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Editorial

One year has elapsed since the founding of the ASIL Interest Group on the Theory of International Law. Many inquiries and suggestions have come to me as Editor from many quarters. The brief communications that I have had with the group's members indicate a widespread enthusiasm for our informal publication which confirms the members' readiness for something along the lines established by our group. There is much energy waiting to be released and directed into innovative theoretical work. We hope to maintain the high level of active involvement demonstrated during this last year, so that the results may continue to surprise us, exceeding the initial expectations.

As indicated by the group's Chair, International Legal Theory wishes to provide a forum for the experimentation of innovative perspectives, with an opportunity for all members to offer some feedback and constructive criticisms on the work of others, without the burden of writing a full-scale review article. Indeed, it is often difficult to venture into novel constructive thinking in International law, without a prior opportunity to experiment with ideas and new theoretical constructs with colleagues on an informal and candid basis. As obvious from the format and content of our first issues, freedom of thought will rule in the columns of International Legal Theory, and open discussion of the material presented in its pages will always be welcome. Our field being at the interface of several disciplines, the submission of interdisciplinary work from scholars of related fields is strongly encouraged. As for the past, members of the Interest Group are invited to send their contributions to the Editor, at George Mason University, School of Law, Arlington, Virginia, or to the Group's Chair at the Arias Foundation, San Jose, Costa Rica. The invitation is open to each one of you to submit comments or main discussion pieces to future issues of International Legal Theory.

Faithful to the objectives set forth in our inaugural issue, we now present a short theoretical essay by Professor Richard Falk, who is the Albert G. Milbank Professor of International Law and Practice at Princeton University, followed by a wide range of reviews and comments offered by other members of the legal and academic communities that have adhered to our forum. They all provide valuable insights on this important topical debate.

The Editor

Letter from the Chair: Joaquin Tacsan

I am pleased to present the second issue of the bulletin of the Interest Group on International Legal Theory. This issue follows the same format as the first one. Our Group does not discuss theory simply for the sake of theorizing, but to make contributions towards a better understanding of the ways in which international law plays a role in international affairs, and thus help fill the gap in discussion and dialogue that existed during the Cold War, when the theoretical issues surrounding international law were scarcely touched.

Each bulletin of the Interest Group on International Legal Theory will contain a focal piece written by a prominent theorist on international law. Members of the Group are invited to send their comments in order to open up dialogue. However, members are also very much encouraged to submit their own work as main discussion pieces. Eventually, we hope to publish a compilation of these bulletins in a series of volumes to be used for educational purposes. This goal is only possible if all of us contribute to the Group's discussions.

In this issue, we are proud to include an article by Professor Richard Falk. As one of the most well-known theorists of international law, Dr. Falk needs no introduction. He is one of the founders of the World Order Models Project, as well as a member of that organization's Board. As an advocate for world order goals to structure the

transition to a global society, he believes that international law and lawyers can play a significant and helpful role in this period of transition if they support these world order goals and are sensitive to processes of change. The following article by Dr. Richard Falk is entitled "*The World Order Between Interstate Law and the Law of Humanity: The Role of Civil Society Institutions*."

In his article, Falk presents the idea that world order falls somewhere between interstate law and the law of humanity, while proposing that the future-oriented law of humanity is what must now emerge from the social movements and voluntary associations of civil society. The law of humanity can only be strengthened by transnational social forces, or "globalization-from-below." Falk argues that the existing interstate laws provide civil society with a means to achieve political influence - that in essence, the law of humanity already exists within interstate law, but must be brought forth by agents of civil society. In addition, independent initiatives must be undertaken to further promote the law of humanity. Finally, he concludes with the observation that the U.N. and the global media are crucial organs through which agents of civil society should conduct their efforts. The Interest Group on International Legal Theory welcomes any of your comments or ideas. We look forward to the next issue of the bulletin, to which Professor Oscar Schachter of Columbia University has been asked to submit a work. We hope to gain a higher level of membership by encouraging interested individuals to join our discussions. Although the annual meeting at the Waldorf-Astoria was not well attended, those who came demonstrated their commitment to theoretical issues. I look forward to all of your contributions and to a successful forum for the discussion of international legal theory.

The World Order Between Interstate Law and the Law of Humanity: The Role of Civil Society Institutions

This paper was presented at the Foundation Opera Canipana del Caduti (International University of Peoples' Institutions for Peace), Rovereto, Italy, July 29, 199-3.

The notion of world order is situated between interstate law and the law of humanity, although not necessarily at all in the middle. The interstate is presumably the past, a time when clearly the interstate dimension dominated our understanding of international law, but not the more distant past when states in the modern sense didn't exist. Perhaps, then, we should associate the period of the interstate with "the modern," and the law of humanity with "the postmodern."

The law of humanity is associated with the future, it is more a matter of potentiality than of history or experience. It is prefigured, and to some extent embodied, in the substance and theory of the international law of human rights. Its formal reality has been established through the primary agency of states, and qualifies as a domain of interstate law. But the historical potency of the international law of human rights is predominantly a consequence of its implementation through the agency of civil society.

This agency of civil society needs to be understood in two senses. Firstly, in the transnational nongovernmental sense, typified by Amnesty International and the various regional watch groups, that is, voluntary associations of citizens using information about abusive behavior on the part of states, exerting influence to obtain compliance, and failing this, to disclose information about abuses that challenges the legitimacy of the accused state. Here, the preoccupation is with the well-being of individuals, and as such, satisfies one aspect of the law of humanity (in contrast, interstate law is preoccupied with the interests of the state as promoted by its official representatives).

There is a second dimension of the agency of civil society in relation to the law of humanity: it is the activation of peoples to pursue their emancipation from oppressive structures of governance, social movements legitimated by their aspirations being embodied in interstate law. The movements of emancipation in Eastern Europe, as for instance, Solidarity in Poland and Charter 77 in Czechoslovakia, that were sustained, in part, by the realization that their most fundamental grievances had already been validated by the state that was offering such blatant resistance. In this kind of setting, the law of humanity is buried in the forms of interstate law, but must be exhumed, and made operative, by the militancy of civil society.

1. Conceptualizing the Contemporary Failures of World Order

World order, then, is a composite reality, reflecting the persisting influence of states on its normative order, yet also exhibiting the effects of voluntary associations and social movements that are motivated by the law of humanity, and situated in civil society. The global spread of political democracy, with its roots in constitutionalism, makes those

persons within the territorial space controlled by the sovereign state increasingly aware of their political, moral, and legal option to appeal to broader communities in the event of encroachment on their basic human rights.

The character of the law of humanity is not self-evident. It could mean law that is enacted by and for the peoples of the world, as distinct from the elites that act in lawmaking settings on behalf of states. Such a usage would correspond with "the rights of peoples," the innovation associated with the efforts of the radical Italian parliamentarian, Lelio Basso, leading to the establishment in the mid-1970s of the Permanent Peoples Tribunal with its site in Rome. Such an innovation is itself explicitly conceived to be a counter-institution intended to expose the abuses of states and the deficiencies of international institutions, and to provide civil society with its own autonomous voice. The formalization of this voice by way of legal instruments (for instance, The Algiers Declaration on the Rights of Peoples (1976)) and acts (for instance, the various decisions of the Permanent Peoples Tribunal) constitutes the substance of the law of humanity so conceived. In this regard, then, states are not regarded as appropriate agents for the development of the law of humanity, and it depends on civil society to establish new forms for law-creation and law-application.

It is also necessary to distinguish the law of humanity from the phenomenon of globalization, although there are some connections that will be noted as well. Interstate law presupposed the autonomy of the territorial state, although such a presupposition was always a legal fiction given the hierarchical reality of geopolitics. During most of the period of the ascendancy of the state, the largest part of humanity was excluded from its protective structures associated for convenience sake with the Peace of Westphalia (1648), being subordinated within the frame of one or another variety of imperial geopolitics. That is, the interstate system was primarily a regional system centered in Europe, and only because the region projected its power globally did the illusion arise of a world system. Ironically, it is only in recent decades, with the collapse of colonialism, that interstate law was an encompassing global reality. The irony arises because at this historical point of climax for interstate law as a framework of formal membership, the realities of interdependence and integration undermine the presupposition of autonomy, rendering partially obsolete the claims of interstate law.

There is a certain confusion that follows from distinguishing the law of humanity as 'the other' in relation to interstate law. During the modern period the ideology of the state included the claim that such a system of distinct sovereignties upheld the well-being of humanity, that interstate law was the best vehicle by which to achieve the objectives of the law of humanity. In this regard, interstate law, with its positivist disposition was seen as an improvement upon the naturalist approach that rested on a vague foundation of universalism that didn't correspond with the specific interests, cultural diversities, and concrete values of separate peoples organized on the basis of distinct national identities. That is, the state reconciled the particular with the general in a satisfactory manner so long as territoriality approximated economic, social, political, and cultural reality. Of course, here too, adequacy depended on fiction as illustrated by the terminology of nation-state, a juristic conception of nationality that often obscured the presence within state boundaries of several ethnic groups with separate, often antagonistic, psycho-political conceptions of national identity. The state-fracturing impact of the right of self-determination when extended to "peoples" (as in Article 1 of the Human Rights Covenants and in the post-1989 practice relating to the former Yugoslavia and Soviet Union) has exploded once and for all the misleading pretension of designating states as "nation-states."

