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The Future of International Law and Human Rights

An Interview with Richard Falk

by CIHAN AKSAN and JON BAILES
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Richard A. Falk is professor emeritus of international law at Princeton University and an appointee to two United Nations positions on the Palestinian territories. He has authored, edited or contributed to 40 books, including *The Great Terror War*; *The Costs of War: International Law, the UN, and World Order after Iraq*; *Achieving Human Rights*; and *International Law and the Third World: Reshaping Justice*.

What do you understand by 'hegemony'? Should the United States be categorised as a 'hegemon' or an 'empire'?

Richard Falk: To be a hegemon is inherently ambiguous, usually implying some mixture of dominance and legitimacy, that is, being seen as contributing global leadership in a generally benevolent manner. As such the meaning of hegemony is subject to varying interpretations depending on how the historical role of the United States is interpreted. After the Second World War, facilitating the establishment of the UN and aiding the reconstruction of Europe, the United States was widely viewed, at least in the West, as a benevolent hegemon. In the non-West, the US was often perceived as a supporter of the colonial powers in their struggle to maintain control over their colonial possessions, and was viewed far more critically, especially by emerging elites that were more inclined to socialist development paradigms than to the capitalist ethos favoured by Washington. More recently the US has more accurately been viewed as a militarist 'empire' that fights destructive wars and intervenes in a variety of societies, especially in the Middle East to retain control over oil reserves, and lends crucial support to Israel that not only oppresses the

Palestinian people but threatens to convert the entire region into a war zone. At present, the United States, with over 700 foreign military bases, navies in every ocean, a programme to militarise space, and drone bases planned for all regions of the world, is increasingly perceived in relation to its hard power diplomacy, a threat to political independence and stability for many countries. It is perhaps best viewed as an 'authoritarian democracy' within its own territory and as 'a global state' of a new kind when considered internationally.

Although the UN General Assembly passed a resolution entitled 'Inadmissibility of the Policy of Hegemonism in International Relations' in 1979 (which, incidentally, was opposed by the United States), international law has still repeatedly been used to legitimate hegemonic power. To what extent is international law intertwined with the geopolitical priorities and interests of the West? And, perhaps more importantly, is there any scope for turning international law into a counter-hegemonic tool of resistance?

RF: Throughout its history, from its modern origins in the seventeenth century, international law has served the interests of the powerful and wealthy, but also contained the potential to protect the weak and vulnerable. It is truly both a sword and a shield, and this double reality has persisted up until the present era. Historically, international law lent a measure of legality to the colonial system, and allowed the West to set the rules for participation as a sovereign state on a global level. It also protected the interests of foreign investment in countries of the global South even when these were exploitative, and deprived countries of the benefits of resources situated within their territories. At the same time, international law was also appropriated by counter-hegemonic forces to contend that existing international arrangements were immoral and needed to be supplanted by new legal rules and procedures. The struggle against the international slave trade resulted in an international treaty that made slave trading unlawful and eventually led to the international condemnation of slavery as an institution.

More recently, the idea of self-determination was gradually given credibility by international law, and it lent strong emancipatory support to movements of liberation struggling against a West-centric world order. Latin American countries used international law creatively, both to limit the protection of foreign investment by establishing the primacy of national sovereignty in relation to natural resources, and by building support for the norm on non-intervention in internal affairs. Recently, both Israel and the United States have mounted attacks on 'lawfare', that is, counter-hegemonic uses of international law to question policies associated with the occupation of Palestine and criminal tactics of warfare.

Human rights and international criminal law both illustrate the contradictory potential of international law. On one level, the imposition of human rights norms is a restraint on interventionary diplomacy, especially if coupled with respect for the legal norm of self-determination. But on another level, the protection of human rights creates a pretext for intervention as given approval by the UN Security Council in the form of the R2P (responsibility to protect) norm, as used in the 2011 Libyan intervention. The same applies with international criminal accountability. In the Goldstone Report, Israeli perpetrators of possible crimes against humanity were made subject to prosecution and punishment, although the geopolitical leverage of the United States within the UN prevents implementation. At the same time, several African

leaders are being prosecuted for their crimes against humanity and participation in genocide: a double standard of sorts, given the impunity accorded to the West and Israel.

