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To cite this article: Richard Falk (2008) The power of rights and the rights of power: what future for human rights?, Ethics & Global Politics, 1:1-2, 81-96, DOI: [10.3402/egp.v1i1.1815](https://doi.org/10.3402/egp.v1i1.1815)

To link to this article: <https://doi.org/10.3402/egp.v1i1.1815>


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 Published online: 28 May 2008.

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CRITICAL DEBATE

The power of rights and the rights of power: what future for human rights?

Richard Falk^{*}

Abstract

This article explores the tensions between geopolitics and human rights under present conditions of world politics. It takes notes of the rise of human rights as a discourse in international law, and draws attention to the use of this discourse by powerful states, especially the United States, to validate non-defensive uses of force. It also notes the role of the media in facilitating the geopolitical agenda associated with exerting pressure on some conditions (Darfur, China, Cuba) but exempting other situations as serious or more so (Gaza, Saudi Arabia). This article also discusses the reliance on the human rights discourse by oppressed groups and by countries in the South, and the emergence of a counter-hegemonic tradition in human rights that challenges geopolitical projects in a variety of settings. The main conclusion is that neither an uncritical endorsement nor a cynical dismissal of human rights is appropriate at this time.

Keywords: *human rights; geopolitics; hegemony; counter-hegemony; international law*

Ever since the end of World War II human rights have been a controversial and complex topic. Realists have been disappointed because of their central conviction that foreign policy should be governed exclusively by the pursuit of material interests. Liberal internationalists, believers in soft power, have been disappointed because political leaders often failed to take seriously human rights concerns in their dealings overseas. These opposing outlooks are further confused by the extent to which there exist multiple roles for a human rights diplomacy. Even the most cynical realist appreciates a selective emphasis on the failures to respect human rights that can be attributed to hostile states. And most liberal internationalists are deferential to strategic relationships, and tend to overlook the violations of aligned states.

This article explores this tension between rights and power under the headings of the power of rights and the rights of power. The main argument of the paper is that rights of power prevail over the power of rights almost always when strategic interests

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of major state actors are at stake, and this is true whether the orientation toward world politics reflects a realist or a liberal internationalist persuasion. There is a second line of argument that insists that a critical perspective is adopted toward the relationship between the advocacy of human rights (rights talk) and the dynamics of implementation (rights work). A major contention here is that the United States has in recent years been particularly manipulative in these respects, championing rights talk as a key tenet of the neoconservative worldview while actively obstructing rights work whenever it conflicts with grand strategy, and worse, officially pursuing policies that involve flagrant rights abuse, especially in the aftermath of the 9/11 attacks.

In concluding that the power of rights, although a much more potent reality than would have seemed likely a century ago, is still no match for the rights of power in a variety of settings. Part of this mismatch arises from the militarist forms of global hegemony that continue to be practiced by dominant sovereign states despite some contradictory developments in international law and in defiance of the Charter of the United Nations. A more Gramscian turn in global hegemony could create incentives for the more powerful political actors to enhance their legitimacy by encouraging respect for human rights as the foundation of effective leadership on the world stage. There are no indications that such a turn is likely, but all is not lost.

Another set of possibilities will be explored. These are associated with a counter-hegemonic approach to human rights based on mounting challenges to the rights of power at the grassroots and in the development of post-colonial diplomacy. The anti-globalization movement, as supported by governments in the South and by an array of civil society actors, is illustrative of efforts to augment the power of rights with respect to policies bearing on economic and social justice. This counter-hegemonic option is both establishing an appropriate discourse (rights talk on behalf of global justice goals) and a supportive practice (rights work by way of resistance and demonstrations, politics from below, as well as through coalitions between anti-geopolitical governments and transnational civil society movements). The global process that led to the establishment of the International Criminal Court is illustrative of counter-hegemonic diplomacy. This project as a juridical undertaking seemed unattainable from a realist perspective given the opposition of leading states, and yet it happened, but happening is only a symbolic victory for counter-hegemonic forces. A substantive victory would require that rights of power give way to the claims of international criminal accountability, and this seems unlikely in the foreseeable future, that is, so long as the structures of global authority sustain existing geopolitical hierarchies, politics from above. It should be observed that the concept of hegemony that has been adopted by the advocates of 'counter-hegemonic' politics and law assumes an established order of inequality and exploitation managed through coercion and manipulation, and reinforced by a highly corporatized media. This is not the 'benevolent hegemony' or 'empire lite' so beloved by neoconservatives and liberal hawks, but rather a violent geopolitics that continues even in this post-colonial era to victimize most of humanity.

It follows that human rights is conceived of as a terrain of struggle in an ongoing battle between disciplinary use of norms and rights to stabilize existing oppressive,

exploitative, and humiliating power structures as distinguished from their emancipatory role when used by social forces aligned with the oppressed, the poor and weak, the forgotten, and the victimized margins of various societal and governmental arrangements.¹ That is, the rights of power include the appropriation of rights and norms to promote current geopolitical objectives, while the power of rights confers a normative edge with a still underutilized potential for moral and legal mobilization in the struggle to achieve global justice and a humane global political order.

The first main section of the article looks at top-down modalities that concentrate on the complex ways in which dominant political actors manipulate language, and use their geopolitical muscle, so as to impose their will. The role of rights is especially important in this era as a way of legitimating, or at least rationalizing, the use of naked force in world politics in ways that violate international law and the United Nations Charter. The second principal section looks at a bottom-up antidote to the rights of power, exploring the capacity of grassroots forces in global civil society and their governmental allies to work toward global justice in a variety of settings. In these contexts the language and pursuit of rights provides a moral motivation for initiatives that aim both to resist oppressive moves emanating from the established order and to transform the status quo in accord with goals associated with equity, equality, and human solidarity.