But, arguably, the erosion of territoriality has undermined the major premise of interstate law and its derivative claim to operate as the guardian of human well-being. This erosion can be understood from different angles: matters of vulnerability-the state has lost the capacity to uphold security in light of nuclear weaponry and long-range delivery systems; matters of environmental protection-the state cannot safeguard its territory from the adverse effects of extra-territorial behavior nor can it by its own efforts maintain the global commons (oceans, atmosphere); matters of economic viability-the state, even those that are well-endowed and large, can no longer provide an adequate framework for economic activity, and is gradually being superseded by an array of international regimes and by the regionalization and globalization of capital markets and corporate and banking organization. In these three types of erosion, the well-being of humanity requires law to be operative on a regional, or global, scale that corresponds to the scope of operations. It is here, however, that interstate realities persist, and the law of humanity is mainly in the dreaming (or pure aspirational phase). Interstate law provides what control there is in relation to war/ peace and environmental issues, and except for the European Community, with respect to transnational economic activity. Thus, the inability of interstate law to rise to these challenges and the failure of the law of humanity to take effective shape is one way to express a critical view of world order; the deep structural quality of these criticisms also helps understand why even such a momentous historical occasion as the ending of the Cold War and the reuniting of Europe can have only a superficial relevance to an inquiry into prospects for the emergence of the law of humanity in an effective form.

There is, in fact, an historically aggravating circumstance associated with the end of the Cold War, the seeming disappearance of strategic and ideological conflict, and the focus upon world economic policy. Global security frameworks, based on interstate activities, had been mainly devoted to the containment of strong states; international law provided an underpinning, prohibiting recourse to aggression and validating collective security arrangements either by means of alliances or international institutions. There were many problems, including the difficulty of differentiating claims of self-defense from those of aggression and the unwillingness of dominant states to forego interventionary diplomacy, but the interstate undertaking was coherent, and since World War 11 quite successful in the North, but it depended on the prevention of projections of military force across acknowledged international boundaries (the Gulf War). With the new situation of international relations there arises a preoccupation with the weak state, namely, the implosive realities of states that cannot maintain their own internal order in relation to either interventionary forces within their immediate region or secessionist tendencies of distinct ethnic groups within their larger national population. The ordeal of Bosnia (or Somalia) is illustrative, with acute and prolonged human suffering arising from systematic criminality or from total breakdown of governmental capacity. Interstate legal forms can validate "humanitarian intervention" under either statist or international institutional auspices, but the challenge of implementation can be overwhelming, especially in those cases where no sufficient strategic interest exists to provide the requisite political will to act effectively or where no geopolitical consensus among leading states can be formed. In the process, despair and anger emerges, as we are aware of the inability and unwillingness to protect victims of abuse. Often only civil society initiatives are helpful in these settings, and then in ways that do not address the underlying conflict, as by providing humanitarian relief on a daily basis and seeking to identify and strengthen reconciling and democratically oriented social forces. Helsinki Citizens Association has been playing an unheralded, but genuine, role in trying to build civil society coalitions that continue to seek alternatives to the violent polarization of Bosnian political space in terms of ethnic and religious enmity.

To some small extent environmentalism, as an expression of transnational civil society, has brought to bear the perspectives of humanity, encouraging and influencing states to establish regimes capable of protecting the global commons. Such transnational influence, as exerted by the Cousteau Society and Greenpeace and a coalition of other transnational associations, is responsible for safeguarding Antarctica from mining and developmental activities. The modality of the counter-conference, as evident at the Earth Summit held under UN auspices in Rio during June of 1992, also has been challenging interstate complacency about environmental issues from the perspectives of the urgencies of humanity, but without any capacity to directly or indirectly enact appropriate protective law in relation to the dissemination of toxic substances, global warming, ozone depletion. Civil society performs a role as critic of interstate law, but is incapable at this stage of providing a real alternative. Such limitations on the influence of civil society are even more apparent in relation to war/peace issues and to transnational. economic activity. Note that the argument from a world order perspective operates on two levels: the eroding capacities of interstate law to provide effective action; the failure of a more responsive law of humanity to evolve, and the inability of transnational social forces expressive of civil society to fill the normative vacuum. I would depict the post-Cold War world order crisis by reference to this combination of circumstances.

2. Strengthening the Law of Humanity: An Urgent Challenge to an Emergent Global Civil Society

There are strong market-driven tendencies to constitute an effective system of global dimensions that operates to promote world trade and investment, and that protects the flows of strategic resources from South to North and that guards the North from threats mounted by the South. There are a number of policy arenas in which this phenomenon of globalization-from-above can be observed: the responses to threats against strategic oil reserves in the Middle East, the efforts to expand the GATT framework, the coercive implementation of the nuclear non-proliferation regime, the containment of South-North migration and refugee flows, the criminalization of "terrorist" violence of a revolutionary character and discretionary status of counter-revolutionary terrorism, patterns of interventionary diplomacy that flow only North-to-South, the "reforming" of the United Nations by concentrating authority in the Security Council and in the IMF/World Bank (while downgrading Southern priorities: eliminating the UN Centre on Transnational Corporations, marginalizing the General Assembly, UNCTAD, UNDP, UNESCO), the reliance on the G-7 summits to set world economic policy despite the non-representation of 80% of the world population. The law implications of globalization-from-above would tend to supplant interstate law with a species of global law, but one at odds in most respects with "the law of humanity."

Transnational social forces provide the only vehicle for the promotion of the law of humanity, a normative focus that is animated by humane sustainable development for all peoples, North and South, and seeks to structure such commitments by way of humane geogovernance (that is, governance protective of the earth and its peoples that is democratically constituted, both in relation to participation and accountability, and that is responsive to the needs of the poorest 20% and of those most vulnerable, e.g. indigenous peoples). To

suggest the political dynamics associated with these conceptions, I propose the terminology of "globalization-from-below" to identify these transnational democratic forces, and their implicit dedication to the creation of a global civil society that is an alternative scenario of the future to that of the global political economy being shaped by transnational market forces. The hopes of humanity depend, in my view, upon the capacities of globalization- from-below to challenge effectively the prevailing dominance of globalization-from above in a series of key arenas that can be identified in very general terms as the UN (and other international institutions and regimes), the media, and the orientation of states. Each of these arenas is complex, and needs to be deconstructed in several stages to identify the actual sites and stakes of political struggle. My argument in this essay is that law provides these agents of global civil society with one instrument of potential influence, and that the grounding of law so conceived is what is meant by "the law of humanity."

(I). The Law of Humanity Already Contained in Interstate Law, but not yet Actualized. There exists in the corpus of interstate law latent recognition of important ingredients of the law of humanity, making the latter function as a normative catalyst, and not necessarily as an innovative and idealistic alternative. This generally unappreciated potentiality of interstate law can be illustrated by brief reference to four instances.

(i) Articles 25 and 28 of the Universal Declaration of Human Rights. There exists agreement among international law specialists that the Universal Declaration has been incorporated into positive international law, but many provisions are simply ignored, including by human rights organizations. Article 25 confers the right upon every person to an adequate standard of living, while Article 28 confers an even more far reaching right: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." Even transnational democratic social forces that adhere to the mandate of global civil society have been silent about such legally binding promises by states. It seems desirable to break the silence, to speculate as to the shape of such "a social and international order" and to insist that market forces be held accountable for upholding such standards within their sphere of operations and that states undertake to fulfill such legal expectations. That is, there already exists in interstate law lip service to the basic ethical demands of the law of humanity (treating each person on earth as a sacred subject), making the implementation of interstate law in this respect equivalent to the enactment of the law of humanity.

(ii) Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons. No international agreement has been given a higher priority in recent years than the NPT, especially by the geopolitical leaders of the state system. Article VI commits existing nuclear weapons states "to pursue negotiations in good faith" to terminate the nuclear arms race, to achieve nuclear disarmament, and most dramatically of all, to conclude "a treaty on general and complete disarmament under strict and effective international control." It is obvious that this part of the nonproliferation bargain has been ignored by the nuclear weapons states. Is it not time, especially with the end of bipolarity, for the countries of the South to insist on the implementation of Article VI as part of a reciprocal arrangement to forego nuclear weaponry that alone accords with international justice? Should not peace groups that participate in transnational activities organize a counter conference to coincide with the 1995 NPT review conference to put forward the case for taking the legal claims of Article VI seriously?

