

Imagining Israel-Palestine Peace: Why International Law Matters with Professor Richard Falk

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The exclusion of international law from past efforts to establish a peace process has disadvantaged the Palestinians and benefited the Israelis. Respect for Palestinian rights would help neutralize the disparities of diplomatic and military power that have so far existed. Neither the realization of rights nor military power can achieve either peace or victory for one side. International law matters in the following respects: to identify the contours of a fair and sustainable peace; to explain the failures of past diplomatic efforts to solve the conflict; to establish winners and losers in the legitimacy war that is being waged on a global battlefield.

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Professor Richard Falk:

Thank you very much for that very gracious introduction. I'm very glad to have this opportunity to speak because any event honoring Edward Said brings powerful memories to me. He was a close friend for many years. I think Yousef spoke very eloquently and appropriately about the power he brought; the power and the underlying combination of insight and passion. I think that's what distinguished his brilliance from that of others who also have addressed this issue. That he had this extremely powerful intellect but it was grounded in deep moral convictions and it pervaded the form that political engagement took for him particularly in the last two decades of his life. Edward's legacy is inspirational in view of this mixture of clarity and courage. He gave a voice to the Palestinian struggle that very few liberation and emancipatory movements have enjoyed. But beyond that, I think his understanding of the conflict remains deeply instructive, and should be acknowledged as prophetic due to his sense of the impossibility of achieving any

kind of peace with justice on the basis of two separated ethnic communities: one that was a Jewish state and another that was a Palestinian state. Edward was often criticized for not endorsing the two-state consensus, which is framed around the given of the Zionist project to be supplemented at some point by some semi-sovereign Palestinian entity that would be called a state but would lack the real elements of national sovereignty.

He wrote a very important essay in 1999 called "Truth and Reconciliation" that, I think, does vindicate this sense of his prophetic understanding of the conflict. And he said in that essay, and I quote:

What if the peace process has in fact put off the reconciliation that must occur if the 100 year war between Zionism, Jewish nationalism and the Palestinian people is to end? I see no other way than to begin now to speak about sharing the land that has thrust us together, sharing it in a truly democratic way with equal rights for all citizens. There can be no reconciliation unless both peoples, two communities of suffering, resolve their justice as a secular fact, and it has to be dealt with as such.

Now, that's a provocative view that goes against the still prevailing understanding that the two-state solution is the only game in town. And that kind of thinking also rests on what I have increasingly myself felt to be a false premise, and that is that the political outcome that will bring the reconciliation and peace will be produced as a result of tradition diplomacy. I don't believe that that's possible. I believe that all of the elements are missing. The United States is not an honest broker, to put it mildly. The Palestinians are not represented by authentic representatives that can speak for the Palestinian people and have increasingly--as was said in the introductory comments--have increasingly alienated the support not only of the Palestinians, but all people around the world who care about a just solution to this conflict. And Israel is governed by an extremist, right-wing, Zionist leadership that has made it clear that it will not compromise on Jerusalem, on refugees, on settlements, on the separation wall. So what is there to negotiate if you take that position, which I think does represent the prevailing position?

The whole idea that a peace process could be established because the U.S. has a more sympathetic political leader, [U.S. President] Barack Obama, is in my view, naïve and dangerous. It's dangerous because failed negotiations are worse than no negotiations. What they do is induce a new cycle of despair that generates a new cycle of violence. In that sense, I think it was fortunate, in a way, that the [Israeli Prime Minister Binyamin] Netanyahu leadership refused to accept even this extremely modest precondition for resuming the so-called peace process--a temporary freeze on settlements. Remember that what was being asked of the Israelis was to stop for a while doing something that was unlawful. The settlements are a clear violation of Article 49, paragraph six of the Fourth Geneva Convention. There's no ambiguity about that. It's very clear. This is equivalent to telling a bank robber, 'stop robbing banks for two weeks and we will give you a legitimate status as a negotiating partner.' And the fact that Israel was able to face down the Obama presidency, despite sending [Former U.S. Senator]

George Mitchell twelve times to persuade Netanyahu, is really both a strong signal of the lack of effective leverage over Israel and the unwillingness of Israel to even create a cosmetic sense of a willingness to accommodate the demands of an American political leadership that's seeking the illusion of balance. It's not seeking balance, but it's seeking the illusion of balance and Israel won't even cooperate to that extent. And pretty clearly their strategy is to continue accumulating facts on the ground. That is, to deny that there is a partner for peace, or to suggest that there is no viable way of achieving peace so long as the [Richard] Goldstone report is being taken seriously. A lot of essentially phony arguments to allow a fairly consistent policy that was pursued all throughout the Oslo years. That of expanding the settlements, of encroaching on the 22 percent of the historic Palestine that was still what was supposedly the territorial basis for a Palestinian state, constructing the unlawful separation wall on Palestinian territory--an act the International Court of Justice by a vote of fourteen to one determined to be unlawful and ordered Israel to dismantle the wall and to pay reparations to the Palestinians for the harm done by its construction up to that point. Now, in the context of these very recent developments, Israel merely defied the International Court of Justice which is probably the most respected organ within the UN system and was supported by the U.S. government in doing that. But it did it without taking it seriously. It was just a clear repudiation of UN and international legal authority. They continued with the construction of the wall and said they would listen to the Israeli Supreme Court but they were not going to listen to the so-called World Court.