THE RIGHTS OF POWER

There are many past and present human ordeals that could be chosen to illustrate the multifaceted connections between ‘rights talk’ and ‘rights work,’ as well as to clarify the closely linked appropriation of the ‘the power of rights’ by ‘the rights of power.’ My overall intention is to work toward the construction of a normative language and praxis for human rights as discourse and behavior that is more consistently responsive to individuals and groups, including entire people, entrapped in highly oppressive, exploitative, and humiliating circumstances.

To select the Palestinian situation to illustrate the essential character of the rights of power is deliberately provocative as it challenges Israel’s main pattern of justification based on its defensive right to uphold the security of its territory and protect its population. To insist that these Israeli policies are unlawful is controversial in many liberal democracies, as is the contention that the Palestinian plight is both concealed and distorted in most mainstream formats of public communication, especially in the United States. From the perspective of normative expectations derived from international humanitarian law, objectively assessed, the Palestinians are victims of multiple abuses associated with prolonged Israeli occupation and harsh security tactics that defy the rules of conduct contained in the Geneva Conventions. The scale and severity of abuse approaches, if not attains genocidal proportions as a consequence of the unremitting siege imposed by Israel on the people of Gaza in recent months. This siege has raised well-documented risks of imminent massive famine and disease, as well as causing many daily forms of psychological and material

forms of suffering.² It qualifies, politically and morally, as a continuing Crime Against Humanity, and by its deliberateness in the face of information as to its impacts on the civilian population of Gaza, also as genocide.³

Yet that part of the world that stakes its claim to the post-colonial moral high ground on its adherence to the norms of liberal democracy and its advocacy of human rights seems hypocritical, considering the pronounced selectivity of what it fails to see and what it sees.⁴ The main claimants to this high ground are the countries of Europe and North America.⁵ As could be expected given this analysis, the zealously self-righteous leadership of the United States refuses to treat the unfolding Gazan catastrophe as a human rights challenge. On the contrary, official Washington actively supports the Israeli policies that seem directly responsible for the massive suffering that is befalling the 1.5 million people of Gaza.⁶

By their silence, and beyond this, by their diplomatic and material support of these repressive policies, these states that talk so much about human rights, and lecture the non-Western world about their duty to uphold these norms, never even reach the stage of admitting that there exists a challenge of rights work in relation to the Palestinians. These rights talkers, reinforced by the rights of power, intensified their punishment of the Palestinian people after the outcome of internationally monitored free elections brought Hamas to power in January 2006. For daring to vote as they did for Hamas candidates, the entire citizenry of Gaza have been severely punished by imposing a comprehensive siege and through withholding international economic assistance from a people that had already been mired in deep poverty, widespread unemployment, and the multiple dangers and hardships of a long and violent occupation, as well as enduring a series of lethal insecurities arising from frequent Israeli military incursions using advanced weapons technology and adopting menacing, humiliating, and arbitrary forms of border control.

On the level of rights talk, the Palestinian case is more deeply revealing of the extent to which the supposed global promise of human rights is broken whenever it seriously collides with geopolitical priorities, what I am calling with deliberate irony, 'the *rights* of power.' If the underlying conflict between Israel and Palestine were to be assigned to an independent third-party mechanism to assess from the perspective of law and morality the respective claims of the two sides, there is little doubt that the outcome would favor the Palestinians on every key disputed issue⁷: that is, ending the occupation by requiring an immediate Israeli withdrawal from Palestinian territory; by resolving territorial claims and reestablishing borders that existed before the 1967 War; by determining the legal status of Israeli settlements in accordance with the Fourth Geneva Convention⁸; by carrying out the mandate of the World Court in its Advisory Opinion relating to the legality of Israel's security fence constructed on occupied Palestinian territory⁹; by restoring the demographics and boundaries of Jerusalem, and by invalidating the assignment of sovereign rights over the city to Israel; by upholding the legal entitlements of Palestinian refugees claiming a right of return; and by determining the use rights of access to ground water aquifers located beneath Palestinian territory. A central aspect of the rights of power has been Israel's capacity, reinforced by the United States, to exclude such assessments of the

legal merits and moral force of the respective claims of the two sides from the actuality of any unfolding so-called 'peace process.'¹⁰ Instead of rights talk, which is excluded, what is offered up for discussion by Israel are 'facts on the ground,' the security concerns of the Israeli people, and the allegedly dysfunctional refusal of Palestinian leaders to accept whatever one-sided solution to the conflict an Israeli government puts forward at a particular time.¹¹

Conceptually, what is exhibited is the displacement of rights talk, even talk, by the rhetoric and exercise of power, and in the process it should be noticed that rights work is erased altogether from the active political agenda. Resisting this erasure, often derided as irresponsible, meant opposing conventional wisdom at the time. This lonely work of resistance explained why Edward Said, and other principled and stalwart Palestinians, were so distressed by the Oslo Peace Process of the 1990s and by the grandstanding attempt of the Clinton presidency at Camp David II.¹² These diplomatic initiatives were at the time widely hailed as constructive breakthroughs for peace by the self-appointed moral guardians of the geopolitical order, and their structural bias against Palestinians was mostly overlooked at the time. The most telling indication of this bias was reliance on the United States as the 'honest broker' of this peace process despite its consistently self-proclaimed identity as the unconditional ally of Israel. This should have been discrediting enough to invalidate the whole undertaking. There were other signs as well that the framework established for the peace process was itself too reflective of the unequal power relations to have any realistic hope of producing a fair outcome that should have been acceptable to the two sides, given their respective rights under international law and their reasonable expectations. In the Oslo framework agreement that initiated the negotiations there was an absence of any reference to a Palestinian right of self-determination or sovereign status, nor any indication that the imbalances in power and diplomatic leverage would be mediated by way of deference to the determination of rights via international law.

