

Human Rights, State Sovereignty, And International Law



We live in an era where virtually every government on the planet claims to pay allegiance to human rights and respect for international law. Yet, violations of human rights and plain human decency continue to occur with disturbing frequency in many parts of the world, including many allegedly “democratic” countries such as the United States, Russia, and Israel. Indeed, Donald Trump’s immigration policy, Putin’s systematic repression of dissidents, and Israel’s abominable treatment of Palestinians seem to make a mockery of the principle of human rights. Is this because “faulty” forms of government or because of some Inherent tension between state sovereignty and human rights? And what about the international regime of human rights? How effective is it in protecting human rights? Richard Falk, a world renowned scholar of International Relations and International Law sheds light into these questions in the exclusive interview below with C. J. Polychroniou.

Richard Falk is Alfred G. Milbank Emeritus Professor of International Law, Politics, and International Affairs at Princeton University and the author of some 40 books and hundreds of academic articles and essays. Among his most recent books are *A New Geopolitics* (to be published in December 2018); *Palestines’s Horizon: Toward a Just Peace* (2017); *Humanitarian Intervention and Legitimacy Wars: Seeking Justice in the 21st Century* (2015); *Chaos and Counterrevolution: After the Arab Spring* (2014); and *Path to Zero: Dialogues on Nuclear Dangers* (2012).

C. J. Polychroniou: Richard, you taught International Law and International Affairs at Princeton University for nearly half a century. How has international law changed from the time you started out as a young scholar to the present?

Richard Falk: You pose an interesting question that I have not previously thought about, yet just asking it makes me realize that this was a serious oversight on my part. When I started thinking on my own about the role and relevance of international law during my early teaching experience in the mid-1950s, I was naively optimistic about the future, and without being very self-aware, I now understand that I assumed that moral trajectory that made the future work out to be an improvement on the past and present, that there was moral progress in collective behavior, including at the level of relations among sovereign states. I thought of the expanding role of international law as a major instrument for advancing progress toward a peaceful and equitable world, and endeavored in my writing to encourage the U.S. Government to align its foreign policy with international law, arguing, I suppose in a liberal vein, that such alignment would promote a better future for all while at the same time being beneficial of the United States, especially given the overriding interest in avoiding World War III.

My views gradually evolved in more critical and nuanced directions. As my interests turned toward the dynamics of decolonization, I came to appreciate that international law had legitimized European colonialism, and the exploitative arrangements that were imposed on the countries of the global south. I realized that the idealistic identification of international law with peace and justice was misleading, and at best only half of the story. International law was generated by the powerful to serve their interests, and was respected only so long as vital interests of these dominant states were not threatened.

The Vietnam War further influenced me to adopt a more cautious view of international law, and even more so, of the United Nations. I opposed the war from the outset from the perspective of international law, citing the most basic prohibitions on intervention in the internal affairs of sovereign states and the core prohibition of the UIN Charter against all recourses to aggressive force. I did find it useful to put the debate on Vietnam policy in a legal format as the country was then under the sway of liberal leadership, although tinged with Cold War geopolitics and ideology. The defenders of Vietnam policy, motivated by Cold War considerations, relied on legal apologetics as well as claims that it was important for world order to contain the expansion of Communist influence, and that the adversary in Vietnam was China rather than North Vietnam. The legal debate to which I devoted energy for ten years convinced me that international law on war/peace issues was subordinated to geopolitics including by the Western

democracies, and that even so, legal counter-arguments were always available to governments eager to disguise their reliance on geopolitical priorities. International law remains useful and even necessary for the routine transnational activities of people and governments, stabilizing trade and investment relations, but often in ways that favor the rich, and issues pertaining to questions of safety, communications, and tourism exhibit a consistent adherence to an international law framework.