(iii) The Nuremberg Principles. The idea of holding leaders accountable for crimes of state was put into practice after World War 11 in the form of prosecutions of German and Japanese officials at Nuremberg and Tokyo; subsequent trials also held accountable all those in society that carried out the blatantly criminal policies of these states, including corporate officers and medical professionals. The Nuremberg Promise was to treat this experience as the first step in the development of an international law of personal responsibility that would bind all countries in the future, and not be applied only to a defeated power. This promise was given legal credibility by being adopted in the binding form of The Nuremberg Principles, first by General Assembly Resolution 95[11 in 1946, and then in 1950 by authoritative formulation by the International Law Commission. But given the belligerent practices of all of the victorious powers in World War 11 since 1945, it is reasonable to conclude that the Nuremberg Promise has been broken, although there have been recent moves under UN auspices to revive a Nuremberg process of some kind in relation to Saddam Hussein and to those in the former Yugoslavia associated with "ethnic cleansing" and the systematic rape of Bosnian women. The forces of civil society have not been oblivious to the relevance of this Nuremberg experience. It was in the political consciousness of Daniel Ellsberg who explains that a reading of the Nuremberg Judgment convinced him of his personal obligation to release The Pentagon Papers during the latter stages of the Vietnam War, and more recently, of Mordacai Vanunu, the Israeli nuclear engineer, who released "secret" information about Israel's nuclear weapons program, and has been convicted in Israeli military courts of "treason," and is being currently held in jail. Both Ellsberg and Vanunu have been acknowledged by global civil society in the form of awards of the 'alternative" Nobel Peace Prize, the Right Livelihood Award. There have also been a series of "Nuremberg Actions," violations of domestic law to highlight crimin~l preparations by states for aggressive war as by the

development and deployment of such allegedly first-strike nuclear weapons systems as the Trident Submarine and the D-5 warhead.

(iv) The Preamble of the UN Charter (as well as the contents of Articles 1 and 2 of the Charter). The celebrated opening words of the Preamble "to save succeeding generations from the scourge of war" represent a basic commitment to find other ways to resolve conflict than through reliance on warfare, yet UN practice, especially recently, as in the Gulf War and Somalia, discloses a disposition by states to endow the UN with a warmaking role, to militarize the approach to security within the framework of the UN, and to downgrade, if not eliminate, the search for justice in the relations of states and respect for the dignity of each person in economic and social relationships. Here again unexploited normative opportunities exist for civil society initiatives, bringing to fruition the empty words of obligation accepted years ago by representatives of the leading states, and never repudiated or even questioned.

(II). Additional Civil Society Initiatives Needed to Realize the Law Humanity. Realization of the law of humanity requires some independent visionary initiatives, especially to satisfy certain structural needs of world order given the scale and scope of international activities. This theme needs detailed discussion, and can only be introduced here in a preliminary fashion. An emphasis on geogovernance is beginning to be acknowledged in establishment circles that are primarily tied to the interstate world: for instance, in the call of the Stockholm Initiative of 22 April 1991 for the constitutional renewal of the United Nations from the perspective of global governance; by the 1992 report of the UN Secretary-General, Boutros Boutros-Ghali, An Agenda for Peace, with its emphasis on a UN collective security process that is more independent of geopolitics than at present and on a strengthening of capabilities for preventive diplomacy that seem more feasible than efforts to resolve conflict after fundamental breakdowns in order have occurred; the proposal of Brian Urquhart to establish a UN Volunteer Force (outlined in June 10, 1993 issue of the NY Review of Books, with further commentary in the July 15, 1993 issue) that could engage in peacekeeping operations (under the "exclusive authority" of the Security Council and "the day-to-day direction of the Secretary-General"), without present degrees of dependence on UN member states, especially the leading ones.

To promote the law of humanity, geo-governance must become a more organic part of the outlook of transnational social forces. There are two circles of emphasis, both associated with the interplay of functional or practical argumentation on behalf of global arrangements with normative argumentation on behalf of a humanely oriented sustainability.

There exists a strong distinct case for geogovernance as adapted to the specific realities of environmental protection and of global market operations. The prospects for voluntary adaptation of consumptive patterns and of technological choices in a manner that locates the primary financial burden in the North depends on having a much stronger institutional capability to set and implement environmental standards for the states and for the global market. Such a possibility could not even be put on the agenda of the 1992 Earth Summit as states and market forces resisted such moves in the direction of environmental geogovernance. Only a concerted demonstration of commitment and need as part of the agenda of globalization-from-below could hope to fashion the interstate political will to establish an equitable, yet effective, form of environmental geogovernance. Legal specialists, serving the cause of the law of humanity, need to work out the institutional forms in helpful detail so that the process of negotiation can be encouraged on the basis of specific plans.

The regulation of the global market is even more difficult to achieve without the successful political mobilization and intervention by civil society forces. As matters now stand, the G-7 states are committed to sustaining the regulatory vacuum on the global level. The abolition of the UN Centre on Transnational Corporations was expressive of this anti-regulatory disposition. Civil society is beginning to awaken to its responsibilities on these matters. The Permanent Peoples Tribunal at its Berlin session of 1988 investigated charges that IMF Structural Adjustment Programs were encroaching on the rights of the peoples in the Third World, and the International Peoples Tribunal to Judge G-7 held in Tokyo just prior to the G-7 summit of July 1993 issued a comprehensive indictment of the manner in which market forces currently operate, including the continuing practice of shielding money stolen from peoples by dictatorial leaders in secret overseas bank accounts and of allowing banks and corporations to choose tax and regulation havens in places such as the Cayman Islands and the Bahamas. At present, civil society forces need mainly to expose the abuses arising from the regulatory vacuum and to resist globalizing initiatives (NAFTA, GATT) that neglect the well-being of the most vulnerable social sectors. The wider task of filling the regulatory vacuum will be a crucial challenge to champions of an emerging law of humanity.

The other set of structural needs involves the redesign of international institutions, especially the United Nations, so as to give greater weight to global civil society perspectives. Again, this is too complex a matter to be discussed here in appropriate detail. What is needed, to put it briefly, is the weakening of geopolitical and market leverage on all phases of UN activities, with mechanisms for greater participation by both countries in the South and by transnational social forces committed to the promotion of human rights and democratization.

Reform of the Security Council has received attention recently. There are statist and market pressures to give the two financial superpowers, Germany and Japan, permanent seats in the Security Council, and some reluctant willingness to give some populous states in the South - India, Brazil, Nigeria are most often mentioned - second-class permanent membership (presence, but without a veto) as part of a statist bargain. The orientation of global civil society would go further, insisting on setting aside a permanent seat for "a moral superpower" (as designated by a panel of Nobel Peace Prize winners), another for a representative of the most economically deprived states (as determined by reference to UNDP indices), a third for a representative of global civil society (as selected by a panel of alternative Nobel Peace Prize winners), and a fourth to represent the world assembly of indigenous peoples.

Other steps of structural reform are needed as well: reasserting the role of the General Assembly; establishing independent sources of UN revenues, possibly by imposing a transaction tax on international financial operations or on the taking of resources from the global commons; generalizing the commitment of states to accept the compulsory jurisdiction of the World Court and increasing the authority and binding effect of "Advisory Opinions." There are many more such initiatives that should be promoted by advocates of the law of humanity.

Illustrative of more specific legally delimited initiatives are also important at this stage: The World Court Project that is being promoted by transnational groups to persuade the General Assembly to request an Advisory Opinion as to the status under international law of threats or uses of nuclear weaponry; a draft convention to monitor and eliminate the international arms trade that has been prepared by citizens associations composed of lawyers and is being promoted transnationally.

3. A Concluding Note: Realizing the Law of Humanity is a Complex, Multifaceted, Yet Indispensable Task.

The main promotional energy will have to come from civil society, although one goal of transnational politics is to make states, mainstream political parties, and global market forces more receptive to the claims and values being asserted by the advocates of the law of humanity. These advocates need to push their efforts strongly in two critical settings: the UN and the media. The UN is an ambiguous entity-, its Charter can be read as substantially embodying the law of humanity whereas much of the practice of the Organization embodies the most regressive features of interstate law, including deference to market forces, discretionary reliance on violence by geopolitical actors, and extreme selectivity and double standards in enforcement activity. Similarly, the media, especially in the atmosphere of democratic canons of legitimacy, is supposed to pursue truth without biasing its presentations for the sake of state or market, yet the reality of media operations (reinforced by patterns of ownership) is an acceptance of voluntary censorship to protect controversial statist undertakings from scrutiny and of refusal to delve deeply into most deformations wrought by the market in light of advertising revenues and managerial orientations of media executives. The UN and the global media are two sites of struggle or battlefields wherein the prospects of global civil society and the law of humanity are likely to be determined in the years ahead. The challenge is certainly formidable, but the opportunity is present to an historically unprecedented degree. Neither pessimism nor optimism can be validated given existing levels of knowledge, making the pursuit of the vision that corresponds to our values the most sensible course of action. And who is to say that its realization is less likely than the emancipation of Eastern Europe seemed a decade ago?!

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The Law of Humanity and the Law of Nations

The nineteenth-century doctrines known as "international law" developed out of the seventeenth-century *"jus gentium" and* eighteenth-century "law of nations." Now we see that twentieth-century scholars such as Richard Falk would like to speak of the "law of humanity". What is the value of such semantic shifts? Proponents of "international law" sought to promote a positivist doctrine, which would minimize the natural law elements of the

old law of nations to privilege the views of governments and states. Advocates of the "law of humanity" presumably seek to diminish the role of states in international law by eliminating "nations" as the basis of world institutions. I will argue that this would be a profound mistake, which confuses the purposes of law, nations, peoples and the state.

I. The Law of Nature

Early scholars of the law of nations such as Grotius, Pufendorf and Vattel applied the law of nature to nations to discover public obligations and rights among peoples. They began with the assumption that all persons are naturally free and equal. Free and equal persons properly relinquish certain rights and powers to states or nations in the interests of justice and the common good of all citizens. But nations, on this theory, remain in a state of nature with regard to each other. Without a legislature to define common justice they must look directly to natural law. So the best evidence of natural law is the general agreement of humanity, as reflected in the opinions and practices of all nations.

