace process whether the Palestinians could really have secured a better agreement even if they had followed a more strategic legal approach given their bargaining power appeared close to zero. This might help explain why movements like Hamas were able to gain in popularity versus an ongoing campaign of diplomacy and negotiation.

The question of how much energy to invest in law continues to haunt all of us who look to use legal mechanisms as part of the struggle. In the case of Palestine, many of us have advocated for and celebrated international legal interventions such as the ICJ genocide case initiated by South Africa in 2024 and international criminal prosecutions by the International Criminal Court and others.[1] Even as these initiatives have thus far delivered no tangible benefits, many of us have argued for their symbolic importance and continue to see them as a useful part of a broader strategy for securing Palestinian rights and justice. But could our energies be more productively used elsewhere? Might we need to go further than just ensuring a strong political project underpins our efforts (as Erakat demands) and refuse to participate in a system so obviously rigged against the powerless?

I remain somewhat equivocal on this issue for the following reason. Reading some of the legal contortions on which Israel and its allies have expended significant effort, the book provoked a recurring question for me: When the rule of might is capable of forcing its will regardless, what is the need for the oppressor to seek the law's veneer of legitimacy?

Throughout the modern history of Israel-Palestine, we see a constant tension between the apparent foregone conclusion of Western-backed Israeli supremacy and moments of discomfort and debate that force (albeit limited) Israeli restraint and concession to Palestinians. It is present in the British attempts to balance their commitment to Palestinian sovereignty with their promise to Zionists of a Jewish state (discussed in Chapter 1). It is present in the UN debates surrounding the legitimacy of Israeli occupation of Palestinian lands in 1967 and the conditions on which it should be required to withdraw (discussed in Chapter 2). And it has been present ever since as Israel has sought to justify and expand its control over Palestinian territories and lives. It seems not only oppressed but oppressor have had to overcome the challenge of making the law work for their interests even when those interests are already secured through force. And it is perhaps here that the opportunity lies.

As someone who has framed my activism on Palestine through the language of international law and suffered consequences for doing so, I see the apparent crisis in the international legal order as cause for cautious celebration. It marks a moment of rupture. Their inability to deploy international law to their advantage has left the international legal order's supposed champions with no choice but to try and burn down what they themselves created. While critical scholars have long mocked the claims of human rights to speak "truth to power" (in the words of David Kennedy, "speaking law to politics is not the same thing" (2002: 121)), the current moment has in fact finally made human rights talk a truly dangerous thing!

In this sense, I see the use of law as offering a sort of "homeopathic strategy" the Italian anarchist feminist philosopher Chiara Bottici (2015) calls for in resistance politics. Inspired by French philosophers Jean-Jacques Rousseau and Guy Debord, Bottici argues that it is futile trying to simply escape the spectacle of modern capitalist society. "[B]ut what we can do is fight the evil with its own weapons" (242). Just as homeopathic medicine works by introducing a small quantity of the pathogen into the body, Bottici proposes "us[ing] the evil against the evil itself in a way that actually counters its effects: "the poison here also becomes the cure". The language of international law and human rights provides a shared language around which global solidarity can be built in a context where highly divisive identitarian and communitarian political rhetoric has been gaining ground everywhere. At the same time, by using the language of international law against its supposed guardians (and beneficiaries) we are creating an internal crisis within the imperial centres of power: an implosion of their own project. While not guaranteed to pave the way for a better order, it at least opens up a terrain for struggle. Again, Erakat offers some useful points for reflection as we do so.

A new international legal order? Where to from here?

First, she marks the difference between the 1970s and 1980s Palestinian engagements with international law and those from 1990 on. In the former, the UN was treated as a site of contestation within which Global South states and liberation/self-determination movements built networks of solidarity and sought to challenge and undermine the hegemony of former and contemporary imperial powers, in particular the US. International law was consciously and strategically deployed as part of a broader anti-imperial politics. This strategic resistance element was, in Erakat's view, lost in the 1990s for reasons discussed above.

The events of the past 19 months have only further emphasised the importance of removing US decision-making power if Palestinians are to have any hope of not just liberation but survival. Aside from the US funding of the Israeli war machine, it has been the US

1 See for example the Hind Rajab Foundation universal jurisdiction project: https://www.hindrajabfoundation.org/

that has blocked every UN Security Council Resolution that may have stopped the carnage in Gaza. It is also the US that has actively sought to undermine any efforts at international justice – most blatantly in the sanctioning of the International Criminal Court following its issuing of indictments for Israeli Prime Minister Benjamin Netanyahu and former Minister of Defence Yoav Gallant. If Erakat shows that the US has never been a neutral broker in relation to Israel-Palestine, we are now witnessing explicit US support for genocide. It is therefore imperative that the fate of Palestine not be left in US hands.

At the same time, the general moral failure of not just the US but all Western powers in relation to the ongoing genocide in Gaza should be a lesson to us all. It has of course long been clear that the regime of international human rights and justice was selective and hypocritical. However the past 19 months has shown the extent to which the supposed champions of the international legal order are willing to erode and destroy the system when it acts outside of their interests. If anything of the international human rights framework is to survive we have to find new ways of engaging with it beyond the appeal to supposedly 'friendly' or 'good' states as advocates.