The U.S. global leadership role is unique in this respect in the period since 1945. In the early postwar period the U.S. seemed to be the champion of a law-regulated world order responsive to the UN Charter framework. This was never the whole story as the Cold War prompted a variety of unlawful interventions, including assassination plots against foreign leaders perceived as leftists. After the Vietnam War the United States Government gradually recognized that its foreign policy goals could not be achieved by relying on an international law approach, a recognition that became especially clear in carrying out its political commitment to support Israel unconditionally. The moves away from liberal internationalism accelerated during the presidency of Ronald Reagan who was instinctively opposed to adjusting American policy to an international law framework.

It was during the presidency of George W. Bush that international law has been further marginalized by being put aside or crudely reinterpreted whenever seen as an obstacle. The United States started spiraling out of control after the 9/11 attacks in the direction of redefining itself an illiberal democracy, a process reaching a new height during the Trump presidency when even the democratic foundational principles of the republic were increasingly drawn into question. This dynamic has been reinforced by the global rise of ultra-nationalist political movements that have gained control of important governments throughout the world. For these movements, nationalist goals are always be given precedence without a second thought. From these perspectives international law should not be allowed to interfere with fidelity to a nationalist agenda. At the same time, the pressures exerted by migratory flows stemming from war torn regions, especially the Middle East and Africa, and from ecologically challenged habitats, have weakened mainstream support for human rights, and especially for those who are refugees or asylum seekers. Despite neoliberal globalization, and in some respects, as a reaction to it, the state system has become more statist, with a

corresponding retreat in efforts to protect the human rights of vulnerable peoples, especially if they are regarded as strangers to the community of the nation state.

In making this negative assessment, it is important not to overlook the central relevance of international law and human rights to civil society movements for peace, justice, and ecological sustainability. These normative sources of authority give peoples a legitimated discourse by which to oppose oppressive tendencies of the state or international institutions, and to project images of alternative futures that are more benevolent from the perspective of promoting a more satisfying shared destiny for the peoples of the world, with a special emphasis on protecting those who are most vulnerable. It is civil society that has tried to keep the 'human' side of human rights as integral to the protective mission, while governments are again limiting their view of rights to the 'rights' side as an entitlement of a national citizenry, especially those who are native born.

C. J. Polychroniou: Human rights are the cornerstone underpinning the rule of law, yet many governments throughout the world violate human rights with frightening frequency. Is there an inherent tension human rights and state sovereignty? Or, to phrase the question differently, do human rights challenge state sovereignty?

Richard Falk: I believe the premise of your question is somewhat misleading. It maybe appropriate to suggest that 'human rights' should become the cornerstone of a global rule of law, and that it does function in this manner in a genuine democratic state. In international society the basis of an effective rule of law is mutual self-interest and reciprocity especially in the context of commercial and financial arrangement, maritime safety, and diplomatic relations. When the Universal Declaration of Human Rights (1948) (UDHR) was drafted, largely under the influence of Western liberal internationalist values, shortly after World War II it was looked upon as a largely aspirational document with very weak expectations with respect to compliance or implementation. This was partly signaled by labeling the document as a 'Declaration,' which meant that it was without obligatory force. It has been my view that the UDHR would not have won widespread support from leading government had it been negotiated as a lawmaking treaty with the effect of eroding sovereign rights. In this sense, compliance with the norms contained in the UDHR depends on what I have called in the past 'voluntary international law.' In effect, international human rights

standards were brought into being because they were understood to be unenforceable, but this initial cynicism was challenged over time by a series of unanticipated developments.

Several factors altered this situation in ways that have given a weak obligatory status to some norms encompassed by the international law of human rights. For one thing, human rights NGOs emerged such as Amnesty International and Human Rights Watch. These civil society actors adopted as their mission campaigns to exert pressure by way of naming and shaming to induce compliance with human rights standards by governments. For another, the West found it useful to claim for itself democratic practices relating to human rights that were alleged absent or deficient in the Soviet Union and East Europe, drawing a propaganda contrast between 'the free world' and 'the Soviet bloc' that was centered on degrees of adherence to human rights in the liberal sense of individual rights. Thus human rights became a valuable propaganda tool to convey what distinguished Cold War adversaries from one another in a self-serving manner. The Soviet Union countered Western allegations by claiming that human rights should be conceived more collectively in relation to societies as a whole and with an awareness of class differences, and thus emphasized adherence to economic and social rights as beneficial for the entire citizenry. This ideological difference, combined with the push for obligatory standards in international law, led to the artificial division of human rights into two parts, and their formulation in separated treaties: Convention on Civil and Political Rights (1966) and Convention of Economic, Social and Cultural Rights (1966). As might have been anticipated, the Western countries give their entire emphasis to civil and political rights, and deny any obligatory force to economic, social, and cultural rights, which are derided as unenforceable and inconsistent with the workings of market economies that sort out winners from losers.