Notice that this made the law of nations in a sense a "law of humanity" from the very beginning. Early proponents of the *jus gentium* considered the best evidence of the law of nature and of nations to be human consensus, as reflected primarily through the laws and governments of states, acting on the international stage. But this reasoning contained two central fallacies. First, not all nations are states, at least in the original sense of the term. "Nation" implies common birth and first referred to prepolitical divisions within and around the (international) Roman empire. Nations can exist without political autonomy. Second, not all states speak for nations. Nearly all governments in Vattel's time were self-interested tyrannies. Grotius and Pufendorf suffered pointless persecution by the most enlightened rulers of Europe. The voice or consensus of humanity is not always best or most clearly expressed by the governments of the day.

This observation must be the basis of the claims for "civil society" advanced by proponents of the "law of humanity". Governments will not always seek justice and the common good. Governmental interests may diverge from those of the people. Governments often oppress the people, or disagree amongst themselves. "Civil society" offers an alternative source of authority. To accept with Grotius and Vattel that the best expression of international law is the deliberate voice of humanity still leaves the very difficult problem of where that voice may be heard.

II. Interstate Law

Critics of the existing world order stigmatize international law as mere "interstate law" among consenting tyrants. They have a point. During the nineteenth century positivist followers of Jeremy Bentham and John Austin denied the very idea of a "natural law", discernible in the law of nations, as "nonsense on stilts". They coined the phrase "international law" to reflect their view that law among nations exists (to the extent that it exists at all) only between nations, when nations agree upon firm laws by treaty or other positive act. This view gained legitimacy from Vattel's old conception of states as free and equal actors, able to proceed without external restraint in their own internal affairs, just as free individuals or citizens properly act without restraint in their own personal ("private") affairs. Liberals embraced a theory that protected each “nation" against outside interference by the others.

Here again, as in the old "law of nations," the positivists' new "international law" lost moral force to the extent that it relied on self-serving, tyrannical governments. Some positivists freely admitted the moral vacancy of law as they conceived it. Austin, for example, and latterly Hart claimed to gain in clarity what they lost in justice. To make law clear by limiting its sources means that there will be less law - no international law at all, according to Austin. But perhaps clarity prevents quarrels. There is a certain intuitive appeal to the claim that each "nation" should pursue self-determination without foreign interference in its own internal affairs.

The Charter of the United Nations reflects the mixed origins of international law (and the analogy between states and free persons) when it echoes the United States Declaration of Independence in declaring that "We the Peoples of the United Nations" propose to (1) maintain international peace and security; (2) respect the equal rights and self-determination of peoples; (3) encourage respect for human rights; and (4) harmonize the actions of nations to achieve these common ends. The actors here are "nations", but also self-determining states, committed to universal human rights. This commitment to rights (and its basis in nations) was reaffirmed in 1948 by the United Nations General Assembly's Universal Declaration of Human Rights.

III. Human Rights

Proponents of the "law of humanity" attribute its origins and early history to the international law of human rights. Certainly human rights have always put limits on the sovereignty of states. Even so great an

advocate of absolute government as jean Bodin admitted in his chapters on sovereignty that foreign states may intervene to protect oppressed peoples against despots. So it was nothing new, after the Second World War, when the United States imposed the concept of individual human rights onto post-war international instruments. But this tended to undermine the more extreme state-centered theories of international law. Why defer to unelected governments in determining the content of the rights of humanity?

The concept of rights grew up and flourished in tandem with the popular sovereignty. The earliest rights claimed in the modern world were political rights. First, peoples sought national self-determination against German or Spanish overlords, as in Switzerland and the Netherlands; then citizens sought internal self-determination against local monarchs, as in the English Commonwealth and Glorious Revolution; finally, developed the full and self-conscious union of popular sovereignty with determinate limits on government, in the United States Constitution. Political rights and protections guaranteed the integrity of public deliberation, which yielded as law the best available approximation of justice and the common good.

The collapse of the French revolution into Bonaparte's empire tended to discredit popular sovereignty in Europe. This led to Benjamin Constant's famous (false) distinction between the liberty of the moderns and the liberty of the ancients. Modern Europeans inevitably abuse political freedom, Constant argued, but still deserve personal liberty in their private affairs. So public and private liberty became separated, "liberalism" was born, and with it the question of how "liberty" and "justice" will be defined, in the absence of a valid democratic technique for discovering the deliberate consensus of the people.

IV. Civil Society

Some now offer "civil society" as the new authority for a "law of humanity". There exists no clear definition of what this might mean, but "civil society" seems to imply (to those who embrace it) an energized citizenry of the world, acting outside of normal governmental channels, to express the deliberate consensus of the people, while treating, as Richard Falk puts it, "each person on earth a sacred subject". Falk situates this general will in transnational non-governmental institutions such as Amnesty International, or internal social movements such as Solidarity in Poland, or Charter 77 in the former Czechoslovakia.

If the "law of humanity" is to mean a "law that is enacted by and for the peoples of the world" it cannot rest on such self-appointed tribunals as these, or the regional Watch groups, or Lelio Basso's Permanent Peoples Tribunals, or even the Algiers Declaration of the Rights of Peoples. Such groups do not speak for the peoples of the world any more than most governments do. States exist to create and apply laws. Groups that claim to do so are appropriating the attributes of states, and like states gain legitimacy only to the extent that they properly reflect the deliberate consensus of the peoples of the world ' or the region they presume to speak for.

Civil society, properly understood, is a precondition of national statehood, just as statehood is a precondition of civil society. Nations cannot fully express their deliberate consensus without the structures of a state. Justice and the common good cannot emerge outside the shared purpose of national institutions. Without guarantees of participation, free speech, and political checks and balances, "peoples" cannot enjoy the "self-determination" guaranteed by Article 1 of the Human Rights Covenant. "Peoples" only fully exist, and exercise self-determination, in the context of nation states.

V. Republicanism

I would like to be clear about the sort of civil society that I am endorsing with this argument. It is a republican society. By "republican" I mean a society committed to the common good, as discovered through public deliberation, under popular sovereignty structured to prevent domination by any single section of society. (See M. Sellers, *American Republicanisin,* Macmillan and NYU Press, 1994). The republican test of political legitimacy is service to the *res publica,* or common good of the people. (See also, Sellers *"Republican Liberty"* in Gabriel Moens and Suri Ratnapala (eds.), *The Jurisprudence of Liberty,* Butterworths, 1996). Immanuel Kant endorsed a federation of such republics as the best basis for a just law of nations. (Kant, Zurn ewigen Frieden, Knigsberg, 1796).

The republican argument for popular sovereignty runs as follows. People have different talents and life plans with differing perceptions of the common good. Private interests color human attitudes. Decent humility requires that citizens defer to a reasonable system for resolving conflicting perceptions of justice. Republicanism proposes that everyone is capable of perceiving moral truths. This makes popular sovereignty the best source of justice. If justice and the common good exist and all people have the capacity to perceive them, then the best route to a just society will be through public deliberation. To exclude any voices from the public debate would deprive society of their insights, and subject some private interests to the domination of others. (See Sellers, *Republican Impartiality,* in 11 Oxford -journal of Legal Studies 273, 1991.)

Republicanism proposes a technique for creating and enforcing laws generally, including the laws of humanity. The persons affected, properly constituted into a civil society, become a "people" for the purposes of the relevant legislation, creating their own common good and common sense of justice. When popular sovereignty does not prevail, voices are excluded, the population cannot exercise its deliberative function, and the "people" no longer exist for the purposes of legislation. *"Res publica res est populi"* , as Cicero first put it. The lessons of the French and American revolutions demonstrate that for the purposes of republican government "the people" must embrace all permanent inhabitants of the territory in question.

VI. Peoples

"Peoples" in customary international law are the citizens of existing states - no more, and no less. The history of decolonization, the Human Rights Covenants, and usage going back to Cicero demonstrate that the "populus" embraces all citizens. Modern republicanism and fundamental justice insist that the citizens should include all permanent residents of the state. So it is nonsense to maintain (as some self-styled "postmodern" scholars now do) that the Covenants' endorsement of self-determination for all "peoples" has "exploded once and for all" the notion of the nation-state. Such statements imply a confusion of "peoples", "minorities" and "nations". Stable peoples will evolve into nations. But not all minorities are peoples (or nations).

The driving force exploding the "modern" interstate system owes less to the definition of a "people" (which has not changed) than to the concept of "self-determination". What is it for a people to enjoy its "right" to self-determination, or "freely" to determine its "political status" or "economic, social and cultural development" pursuant to United Nations Covenants? Plain English, and the history of theconceptof self-determination going back to past Woodrow Wilson to the American and other modern revolutions imply republican popular sovereignty, with all the rights to fair procedure and universal suffrage that entails. To deny any segment or minority of the population basic rights and a voice in public affairs denies the people of that state their self-determination, in violation of accepted international law.

Self-determination has long been recognized to embrace both "internal" and "external" popular sovereignty. (See e.g. Antonio Cassese, *Political Self-Determination - Old concepts and New Developments* in Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law,* Alphen aan den Rijn, 1979.) It requires that the people be free both of external interference and internal usurpation of government. Contemporary advocates of "democratically constituted geogovernance" (the phrase is Richard Falk's) would do well to recognize the most democratic of all systems -democracy, as a useful vehicle for providing a "government representing the whole people belonging to the territory without distinction as to race, creed or color", pursuant to the United Nations General Assembly's 1970 "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations".