It is arguable that the weaker side deserves an intermediary biased in its favor to offset its bargaining disadvantages, but it would be unprecedented for the stronger side to agree to such an arrangement. The most, but also the least, that the weaker side could hope for is a neutral diplomatic setting, with an intermediary that was a credible interlocutor, bringing as much balance, reasonableness, and fairness to the negotiations as possible. As suggested, an intermediary biased toward the stronger side merely underscores the absence of any leverage on the weaker side, and with such weakness has almost no prospect of receiving any satisfaction for its contested claims and goals even if willing to engage in compromise and eager for a reconciliation. It was not surprising that the United States made little existential attempt to be an 'honest broker' at Camp David, but rather crudely played the part of 'power broker' and Israeli advocate, adding its formidable support to the proposals of Israel and blaming the Palestinians for their refusal to accept what Israel has offered with a display of gratitude.¹³ It is disturbing that the mainstream media uncritically reported Washington's one-sided version of why the negotiations failed.

Such an erasure of the rights of the weak as a proper concern of inter-governmental negotiations has the unintended effect of relegating *genuine* 'rights talk' and 'rights work' to civil society militants, moderate governments, and the margins of world public opinion. This relegation process is uneven, being far worse in the United States with respect to the Palestinians than elsewhere in the world, including even Europe. The attention of almost all 'reasonable' people in the West is thereby shifted by a manipulative mind game to the prudent exercise of the 'rights of power.' This becomes the inevitable result of an unequal bargaining relationship in which the rights of the weak side are disregarded altogether by being deliberately placed outside the domain of diplomacy. Adding to public confusion, the mainstream media, especially in the United States, disarmingly claiming objectivity, portrayed the proposals of Ehud Barak at Camp David II as 'generous' and 'courageous.' Yasir Arafat, as representing the Palestinians, was cast in the role of 'spoiler' whose opposition to the Israeli proposals was treated as convincing evidence that he had never been truly interested in achieving 'peace,' was intent on resolving the conflict through violence, and came to Camp David lacking the good faith needed to negotiate a peace agreement. This false rendering of the failed diplomacy later was relied upon by Israel to vindicate its use of excessive force to subdue the Second Intifada. This angry challenge to the status quo emerged in late September 2000 directly from Palestinian frustrations and Israeli provocations (especially Ariel Sharon's notorious 28 September 2000 visit to the al Aqsa mosque on the Temple Mount/Harim-al Sharif).

Against this background it was hardly surprising, yet inflammatory and inaccurate, for President Clinton and other notables to declare in public that Arafat was responsible for the breakdown of the peace negotiations. This background set the stage for positing the unilateralist claims of Ariel Sharon to the effect that since the Israelis had no 'partner' in their search for peace, they were entitled to proceed unilaterally, imposing their own solution to the conflict and calling that 'peace.' As argued, the geopolitically compliant media played a decisive part in producing such a distorted view of these realities, inverting the equities in a manner that would make even George Orwell blush: the strong side while being insistent on retaining most of its unlawful advantages resulting from military and diplomatic dominance, as well as its successful reliance as occupier on state terror and political violence, is applauded for its peace initiatives and its reasonableness, whereas the weak side is scorned for its imprudent and defiant rejectionism and its supposedly addictive reliance on terrorism.

In this manner the rights of power consistently overwhelmed the power of rights in public space. At the same time existential conditions of acute injustice are almost totally exempt from mainstream scrutiny and criticism. Of course, this perception and discourse relating to Israel/Palestine is largely inverted, with comparable imbalance, throughout the Middle East and South Asia. This pro-Palestinian rights talk has little impact on the dynamics of the frozen conflict: the problem-solving matrix for this conflict, despite its geographic location, remains as firmly anchored in the Eurocentric West as was the case during the colonial era.

This argument can be generalized far beyond the particular tragedies of the Palestinian narrative, which is admittedly an unusual situation due to the degree and unconditionality of American support for Israel that partly reflects domestic political pressures that is arguably often at odds with United States national interests.¹⁴ Rights talk is excluded from public consciousness, or artfully manipulated, whenever it gets seriously in the way of the rights of power. For this reason the very possibility of rights work is occluded from consciousness. This structure sustaining oppression and obscuring various forms of cruelty was explicit in the relations between Europe and the Middle East and South Asia during the colonial period, but it persists in many, but not all, post-colonial settings, although in often disguised and inconsistent forms. The root causes of different contexts of human suffering as it appears in many political spaces continues to exist because the rights of power usually have the will and capacity to prevent even a critical awareness from emerging.

