

Interview - Bas de Gaay Fortman (Part Two)

Written by E-International Relations

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Below is the second part of an exclusive interview e-IR's Maysam Behravesht (May) is holding with Professor Bas de Gaay Fortman, Chair in Political Economy of Human Rights at Utrecht University Law School, Netherlands. The interviews mark the occasion of the paperback reprinting in July 2012 of his latest book, *Political Economy of Human Rights: Rights, Realities and Realization* (Routledge, 2012), which he has dedicated "to my students, from all over the world (1960-2010)" and often calls by its abbreviation, PEHR. This interview addresses some of the more practical arguments of the book while seeking to cover such significant issues as the legal and normative function of international human rights (HR) organizations, the US-led invasions into Afghanistan and Iraq in the wake of 9/11 attacks and their human rights implications at the international level, the HR dimensions of the lingering 2008 financial crisis, and the political-economy as well as HR dynamics of the Arab Spring.

For the first part of our interview with Prof Fortman, please see [here](#).

e-IR: What is your assessment of the role such organizations as the International Criminal Court (ICC) and International Criminal Tribunal for the former Yugoslavia (ICTY) play in trying to prevent systematic human rights violations, bringing mass abuse perpetrators to justice and uphold HR principles and values on the ground? Aren't they a bit too legality-stricken, as can be worked out from their protracted prosecutions and trials? I personally

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believe they pursue a practice of *human rights ad nauseam* – judicially taking legal provisions of human rights in prosecuting internationally recognized and well-established criminals to such extremes as to practically render them ineffective and even counterproductive. What do you think? And if so, how should such institutions be reformed for purposes of greater efficiency and effectiveness in your opinion? After all, human rights as a universal cause appears to lack a truly effective and powerful *punitive prop* at the international level.

Prof. Fortman: One should not generalize here. As an ad hoc tribunal, the International Criminal Tribunal for the Former Yugoslavia has been quite effective, building upon its support in not just the international community but also within the region itself (although particularly in Serbia doubts are being expressed as to the impartiality of the ICTY). The Special Court for Sierra Leone, at the other extreme, required a huge investment in a (rather empty) judicial campus in Freetown as well as lawyers' fees, but hardly any trials and convictions "in return". In response to a question on this disproportional outcome, a prosecutor exclaimed, "Justice has no price!" That is "human rights ad nauseam", as you pointedly call it.

Naturally, the struggle for justice cannot escape the demands of effectiveness in the use of scarce resources. If there are few indictments, very few convictions, hardly any assistance to victims, and negligible investment in prevention (by promoting juvenile employment, for example), the excessive expenses connected to international criminal justice cannot be justified. This applies to the International Criminal Court, too. After being in operation for over ten years, and with an annual budget exceeding US\$ 140 million, there is only one conviction (of a Congolese warlord [Thomas Lubanga Dyilo], found guilty of recruiting child soldiers) and almost no compensation to victims. What is quite worrying, moreover, and not just in respect of double standards, is that all indictments so far concern Africans.

Generally, the struggle for justice in Africa involves failed states and failing economies in the first place. While in the Soviet Union and the other states of "the Eastern Bloc" human rights played a primary part in the struggle against oppressive regimes, in Africa today human security and human development are key strategic objectives, too. Strikingly, successful examples of transition there from horrid violence to peaceful co-existence included policies and programmes for disarmament and employment of the youth involved in the conflict. True emancipation from bad government is taking its time.

e-IR: With all due respect for your embedded knowledge and lived experience of these organizations and their workings, I beg to differ vis-à-vis the Yugoslavia tribunal or ICTY. I personally attended a trial session of Radovan Karadzic, the former president of Republika Srpska (1992-1996), in ICTY's headquarters in The Hague in June 2011. There I learned upon consultation with ICTY officials that Karadzic refused to attend court sessions for a long while on the grounds that "I don't have time" and most strikingly with impunity, which was primarily granted by the juridical belief that "he is not yet guilty, but only accused of crimes" and that "we cannot force him to come to the court". Such practices, I very much suspect, make a laughable spectacle of HR laws and can conveniently undermine the credibility of the universal venture, particularly given the very high cost of these processes and establishments as you pointed out. One question that immediately jumps to mind in this context is, won't the HR be better served if the huge budgets spent upon these unnecessarily protracted processes are spent instead on preventing, say, African children from starving to death on a daily basis? After all, by standards of moral utilitarianism at least, human rights as a universal cause is not only about quality, but also about quantity, not to mention the core premise that all human beings are equal in dignity. What do you have to say Bas?