VII. Nations

Nations were essential to the law of nations, and public international law. But both categories (and particularly the latter) rested on a false equivalence between nations and states. The proposed new "law of humanity" would avoid this mistake, at the cost of disregarding nations altogether. Instead "postmodern" lawyers would frankly rely on the United Nations General Assembly, or on Nobel Peace Prize winners, or the International Court of justice, or the media, or on other undemocratic or non-democratic forces in the best position to resist globalizing initiatives such as GATT and NAFTA. But why resist globalization if not in aid of local autonomy and national independence? The phrase "law of humanity" implies universal values and a world republic. The rhetoric of its advocates implies local interests and national particularity.

Both are desirable. Universal human rights provide the basic framework for local self-determination, and self-determination leads to local self-expression. Differences in climates, cultures, customs and history divide humanity into natural units. War, poverty and pestilence may force migrations and social discontinuity. But stable societies develop national attributes from the cultural capital of their constituent minorities. Stable states become nations. A world nation or world republic would not be desirable even if it were possible because people properly savor the particularity of local circumstance. Nations benefit from the models they provide each other. World government would risk universal tyranny through the single usurpation of an ambitious despot or self-important Caesar. National independence protects reservoirs of justice when the rest of the world becomes foolish or unlucky.

States properly follow the boundaries of existing nations. So should nations grow out of existing states. Every people is a prospective nation. Given republican government each people will become a nation. But in the absence of self-determination, minorities suffer, or majorities suffer, and secession may provide the best basis for developing the sense of justice and pursuit of the common good that leads to national identity and

stable social institutions. As the United Nations General Assembly's 1970 Declaration on Friendly Relations strongly and correctly implies, the right to "territorial integrity" and "political unity" of "sovereign and independent states" depends on the representative nature of their governments, and absence of discrimination on the basis of race, creed, or color.

Conclusion

To speak of the "law of humanity" rather than the "law of nations" would be a mistake, because it understates the proper role of nations in human well-being. Speaking of "nations" rather than "states" usefully distinguishes "international" from "interstate" law. The law of nations is the law of humanity, discovered through the mediation of nations, or rather of peoples, treated as nations, even before they become so. The so-called "law of humanity" is not "post-modern" but pre-modern, harking back to when the Roman praetor's edict settled legal relations for all the Mediterranean world. The European Reformation put an end to such pretensions of universal authority. Worldwide " civil society" does not exist, should not exist, and has not existed since Alaric sacked Rome. The Secretary-General and United Nations General Assembly do not provide deserving replacements.

Let me repeat my argument. Natural law was the basis of the old "law of nations". The United Nations confirmed the preeminence of the new "international" law. But both recognized the central importance of fundamental human rights. Civil society develops within nations, not between them. Every state should be a republic. This would make its people a nation, and self-determining nations still provide the best foundation for public international law. Self-appointed "Watch" groups, "People's" tribunals, and scholarly gatherings may pontificate about the law of humanity. But they cannot discover it without the mediation of self-governing national republics, based on human rights, popular sovereignty, and respect for the rule of law.

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Some Reflections on the Law of Humanity

Had he his way, Richard Falk would reground international law on a principle of justice for the least. Now, according to Richard Falk, his way is history's way-and history inevitably has its way, But Falk's vision of universal justice is so grand that it is often difficult to make out the details in what he sees. Falk does not explain how the poor can arrive at effective representation in international legal fora. In the end, the deficiencies of Falk's argument are frustrating in proportion to the inspiration of his ideas.

1. What Will Work: How the Law of Humanity Will be Adjudicated

The largest problem with Falk's paper is that he never defines just what is encompassed by the law of humanity. Does he conceive of a universal law, amenable, with little variation to every society? And is the law of humanity concerned with property and commercial relations, or is it limited to rights and protection from bodily harm? Must cases always have national governments involved as a party, whether plaintiff or defendant? Or can individuals battle with one another in international courts. If states are parties, where is the authority in an international system to compel them to abide by a decision? Other questions Falk leaves unaddressed are commercial enterprises, such as corporations, persons under Falk's envisioned international law. Indeed, do organizations have standing in any way?

But the weakness of Falk's presentation of the "law of humanity" is not simply vagueness. A body of law that putatively serves everyone could well produce its own injustices. The accepted distribution of duty and fault in one culture may be foreign and fearsome to another. By speaking at the grossest level, Falkhides the difficulties of international jurisdiction over dissimilar societies. That environmental destruction is ultimately dangerous, or that genocide is rebarbative, may hardly be controversial. But what of ancient conflicts over a particular region of land? Should a high court in such disputes base its verdict on historical records or current settlement? That is, does the law of humanity honor a community's tradition over its current economic needs, or vice versa? And if the debate revolves around two different historical accounts, on whose history does the court rely?

Another pragmatic problem Falk skips over is: who should have the power to adjudicate, and how does this judicial body acquire its authority? Falk does not reveal how he would constitute a world court that could justly represent the interests of all people? He tries, rather, to circumvent the challenge of value diversity by maintaining that all people share a fundamental concept of human rights, and that we understand each of these rights similarly: "The global spread of democracy, with its roots in constitutionalism, makes those persons within

the territorial space controlled by the sovereign state increasingly aware of their political, moral, and legal option to appeal to broader communities in the event of encroachment on their basic human rights."

Falk thus also implies the obverse: the oppressed inhabitants of any one land can turn to foreign nations to find succor, hopeful that their straits will be abhorred by the peoples of every nation. He is sure that human rights are universal. More important, that all of us know this. How to get nations to submit themselves to the authority of the WCJ (or its like) is not the only quandary arising from Falk's argument. The judges who presently sit on the World Court come from the same background (economic class, education) as the plaintiffs who typically come before them. They are educated, materially middle class or better, and familiar with the political and commercial concerns of the cases they commonly adjudicate. Can such figures serve the entirety of humanity fairly? Imagine, for instance, a case where a Bedouin woman raises a charge against another nomadic community that they put a hex on her family's animals. Could she be confident that the justices would understand the circumstances of her complaint? A local religious conflict over the treatment of agricultural animals may simply be incomprehensible to "humanity's" court.

One solution to insure that the WCJ reflects more diverse human experience than is currently so is to require a broader cultural representation on the bench. However, expanding the range of human knowledge about human affairs brings with it proportionately greater disagreement about just what are just results in particular cases. Any judge who understands a plaintiff's or defendant's circumstances with greater sympathy and knowledge than his or her peers has a special burden. All the more is this true when the judge is the one person on the bench familiar with the social customs of the opposing parties. He or she has not only to decide the case correctly, but to educate the, other judges as to the justness of an outcome they might find alien.

Thus, a Moslem cleric familiar with village life in Afghanistan may view the proprieties of human behavior differently from a justice born of a bourgeois Parisian Catholic family. He will have to surmount his French colleague's mystification to achieve agreement among the justices. But imagine a case that involves behavior permissible in Islamic society but unacceptable in the West? Who knows the "law of humanity" then. When such a case came before the U.S. Supreme Court, the Court imposed American law as it understood the law. A court founded on the law of humanity is more limited because its province of responsibility is so vast.

Solving this problem through mere majority vote, of course, is no answer. Entire societies could lose out whenever the court goes against their judicial representative and sets an unwelcome precedent. Would-be reformers of the WCJ cannot hope to improve the fair handling of the law of humanity simply by increasing the distribution of judicial appointments.

Another dilemma for the law of, humanity is, who undertakes enforcement? The history of UN military ventures does not bode well for international policing. Unless the WCJ, or its successor, has its own effective police powers and police force, it must rely on the willingness of sovereign countries to back up its decisions. As the conflict in the Balkans shows, nations do not (yet) identify their interests with the needs of all humanity. It is for this same reason that nations have not bound themselves to a discreet, powerful international military with the mandate to cross the borders of any country.

The answer may lie in a multi-layered jurisdictional structure. Disputes involving specific cultural traditions could be heard first in local courts. If the losing party believes its case involved a law of humanity, and that this Ilaw was not well attended to by the court, the party may appeal for a binding opinion from a higher court commanding a more international jurisdiction. These courts, in turn, would give careful deference to lower court decisions if they find that the case actually did center on a culturally-particular issue. The entire arrangement would not form a mere legal hierarchy, for the lower courts would prevail in their special subject matters. The so-called "higher" international courts would only hear an appeal that falls within the realm of international human law. Conflicts in law-which would be inevitable in this system--could either be settled in deference to decisions by the higher courts, or they could go to a third body of specialized arbiters. Admittedly, this suggestion is not ideal, but it might come closer to a universal system of justice.

2. The Transformation: How the Law of Humanity Will Prevail

In his paper, Falk suggests that, all over, political systems are failing apart from within. He proclaims the decline of national sovereignty entails a transition to the law of humanity., Furthermore, Falk observes that international law, in its extant incarnation, cannot compensate for the weaknesses of national foreign relations. At one point, he states that, "the erosion of territoriality has undermined the major premise of interstate law and its derivative claim to operate as the guardian of human well-being."