The UN Charter upholds 'the principle of the sovereign equality of all its Members'. But how can this article be taken seriously when the Security Council, whose five permanent members are armed with the power of the veto, constitutes a collective hegemony?

RF: The issue of permanent membership and the veto is somewhat complicated. There was a deliberate decision after the failure of the League of Nations to make the next attempt to establish a global political actor sensitive to geopolitical realities. The underlying idea was to provide major states, defined in 1945 by reference to the winners in the Second World War (now an anachronism), with assurance that they could take part in the UN without jeopardising their national interests. In this regard, the UN has succeeded, as none of the big countries has withdrawn, and the Organisation has managed to achieve virtually universal membership of all sovereign states. Of course, during the Cold War this was a somewhat hollow victory as the two superpowers used their vetoes to block Security Council decisions that were opposed to their interests, and a demoralising gridlock resulted.

As matters now stand, the veto seems inappropriate, given the absence of any deep ideological split between major states, and definitely constrains the war-prevention mission of the UN. Similarly, the present permanent five are out of touch with geopolitical realities, and constitute a remnant of a West-centric world order, casting a shadow of illegitimacy across the activities of the most important organ of global policymaking in the UN System. To achieve effectiveness and legitimacy it is time to scrap the right of veto given to permanent members, or at least severely restrict its use. It is also time to either abandon the idea of permanent membership or broaden it to reflect the rise of non-Western states to the status of global leaders (e.g. Brazil, India, Indonesia, Turkey, South Africa), and to downgrade European representation by either giving the European Union a single seat or rotating a European state among Germany, France, UK, and Italy.

But is this achievable in reality? Would the Western powers ever consent to such an assault on their collective hegemony?

RF: Despite years of effort to make adjustments in the permanent membership, it has not been possible to reach a compromise. Most attempts have not challenged the over-representation of Europe, but have tried to find ways to add countries from the global South. Opposition has surfaced regionally, with Pakistan opposing India being given a permanent seat, and similar problems surfacing between Brazil and Argentina, and Nigeria and South Africa. Other historical issues have also arisen in relation to the claims of Japan and Germany to be treated in a manner equivalent to the United Kingdom and France. There are also concerns that addressing the representation problem by adding permanent members, especially if also granted the veto, would make the Security Council unwieldy, and not capable of reaching decisions in most conflict situations. Some suggestions have been made either to abandon the veto, or restrict its availability. Another proposal would deny the veto to new permanent members of the Security Council. So far no formula has been found that is able to generate the consensus needed to

amend the UN Charter, which would be necessary, and can be blocked if any of the five current permanent members is opposed.

In the case concerning 'the Military and Paramilitary Activities in and against Nicaragua' (*Nicaragua* v. *United States of America*), the International Court of Justice (ICJ) found in favour of Nicaragua and ordered the United States to make reparations for all injuries caused. When the US refused to comply with the judgement of the ICJ, Nicaragua brought the matter to the Security Council, where it was duly vetoed by the United States. What is the relevance of the ICJ when its judgements have to be enforced by the Security Council?

RF: The experience in the Nicaragua litigation illustrates the pervasiveness of a geopolitical veto that is more extensive than the Security Council prerogative. As a party to the ICJ, the US had an obligation to uphold adverse judgements, but was able to shift implementation to the Security Council where its veto was available. This experience reveals the primacy of geopolitics in relation to international law and international institutional authority. If the geopolitical wind had been blowing in the same direction as the findings in the Nicaragua judgement, that is, if the decision had been supportive of the US position, then the United States would have been quick to seek sanctions in the Security Council to reinforce its claims under international law. It remains important, however, to appreciate that even though such counter-hegemonic applications of international law can be neutralised, they are still significant. There is an impact on world public opinion and civil society forces. In the Nicaragua context, despite repudiating the decision explicitly, the US Government complied de facto with the main finding, the unlawfulness of blockading Nicaragua's ports. International law in its counter-hegemonic uses is very important in any domain where issues of legitimacy are significant, but is rarely able to have a corresponding behavioural impact. Similarly, the Goldstone Report establishes the credibility of the accusations directed at Israel with respect to its tactics used during the 2008–09 attacks on Gaza, but was not able to facilitate the next step that would have involved activating accountability mechanisms either within Israel or at the level of international society.