Against this background two important international developments lent practical political significance to these conceptual issues. First, the efforts of the countries in East Europe to gain freedom from Soviet rule, led to movements of resistance organized around demands for adherence to human rights by the institutions of the state. Secondly, the UN-backed Anti-Apartheid Campaign illustrated that human rights, if widely backed on a global level, can be a formidable instrument of soft power resistance to an oppressive regime of the sort present in apartheid South Africa. In such contexts, international law and human rights played

important roles in struggles by people against repressive conditions, and deserve appreciation by progressives who are otherwise critical of hypocritical legalism and moralism as the means by which the rich and powerful hide their reliance on naked power to achieve their ends.

These developments suggest the emergence of human rights, but not yet its global acceptance as enforceable law. Particularly over the course of this century human rights have been under intense pressure from a number of sources. First came the American response to the 9/11 attacks in 2001 that produced a counterterrorist campaign that subjected suspects to torture and indefinite detention without charges or trial. Then came the migration and refugee crises that exerted pressures on states to close their borders, despite the life-threatening denials of human rights entailed. Finally, came the rise of autocratic leaders who relied on scapegoats and fear-mongering to justify disregard of rights by governmental institutions, especially of all residents without all the credentials of nationality and citizenship.

We can work toward a world in which there is a global rule of law that embodies human rights, but such a world does not now exist, and in all likelihood, never existed. Sovereignty based on territorial boundaries and international recognition, and given emotional content by nationalist and patrioteering ideologies, tends to override human rights concerns whenever the two sources of rights clash. Despite the use of the word 'human' the real perception of 'human rights' remains dependent for implementation on national procedures of implementation.

C. J. Polychroniou: How does Donald Trump's immigration policy square off with human rights and international law?

Richard Falk: Trump's immigration issues proceeds as if international doesn't exist, or at least doesn't count. His approach to Muslim potential immigrants or undocumented Hispanics living in the United States displays a monumental indifference and lack of empathy to whether such an identity should be respected and protected. Trump's sole criterion is whether or not it is good for America with a pragmatic and selective approach to law enforcement (useful with respect to undocumented immigrants) and a total disregard for the values and norms of human rights. Overall, Trump has exhibited contempt for international law treaties that were considered when negotiated as major breakthroughs

contributing to peace, security, and a sustainable environment. Among his most notable repudiations of law-oriented approaches were his withdrawal from 2014 Climate Change Agreement, repudiation of the 2015 Nuclear Program (5 +1) Agreement with Iran, and refusal to take part in international efforts to develop a humane and collective approach to problems arising from global migration and refugee flows. Trump's ultra-nationalist and Islamophobic political agenda is self-consciously and deliberately insensitive to claims advanced on the basis of international law. It is a view that accords preferences to geopolitical opportunism in all sectors of international life that give unreserved support to nationalist priorities without even taking into account considerations of legality or of moral and political legitimacy.

C. J. Polychroniou: Ever since it's creation as a nation-state, Israel has shown an absolutely brutal face towards the Palestinian people. Why is the so-called international community allowing Israel to continue with its inhumane stance towards the Palestinians?