Falk gives four main reasons for his prognostication. First, the collapse of colonialism and the ascension of international political and commercial cooperation are erasing the significance of regional borders. Second, nuclear weapons have the capacity to destroy entire societies, no matter how distant they may be. A central rationale for nationhood-the security of a particular, self-defined people-evaporates. Third, environmental damage is becoming increasingly severe and destruction of the natural environment is not confined by man-made national boundaries. just so, the solutions to pollution, soil erosion, loss of natural resources, must be addressed through international cooperation. Fourth, "the state, even those that are well-endowed and large, can no longer provide an adequate framework for economic activity, and is gradually being superseded by an array of international regimes and by the regionalization and globalization of capital markets and corporate and banking organizations."

What Falk fails to show is in just what way these international concerns effectively impel the deterioration of nations. The decline of colonialism is, after all, the result of nationalism, not the signal of its demise. At the end of World War 1, Woodrow Wilson promoted national self-determination alongside his vision of an international body for preserving peace. He expected, and encouraged, international cooperation to coincide with an explosion of national identity.

Second, nuclear weapons maybe capable of liquidating societies, but they are launched in the first place by rival states. The threat of nuclear war is a threat that comes from nations. Smaller organized societies, despite frequent public speculation, cannot easily produce nuclear devices. International institutions can, but they lack the particularistic interests that could drive nations to such hyperbolic aggression.

Third, environmental decline is indeed a transnational threat, but it is not clearly beyond the effective reach of individual nations, albeit most likely reacting to international pressure. Nor is it likely that countries unwilling to reduce the environmental destruction within their borders will be relieved of their sovereignty by international organizations any time soon. The horror of Chernobyl, and the acidic atmosphere covering the Warsaw Pact countries, did not precipitate war or even international sanctions. In fact, countries in the West, such as Germany, also continue to ruin their land and waters with impunity. International pressure has not threatened these culprit governments.

Finally, as to international economic activity, again, it is conducted not despite nations, but because of them. Admittedly, international trade and manufacturing might conceivably occur in a world without nations, but that is not the point here. What is important is that world-wide economic engagement is presently propelled by the states' self-interest.

Falk looks to the successful "militancy of civil society," exemplified by the (spotty) international clout of Amnesty International, and by Solidarity and Charter 77 in Eastern Europe to spell the decline of national governments and to implace the law of humanity on the throne of the world. This idea recurs throughout Falk's paper. We know, indeed, of similar examples outside Europe (such as the conquest of apartheid through combined organized and spontaneous protest, and the collapse of the Marcos government in the Philippines which resulted in good part from mass disapproval), but it remains hardly credible that such movements can ever displace the mountains of the prevailing structure of commercial and political interests that drive international relations.

Falk would have proposed a more helpful and practicable plan had he kept his goals more humble. After setting out what the law of humanity comprises, his next step should have been to suggest how elements of this law can be steadily incorporated into the existing international legal system. I do not disagree with Falk about the failure of the international legal arrangements to provide justice to the bulk of the world's people. However, an equally urgent mission of international judicial reform is to bring more justice sooner. Reform is not a lesser aim than revolution; in this instance, it is the more probable, and hence, the more humane course.

The solution may originate from below rather than from above. Civilian complainants must be able to have standing to bring their complaints before the WQJ. Success may depend on the persistence and visibility of groups advocating for the rights of those who have been unable to gain their day in World Court. Popular public pressure and repeated, publicized attempts to bring non-traditional cases before the WCJ may eventually open the Court to complaints arising under the law of humanity. International legal institutions might change as their dockets start to reflect the legal disputes of common society rather than the elite commercial and political classes. Pushing commoners' cases is a mission for which the civil organizations of which Falk writes are already well-suited. They can mobilize and bring cases of the poor and politically excluded before the WCJ.

But to be effective, international civil advocacy groups could not rely on the "latent ... important ingredients of the law of humanity" that appear in the Universal Declaration of Human Rights or the Nuremberg

Principles. The law of humanity Falk so blithely refers to does not yet exist as a defined or authoritative corpus. At best, we can begin to construct a code incorporating elements of different legal systems (secular and religious), such as rights and freedoms grounded in each individual, or social rules of tolerance. But much of the law of humanity will only be written through legal action itself. That is, civil groups representing victims of inimical national practices will need to start campaigns to bring their grievances before the WCJ, and world opinion. For instance, horrors such as the disappearances that occurred for years in all too many South American countries could be made international issues. The opinions cast by the WCJ on such human rights violations would have binding legal consequences for all nations in their relations to "criminal" governments.

Falk confidently depicts a future bound to come. Yet throughout, Falk also exhorts his audience to agree with him that we must change the way international law is done. Does the article, then, represent Falk's wager on the course of international law? Or is it his Jeremiad, calling for a more just legal system?

Neither characterization is complete. The essay is too impassioned to qualify as sober forecasting. It is also too unspecific to serve as a manifesto for clear reforms. FaIk's paper may really be a third category of writing. He has composed a thought experiment, meant to limber up the imaginations of his readers. If this is correct, then he has succeeded. No one would dismiss Falk's speculations, at least not without a twinge of unhappiness at one's own infertile cynicism. Thus even if we are not so sure that the dawn of the law of humanity is upon us, Falk has done wise work. He has outlined the limitations of an exclusive, parochial international legal system, and he has carved a far ways toward the answer.

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Richard Falk's Law of Humanity: The Public Choice Dimension

Despite the end of the Cold War, Richard Falk declares the crisis of world order remains, However, the contours of the crisis appear different. The struggle is no longer whether socialism will prevail over capitalism, but whether inequality between North and South, i.e., the industrial haves and the developing have-nots, will be redressed in the future, Professor Falk addresses this issue, among others, in his essay *"The World Order Between Interstate Law and the Law of Humanity: The Role of Civil Society Institutions. " Of* course, the problems associated with developing states are not new; rather, the North-South struggle was largely overshadowed by the East-West conflict during the Cold War.

Professor Falk takes a 'radical" view of the current struggle. This view sees the poverty of developing nations as the direct consequence of colonialism and its legacy, perpetuated through unequal trade; extraction of enormous profits by exchange of finished products for raw materials; and the usual criticism that the capitalist system is inherently exploitive. Any proposed solutions by the North simply serve its interests in maintaining the status quo. Professor Falk identifies other symptoms of the current crisis such as human rights abuses, armed conflict, and environmental degradation. The inherent nature of the statist system is incapable of solving these problems. As early as 1975, Professor Falk identified the need for "disciplined inquiry, for systematic comprehensiveness, and for continuous revision of our designs for the future." His search for a new system of world order has led to the identification of the law of humanity.

He begins his explication of the law of humanity by identifying the current crisis in world order. First, the "modern" interstate system of sovereign states and international law fails to remedy, among other things, global problems such as protecting global commons and human rights, reforming under representation in the U.N., reducing the vast inequalities in the world, and preventing armed conflict. Second, his solution to these alleged failures of the modern period, the law of humanity, has not evolved sufficiently to solve these urgent problems. And third, "civil society," comprised of transnational social forces, is unable at this juncture to fill its eventual role as the engine for evolution and creation of the law of humanity.

Having identified the problem, Falk calls for urgent action. First, he says that "transnational social forces [global civil society] provide the only vehicle for the promotion of the law of humanity." This global civil society must, in Falk's view, challenge the current regime of globalization-from- above, i.e., the current global economic system where international economic policy is dictated by the G-7 states to protect their market-driven interests such as flows of strategic resources from the South to North, expansion of GATT, and interventionary diplomacy. He calls the political dynamics of this challenge as "globalization-from below." More specifically, this alternative model is characterized by "humane geogovernance," presumably a system to reverse whatever negative outcomes are derived from the globalization-from-above model.

At bottom, Professor Falk is attempting to describe an evolutionary change in world order. He says that the "notion of world order is situated between interstate law and the law of humanity, although not necessarily in

the middle." Evolutionary change in world order and geopolitics is a constant. Falk has identified factors that are influencing this evolutionary process. Whether Falk envisions global civil society as replacing the current state-centrist system or as simply acting upon the state centrist system is unclear, but it can at least be said that the evolutionary change that Falk identifies sees a diminishing role and perhaps the eventual disappearance of the nation-state as it is defined today. He suggests that the United Nations, despite its current drawbacks, is one battleground for victory, so perhaps global government is the ultimate vision. His earlier scholarship suggests as much.

Transnational civil society consists of such nonterritorial transnational actors as Greenpeace and Amnesty International. Compared to some small microstates, these organizations exert, as Falk suggests, significant pressure on the behavior of states. Indeed, public choice theory suggests that well-focused interest groups can act collectively more effectively than larger unorganized groups with diverse interests. A discussion of public choice theory and its application to world order is made later. Nevertheless, it is fair to say that the "persisting influence of states on [world] normative order" will be the rule rather than the exception well into the next century. His earlier scholarship posited the hypothesis, which is still valid today, that "authority is related to power, and that in the world order system ... power is concentrated in a relatively small number of large national governments and closely affiliated corporate entities."

Falk also identifies areas of the law of humanity already contained in international law, including Articles 25 and 28 of the Universal Declaration of Human Rights, Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuremberg Principles, and the Preamble of the United Nations Charter. Falk asks global civil society to hold states accountable for upholding the ethical standards embodied in these legal promises. Such initiatives are not enough for realization of the law of humanity. Falk also sees need for "independent visionary initiatives" and provides as examples the Stockholm Initiative of 22 April 1991, the 1992 report by United Nations Secretary-General, *An Agenda for Peace,* and Brian Urquhart's proposal for a United Nations Volunteer Force.