The legal scholar, Balakrishnan Rajagopal, claims that the international human rights movement has a 'birth defect' because it failed to mount a challenge to colonialism at the time. Indeed, many of the endorsing governments of the Universal Declaration of Human Rights (UDHR), which was adopted by the UN General Assembly in 1948, were European colonial powers, some of which exerted incredible pressure at the drafting stage of the document to block any reference to the right of self-determination. Has the international human rights movement outgrown its 'birth defect'? Has it now developed a discourse that can also represent those countries and social movements which resist hegemony?

RF: I think the Rajagopal birth defect reflected the geopolitical realities that existed at the time the Universal Declaration was drafted and endorsed, in a manner parallel to the birth defect embedded in the overall constitutional structure of the UN, as most dramatically expressed by the operating procedures of the UN Security Council discussed above. It needs to be realised that a framework document such as the UDHR is a living legal organism that evolves over time, incorporating changes in the global climate of opinion. At the time, due to the concerns of the colonial powers the right of self-determination was not included among its provisions, yet by 1966 when the two human covenants were negotiated, the right of self-determination was

elevated to the status of a common Article 1, and understood to be both inalienable and to inform the interpretation of all other rights. At the same time, the UDHR has some truly radical provisions that have been ignored, but remain authoritative if the political climate encourages their actualisation. For instance, Article 25 confers upon all persons the right to have a standard of living sufficient to meet the basic material needs of an individual and family. Article 28 goes even further, mandating the establishment of an international order that has the will and capacity to realise all other rights set forth in the Declaration. In passing it is worth noting that even in these idealistic provisions the UDHR was captive of the patriarchal language prevalent at the time, referring in Article 25, for instance, to the right of everyone 'to a standard of living adequate for the health and well-being of *himself* and of *his family*'. It is inconceivable that such phrasing would be used if the UDHR were to be redrafted in 2012, as women have managed to change the normative atmosphere at least enough to render unacceptable discriminatory language of this sort.

There is another point to observe here. The UDHR has become an iconic document over the course of more than six decades, the starting point for discussions of whether or not the rights as set forth are truly universal or slanted to reflect the hegemony of Western values, especially those associated with liberal individualism. In 1948, when the majority of governments were actually in their domestic practices hostile to human rights, it was only possible to get approval for the Declaration because it was understood to be *unenforceable*! This feature of the process was underscored by calling the document a 'declaration' rather than a 'statement of principles' or a 'treaty' with obligatory implications. What led to the rise of human rights, and expressions of respect for the provisions of the UDHR, were three main developments: the activism of human rights NGOs that viewed UDHR as obligatory and were able to embarrass many governments in ways that induced unexpected degrees of compliance; the US 'discovery' of human rights during the Carter presidency in the late 1970s as part of an effort to restore America's moral reputation after its humiliating experiences in the Vietnam War; and perhaps most important of all, the degree to which human rights allowed the global anti-apartheid campaign to become a political project that contributed to the collapse of the racist regime in South Africa.

Western human rights groups, such as Amnesty International (AI) and Human Rights Watch (HRW), refused to take a stand on the legality of the Iraq War, in spite of widespread protests around the world. No such 'neutrality' was evident in an HRW report on Venezuela (2008), which was criticised in an open letter by 100 experts on Latin America as a 'politically motivated essay'. To what extent do you think these human rights groups are politically motivated? And should those who are engaged in counter-hegemonic struggle, particularly in the global South, dissociate from them completely?