Prof. Fortman: You have a point, May! In response I should like to add that, obviously, transitional justice, as it is called these days, cannot be confined to *criminal* justice. *Civil-political* justice requires that victims and their relatives receive due compensation. *Socio-economic* justice demands a struggle against poverty in the region and new employment opportunities for young people. The current misbalance between the criminal aspects of justice and those other elements is rather worrying.

e-IR: In the first part of our conversation, you said you "abhor" the terminology "protection and promotion of human rights", and instead argued for the "realization" of human rights. My contention here is that well, if rights can be violated, they can as well be protected from or against violation. I am raising this question because I think the very language one uses – in documents, petitions, indictments etc. – matters a great deal and can have enormous

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implications in practice.

Prof. Fortman: My problem is not so much with the term “promotion of human rights” as this may well refer to the creation of a human rights enabling environment: a reasonably functioning economy, good governance, an open and tolerant culture, and the rule of law, to mention some key characteristics. That makes sense of course. Yet, here, too, a semantic problem remains: the urgent need for active engagement against adverse (disabling) environments. Prevailing disabling factors consist in failed states, tyranny and a general climate of xenophobia, for example. As long as it is understood that “promotion of human rights” requires efforts to eliminate these in the first place, I am with you.

But the term “protection of human rights” is definitely flawed. Rights are meant to protect certain interests by law. Human rights imply protection of fundamental interests by law, meaning human concerns that relate to crucial aspects of inclusive dignity. It is people’s fundamental freedoms and their basic entitlements that have found protection through their construction as human rights. Strikingly then, “to protect human rights means “protecting the protection of fundamental interests by law”, which implies a lamentable softening of the whole human rights endeavor. Like other rights, human rights have to be *realized*. At a more practical level, “protecting human rights” is often seen as establishing the right legal systems and procedures. Thus, “protecting against being violated”, as you call it, tends to be interpreted as a legal institutional project requiring incorporation of these rights into constitutions and statutes, and establishing mechanisms for monitoring and supervision of compliance. But in the first place, it is the people who have to be protected, not institutions, and that tends to be a tough struggle against the powers that be rather than just persuading them to engage in harmonious UN supervised institution-building.

e-IR: What precise distinction(s) do you draw between human rights, human security and human development as the three policy-making components of your human dignity realization triangle? Would it be analytically unsophisticated to include all three concepts under the broad banner of human rights? What is the use value, in objective as well as subjective terms, of such a nuanced categorization after all?

Prof. Fortman: It is, indeed, possible to conceptualize human rights in such a way that their realization would imply security and development as well. UNESCO, for example, has proclaimed a “right to peace”. The UN General Assembly has declared a “right to development”. This terminology and the corresponding norms and values may well play a positive part in the sense of modern legal and political principles. But the snag is always that positive discourse may conceal actual threats. For many people in “underdeveloped” regions, development is a hazard, a threat to their food security through a full focus on export crops, for example. Hence it is important to stress that from a normative perspective it is *human* development that matters, meaning upstream initiative and action, *self*-development in other words.

In fact, the struggle for implementation of human rights tends to be strongly focused on legal protection against abuse of power, primarily by the citizens’ own state. Yet, people have to be protected against other institutions as well, and generally against their fellow human beings, too. This requires “law and order” in other words, or as it is often put, “justice must be done and be seen to be done”. Human security means daily “freedom from fear” as Roosevelt called it in his “Four Freedoms”. It requires peace and political stability in the first place. Human development involves “freedom from want”, which implies more than just “progressive realization” of social, economic and cultural rights in a given economy; it is the economy itself that will have to develop, primarily by eradicating constraints to self-development. Socio-economic perspective for everyone, that is the crucial issue. Strategically, I do not see it as helpful to shove these distinct challenges in one all-embracing human rights discourse. Another matter is that policies and programs have to aim at simultaneous realization of human development, human security and human rights. It is precisely that objective which may fall out of sight if the distinction in these three different aspects of human dignity protection is lost.

e-IR: You have dedicated a whole chapter of PEHR to “the rights of the poor” and another to “the rights of collectivities”. Would you please offer us a synoptic account of how they stand in today’s world generally and how you think they should be realized? Pertinently, what is your take on “multiculturalism” as well as on “cosmopolitanism” as oft-contented political approaches and policy recommendations to the latter end?