Finally, Falk counsels the advocates of the law of humanity to press their claims in two critical battlefields: the United Nations and the media. The United Nations Charter supposedly embodies the law of humanity; however, its practices need reformation. The global media provides a source for raising awareness of law of humanity issues, even though it simultaneously censors controversial statist undertakings.

Public choice theory, which applies economic concepts to collective action problems and lawmaking, can add significantly to the current debate on the future of world order. (See Paul B. Stephan 111, *Public Choice Theory and International Economic Law, 10* Am. U. ' J. Int'l Law & Policy 745 (1995)). This is especially true since the world is no longer divided by two overarching ideological and monolithic interests, and where world politics consists of compromises among competing interests,

Only a very brief and simplistic exposition of public choice theory is possible here. Public choice can be understood by analyzing the problem of monopolies and cartels in economic theory. Positive analysis shows that if a few producers can organize and act collectively instead of competitively, they can derive benefits at the expense of consumers by generating monopoly rents (by restricting output and raising prices). Normatively, this suggests that government should step in to regulate and restrict monopolies. Now, consider the case where the government responds to producer interests and passes laws that, instead of benefiting consumers, benefits producers. Public choice theory suggests that lawmakers respond to the efforts of effective interest groups that are able to send their message more effectively than disorganized and diverse consumers. One arena, then, for well-developed interest groups to capture monopoly rents are lawmaking bodies.

This explains why the United Nations is largely ignored by developed states and not given any substantive lawmaking capacity. In the international setting, it is the wealthier industrialized states, the minority, that are able to out compete the majority of states in the marketplace of international law. This is consistent with Falk's notion of globalizationfrom-above. If we look at the primary sources of international law, treaties and custom, we realize that they are derived from the current and historic acts of industrialized states. A new group of states, former colonies, is entering the competition for international lawmaking at a relatively late date. How effective this "interest group" can organize itself and advance its interests remains to be seen.

Because of varying cultures (religions and customs) and varying degrees of economic development among so-called Third World states, advancement of their common interests remains difficult. Falk, of course, suggests that interventionary diplomacy is a large part of the problem. Whether the nongovernmental organizations identified by Falk, such as Greenpeace, truly represent the broader interests of humanity rather than narrow idiosyncratic interests is certainly a legitimate question also. Public choice theory suggests that such groups, contrary to what Falk believes, are mere rent-seekers.

Public choice theory also points to the importance of municipal law systems. To the extent national governments are free to change international policies based upon the influence of well-organized national interest groups competing for their agenda, change in the international setting is facilitated. The recent decision by France to test a nuclear weapon in the Pacific certainly represents the pursuit of a national policy that significantly impacts upon the international law of nuclear weapons proliferation.

For individuals that agree with Falk in the need for reform in world order in such areas of human rights and environmental law, public choice suggests a plan of action. Groups with interests in these areas should organize at the national level and enter the competition for lawmaking. Successful competition at the national level will influence the course of events at the international level, and ultimately the content of international law.

Many people may resent a theory that purports to rely on crass self-interest. However, one may want to consider an example from American history. Recall that the early republicans, including Abraham Lincoln, ran on a platform that included the abolition of slavery, implicitly endorsing the doctrine of equality for all people embodied in the Declaration of Independence. Such natural law principles can and do win out in the competition for lawmaking.

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The State and the Law of Humanity: L'etat est mort, Vive l'etat!

The current international legal system with its state-centered approach is supposedly outmoded as technological advances and global problems antiquate a world defined by territorial divisions. Many international publicists welcome this new world order as an opportunity for a "people-centered transnational legal order;" yet the world finds itself caught between interstate law and the law of humanity. This uncertainty implies that these two entities, humans and states, represent opposite ends of a spectrum: that for there to be a law of humanity, there can be no interstate law. Professor Falk, in his article, *The World Order Between Interstate Law and the Law of Humanity: The Role of Civil Society Institutions,* suggests that the state hinders the law of humanity, and that civil society institutions are the "only vehicle for the promotion of the law of humanity." However, emerging trends are not an indication that the state is to wither away, but that there is still a need for the state to exist. While the state may be inadequate as the sole vehicle for the promotion of human rights, it remains a necessary element for its progress. For the law to be the instrument by which the civil societies exert their influence, the state needs to exist to provide the structures and fora for the law of humanity. The state itself is not the barrier to the actualization of the law of humanity. The concept of international law as the "law of nations" easily masks the fact that other agents, such as corporations, also impede the progress of the law of humanity. These agents coupled with how the state and international law are currently defined and relate to each other prevent the evolution of international law into a law of humans by humans. Until recently international law was defined and understood to be both dependent upon, and derivative of, the state. The world crisis today illustrates that this conception is in fact a fallacy. The state is neither the guarantor nor the creator of international law; international law exists independently of the state. However, the state is a required organic element of the new system of geo-governance.

1. Reaffirmation of the Nation-State

The nation-state is defined as the power or authority represented by a body of people politically organized under one government, especially an independent government, within a territory or territories having definite boundaries. *(Websters Unabridged Dictionary, 2d* ed. (1979)) Defined as such, the state is an extension of the people within it, and just as the people within it are sovereign individuals, so is the state sovereign vis-a-vis other states. In this respect, the state has inhibited the protection of human rights, because state sovereignty demands that a state's interests precede those of an individual. Many publicists have criticized the state for this reason and have advocated its dissolution. (See Julius Stone, *Visions* of *a World Order: Between State Power and Human justice (1984)).* Yet it is not the state which poses an obstacle to the advancement of human rights, but the concept of state sovereignty. By removing this concept from the definition of the state, the state can and should be redefined by its functions as a unit under international law to act as a counterbalance to those entities which impede the progress of the law of humanity. The state will retain its juristic personality "while discarding its pretentious claim to intrinsic sovereignty not derived from its human population." (Samuel K. Murumba, A *Grotian Moment, 3* Brook. J. Int'l *L. 865 (1993))* This redefinition is actually a reaffirmation of the state's original conceived purpose as that of a protector, and not a defier, of rights.

(I). The Nation State of Today. The nation state is an institution, a sovereign body, which derives its legitimacy from the consent of the people governed on its territory. Supposedly representative of this collective will, the state's well-being was initially analogous to the well-being of the people within it. Unfortunately, the state, and not the people, has grown to dictate just what that well-being is. The end of the Second World War saw the development of the "Welfare State," as it assumed the responsibilities of society, such as unemployment, health and the maintenance of a standard of living. Skeptics viewed the advent of the Welfare State as little more than " the old trick of turning every contingency into a resource for accumulating force into the government," as forewarned by James Madison in *1794.* The state has no power, only that which society gives it: "there is no other source from which State power can be drawn. " (Albert Jay Nock, *Our Enemy the State 23 (1983)).* Indeed, by assuming these roles, the state took from the people some of the responsibility for the outcome of their lives.

The emergence of the state as a quasi-guarantor for the lives and standard of living of its people justifies its drive to accumulate material wealth, or in statist terms, "build the national economy." Too often, however, the maintenance of the national economy has been at the expense of individuals and the environment. Citizens were, or are, motivated by the belief in some collective gain to sacrifice their rights for the general welfare. (Alexis de Tocqueville's impression of American democracy, as cited in Robert Reich, *The Work of Nations, 68 (1992)).* The health of the national economy has become the focus of the nation, giving rise to the supposition that the national economy and the national interest are synonymous. This supposition also led to a perversion of the basis for a state's existence: the state's survival and power are no longer predicated on its people, but on its economy.

The evolution of the hierarchy of national economy, state, and people paralleled the growth of the corporate world. The existence of this hierarchy is captured in the famous General Motors slogan, "What's good for General Motors is good for the United States." Today a state's economy depends less upon the activities of its individuals (as it did during the monarchical era where the wealth of the monarchy and therefore the state depended on how the people managed the state's resources) and more upon the activities of large corporations. A tacit agreement has developed between states and corporations whereby states strive to provide a supportive environment for corporations in exchange for corporate profit, which is supposed to inure eventually to the benefit of the national public. (See generally, Robert Reich, *The Work of Nations (1992)).* The priority states place on the corporation versus the individual manifests itself in governmental policies (or the lack thereof) designed to entice corporate investment. Too often these policies allow corporations to violate the very individual and environmental rights which a state is supposed to uphold.

As corporations have exceeded territorial boundaries, so have nation-states struggled to keep a hold on the wealth generated by the corporations at the expense of their own citizens. The civil society phenomenon described by Richard Falk is a reclaiming of those responsibilities originally abdicated by society to the state, because the state represents less the human interest and more the corporate one. Even though the civil societies may be more attuned to the needs of the groups they represent, they lack the facilities and the structures to protect those interests. Redefining the state would allow its structures to be used toward the promotion of human rights law.