This pattern is definitely descriptive of many inter-governmental and inter-regional realities, but also in more complicated ways it affects a variety of intra-governmental settings. For instance, the issue of Indian untouchability, dalits, and caste subordination is almost as occluded from international rights talk as is the ordeal of the Gazans, not because of any self-conscious strategy by outside political actors, but because the plight of culturally and politically victimized Indians is not nearly so geopolitically resonant as is the plight of Tibetans or Chechans. Whatever the governmental context, by achieving this subordination, the question of rights work never even gets on official political agendas. Arguably, and in a range of circumstances, oppressive economic, political, and cultural structures *within* sovereign states are responsible for the most persistent and severe denials of fundamental rights in the world that affect by far the greatest number of lives. These human wrongs are mainly indigenous, and can often be only indirectly, if at all, linked to the colonial legacy. This fundamental distribution of authority to shape human behavior continues almost exclusively under the control of leaders situated behind the high, and virtually unbreachable, walls of sovereign states. This deference to sovereignty is reinforced by continuing to accord legitimacy to a world order composed of sovereign states.¹⁵ These states have long served as sanctuaries of impunity in which the commission of 'human wrongs' often goes unnoticed, and almost always go unpunished.¹⁶

A spectacular exception occurred in 1998 when the former Chilean dictator, Augusto Pinochet, was detained in Britain in response to an extradition request to face charges in Spain for crimes against humanity and other abuses of power during his tenure as president of Chile. The drama surrounding the detention of Chile's former dictator suggested that it might be possible in certain rare circumstances to overcome impunity. After a long litigating process in Britain Pinochet was sent home to Chile because he was found unfit to stand trial by the British Foreign Secretary in what many observers felt to be a political decision dictated by a concern about the treatment of political leaders by foreign legal systems. Pinochet died some years later in Chile before any punitive initiatives were consummated in his home country. German courts in the last few years have, for thinly disguised presumably similar

political reasons, been unwilling to exercise the jurisdictional authority contained in their criminal laws to hold Donald Rumsfeld accountable for torture at Abu Ghraib, despite the submission to the prosecutor of a strong dossier of incriminating evidence. The promise of 'universal jurisdiction' has titillated the imagination of liberal legalists, but it currently lacks the capacity to overcome the insulation of international crimes of state from procedures of legal accountability except in some rare special instances.¹⁷

This dynamic is actually given explicit recognition in some conceptualizations of international law that accord hegemonic status power *within* the law, creating a tension between the political/juridical myth that international relations and world order are based on norms of 'sovereign equality' and assertions that inequalities of status and power deserve to be acknowledged as having a 'desirable' lawmaking effect.¹⁸ The most symbolically significant example of such an acknowledgement of hegemonic international law is written into the Charter of the United Nations, which makes the five states that prevailed in World War II (and were the first five to acquire nuclear weapons) permanent members of the Security Council and alone entitled to exercise a veto over its decisions. This two-tier UN hierarchy is actually less overtly deferential to geopolitical claims in some respects than was the League of Nations Covenant's juridically inexplicable statement of deference to the Monroe Doctrine. The UN approach to power and law has far more operational significance given the centrality of the Security Council on matters of peace and security, and considering the use of the veto, and its threatened use, by permanent members whenever controversial decisions are being made, thereby often gridlocking the UN at times of greatest urgency. In effect, this veto power institutionalizes 'hegemonic international law' by formalizing sovereign *inequality* as a basic ordering principle of pervasive operational significance.

It was also reinforced in judicial settings at the outset of the UN's existence by the reservation attached to the US acceptance of the compulsory jurisdiction of the World Court, which allowed the US Government to prevent the submission of any legal dispute within the domestic jurisdiction of the United States as determined by the United States Government. When the World Court established its legal competence over vigorous objections from Washington to decide the Nicaragua case back in the 1980s, a dispute involving various hostile actions of the US directed at undermining the legitimate Sandinista Government in Managua, the US Government rescinded its acceptance of compulsory jurisdiction altogether, typifying its unwillingness to risk an impartial application of law and rights reaching an adverse outcome.¹⁹ The rights of power also control the interminable yet frustrating discourse on UN reform, with most attention by governments being devoted to the rather superficial challenge of taking account of shifts in the geopolitical landscape that have taken place since the UN was established in 1945. In effect, at issue is whether India, Japan, Brazil, and others should be elevated to this status of permanent members, with or without a veto power, but without any more general consideration of whether a right of veto can ever be reconciled with the supposed commitment of the UN to a law governed world.²⁰

The docility of the United Nations with respect to its central mandate of war prevention is a further demonstration of the rights of power overwhelming the power of rights. The UN was widely heralded when the UN Security Council resisted in 2003 US geopolitical pressures to authorize the initiation of an aggressive war against Iraq, but this was an extremely modest gesture of resistance. If more dispassionately considered, the UN role would itself confirm the distortion of rights that is achieved by the claims of power. From the perspective of legal rights, Iraq should have been protected by UN collective security mechanisms against unlawful threats and uses of force that had been made and carried out for many years prior to 2003 by the United States and Great Britain, as well as from sanctions that were a form of collective punishment victimizing the civilian population of Iraq.²¹ It is widely remembered that when Madeleine Albright, the American Secretary of State during Clinton's second term, was asked by a TV newscaster in 1996 whether she thought the several hundred thousand civilian casualties attributable to sanctions were worth this price in lives, she replied chillingly: 'Yes, we think the price is worth it.'²² In relations to the imposition of sanctions, the UN was so effectively manipulated that it had endorsed a geopolitical stance of the US Government that was completely oblivious to the rights of the people of Iraq, and again, expectations were so low, that it was considered a victory for 'compassionate liberalism' to soften the cruelty being experienced by the Iraqi people during the 1990s to allow some food to be sent to Iraq in exchange for a portion of Iraqi oil revenues. The point here is that if we look at the manner with which rights and power are configured internationally, it becomes clear that even rights talk at the UN and in other arenas where the participants are governments, is often reduced to formalistic verbal communications that lack any pretension of substantive seriousness in the sense of seeking behavioral results.

