How International Law Evolves

Norms, Precedents, and Geopolitics

By **Richard Falk**

Abstract

In December 2018, MEI co-organised a workshop with Macquarie University titled "The Vietnam and Arab-Israeli Conflicts: International Legal Migrations, Comparisons, and Connections". The workshop was aimed at comparing some of the international legal justifications both for the resort to force and for the conduct of hostilities that emerged during the Vietnam War and the 1967 and 1973 Arab-Israeli wars. These arguments set legal precedents for the justification of violence that changed the face of armed conflict. The following is the text of a keynote address at the conference by Richard Falk, an Emeritus Professor of International Law and Practice. It looks at how the geopolitical antagonists in the two theatres of conflict used informal law-making processes to shift the understandings of the international law of war and peace that had been established under the framework of the UN Charter at the end of World War II.

Prologue

We should understand that this workshop devoted to the relevance of international law to these two geographically distinct war zones in the period between 1961 and 1973 is a very distinctive undertaking. I am not familiar with any similar search for comparisons and connections, either in relation to the Indochina or Arab-Israeli conflicts, with respect to law-making interactions and potentialities. What is notable about this inquiry is that it considers the interaction between regional scale conflicts to be both a source of new norms of international law and occasions for the evasions and justifications of existing norms.

My point of departure is to take note of the motivation of the lead political actors in both conflict configurations to evade the constraints on the use of force imposed by the UN Charter, a constitutional framework for international law drafted under the primary influence of World War II along with the implications for future wars associated with the use of atomic bombs against Japanese cities. This influence expressed itself by the adoption of a war prevention rationale powerfully set forth in the opening words of the Charter Preamble, "… to save succeeding generations from the scourge of war." This language was a response not only to the devastation associated with the thus concluded war with its 60 million deaths, but to the fear that a future war of similar proportions would bring even more catastrophic results for the entire world. The Charter norms on the use of force were designed to be very constraining, suggesting that recourse to force by states was legal only if undertaken in self-defence against a prior armed attack [Articles 2(4), 51 of the UN Charter] or in response to a decision of the UN Security Council.

There was also a geopolitical condition of fragile harmony that prevailed in 1945 as a result of the recent victory over fascism achieved by the Allied Powers. The United Nations was established with some hope, although contested by political realists from its inception, that the combination of these restraining norms and the collective security mechanisms of the Security Council could ensure a peaceful world. Such idealistic expectations were challenged by the Korean War (1950–52) and by the 1956 Suez Crisis and Operation, and above all by the outbreak of the Cold War. Nevertheless, until the decade of the 1960s there remained a superficial attachment by the geopolitical antagonists to the UN Charter framework constraining aggressive war making as the focus continued to be on the avoidance of a third world war.

This changed in the decade of the 1960s. It became clear that the victors in World War II were faced with significant geopolitical challenges that could not be addressed by adhering to the Charter norms. This was made apparent in the Indochina War, especially its Vietnam central arena. The Charter notion of self-defence was not applicable nor would the American extension of the war to North Vietnam in 1965 have enabled the Security Council to restore peace due to the veto power possessed by the geopolitical antagonists, the Soviet Union, China, and the United States. For these reasons the Indochina War, despite its scale and level of destruction, was undertaken without heeding the UN framework or contemporary international law, although the US. Government in particular put forward elaborate documents defending actions taken by invoking international law rationalisations.

As well, both in Indochina and the Middle East the warfare that resulted was not between political entities of symmetric technological capabilities and tactics. International law had been evolved to address wars fought between sovereign states of roughly equal technological capabilities and was concerned with limiting war rather than outlawing it. The experience of World War II convinced the victors that there was a gap in the legal framework concerning the protection of civilians living under military occupation, captured prisoners of war, and the treatment of wounded soldiers on the battlefield. This realisation resulted in the negotiation of the four Geneva Conventions of 1949, a new corpus of law that became known as "international humanitarian law".