Richard Falk: I think the fundamental explanation for this long experience of Israeli oppressive practices and policies with respect to the Palestinian people flows directly from the essential nature of the Zionist project to establish an exclusivist Jewish state in a predominantly non-Jewish society, and to do so during the long twilight of European colonialism. This reality was further shaped by the Zionist insistence on seeking to be a legitimate modern secular state that respects human rights and formally operates as a constitutional democracy. Such Zionist goals meant that to be Jewish and to be democratic led directly to the forcible dispossession of as many as 750,000 non-Jewish residents of Palestine in 1947 in events differentially remembered by the Palestinians as the Nakba, or 'great catastrophe,' and by the Israelis as the War of Independence. My point is that ethnic cleansing was embedded in the establishment of a majoritarian and exclusive Jewish state from the moment that the Israeli state came into being. This insistence on being an exclusivist Jewish state was always embedded in the Zionist Project, but it was not revealed until the passage of the Israel Nation State Law of the Jewish People, which removes any ambiguity, converting the de facto realities of an apartheid state into a self-proclaimed de jure framework.

There is a further issue of great importance. The idea of self-determination gained prominence during the period after World War II, gaining momentum as a result of a series of anti-colonial struggles involving countries throughout Asia and

Africa. The Palestinian people could not be expected to submit to the Zionist Project without doing all in their power by way of resistance, and archival records show that Palestinian resistance was anticipated by early Zionist leaders. These prospects and realities of resistance generated Israeli responses designed not just to uphold security, but to crush Palestinian hopes and lead to their submission to what had the appearances of 'a lost cause.' The supposed Trump 'deal of the century' is a geopolitical reinforcement of Israeli efforts to compel the Palestinian to accept an Israeli victory, and to content themselves with some improvements in the economics of everyday life attainable only under Israel's political and cultural domination. Again, the cycle of resistance and repression is mutually reinforcing, and can be expected to continue until Israel recalculates their interests so as to reach a political compromise capable of producing sustainable peace based on the equality of the two peoples. This is what happened in South Africa, coming as a surprise, as a result of mounting worldwide soft power pressures that led the political leadership to accept the dismantling of the apartheid regime in the country. Until Israel's political leaders reach such a point, there will be escalating patterns of Palestinian resistance, reinforced by international solidarity initiatives, giving way to interludes of intensified Israeli repression, and on and on.

Of course, in the background until recently, was the relevance of the Jewish diaspora as creating a geopolitical situation that shielded Israel from efforts to implement either UN majority views on how to resolve the conflict or to exert inter-governmental pressures on Israel by way of sanctions. Zionism is a non-territorial world movement with a territorial base in Israel since 1948. With Trump in the White House Israel is assured of unlimited political support for its policies of brutality against the Palestinian people. This development is accentuated by the broader developments in the Middle East that have led to a convergence of primary interests of Arab governments with the regional policies of Israel, which has meant a weakening of regional and international governmental support for the Palestinian national struggle. The failure of the Palestinian movement to achieve political unity contributes further to the current ordeal being daily experienced by the Palestinian people as the excessive Israeli violence at the Gaza border in response to a largely nonviolent protest movement has demonstrated so dramatically.

C. J. Polychroniou: Numerous artists withdrew recently their participation from a

music festival in Israel, apparently under pressure from the Boycott, Divestment, and Sanctions (BDS) movement. Given that Israel is not facing the sort of international isolation that apartheid South Africa began to face years before it's collapse, is BDS of any concrete benefit to the Palestinian people, or merely a plain irritation for the Israeli government?

Richard Falk: The growing impact of the BDS Campaign is a sign that global solidarity movement of support for the achievement of Palestinian basic rights is gaining political traction throughout the world. With the UN unable to implement its numerous resolutions based on upholding Palestinian rights under international law and the Oslo 'peace diplomacy' abandoned after falling into a condition of disrepute, civil society has both the opportunity and responsibility to playing a central role in creating the preconditions for a peaceful settlement of the conflict in manner that recognizes the rights and equality of Jews and non-Jews. BDS is the spearhead of this form of coercive nonviolent efforts to obtain compliance with basic requirements of law and morality. It should be kept in mind that BDS was not an internationalist venture, but formed in response to a call for solidarity by a large number of NGOs based in Palestinians and has continued to be led by Palestinians.