Or another example, the US Government after proclaiming in many ways, especially since 9/11, that it will never be constrained by international law in the pursuit of its security interests, in mid-February 2008 indignantly invoked international law to protest the failure of the Serbian government to protect its embassy in Belgrade after Kosovo's controversial secessionist declaration of political independence.²³ What this illustrates, then, is the opportunistic use of international law, a variant of 'rights talk,' by a hegemonic actor such as the United States whenever the political leadership finds it convenient to do so. Because of the rights of power, such opportunism rarely attracts adverse comment. The American claim is evaluated by the UN membership as if the United States is itself a model adherent of international law rather than being one of the worst offenders.

The dark side of this schizophrenic relationship to international law and human rights is vividly disclosed by the approach taken to crimes of state committed by political leaders. The extension of the Nuremberg Principles to the circumstances of the 1990s helped create the profoundly misleading appearance that 'a golden age of human rights' was emerging out of the leftover debris of the Cold War. More accurate perceptions might have discerned the dawn of a new dark age for international law and human rights: First came the legally dubious Kosovo War of 1999 under NATO auspices with its plausible human rights rationale, then came the

American response to 9/11 that included an array of encroachments on individual rights, and then came the Iraq War with its flagrant disregard for international law and the authority of the United Nations. On the glossy surface of world politics this darkness was effectively ignored. With a variety of maneuvers behind the scenes, the International Criminal Tribunal for Former Yugoslavia, was induced to indict Slobodan Milosevic while the NATO bombs were reigning down on Serbia in a non-defensive war never endorsed by the UN Security Council.²⁴ Worse still, despite launching an aggressive war against Iraq, the captured leader, Saddam Hussein, was subjected to political trial managed behind the scenes by the aggressor state and summarily executed in a disgracefully discrediting manner. In both instances, the enthusiasm for criminalizing the behavior of political leaders was undertaken to provide an aura of legitimacy for the lawlessness of the hegemonic instigators, an almost perfect instance of ‘empire’s law’ as there was a virtual guaranty of an absence of symmetry in this revival of the Nuremberg ethos of accountability. Of course, at Nuremberg itself this guaranty of impunity was formally part of the structure of judicial assessment, which was somewhat later derided as victors’ justice.²⁵

Despite such contradictions of usage, the geopolitical status of the United States, makes power of rights appear formidable on those occasions when such a hegemonic actor manifests the political will to implement rights claims. The rather dispiriting point here is that the ‘rights of power’ are indispensable for achieving the ‘power of rights’ in many specific situations given the way the world continues to be organized. This pattern strengthens the impression that the most vulnerable are either erased from view altogether (as had been the case until rather recently for indigenous peoples, or currently, the people of Gaza) or their grievances are entirely ignored as any corrective response is generally perceived as existing in a realm beyond the reach of practical politics (as is the case for many abused minorities in larger states). Such an assessment would be even more depressing from a humanistic perspective if it were not the case that power itself is undergoing a variety of transformations that enhance the leverage of the dispossessed and vulnerable.

THE POWER OF RIGHTS

No recent voice has been clearer than that of Balakrishnan Rajagopal in exposing the hegemonic orientation of the liberal human rights movement, including that associated with such leading human rights NGOs as Amnesty International and Human Rights Watch. By hegemonic orientation Rajagopal has in mind the selectivity in the way rights talk and rights work are both implemented, highlighting some instances, ignoring others. This critical task is necessary to undercut, especially, arguments favoring ‘humanitarian intervention’ so as to circumvent the prohibitions of law and morality associated with recourse to non-defensive force that do not elicit approval from the UN Security Council. In the period of strategic unipolarity since the end of the Cold War, the United States has been the predominant hegemon, and has consistently fused controversial claims to use force

with various humanitarian rationales. This practice has been particularly pronounced during the Bush II presidency, and especially so since 9/11. And it has encouraged the perception that rights talk obfuscates both the rights of power and lawlessness.²⁶

Rajagopal is equally insightful in contemplating a counter-hegemonic potential for a reoriented human rights movement. His words are worth quoting at some length because they identify so clearly the uncertain fault line that separates hegemony from emancipation when it comes to human rights:

Current human rights discourse and practice has a choice, a fork in the road . . . it can either insinuate itself within hegemonic international law or it can serve as an important tool in developing and strengthening a counter-hegemonic international law. By ignoring the history of imperialism, by endorsing wars while opposing their consequences, and by failing to link itself with social movements of resistance, the main protagonists of the Western human rights discourse are undermining the future of human rights itself.²⁷

It is crucial for those world citizens with a progressive agenda not to bow down before this hegemonic appropriation of human rights discourse, and limit a negative response to exposé and criticism, however deserved.²⁸ There exists an important corpus of counter-hegemonic practice and discourse that can take political advantage of the inter-governmental normative architecture of international human rights law. This structure incorporates norms that are ethically helpful in challenging prevailing forms of oppression and exploitation. This corpus of norms provides tools for struggle and resistance, as well as critique, and offers a conception of engagement that re-situates human rights on the emancipatory side of the geopolitical ledger of accounts.