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Prof. Fortman: To overcome such major human rights deficits as the structural non-implementation of the rights of the poor and the lack of protection of collectivities against abuse of dominant power is, indeed, a major global challenge today. Let us confine ourselves now to the collectivities on which you focus your question. Basically, that problem is not with minorities but with majorities. Hence, it does not help much to define and specify more and more “minority rights”; what these collectivities need is first of all protection against abuse of state power in their own land. The new terminology that you refer to is not necessarily helpful. Multicultural societies have been a fact of life throughout human history, and usually such plurality has done those heterogeneous nation-states quite some good – it is often external forces that trigger collective violence. But an *ism*, “multiculturalism” appears to ideologize and polarize social relations. Likewise, global citizenship as an open and tolerant attitude that sees our earth as spiritually round too is not promoted by “cosmopolitanism” in an ideological sense.

e-IR: Now let us turn to the US-led “War on Terror” in the wake of terrorist attacks against the United States on 9/11, a controversial subject you have addressed in PEHR under the category of “Global realities: conflict and confrontation”. What were the implications of such a systematic campaign, particularly for international (humanitarian) law? Did it ameliorate or exacerbate the human rights situation worldwide? And if the latter, what do you think should have been done instead?

Prof. Fortman: The term “war on terror” was a misnomer introduced by the Bush Administration. It served to justify a further worsening of American exceptionalism by extending the interpretation of “pre-emptive” response to threats to US national security to preventive military action in the sense that a threat would justify such response even if it were not imminent, immediate and impossible to eliminate by any other means. With the Iraq invasion, the USA drastically detached itself from the international legal order. It was only through Obama’s election, on a platform opposing preventive military action (in the sense of eliminating a perceived enemy’s capacity to develop any military threats at all), that this global superpower could be somewhat realigned into the realm of international law. This was the Nobel Committee’s consideration for granting him the Peace Prize in 2008, no matter how we might look at that in hindsight today.

e-IR: You have written extensively on political economy and managed well, as the success story of PEHR demonstrates, to develop an original political-economy approach to HR studies. With this in mind, I am just wondering how the enduring 2008 financial crisis can be viewed and articulated from the HR perspective. This may sound like an overwrought or even naïve enquiry, but what went wrong in the first place Bas, and equally importantly, what was wrong, if anything, with the Western states’ response to the crisis?

Prof. Fortman: Like earlier financial crises this one, too, coincides with long and painful recessions, and hence affects people’s entitlement positions all over the world. But first a few words on the background. Strikingly – as I recalled in *God and the Goods* (1998) – some sixty years ago Georges Ripert spoke of the “revolutionary rise” in movable wealth in France: from a total capital of 9 billion francs in 1850 to 115 billion in 1912, that is, a 1200 percent increase in 62 years. In the eighties and nineties of the last century we witnessed a second “financial revolution”: from real trade in actual currencies and securities to electronic claims on future values. When this concurred with an excessive increase of bank credit to private households, a loss of confidence in bank debts was to be expected, and then, as suddenly as an anticipated death, it was there.

What we have witnessed during those four years since it happened is a strong resistance by the rich and powerful to maintain their financial entitlement positions at the cost of those of the weak and vulnerable. Greece is a notorious example here; if only the superrich had not withdrawn their money from national bank accounts, the country’s financial situation would have stayed manageable. What these people risk by the frightful manifestations of their greed is a seriously unstable polity and an economy in shambles. Indeed, R. H. Tawney’s *The Acquisitive Society* comes back to mind here; there lies the deeper layer of the current crisis.

For the international venture for the realization of human rights, the implication is that we cannot confine ourselves to country reports and (in future) individual complaints to the UN Committee on Economic, Social and Cultural Rights. Violation of these rights is systemic; hence the political economy of entitlement systems cannot be escaped. Yet, analysis is one thing, effective response another. The Occupy Movement put the economic order on the agenda once

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again; now at all sorts of levels – international, regional, national and local – the challenge is to press for equitable policies. In the struggle to protect basic entitlement positions in a time of economic and financial crisis, concrete results were booked in Spain where the banks had to accept a moratorium on the expulsion of debtors from their homes. Accepting financial losses through conversion of default mortgage loans into tenancy contracts is now being preferred to highly contested processes of repossession.