What's interesting is why have they reacted so hysterically to the Goldstone report when they've always in the past reacted dismissively toward criticism that emanated from the UN? They always said 'well the UN is a one-sided organization. It's not to be trusted. It will always take positions that are hostile to Israel.' Sure enough though, something in this Goldstone report touched a raw Israeli nerve. And one has to ask, what is it to understand the complex diplomacy that has emanated from it. And just as an aside, it may turn out that that the most significant impact of the Goldstone report is to delegitimize the Palestinian Authority because of its willingness to play along with the U.S.-Israeli effort to have it sidetracked from any serious implementation. But let me return to this question: why the hysterical response? Netanyahu devoted a significant portion of his General Assembly speech to attacking the Goldstone report. The [Israeli] Minister of Defense [Ehud] Barak said this was a great gift to terrorists by imposing legal restrictions on the use of force against terrorists. It was making it impossible for democratic states to defend themselves. And the President of Israel, Shimon Peres, called the report a mockery of history. You can search for any comparable set of reactions to an international criticism. Part of the explanation is that their normal tactic of shooting the messenger in order to avoid the message is really hard to pull off given the protective armor that Richard Goldstone possesses. He is after all a lifelong Zionist, a person with deep personal connections with Israel; he fought to have the mandate from the Human Rights Council include the inquiry into the crimes of Hamas.

The report itself is as susceptible or more susceptible to criticism from a Palestinian side because it endorses the false Israeli narrative that the use of force against Gaza was essentially defensive. It overlooks the fact that the temporary ceasefire had been working, the rocket fire

had been reduced virtually to zero, that Hamas was proposing a ten year extension of the ceasefire, that it was in a context where the whole population of Gaza was under a blockade that was itself a form of collective punishment-again, clearly prohibited by Article 33 of the Fourth Geneva Convention. That whole Israeli narrative, that also has dominated the mainstream media here, that the only question worth inquiring into was whether Israeli force was disproportionate and indiscriminate is, from an international law point of view, deeply misleading because it suspends inquiry into the major premise: was the major recourse to force justified in the first place?

There were two things that made it non-justifiable in my view. The first is that there was a diplomatic alternative in the form of the ceasefire. Secondly, that it was Israel, not Hamas, that really disrupted the ceasefire by launching a major attack on November 4th inside Gazan territory and killing several Palestinians on that occasion. What is disturbingly relevant here, beyond the Goldstone report itself, although it's illustrative, is the degree to which this false narrative continues to dominate the debate in all venues, even in the UN and certainly in the mainstream newspapers-CNN and so on. And so democracy can't function if it doesn't have access to the realities that underlie the formation of policy. Nowhere is American political democracy more defective than in giving the people some kind of accurate understanding of the facts, the truth of the allegations.

This question of why was Israel so upset by the Goldstone report has to do mainly with the degree to which for the first time there is a serious proposal that Israeli military and political leaders should be held accountable for the criminality of their occupation policies and their use of force. Even though it is probably unlikely that anything very tangible within the UN system would emerge from this, it does confirm the view held overwhelmingly outside the United States, the view of world public opinion, that Israel is an oppressor of the Palestinian people in the occupation and is relying on crimes against humanity and war crimes in order to maintain control. That message, even if it's a symbolic message, is very hard to refute given the facts of the Gaza attack last winter. And given the understanding first that Goldstone mission was an extremely professional look at the allegations and it really repeats conclusions by several other respected groups: Amnesty International, Human Rights Watch, a Dugard group. John Dugard was chairing a group that worked under the auspices of the Arab League. All of these reports are more or less identical in their confirmation that Israel used phosphorous against civilian targets, that indiscriminate tactics were relied upon, very loose rules of engagement. This has been born witness to by the 30 Israeli soldiers who published this very moving document called "Breaking the Silence" in which they in effect say they were told to be indiscriminate in order to eliminate risks of Israeli casualties.

The analysis and the conclusions that one finds in the Goldstone report are beyond serious question. You have to be extremely biased to question their bias, to allege their bias. In other words, even if you're very sympathetic with Israel, you can't look at these facts without coming to these general conclusions. And as I say, the threatening aspect from Israel's point of view is to give credibility to those who've been alleging war crimes in a variety of contexts. This in turn creates a foundation for the expanding campaign of boycott, divestment and sanctions. It

makes that campaign seem not anti-Semitic, not arbitrary but grounded in law and morality. That campaign had been growing very rapidly ever since the Lebanon war of 2006 around the world. You may not know it in North America, but in most other parts of the world there are boycotts of cultural and athletic events where Israel is supposed to participate. There are academic boycotts. There have been efforts from Sweden and France, successful efforts, to discourage investment contracts with Israel, including quite large ones. Labor unions have refused to unload cargo from Israel or to load cargo destined for Israel. There's a lot of very effective civil society initiatives around the world. The Palestinian solidarity movement, on this global scale, has become the real sequel to the anti-apartheid movement that was so effective in the 1980's.