In this spirit of sincere dedication to the values that give rise to the norms, progressive activists should pay close attention to Upendra Baxi's broad injunction made several decades ago 'to take human suffering seriously,' or as he more recently formulated his outlook, to bridge 'the immeasurable distance between what we call "human rights" and the right of all to be human; and that this distance can be begin to be traversed only if we claim the audacity to look at the human rights models from the standpoint of the historically oppressed groups.' as the foundational imperative of a counter-hegemonic human rights movement.²⁹ To similar effect, with an eye toward not confining popular struggles to the formal arenas of law and international institutions, Smitu Kothari and Harsh Sheth write of the importance of evolving 'a social praxis, rooted in the need of the most oppressed communities, that seeks to create norms of civilized existence, In any final instance, it is only this—a shared vision of how we want to live as a collectivity—that can provide us the moral basis for evolving our own conduct.'³⁰ From these perspectives, the power of rights has had several instructive historic successes within the broad framing of world order issues, including the discrediting of colonial claims and the upgrading of the right of self-determination; the affirmation of national sovereignty over natural resources; the anti-apartheid, anti-racism struggle; the liberation of Eastern Europe by nonviolent means; the pursuit of 'another globalization' oriented toward human well-being rather than the efficiency of capital; and the continued elaboration of a human rights

architecture (norms and procedures) that provides legitimation for a variety of emancipatory struggles (while admittedly also simultaneously providing tools to validate an array of hegemonic projects). Reverting to Rajagopal's reference to the fork in the road confronting the human rights movement, reminds us of the closing lines of Robert Frost's familiar poem 'The Road Not Taken':

'Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.'

I think that there exists a better way to contemplate the contextual realities of the counter-hegemonic approach to rights than to contemplate what to do at a fork in the road. It is to recognize that the choice has actually been made quite a long time ago by both sides: the mainstream human rights movement in the North generally, yet not invariably, has chosen to work within the frame of hegemonic international law. This is in line with the precepts of liberal internationalism (the 'empire lite' of Michael Ignatieff) and moves along on the well-traveled road with positive results achieved in those sectors of international life where the strategic motivations of the hegemonic actor are either minimal or absent.

The other less traveled road has been best articulated by post-colonial thought, made manifest through civil society initiatives, and given a loose institutional identity by World Social Forum. It links perceptions and activities directly to the plight of the vulnerable, the marginal, the oppressed, exploited, and abused. This emancipatory undertaking finds itself moving in spurts and stops on this less traveled road, sometimes effectively and at other times futilely, but its steadfastness and courage is what in Frost's words, makes 'all the difference.' The historic moment is characterized, thus, not by a choice between alternatives but by two opposed sets of priorities, one guided by grand strategy, the other by compassion and human solidarity that only rarely converge in thought or action. One instance of convergence occurred during the latter stages of the anti-apartheid campaign when dominant governments were induced to empower claims for racial justice in South Africa, achieving dramatic results.

This less traveled road as it pertains to human rights is synonymous with the imperatives of counter-hegemonic discourse. Its heritage is most easily traced to the efforts of Latin American jurists early in the twentieth century to use international law with some success as a defensive strategy to mitigate, and eventually invalidate, US interventionary diplomacy, and the accompanying unequal economic arrangements that had been forcibly imposed and maintained. More globally, and in the setting of the Middle East and Asia, the anti-colonial movement based on a creative extension of the highly constrained self-determination ethos as disseminated by Woodrow Wilson at the close of World War I, as well as the more faithful borrowing by nationalist figures in Asia and Africa from a comparable endorsement of self-determination made after World War I by Lenin.

What rights work has been done in recent years on the less traveled road of counter-hegemonic creativity has been mainly due to the efforts of civil society actors

with a transnational agenda. There are many examples, but among the most poignant, was 'the tribunal movement' prompted by the Iraq War (and a natural sequel to the pre-war global demonstrations on 15 February 2003) and by the silences of governments and the United Nations. This movement consisted of trials in some 20 countries around the world. It was financed and organized by representatives of civil society to assess the legality of the invasion and occupation of Iraq and the criminal accountability of those leaders (and supportive actors, including corporate officers, journalists). These efforts culminated in an elaborate proceeding, enjoying wide coverage on the Internet and alternate media, in Istanbul in 2005 that examined all facets of the legal and ethical case against the US/UK policies in Iraq.³¹ This kind of initiative is the mirror image of the hegemonic prosecutions of Milosevic and Saddam Hussein referred to above, but lacking the backing of the power of rights, and resting its claims on the authority of the rights of power. This counter-tradition associated with international legality and criminality was organized during the Vietnam War acting on the initiative of Bertrand Russell who was able to enlist the participation of leading intellectuals of the day, including Jean-Paul Sartre, and was followed by the establishment in Rome of the Permanent Peoples Tribunal dedicated to the same goals of exposure and truth-telling. From the perspective of my understanding, a significant development over the years is reflected in the shift of tribunal sites, that is, by the geographic move away from Europe to Istanbul, which can claim a location that is at least as much Asian and Middle Eastern as it is European.

A TRAJECTORY FOR THE POWER OF RIGHTS

The rights of power are well financed and motivated by the material sensibilities that control almost every modern society. The power of rights needs to motivate its varied constituencies by both the urgencies of its cause and the genuine, although not assured, possibilities of producing improvements in the human conditions. Without motivation there will be no struggle, and without struggle there will be no progress. A few lines from a poem by the German poet, Günter Eich, express the promise and responsibility associated with the power of rights:

No, don't sleep while the arrangers of the world are busy!
Be suspicious of the power they claim
To have to acquire on your behalf!
Stay awake to be sure that your hearts are not empty, when
others calculate on the emptiness of your hearts!
Do what is unhelpful, sing songs from out of your mouths
that go against expectation!
Be ornery, be as sand, not oil in the thirsty machinery
of the world!