Yet, these Geneva Conventions were still preoccupied with wars between sovereign states. What was shown by the Indochina and Middle East wars of the 1960s was the importance of extending international humanitarian law to conditions of sustained warfare *within* sovereign states. This gave rise to the two 1977 Geneva Protocols that were deemed supplemental to the 1949 treaties. In particular, Protocol II dealing with the Protection of Victims in *Non-international Conflicts* was a tricky area for international law as it challenged the sovereign rights of the territorial government. This complexity explains why the first protocol dealing with International Protection was widely adopted while the second addressing Non-International Civil War has not been ratified by several important states, including the United States.

In assessing these legal developments two features of international political society are paramount and need to be kept in mind when discussing the two war zones of the 1961–1973 period:

- the primacy of geopolitics vis-a-vis international law;
- the primacy of military necessity in combat situations.

These two realities, given the absence of centralised governmental institutions, explain the marginality of international law in war/peace situations, both with respect to recourse to force and the behaviour of the parties in the course of warfare.

Acknowledging these two definitive constraints on the role of international law in relation to war should not lead us to cynical conclusions that "law is irrelevant with respect to war" or that "international law does not matter". International law is relevant and matters for several reasons: it empowers civil society activism; it provides a channel for domestic dissent from war making in

democratic societies in both government circles and civil society; it moderates behaviour to the extent that reciprocal interests support compliance with international legal norms (e.g., treatment of prisoners of war).

A brief comment on the two war zones

For the United States in Vietnam the Charter norms were perceived as inconsistent with the mission to prevent a Communist victory in South Vietnam and a subsequent unification of Vietnam under the control of Hanoi. It was believed in Washington that it was militarily necessary to extend the war zone beyond the boundaries of South Vietnam to punish North Vietnam for supplying the anti-regime insurgency led by the National Liberation Front (NLF) or Viet Cong. Similarly, in 1971, the extension of the war to Cambodia was prompted by calculations associated with disrupting the support of the war in the South by keeping a base area in Cambodia. Similar reasoning produced a sustained military assault within Laos, orchestrated by the American Embassy. In other words, the Cold War priorities prevailed over efforts to constrain recourse to war and tactic in war. On the other side, the priorities of national liberation and anti-colonial legitimacy also prevailed over legal constraints.

In the Middle East, there were similar factors at work, although tempered by some balancing considerations. The United States was still in the 1960s seeking to balance its commitment to Israel with its vital strategic interests in retaining favourable access to regional oil supplies. In this respect, contrary to Israel's wishes at the time, it sought to affirm international law with respect to the acquisition of territory by force, the major premise of the unanimous UN Security Resolution 242 adopted shortly after the 1967 war. Yet, even then there was insufficient political will to achieve an Israeli withdrawal.

Of even greater relevance to the focus of the workshop is the degree to which antagonists in the Middle East with respect to Israel/Palestine evaded the Charter norm on recourse to war. Israel in 1967 and Egypt in 1973 both sought to gain military advantage by striking first, and thus violating the requirement of a prior armed attack contained in Article 51. Both governments defended their actions by claiming security imperatives as providing a convincing "legal" rationale for pre-emption.

As far as interconnections are concerned, both war zones produced conflicts that ignored the fundamental framework of international law and institutional accountability that was the hallmark of the war prevention efforts after World War II. The asymmetric nature of the wars also strained the law of war during combat, especially in Indochina, but also in the Middle East to the extent that warfare after 1967 shifted to Palestinian efforts to pursue an armed struggle strategy that was designated as "terrorism" by Israel and its supporters. Such a rationale had been used by the United States in Vietnam, but with less impact due to the outcome of the struggle and the absence of widespread support for Israel in the West, especially the United States.

International law evolves

Against this background it becomes possible to get a better appreciation of how international law evolves. It is important to realise that in some sense all of international law is "soft law" because of the absence of regular procedures of authoritative interpretation and of enforcement. Added to this, international law in relation to peace and security issues suffers from the special issues previously mentioned — essentially, the primacy of geopolitics and of military necessity. Geopolitics manipulates the law governing *recourse* to force, while military necessity is constantly reshaping the law involving the *use* of force.

A major interconnection between Indochina and the Middle East is illustrative. In Indochina, the United States created a strong precedent for disregarding the Charter's provisions governing

recourse to force. It put forward some legal justifications to the effect that North Vietnam was guilty of "indirect aggression" by its support of the insurgency in the South, creating a legal foundation for extending the war beyond the confines of South Vietnam. It also contended that Cambodia and Laos violated the laws of war governing neutrality by allowing their territories to be used for hostile purposes associated with North Vietnam's belligerent activities.