In the case of Sri Lanka, while it is with relief that many seeking accountability for the violations committed in the civil war here received the UK decision to issue sanctions against four individuals accused of serious human rights abuses, how are we to reconcile these with the same UK government that continues to provide cover and support for the same violations in Palestine? We might say that we need to be strategic and take each situation separately. However, are we not then reinforcing the authority of states who will abandon us the minute our struggles are no longer palatable or in their interests?

This is why Erakat's reminder of an earlier period of international law and politics which contested rather than accepted Western hegemony is important. And indeed in relation to the current situation in Palestine we have perhaps seen the re-emergence of Global South lawmaking. It has been South Africa that has taken the lead in pursuing justice for Palestine through its case against Israel in the International Court of Justice. This and some of the other legal and diplomatic interventions (ICC prosecutions, arms embargoes, expulsions of Israeli diplomats) has ended up with Global South nations pitted against many of the nations that have long presented themselves as the 'policemen' of the international community. Could this be a moment for us to revisit and revive the Third World movement? This might be useful not only politically and legally but also economically at a time when the ravages of a global economy structurally designed to maintain inequality are affecting so many parts of the world (not least Sri Lanka).

However, Erakat also makes a second important point that may require us to go further than simply pushing for a global rebalancing of state power. After all, no state has demonstrated itself beyond double-standards or selective application of international law.[2] In considering the ways forward for Palestine, Erakat reminds us of the words of anti-colonial activist intellectual Frantz Fanon. Fanon, Erakat observes, was highly sceptical about the promise of the nation-state as a vehicle for self-determination:

> He appealed to his comrades in [the Algerian independence] struggle, saying: 'let us not pay tribute to Europe by creating states, institutions, and societies which draw their inspiration from her. Humanity is waiting for something other from us than such an imitation…' (Erakat 2019: 21)

What might this 'other' be? This appears to be the key unanswered question that Erakat urges us to think towards. She plainly states: "This path is not well-paved; in fact, it does not even exist". However, "[e]mbarking upon it is a commitment to build new possibilities for decolonisation and freedom more generally" (240).

I see Erakat's provocation as raising two interconnected questions. How to imagine and activate an international legal rights-based order that does not rely on the benevolence of nation-states? And how to imagine self-determination beyond the frame of the nation-state? Both of these are significant questions not just for Palestine but many others, not least Sri Lanka.

It was and continues to be a source of great pain to many survivors of the Sri Lankan war that no international intervention prevented or has provided justice for the tragic events in the final stages of the war. The bitter truth is that it was not of sufficient geopolitical significance to give states an interest in intervening. And now, 16 years on, while the UN Human Rights Council continues to make salutary gestures towards the question of justice in Sri Lanka, it has shown little appetite for holding Sri Lankan authorities to account for the promises they make. Even where states have shown a willingness to act—as in the case of the UK

2 South Africa has in the past failed to act in relation to the arrest warrant issued by the ICC against former Sudanese President Omar Al-Bashir. So too Nicaragua has been accused of initiating proceedings in the ICJ against Germany for facilitating Israeli genocide, of trying to deflect from its own record of internal human rights abuses.

government's recent sanctions—the efforts are partial, selective, and largely symbolic. This requires us to reckon with the question of how to imagine justice as something *we the people* can make possible? What sorts of communities of solidarity might we need to draw on and cultivate? What sort of collective power might be needed to mobilise?

The importance of moving beyond a state-based model of rights is not just relevant to those seeking redress for past wrongs. As Erakat shows, 'state sovereignty' has been a trap that has limited the horizons of possibility for the Palestinian struggle. By placing their demands for self-determination within this framework Palestinian leaders have also endorsed and legitimated the very system that protects and promotes Israel. Meanwhile the internal diversity of Palestine is suppressed in order to establish a coherence to the national project. How do, Erakat asks, "economics, labor, gender, and race inform the struggle for freedom and its horizons?" (22).

This is a question that all too often nationalist movements have failed to fully take seriously, the Tamil nationalist movement being a case in point. Many critics have pointed to the ways in which appeals to 'Tamil-ness' (as with 'Sinhala-ness') have elided important issues like class, caste, gender, and regional hierarchies.[3] Is there a way to simultaneously confront the realities of ethnic discrimination and marginalisation in the country without reifying a singular ethno-nationalist identity that ultimately reproduces many of the problems it claims to be confronting (i.e., Sinhala Buddhist nationalism)? These conversations have been happening in Sri Lanka particularly with the unprecedented electoral success of the National People's Power (NPP) and the decline in people's confidence in Tamil nationalist leaders. It is also a conversation that has been happening among other communities seeking self-determination: see for example the Kurdish movement (Üstündag 2016). Now might be an important opportunity for conversation, experience and idea sharing across different communities.

In conclusion, I highly recommend Erakat's book to anyone interested in Palestine, anti-imperialism, and the role of law in emancipatory political movements. At a time when we are in need of inspiration, Erakat provides just that and not in an abstract way. Her book is a source of detailed, practical examples of the messy, risky business of conducting a liberation struggle in a highly colonial world order. By mapping the highs and lows of the Palestinian struggle she offers valuable insights and lessons learnt that allow us to rejuvenate and expand our struggles for decolonial justice and freedom. In that sense she makes tangible the slogan that many have repeated the past 19 months: the struggle to free Palestine has the potential to set us all free.

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3 For just one example, see the edited collection by Pradeep Jeganathan and Qadri Ismail (1995): *Unmaking the Nation: The Politics of Identity and History in Modern Sri Lanka*, Social Scientists' Association, Sri Lanka.