RF: This issue is tricky. There is no doubt that the private-funding base of these leading human rights NGOs leads to some biasing of their agendas, and that it is necessary to make this deficiency visible through critical reflection. At the same time, it is important to have such organisations dependent on voluntary contributions, rather than being like Freedom House and the two pro-democracy groups funded in the United States by Congress and aligned with the two main political parties (the International Republican Institute (IRI) and the National Democratic Institute for International Affairs (NDIIA)). In this respect, in most cases collaboration still seems to be desirable on a North/South basis, provided those NGOs in the global South do so

with eyes wide open, and those of us in the North do our job of exposing and criticising. In my experience there has been some progress, although the problem remains serious. For instance, in the early period, the work of the main human rights NGOs was overwhelmingly concerned with the human wrongs of the Soviet system, and then secondarily with 'prisoners of conscience' held in captivity by governments in the global South. Gradually, in reaction to criticism there has been more self-criticism directed at American patterns of abuse, and a greater willingness to report critically on Israel. Often the criticisms are too mild, but in the United States they have been helpful in opening space for a more balanced dialogue, especially outside the governmental centre of authority in Washington, where closed minds preclude any kind of truthful accounting with respect to human rights in relation either to American military activities around the world, or with respect to Israel's consistent defiance of international law.

Since 1989, the United States has shifted its attention to democracy promotion and human rights, both of which have been irrevocably linked with free-market economics. As a consequence, 'democracy' has become synonymous with free trade and 'human rights' have been reduced to political and civil rights (with economic and social rights, which were also included in the UDHR document, sidelined). But are democracy and human rights even compatible with free-market economics?

RF: This is an important issue that is rarely discussed intelligently. I would respond in two different ways. First, there are degrees of incompatibility, and there are more factors relevant to upholding democracy and human rights than the operation of neoliberal markets. Perhaps this point can be initially made by reference to the decline of democracy and the erosion of human rights within the United States since the 9/11 attacks. The atmosphere of fear and security manipulated by the government has converted American citizens into terrorist suspects who are all subject to arbitrary and unreviewable detention and surveillance. Cumulatively, American society is sliding toward a new form of 'authoritarian democracy'. Elections continue, free speech is generally protected, institutions operate in accordance with the Constitution, but the reality of state–society relations is dramatically altered by the counter-terrorist claims of emergency rule and the right of exception. Even our sense of the free market is variable, shifting from a more welfare-oriented model after the Great Depression to a capital-driven market after the collapse of socialism as a viable alternative. That is, post-1989 capitalism was far more unfriendly to economic and social rights than was the prior capitalism seeking to win public approval as a more compassionate economic arrangement than that which prevailed in state socialist economies. The deliberate weakening of the labour movement by the machinations of market fundamentalists, gaining momentum during the periods when Margaret Thatcher led the United Kingdom and Ronald Reagan governed in the United States, also contributed to the decline of human rights. In effect, the systemic incompatibility between free-market capitalism and the quality of democratic life and respect for human rights has to be modified to take account of such contextual variables as wartime, security threats, and the societal balance between entrepreneurial and working classes.

At the same time there are systemic incompatibilities that should be acknowledged. The capitalist priority is efficiency of capital and profitability, which is generally inconsistent with protecting the vulnerabilities of people and nature. In the current setting the situation of the poor is neglected despite the grotesque wealth of the capitalist elites, and the dangers to the well-being

of humanity associated with climate change are ignored despite a strong scientific consensus warning of the adverse, and possibly irreversible, consequences of further delays in reducing the level of greenhouse gas emissions, especially carbon. Nothing more vividly illustrates this incompatibility than the millions being devoted by the oil and gas industry to sponsoring climate sceptics, which, with the complicity of the media, have induced public confusion and indifference, with likely serious effects on future human well-being. In these regards capitalism is in crisis both morally, due to widening disparities of income and wealth and disclosures of abusive practices, and ecologically, due to its refusal to make business adjustments in accounting procedures that pass the consequences of emissions to the public and the future.

When Spain requested the extradition of the former Chilean dictator, General Augusto Pinochet, from the United Kingdom to face charges relating to torture, terrorism and genocide in 1998, it invoked the principle of Universal Jurisdiction (UJ). This was later attacked by Pinochet's close ally, Henry Kissinger, the former US secretary of state and national security advisor, who called the legal case against Pinochet 'a dangerous precedent', warning that states with authoritarian governments could now also exercise universal jurisdiction and try foreign nationals in domestic courts with limited or no judicial independence. You have also stated that you are unsure 'whether the world as a whole is ready for universal jurisdiction in criminal proceedings based on Pinochet-like cases'. Should domestic courts refrain from making judgements on serious breaches of international criminal law until more general guidelines are established?