NOTES

1. This dual potentiality of human rights as used for purposes of mystification by dominant political actors and for emancipatory goals by and on behalf of subjugated peoples contrasts with the trenchant critique of human rights discourse and diplomacy as exclusively instrumental and regressive. For this view see Anthony Carty's (2007) important book, *The philosophy of international law*, esp. 194–195. Edinburgh, Scotland, Edinburgh University Press.
2. The word 'genocide' is used here to describe a set of moral and political assessments, but does not imply a legal conclusion that depends, according to the International Court of Justice, on a level of documentary evidence that is unlikely to be available in the context of Israel's occupation policy directed at Palestine. For case see *Bosnia and Herzegovina vs. Serbia and Montenegro*, ICJ Reports, 26 Feb. 2007; for comment see Jillayne Seymour (2007) Jurisdiction and responsibility by necessary implication: genocide in Bosnia, *Cambridge Law Journal*, 66(2), 249–253; for a non-legal determination that Israel's policies toward Gaza have a genocidal quality see Ilan Pappé (2007) 'Palestine 2007: genocide in Gaza, ethnic cleansing in the West Bank,' *The Electronic Intifada*. Available online at: <http://electronicintifada.net/v2/printer6374.shtml> (accessed 11 January 2007); Pappé (2008) The mega prison of Palestine, *The Electronic Intifada*. Available online at: <http://electronicintifada.net/v2/article9370.shtml> (accessed 5 March 2008) Israel's Deputy Defense Minister, Matan Vilnai, warned Gaza of a 'shoah' if rockets from Gaza continue to imperil the security of Israeli border towns and cities; later spokespersons insisted that Mr. Vilnai was using shoah in the Hebrew sense of 'disaster,' not in its historical sense of denoting the Holocaust experienced by the Jews due to the policies of Nazi Germany, but the association of the two meanings of shoah was unavoidable, especially given the fact that Gaza was already a disaster, and being described as genocide ever since Hamas took over political control of the territory.
3. Whether this pattern of behavior is also genocide in a *legal* sense depends on a presently unsatisfied condition: a determination by a duly constituted tribunal that hears allegations and defenses. Note that such condition has not inhibited the label genocide from being affixed to the Holocaust, the massacres carried out by the Khmer Rouge in Cambodia, or numerous other instances. Most of the extensive literature on genocide draws its conclusion on the basis of the facts of deliberate and systematic action taken against a particular ethnic group, although it usually involves mass killing as its core characteristic, it could satisfy most definitions if an intent to destroy the group in whole or in part is considered evidence of a genocidal intent. Perhaps, the Israeli approach to Gaza is best expressed by the conceptualization of 'slow genocide.' See Martha, L., Cottam, J. Huseby, & Lutze, F. E. (2006) 'Slow genocide,' paper presented at the annual meeting of the International Society of Political Psychology in Barcelona.
4. For instance, such a selective outlook *sees* with unremitting clarity violations of human rights by Communist governments in Cuba or China, while not seeing much grander violations committed by Israel or the United States.
5. For devastating critiques along these lines see Carty, Note 1, and Anne Orford (2003) *Reading humanitarian intervention: human rights and the use of force in international law*. Cambridge, UK, Cambridge University Press.
6. See the notoriously one-sided text condemning Hamas responsibility for rocket attacks on Israel that have caused 12 civilian deaths in Israel, while Israeli use of force in Gaza has caused over 2,600 Palestinian civilian deaths in the same period. US House of Representatives, H. RES. 951, 5 March 2008 passed by an incredible vote of 404-1. Any deliberate targeting of civilians is illegal and immoral, but such condemnations should be balanced by reference to the realities of harm being caused.

7. For general assessment along these lines see Richard Falk (2005) International law and the peace process, *Hastings International and Comparative Law Review*, 28(3), 331–348.
8. See Article 49(6) of the Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War.
9. Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, including in and around East Jerusalem, ICJ Reports, 9 July 2004; the legal conclusions of the International Court of Justice, the highest judicial arm of the UN System, was supported by a vote of 14-1, including several European judges with an approach to international law respectful of sovereign rights. The General Assembly urged by a vote of 150-6 (Israel, USA, Australia, Micronesia, Palau, Marshall Islands), with 10 abstentions Israel to implement the findings of law. General Assembly doc: GA/10248, 9 March 2004.
10. This refusal to resolve disputes by reference to respective legal rights as fairly determined is a challenge to the whole idea central to the United Nations Charter that states should renounce force in their resolution of force.
11. Dennis Ross, the chief diplomatic advisor to President Bill Clinton during 2000 Camp David II negotiating sessions, influentially and exhaustively reports on his pervasive effort to avoid any proposals that Israeli public opinion would be unwilling to swallow for the sake of conflict resolution without paying the slightest attention to comparable concerns on the Palestinian side, specifically, what it was reasonable to expect the Palestinians to accept. This kind of approach to the search for a diplomatic solution was particularly outrageous given the fact that the Palestinians were mainly seeking to exercise their right of self-determination over only 22% of the original Palestine mandate, thereby conceding prior to negotiations that pre-1967 Israel could expect to be secure within its 78% of the territory in dispute if an agreement on Israeli withdrawal from the 22% could be achieved in the process of establishing the state of Palestine. For Ross's presentation of Camp David II see his massive account: Dennis Ross (2004) *The missing peace: the inside story of the fight for Middle East peace*. New York, Farrar, Straus, & Giroux.
12. For Said's (2000) views see his *The end of the peace process: Oslo and after*. New York, Pantheon.
13. This tale of Israeli forthcomingness and generosity is disarmingly told in Ross, note 9; even Israeli sources are more candid in distributing the blame for the failure of negotiations and acknowledge that it is not clear that the Israeli proposals would have been accepted by Knesset or Israeli public opinion. For a surprisingly objective account see Yoram Meital (2006) *Peace in tatters: Israel, Palestine, and the Middle East*. Boulder, CO, Lynne Rienner.
14. This issue is explored in depth by two international relations experts who had been previously regarded as members of the American foreign policy establishment, but with this criticism of the Israeli influence on American policy formation they have been themselves somewhat marginalized. John J. Mearsheimer & Stephen M. Walt (2007) *The Israel lobby and US foreign policy*. New York, Farrar, Straus, & Giroux.
15. This deference is disguised to some extent by the term 'nation-state' as if the nation is genuinely synonymous with the state. For many minorities the state operates as a hostile trap rather than as a security blanket. Governments do have the exclusive authority to confer nationality for international purposes, including the issuance of passports, but this only confuses the issue of whether nationalities within a particular state are adequately represented and fairly treated. The image of 'captive nations' points to the reality where minorities (and occasionally majorities, as in apartheid South Africa) are denied equality of treatment, and may be targets of exploitation and abuse.
16. This indictment of Westphalian world order on these grounds has been most persuasively achieved by Ken Booth (1995) Human wrongs in international relations, *Journal of International Affairs*, 71, 103–126; for further exploration see Tim Dunne & Nicholas J. Wheeler (Eds) (1999) *Human rights in global politics* ; also, from a different perspective based