The catchwords towards long-term reform are confidence and trust. There is a huge problem in our world today in the normative quality of leadership, whether political or economic. New confidence-building depends on renewed institutional environments, including vital reform in mentality and attitude at all levels, beginning at that of leadership. How to escape from the current spiral of greed and thrift? That is the question.

e-IR: What windows or prospects do you think such transnational developments as the Arab Spring in the Middle East and North Africa have opened up for the realization of human rights globally? What risks or perils may be envisaged for the HR cause in the new environment?

Prof. Fortman: Opening up is, indeed, what these movements did; in the case of the Arab Spring, it was the political order that was brought on the agenda. In terms of human rights realization, I call this *upstream* action. Transition from tyranny to a functioning democratic political order is to be seen as a major contextual requirement for structural implementation of human rights. Highly important at the international level is the operationalization of the responsibility to protect (R2P). Yet, that has its severe limitations as became obvious in the case of Syria. Rather worrying in such processes of regime change – inevitable as they are – are the effects on arms sales and new developments in “smart” weaponry. ARMS RACE=THEFT FROM THE POOR was the slogan with which we demonstrated at the time of the Cold War.

e-IR: Let me grasp the opportunity here and float a perhaps counterintuitive and audacious idea, which emanates from the frustrating stalemate over the humanitarian crisis in Syria as you touched upon. In spite of overwhelming evidence and largely substantiated reports on gross violations of human rights and international humanitarian law by the Assad regime (Amnesty International, Human Rights Watch, UN bodies etc.), no legal action has been taken against him and his cohort, which appears to be mostly due to the political polarization and practical paralysis of the UN Security Council (UNSC). Please correct me if I'm wrong Bas. One might argue that tackling such challenges would require HR to struggle for establishing a *sovereignty of its own* advocated by the global civil society and community of human rights activists and represented in practice by, say, Amnesty International, or a consortium of independent HR organizations whose genuine commitment to the venture has been proven (though appears idealistic as these NGOs certainly lack executive or hard power by themselves). After all, the sorry case of Syria illustrates beyond the faintest doubt that the fate of human rights cannot simply be left to a body of five powers that are so strongly driven by their diverging national interests and competing ideologies. How do you see the issue? Where should we look for the solution?

Prof. Fortman: I fully concur, May! But the problem with the human rights commitment, tactics and tools of our global civil society is that these are also tuned to the international level of states and their human rights “peer reviews”. So there has to be a major change in focus from within, too. Here I would refer your readers on this splendid website to my article “Political Economy of Human Rights: The Quest for Relevance and Realization”.

e-IR: Finally, in a recent opinion piece titled “Are We Still Committed to Human Rights for All?”, Paul Seils, Vice-President of the International Centre for Transitional Justice, offers a critical and reflective account of how the concept of human rights is abused by states for political gains today. Within such a context, I would particularly like to know how you find yourself reacting, as an HR theorist but also an activist, when a recognized *democracy* instrumentalizes human rights or exhibits a double-standard treatment of it? After all, you do not expect a dictatorship much to respect human rights.

Prof. Fortman: Instrumentalization of human rights and acquiescence to double standards seriously undermine the legitimacy of the whole international human rights venture. The first is a matter of contorted foreign policy on the part of states; here I should like to refer to another article on your website “Human Rights in the Context of International

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Relations". There I discuss "defensive" and "offensive" human rights as two distinct means of distorting the whole mission. Double standards have to do with some fundamental flaws in the organization of the United Nations as such, including veto-power in crucial decision-making. These deficiencies constitute major reasons why we would have to invest much more in "upstream human rights", with a primary focus on context. Of course we cannot just expect dictatorships to benevolently respect and protect inclusive human dignity. It is global civil society in the first place from which we might expect the necessary reassessment of the human rights movement's commitment, tactics and tools. Inevitably, then, in order to play a more meaningful part in our world today, the mission has to become more confrontational in its interactions with the powers that be.

e-IR: Thank you very much indeed for your time and explanations, and I hope 2013 will be a better year globally for HR than 2012 was.

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