Although Israel in 1967 and Egypt in 1973 did not specifically invoke the American precedents set in the Vietnam War, their conduct was shielded from critical scrutiny by the combination of a weakening of the geopolitical commitment to the Charter conception, and by the sense that such recourses to force were within their context "reasonable". Because of their geopolitical alignment with Israel, Western countries legally condemned the Egyptian surprise attack on Israel, but in a manner that made it appear to be more an expression of alliance diplomacy than a pronouncement of allegiance to international law. Such a view gains weight from the pattern of practice in years subsequent to 1973.

It was also evident that the West controlled international legal discourse on permissible and impermissible uses of force. In this way, the violence of non-state actors and liberation movements was demonised as "terrorism" while state violence even if directed at civilian targets was treated under rubrics of security and self-defence. Such a discourse gained wider impacts after the 9/11 attacks on the United States, and through the launch of the so-called "War on Terror". It has impacted strongly in the Middle East contexts, especially allowing Israel to validate its excessive force and collective punishment as security measures or an exercise of the right of every sovereign state to defend itself. To some extent, especially in recent years, the United Nations has challenged this discourse by issuing many reports on Israeli violations of the Geneva Conventions and international humanitarian law more generally. This tension between the geopolitical discourse and the UN discourse is what leads the United States and Israel, in particular, to make accusations about UN bias when it comes to violations of international law. It is this tension, however, that enables civil society initiatives to claim the legitimacy of international law, as is the case with the Boycott, Divestment and Sanctions (BDS) Campaign against Israel.

It should be noted, in passing, that when Western interests are engaged, as by Russia's recent confrontation with the Ukraine, the Charter framework is again invoked as if it is as authoritative as when adopted in 1945. In other words, the fate of norms is tied to the control of the international normative discourse, and especially in relation to the geopolitics of propaganda.

Conclusion

The main conclusion reached is that the Charter framework established in 1945 was greatly weakened, if not altogether rendered somewhat anachronistic, by the combined impact of geopolitical opportunism and military circumstances in the wars taking place in Indochina and the Middle East between 1961 and 1973. To some extent, it can be asserted that the Charter framework was always unrealistic, given the character of a state-centric world order system that included hegemonic actors recognised as such by their right of veto in the UN Security Council, a reality that was fully disclosed after the onset of the Cold War. The nature of the conflicts, which consisted of nationalist movements, was also not anticipated by the kind of legal order envisioned for the post-World War II era, and not able to cope with the normative challenges of asymmetric warfare or wars of national liberation.

There is also an important tension with regard to the orientation towards normative discourse. The West seeks a statist discourse with unrestricted discretion for geopolitical actors, excepting, of course, its rivals, who are held fully accountable. The South, especially at the UN General Assembly, is generally favourable to the claims and struggles of nationalist movements if directed towards liberation from European or Western control. In this regard, this subaltern discourse is supportive of the situation of the Vietnamese and Palestinian national liberation struggles, given concreteness in international law

by the wide consensus supporting the right of self-determination as enshrined in Article 1 of both International Covenants on Human Rights.

About the Author

Richard Falk is Albert G. Milbank Professor of International Law and Practice Emeritus at Princeton University and Research Fellow at the Orfalea Center of Global Studies, University of California, Santa Barbara (UCSB). He is currently directing a project on the peaceful resolution of the Qatar crisis. Prof Falk has served as a member of independent international commissions devoted to the public order of the oceans, the Kosovo War, and the International Law Rights of Catalonia. He was UN Special Rapporteur for Occupied Palestine in 2008-2014. Prof Falk has also participated in several civil society tribunals dealing with issues of war/peace and individual accountability for upholding international law. In 2017, he co-authored a UN report titled "Israeli Practices towards the Palestinian People and Question of Apartheid" that generated controversy and widespread discussion. Apart from his multiple published works, a collection and interpretation of his writings, *Revisiting the Vietnam War: Selected Writings and Interpretations of Richard Falk,* was edited by Stefan Andersson (Cambridge University Press, 2017).