- on the structure of world order, not on the coercive power of the individual sovereign state see Chandra Muzaffar (Ed.) (1996) *Human wrongs: reflections on western global dominance and its impact upon human rights*. Penang, Malaysia, Just World Trust.
17. For a comprehensive presentations of liberal legalist hopes associated with universal jurisdiction see Stephen Macedo (Ed.) (2004) *Universal jurisdiction: national courts and the prosecution of serious crimes under international law*. Philadelphia, PA, University of Pennsylvania Press.
 18. For examples of such formal rationalizations of hegemony as inhering *within* international law see Detlev Vagts (2001) Hegemonic international law, *American Journal of International Law*, 95(4), 843–848 and José E. Alvarez (2003) Hegemonic international law revisited, *American Journal of International Law*, 97(4), 873–888. See also Nico Krisch (2005) International law in times of hegemony: unequal power and the shaping of the international legal order, *The European Journal of International Law*, 16(3), 369–408.
 19. For decision see Military and Paramilitary Activities in and against Nicaragua (Nicaragua V. USA), International Court of Justice Reports, 27 June 1986.
 20. For a critique of the official dialogue on global reform from these perspectives see Richard Falk (2008) Illusions of reform: needs, desires, and realities, in: Kevin P. Clements & Nadia Mizner (Eds), *The center holds: un reform for 21st century challenges*, 19–30. New Brunswick, NJ, Transaction Publishers.
 21. See Richard Falk (2008) *The costs of war: international law, the UN, and World order after Iraq*, 37–51. New York, Routledge.
 22. This statement was made on the TV program *60 Minutes*, and followed upon a statement by the newsperson, Leslie Stahl: We have heard that a half million children have died . . . I mean, that's more children than died in Hiroshima. And . . . and you know, is the price worth it? For full text see <http://www.uwire.com/content/topops0214001001.html>.
 23. See Jeremy Scahill (2008) The real story behind Kosovo's independence, *Truthout*. Available online at: http://www.truthout.org/docs_2006/022408Y.shtml (accessed 23 February 2008).
 24. For an overly devastating critique see John Laughland (2007) *Travesty: the trial of Slobodan Milosevic and the corruption of international justice*. London, UK, Pluto.
 25. Most completely depicted in the context of the Tokyo war crimes trials in Richard H. Minear (1971) *Victors' justice: the Tokyo war crimes tribunal*. Princeton, NJ, Princeton University Press.
 26. This critique is well developed in Philippe Sands (2005) *Lawless world*. New York, Viking and Marjorie Cohn (2007) *Cowboy republic: six ways the bush gang has defied the law*. Sausalito, CA, PoliPoint Press.
 27. Balakrishnan Rajagopal (2006) Counter-hegemonic international law: rethinking human rights and development as a Third World strategy, *Third World Quarterly*, 27(5), 767–783, at 775.
 28. Several recent publications are relevant and encouraging. See Anne Orfeld, Note 5; Carty, Note 1; Amy Bartholomew (Ed.) (2006) *Empire's law: the American imperial project and the 'war to remake the world'*. London, UK, Pluto; Ikechi Mgbeoji (2003) *Collective insecurity: the liberian crisis, unilateralism, & global order*. Vancouver, Canada, UBC Press; Susan Marks (2003) 'Empire's Law,' *Indiana Journal of Global Legal Studies*, 10, 449–466.
 29. See Baxi (1989) From human rights to the right to be human: some heresies, in: Smitu Kothari & Harsh Sheth (Eds), *Rethinking human rights*, 181–166. Delhi, India, Lokayan, at 166; more recently, extending his analysis to the emerging circumstance of possibly being 'posthuman.' Baxi (2007) *Human rights in a posthuman world*. Delhi, India, Oxford.
 30. Kothari & Sheth, Note 25, On Categories and Interventions, 1–17, at 9.
 31. For proceedings see Müge Gürsöy Sökman (Ed.) (2008) *World tribunal on Iraq*. Northampton, MA, Olive Branch Press.