RF: This question raised difficulties for me. On the one side, I welcome prosecutions of individuals such as Pinochet, and would welcome the indictment, prosecution, and punishment of Kissinger. On the other side is the geopolitical reality that only those in the global South are likely to experience the impact of UJ. The problem is not one of the absence of 'general guidelines', as these exist in various places, maybe most authoritatively in the list of international crimes given in the Statute of the International Criminal Court (ICC). As elsewhere in my responses, the main challenge is what to do in the face of double standards. Those who should be rendered accountable under international criminal law, the Kissingers of this world, enjoy de facto impunity, while those who come from countries that have long been targets of hegemonic abuse are used as poster children of accountability.

Pinochet is a kind of hybrid case as his ascent to power and his abuses enjoyed the support of and encouragement from Washington, and especially from Kissinger. It is of course amusingly self-serving for Kissinger to be the one warning of the pitfalls of UJ! One of these pitfalls that actually exists is the sense that the liberal democracies of the North would occupy the high moral ground by making the main culprits of the world all appear to be situated in the South. This pattern is already part of the first decade of experience in the ICC, which goes after a series of African leaders, but tells Palestine that it has no standing to pursue its claims concerning Israel's Gaza attacks because Palestine has not been recognised as a state within the United Nations. This issue of expanding the reach of international criminal law by reliance on the use of UJ by domestic courts needs to be balanced against the injustice of according impunity to those with strong geopolitical backing. It is notable that several western European countries backtracked on UJ after threats of retaliatory moves by the United States and Israel. There is no doubt that the domain of UJ is a geopolitical battleground.

Indeed, war crimes and torture charges were also filed against the former US Secretary of Defense Donald Rumsfeld and other senior officials in German courts in 2006, but led to nothing. Does what you say about the impunity of figures like Kissinger and the influence of the US in Europe suggest that UJ is a dead end? What can be gained by charging US state representatives?

RF: At this stage there exists de facto impunity for such Western international political personalities from the perspective of formal legal mechanisms. But the fact that UJ exists in relation to serious international crimes does convey two important aspects of the global reality: first, that such individuals would be held accountable if international law was applied without regard to geopolitics, and second, that there is enough ambiguity about the reach of UJ that it inhibits such individuals and conveys an impression of de facto criminality.

There are several considerations that bear on an appraisal of UJ. The weaknesses and biases of the international mechanisms of accountability make it seem desirable to extend the domain of accountability by empowering domestic courts to act as agents of the world legal system. Even if there is no consistent application of UJ, it still leads those who might be prosecuted to alter their travel plans to avoid even the complication of waiting for a complaint to be dismissed. It has been reported that both George W. Bush and Dick Cheney are reluctant to travel to democratic countries where the UJ provision exists. Also, even the dismissal of a complaint as took place with regard to Rumsfeld calls attention to his criminal record, alerts civil society to this fact, and may produce indirect pressures that disrupt the comfort level of unindicted war criminals.

On the cautionary side, UJ could be used to achieve some kind of ideologically motivated criminalisation of 'the other' that would discredit and derail a constructive effort to develop a credible meta-law that governs the behaviour of leaders of sovereign states. It should be appreciated that this whole effort to hold leaders of states criminally responsible is a rather radical challenge to territorial sovereignty and a repudiation of the whole related ethos of 'sovereign immunity'. Such an undertaking assumed seriousness after the Nuremberg and Tokyo trials of surviving German and Japanese political and military leaders, and although tainted by its character of being 'victors' justice' it did set up a series of expectations that the legal status of these undertakings would be determined by whether in the future those who sat in judgement would accept the same standards being applied to themselves. In fact, this 'Nuremberg Promise' has been broken and the trials to some extent invalidated.

My conclusion is that it is on balance desirable to encourage UJ, and to create pressure from below to make application of such jurisdiction as consistent as possible. I think this will act as a deterrent in some situations, although this impact will never be acknowledged by those affected as it would only embolden civil society to intensify its pressures. There may come a future time when the ICC provides a sufficiently comprehensive and consistent regime for the enforcement of international criminal law against state crime as to make UJ redundant, but such a circumstance is not likely to emerge in the near future.