I think, and I've been trying to express this in a variety of ways, that one must understand that there is a second war-the nonmilitary war- what I call the legitimacy war which is being waged around the world. It rests on three kinds of elements or dimensions. First of all, the symbolic dimension of appropriating the symbols of legality and morality and legitimacy for a particular struggle. Secondly, the reliance on soft power, not hard power, to carry on the struggle. In other words, boycotts and divestment. Things that are coercive in a way but don't rely on violence. So, it's a kind of nonviolent, coercive soft power approach. And finally, the use of low technology violence to a partial extent. I don't think this is characteristic of the anti-apartheid struggle or necessarily the Palestinian solidarity movement, although of course there has been Palestinian low technology violence. But what it does draw attention to is the connection between this sort of legitimacy war and the decolonization movement that was such an important historical transformation in the last half of the twentieth century. Where again, it was a series of struggles in which the low technology side, which had appropriated the symbols of legitimacy and had some soft power support, prevailed. One of the interesting elements in all this kind of understanding is the tendency of people throughout the world and particularly policy makers and leaders to exaggerate the capacity of hard power to shape political outcomes.

If you look back at the most important conflicts of the last 75 years you'll see hard power superiority has rarely shaped the outcome. It's not that it never works but it rarely works. I sometimes have used the example of Vietnam where the United States won every battle and lost the war. Where it had complete military dominance and yet lost the war because it lost the legitimacy war. It lost the legitimacy war in the sense that it couldn't command popular support. The Vietnamese, next to the South Africans, were extremely skillful in mobilizing popular support throughout the world for their struggle. One of the important things at this stage is to understand the potency of legitimacy wars. They don't always succeed. Tibet is a good example where a legitimacy war is failing because it hasn't been able to create a political climate that would transform the relation of forces. But by and large, recent history suggests that hard power is good for destroying and oppressing, but it's not good for shaping political solutions to conflicts. What shapes the political solutions are either this collaboration between low technology violence and legitimacy, or some kind of transformation of the formally oppressive elite that control the political space--the South African example. Another model is the Good Friday solution of Northern Ireland where the British side and the Northern Irish side finally decided to treat the [Irish Republican Army] IRA not as a terrorist organization, but as a

political actor and that made it possible to reach a compromise and an accommodation. So those are the two models that I think are very relevant--the Northern Ireland model and the South African model--to understanding the prospects. Seemingly remote at this point, but the only real prospects for finding any kind of sustainable peaceful solution to this conflict that has so deeply tormented the Palestinian people and the Israelis as well.

There is a further element that complicates what I've been trying to express and that is that those that run the governments of the world and shape public opinion in most societies remain addicted to hard power. We see it now on the American debate on Afghanistan and on Iran. There is a sense that serious governmental policy, particularly by powerful countries, should be shaped according to what academic people call the realist consensus. What realism claims is that history is shaped by hard power; that the challenge for security for important countries is to manage military force effectively. This addiction to hard power is reinforced by what Eisenhower long ago called the military industrial complex. In other words, it's not only that this is a political consciousness that's deeply embedded in our way of thinking, it's also a socioeconomic structure that has deep roots in the society and is extremely hard to challenge. The gatekeepers of power will not allow entry of those that are not subscribers to this realist consensus. So you get no interesting discussion of whether, for instance, the military budget of the United States is way inflated over any legitimate security objectives. It is outside the realm of responsible debate [of] this addictive consensus. And that prevents any kind of constructive criticism, even constructive debate. The last presidential campaign never raised the issue, even though the United States spends as much as the rest of the world put together on its military machine and has never felt more insecure. There is a zero learning curve. The government continues to reinvent ways to fail. Each new kind of political cycle comes with a new counterinsurgency doctrine that is more humane, more people oriented but still rests on the core fallacy that foreign military intervention can achieve successful political outcomes. Afghanistan is the example of the moment that illustrates this general conclusion.

So let me end by saying that I think one needs to look in new directions to be hopeful about an eventual, just outcome of the Palestinian struggle. That new direction depends on the mobilization of global civil society around this struggle as the symbolic struggle of our present period and one that does rest on the premises of what I've been calling the legitimacy war. This requires that we disabuse ourselves of the two-state illusion and at the same time that we be careful not to mindlessly endorse a one state that would reproduce within the borders of a single state exploitative and oppressive structures that now exist in the form of the occupation. In other words, one can look at after 42 years one can consider the occupied territories to be effectively annexed. But this is a *de facto* one state already. It exists. The question is how do you democratize it. You can't democratize it without eliminating its ethnic identity. It has to be a state that serves the diverse peoples, the diverse religions that live within its borders. That may seem like a difficult struggle, but it's at least taking account of the real elements that have prevented over this long period of time any progress toward an outcome that could be identified with sustainable peace. I think we all have a part to play in this struggle because it is a civil society challenge. The Jewish philosopher Abraham Heschel once said, "few are guilty but all are responsible." And I leave you with that thought. Thank you very much.

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