The frantic efforts of Israel and its supporters around the world to criminalize participation in BDS seems an over-reaction to the effectiveness of BDS as a tactic of opposition and a challenge to the legitimacy of Israel as an exclusivist or apartheid Jewish state. Such moves to defame BDS supporters and even to criminalize participation is posing a serious danger to free expression in the West. It should be appreciated that BDS tactics are entirely nonviolent, although admittedly militant with a coercive intention, and based on transnational civil society 'enforcement' initiatives in settings where the institutions and procedures of global governance are unable or unwilling to protect the rights of vulnerable peoples.

The pronounced efforts to brand BDS as 'anti-Semitic' is particularly regressive. By the insistence in defining anti-Semitism as embracing harsh criticism of Israel it directly challenges freedom of expression and weakens the capacity of society to promote social and economic justice. Besides this, by conflating criticism of Israel with hatred of Jews, Zionist opportunism is confusing the nature of anti-Semitism in ways that obscure real threats of ethnic hatred, which is as unacceptable to BDS supporters as it is to BDS attackers. The definitions of what

sometimes called 'the new anti-Semitism' by the U.S. State Department and by the British Labour Party are illustrative of this unfortunate trend.

At the same time it is important to appreciate the potential leverage exerted by the BDS campaign. Roger Waters, co-founder of Pink Floyd, recently called cultural and sports boycotts of Israel by world class artists and celebrity athletes as 'a game changer.' He had in mind the singer Lana Del Ray who withdrew from concert appearances in Israel and the star Argentinian footballer, Lionel Messi, who captained the team that cancelled 'a friendly' with Israel prior to the Moscow World Cup. Waters explains his animating motivation with these words tied to the wider struggle for human dignity:

"And as I say often on stage, when we all got together in 1948 in Paris, and the Universal Declaration of Human Rights was signed by the then-fledgling United Nations, it declares that all human beings all over the world, irrespective of their religion, ethnicity, or nationality, have a natural right to basic civil and human rights, and to the right of self-determination. And I believe that to be true. So this struggle is really only an attempt to implement those brave words from 1948."

The long victimization of the Palestinian people is a stark reminder that the original undertaking to promote human rights in 1948 remains an almost invisible distant goal. In praising those who support boycotts Waters declared that it is simply "the right thing to do." In so declaring he was explicitly invoking Archbishop Tutu's influential remark that 'neutrality in the face of injustice' is morally unacceptable.

It is helpful to remember that most of the positive changes with respect to law and morality started on the streets with expression of outrage directed at prevailing policies. This was true of the civil rights movement in America, of the protests against Communist rule in Eastern Europe, of the Arab Spring, of the struggles for gay rights, and indeed for every notable positive development that has occurred during my lifetime. Yet one should not get carried away. We should not, however, uncritically glamorize movements from below. Fascism was responsive to populist frustrations giving rise to demagogues who stir crowds to frenzy with their demonic solutions to the ills of society.

C. J. Polychroniou: You served for many years as United Nations Special Rapporteur for Palestinian Human Rights. What has been the role of the UN

towards the so-called Israeli-Palestinian conflict, and where does international law stand over this matter?

Richard Falk: My experience at the UN as Special Rapporteur helped me understand why the UN is important, yet extremely limited due to its lack of independent political capabilities needed to implement its recommendations. This gap between contributions and expectations was particularly apparent in relation to the Palestinian issue. In both the Human Rights Council in Geneva and the General Assembly in New York, the Palestinian struggle to achieve their rights was supported rhetorically by an overwhelming majority of states, yet it was opposed by important geopolitical actors, especially the United States. In concrete terms this UN majority was able to insist on fact finding inquiries into allegations of Israeli wrongdoing and to release reports extremely critical of Israel's behavior, but the Organization was blocked as soon as it tried to implement any recommendations that would challenge Israel's policies and practices. Such outcomes on the level of behavior give rise to impressions of irrelevance that are as misleading as are reliance on the UN, as now constituted, to serve as a reliable vehicle for achieving the values of peace, global justice, and ecological stability.