The Chilean government considered the Spanish proceedings as 'an illegitimate invasion of the jurisdiction of the Chilean courts'. Should the foreign domestic courts not have respected the primacy of Chilean jurisdiction in the Pinochet case, particularly since Chile

was a constitutional democracy at that point? Or did Chile in fact require such international pressure in order eventually to act against Pinochet by stripping him of his immunity from prosecution?

RF: I think this is a question that is difficult to answer aside from the specifics of a given situation. In the Pinochet context it seemed that Chile was honouring its amnesty law, and was unlikely to prosecute Pinochet when Spain issued its extradition request and Britain detained Pinochet during a visit for medical examinations. At the same time, there is a sense that to avoid partisanship in relation to the application of international criminal law, it is desirable to defer to the country where the crimes took place if there exists a reasonable prospect that justice will be rendered. It is also likely to be true that the evidence and witnesses will be more readily available, but it may also be true, as was the case in Chile, that there were fears that the transition to democracy might be blocked if the amnesty compromise was suspended and accountability imposed on Pinochet. In the end, given international pressures and the British legal determination that Pinochet should be held accountable for violations of the Torture Convention, the Chilean government shifted its position and initiated several prosecutions of Pinochet, although none were carried to a legal conclusion due to his failing health and subsequent death.

Although the Convention on the Prevention and Punishment of the Crime of Genocide (1948) defined genocide as 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group', the Spanish courts extended the concept to include 'political groups'. Is it now time to move beyond the present text of the Genocide Convention? Should the crime of 'political genocide' be recognised under international law?

RF: I think if there is to be a crime of 'political genocide' it needs to be formulated with great care and precision to avoid unpopular views from being criminalised. As matters now stand, the combination of genocide, as conventionally understood, and crimes against humanity, seems sufficient to cover the criminality of political leaders, and the lethal consequences of totalising ideologies. With Islamophobic tendencies in Europe and North America it is quite possible that Islamic leaders could be charged with 'political genocide'. An extremist American pastor in a small Florida church held a trial that convicted the Koran of encouraging the murder of non-Muslims and of being responsible for the 9/11 attacks. It is this sort of outlook that would be encouraged to claim that Islam embodied 'political genocide', a development that would have many negative effects on inter-civilisational relations within and among countries.

The Spanish courts also charged Pinochet with terrorism, which is interesting because there is still widespread disagreement within the international community over whether states or their authorised agents should even be included in the definition of terrorism. How important is it that this definitional stalemate is resolved? What are the obstacles to its resolution?

RF: It was a step forward to charge Pinochet with terrorism, and to acknowledge that the essence of the crime is the use of political violence to induce great fear in society and against those who are innocent, and not just such violence that is directed against the state by opposition groups. It may be that there is so much ambiguity and ideology attached to the term 'terrorism' that it is

best to avoid its use altogether, as it is likely to be twisted in public discourse to demonise the enemies of the established order, while exempting state violence from legal and moral scrutiny. As powerful interests have a large stake in the one-sided conception of terrorism it is unlikely that the welcome Spanish departure from this pattern will be often repeated.

The ICC can only prosecute terrorist acts if they fall within the categories of genocide, crimes against humanity, or war crimes. Do you think that its jurisdiction should extend to terrorism specifically? And if so, would this make the participation of the United States in the Court all the more unlikely?

RF: Of course, this raises questions that were partially addressed in the prior response. It would not be desirable to include 'terrorism' among international crimes subject to ICC jurisdiction if defined to apply only to anti-state acts of violence. The failure to include terrorism as a distinct crime was due to the inability to agree upon its proper definition. In this regard, if the Spanish approach in the Pinochet case were to be adopted by the ICC, then it does seem that this would be an additional impediment to US participation, but it would be a delegitimising mistake to tempt the United States to become a party to the Rome Treaty by agreeing to define terrorism narrowly in the manner favoured by the American government. With a reactionary US Congress there is, in any event, no likelihood of securing American participation even if the current parties to the treaty were to go along with Washington's views on terrorism.