In a positive manner, the UN was a crucial authority with respect to validating Palestinian grievances, and helped Palestine in its effort to win the Legitimacy War with Israel, which is important. Legitimacy Wars are 'fought' to get the upper hand with world public opinion by appealing to international law and international morality. In the early period of Israel's existence, with the cloud of liberal guilt associated with the Holocaust still shaping political consciousness, the wrongs done to the Palestinian people were virtually erased from awareness in the West. In recent years, the soft power balance has been shifting in Palestine's favor just as the hard power balance is more weighted in Israel's favor than ever before. It should be remembered that most political struggles relating to self-determination were won in the end by the side that won the Legitimacy War, and not the side with military superiority. This observation applies not only to the wars against European colonialism, but it also relates to the American regime-changing interventions as well as the Vietnam War.

Another aspect of my experience as a UN appointee, although not a UN civil servant as the position was voluntary and unpaid, was a bewildering mixture of independence and defamation. Even the Secretary General could not dismiss me,

only the Human Rights Council could do this if a majority found that I exceeded my mandate. Throughout my tenure at the UN the HRC overwhelmingly supported my efforts as Special Rapporteur. At the same time, ultra-Zionist NGOs, UN Watch and NGO Monitor, were free to roam the halls, and release all sorts of defamatory material about me without losing their accreditation at the UN, and even having leverage with several pro-Israeli governments, prompting diplomats representing the U.S. and Canada to echo their attacks almost word for word.

My position at the UN was tricky in unexpected other respects, with pitfalls that I discovered only in the course of my experience. Perhaps, most significantly, I came to realize that the Palestinian Authority (PA), which represents Palestine at the UN and originally backed my appointment, pushed hard behind the scenes to have me dismissed by the HRC, or at least put me under rather intense pressure to resign. I only began to understand this when it became clear that the PA put greater stress on their rivalry with Hamas than with their struggle for Palestinian self-determination, and as well, were somewhat compromised by their quasi-collaborative relationship with Israel, especially with respect to West Bank security arrangements and access to international aid cash flows. What irritated the PA was my effort to present the role of Hamas fairly, especially as it related to developments in Gaza, and the initiatives taken by Hamas leaders to negotiate a long-term ceasefire with Israel. With the passage of time I did work out live and let live workable arrangements with the PA who were ably represented in Geneva and New York by Palestinian diplomats who were dedicated to achieving Palestinian self-determination but believed their effectiveness depended upon accepting UN constraints associated with an acceptance of the reality that it is the U.S. that calls the shots on many issues of concern to Palestine. In other words, I learned to be less judgmental without giving ground on my essential effort to report the truth as I perceived it.

Finally, I was forced to accept the fact that although I did my best for six years to express the realities of the Palestinian situation, focusing on the denial of basic rights under international law, including the inescapable relevance of continuous unlawful Israeli encroachment on occupied Palestinian by settlements, the wall, disrupting mobility, and numerous other measures, the Palestinian situation on the ground got worse and worse with the passage of each year. Israel never adhered to international law treaty arrangements that obliged UN Members to

cooperate with the UN in the discharge of its official undertakings. When I tried to enter Israel at the end of 2008 on an official mission trip, I was expelled and detained in a prison cell for more than 16 hours. Despite this, the UN was unwilling to mount a public protest or to secure my access throughout my term.

What I did achieve as SR was to facilitate some shifts in the public discourse on the Palestinian struggle within the UN itself and in relation to the NGO community and the attentive media. It became more possible to speak of 'settler colonialism' in relation to the Zionist Project of establishing a Jewish state with the blessings of British Foreign Office in 1917 although the Jewish population of Palestine at the time was less than 6% and of 'annexation' with reference to the expansion of the settlements established in violation of international humanitarian law governing belligerent occupation and of 'apartheid' as the essential character of the manner in which Israel maintained control over the deliberately fragmented Palestinian people. It was these assessments that exerted enough influence to help explain the personal attacks on me as an anti-Semite and political extremist. It also led me to have very positive relations with many of the delegations representing countries supportive of Palestine and to receive private reassurances of support and even admiration from high-ranking UN staff members.

Source: Global Policy Journal