(II). Redefinition of the State. For the state to become an effective instrument in the promotion of the law of humanity, it must restrict itself to its raison d'etre. The contemporary state fails to represent its constituents' needs because it attempts to play a dual role - that of an economic director seeking to fulfill the needs of a free market and of a protector of society against fluctuations caused by that very same market. These two roles translate into government policies which alternate between the two conflicting interests making the policies ineffective in the long run. The growth of a global economy has further complicated these dualistic roles as the sovereign state struggles to control an economy whose variables transcend its territorial boundaries. Redefining the state would involve a separation of these two roles. The state would cease being an economic director and would focus on the needs of the people who choose to be represented by that state. In actuality, this redefinition is a reaffirmation of the state's original role as a protector of human rights. Two developments must occur if the state is to successfully reassume this role.

Firstly, corporations need to be recognized as subjects under international law, with international duties and responsibilities. They would be separated from the state, have no nationality, and would be regulated at the supranational level. Supranational regulation of multinational corporations would prevent corporations from evading their human rights' and environmental responsibilities as they currently do by acting under the cloak of national law. As corporations certainly exert extensive international political influence, their subjection to an international law is not only feasible, but also the only effective way to control corporate activity which thus far has hindered the progress of the law of humanity.

Secondly, because the state would not be focusing on promoting corporate profits, the state could then concentrate on its constituents' needs. It would be a body politic, defined not by its territorial limits but by its function, Several publicists have already addressed this concept. The state would become "boundless and open, a constellation of authoritative behaviors, or authoritative exercises of jurisdiction over individuals, events and property... It [would have] no permanent inside and outside, no identifiable interests. In short, the state does not define the scope of its jurisdiction; rather it is the jurisdictional decisions themselves that define the state." (Harvard Law Review Association, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and* Transnational Norms *',* 103 Harv. L. Rev. 1273). Its functions would be to administer, execute and protect international law (or rather, the law of humanity, described infra) not to create it.

The ability of a state to act as an administrator of international law was already demonstrated in the human rights case of *Filartiga v. Pena-Irala.* (630 F. 2d 876 (Cir. 1980)). In this case, a Paraguayan national living in the United States brought a wrongful death (through torture) action against another Paraguayan national under the United States Alien Tort Statute, 28 U.S.C. §1350. The statute provides: "The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or treaty of the United States." The decision on appeal stated that even though the United States was not party to any treaty on torture, torture "violates norms of the international law of human rights, and hence the law of nations." In its landmark decision, the court described the torturer as "an enemy of all mankind"; affirming the existence of a natural law which every state would have a duty to protect. The case evidences the ability, and willingness, of a state to act as an administrator of a "stateless" law.

Boundless, the state becomes a "free state"; the people within it would not be united by a national identity or national interest (which act against the appreciation of a law of humanity), but by the concept of human solidarity embodied in the Universal Declaration of Human Rights. (Ali Khan, *The Extinction of Nation States, 7* Am. U.J. Int'l L. & Pol'y *197).* The evolution of the state to a free state' would be consistent in its reaffirmed role as protector of human rights and environmental concerns, and a reaffirmation of the state's raison d'etre. The state, thus redefined, would successfully provide the organic element required in Falk's proposed system of geo-governance.

2. Redefinition of International Law as the Law of Humanity

Falk's "globalization-from-below" concept requires a clearer definition of the law of humanity if it is to succeed on a practical level. The suggestion that law is an instrument by which the transnational civil societies can exert their influence explains why the law of humanity has yet to be realized. It illustrates the extent to which the law of humanity is viewed as subordinate to interstate law - a positivist perspective which makes its full realization dependent upon the action of states themselves.

The positivist perspective that international law is little more than an institutional administration of legal norms determined by states inhibits the successful implementation of a humanitarian law. Property defined, the law of humanity is a naturalist concept; it does not exist *grace a* the consent of states, but in spite of them. The limbo between interstate law and the law of humanity is representative of the positivist-naturalist debate concerning international law itself. The success of civil societies in promoting the law of humanity thus far is evidence of the naturalist view. The complete actualization of the law of humanity requires an acceptance of the naturalist viewpoint, which was in fact the initial basis for international law.

(I). The Naturalist* Viewpoint *in International Law. The evolutionary days of international law during the late sixteenth century were characterized by two conflicting views. The first, advocated by Jean Bodin was that a sovereign (at that time, a monarch) would be bound by some external sources of law: divine law, natural law and the customs and traditions of the people being ruled. (John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of International Law, 42* Kan. L. Rev. 605, 613). The opposing view was that of Machiavelli: that there could be "no law or set of obligations among rulers of states, since the ruler of a state could (and indeed must) be a law unto himself in order to create a stable state." The latter view came to predominate, despite other theorists who were proponents of the natural law theory.

The marriage of these two ideas was found in Grotius' *De Jure Belli ac Pacis* where he set forth certain rules governing the relations between states. The law of nations according to Grotius was derived from, *jus genitum voluntarium* (the consent and practice of states) and natural law. The former is the positivist view and the latter is the naturalist view. Eventually there was a split between the positivist and naturalist schools of thought regarding international law. The former gained in popularity because it coincided with the Renaissance theory of empiricism and with the contemporary theories of state sovereignty during the seventeenth century. International law developed into a codified "rights of states" - a sort of inviolable bill of rights for nations.

In this setting, international law, and the law of humanity, become subordinate to the will of the state, because they require state action, not only for their enforcement, but also for their very realization. As the law of humanity is merely expressed in the Universal Declaration of Human Rights, itself a non-binding international legal instrument, its realization is virtually impossible. As Falk noted, the law of humanity is only validated and implemented when it coincides with state strategic interests. The idea of the law of humanity as a component of the law of nations limits its actualization. Understanding that the law of humanity is a 'natural' international law would enable states, individuals and civil societies alike to view it as both a common goal and a priority.

(II). Defining the Law of Humanity*.* The law of humanity is an extension of current human rights law. Initially, human rights were understood to be rights against the state. Again this perspective or definition limits the ascendancy of the law of humanity by relating it to the state. Human rights and law of humanity are in fact a 'natural' law; natural in the sense that the rights involved are both fundamental to, and inalienable from, each individual. The law of humanity creates an obligation for no-one, but at the same time imposes a duty on each individual. It evokes within each of us a responsibility to be accountable for our environment and our conduct, and therein lies our duty to respect those rights. There is no obligation in the sense that the existence of the rights do not depend upon the state or other entity (such as a right to a certain standard of living, or a right to speak). The individual is free to exercise and enforce those rights. The state should only be there to act as protector of those rights, providing the juristic fora to mediate between excessive uses, or abuses of a right.

The law of humanity is actually the essence of law, "a non-obligatory articulation of how society wishes its affairs to be ordered." (Rex J. Zedalis, *On First Considering Whether Law Binds, 69* Ind. L. J. *137, 206 (1993)).* The guideline which the law of humanity establishes, or rather, the standard by which a conduct will be deemed legal', is "whether the conduct itself is consistent with the ordering of affairs essential to allow values which advance the human condition to be pursued." (Id. at *207).*

Hence the law of humanity which motivates the civil societies is an understanding that the law is merely an enforcement of the values which each individual represents and is therefore responsible for. This sense of responsibility is not only what gives the law of humanity its binding force, but what binds people together.

3. Conclusions

The current world crisis is often wrongly perceived as a struggle to assert the human interest against that of the state. This assumption is based on the public/ private dichotomy characteristic of western societies: that only a state, through its government, can violate human rights. Violations on the private level are ignored because constitutional rights (the closest contemporary equivalent to a law of humanity) cannot be invoked against a private individual or corporation. Actualization of the law of humanity involves asserting the human interest against private and public entities alike. The fact that the law of humanity can be violated by both state and non-state actors reinforces the need for the state to exist as a counterbalance to other violators, as well as provide the fora in which the people can assert their rights.

The justification for the state's existence is simple: the law is not an instrument of the state; the state is an instrument of the law. The realization and enforcement of the law is achieved by individuals, but through states. "Globalization-from-below" is a promising development rooted in the understanding that individuals are ultimately responsible for the promotion of the law of humanity too long assumed to be a state duty. However, as civil societies continue to reassume this responsibility and become the vehicle for the law of humanity's realization, they should not ignore the fact that the state remains a necessary medium for its successful promotion.

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A Role for Regional Civil Society? A Comment on Richard Falk

It is one of the strengths of our academic culture that the newly-minted can engage and critique the work of the eminent. Thanks to this academic forum, we have all been offered a valuable opportunity to explore and discuss the fundamental ideas shaping our discipline. It is thus that I find myself privileged to respond to Richard Falk's essay" *The World Order Between Interstate Law and the Law of Humanity: The Role of Civil Society Institutions."*

Falk sets for himself the goal of articulating the role which transnational civil society can play in the realization of the "law of humanity" within the context of 'interstate law," or international law as it now exists, dominated by states and interstate concerns. By civil society Falk is presumably referring to the movements, organizations and institutions which assume, on the transnational level, the mediating role between government and the individual which is crucial to the success of liberal democratic values on the national level.

I am less certain about Falk's use of the term 'law of humanity," which I find a little troubling on conceptual grounds. As I understand him, Falk uses the term "law of humanity" to describe a set of values centered on the well-being of humanity, not coextensive with but "prefigured, and to some extent embodied" in the interstate law of human rights, and which he frankly admits is as yet "largely in the dreaming." This use of the word "law" is clearly not positivist (which is not surprising), yet also seems to run counter to the way in which the New Haven School urges that law be understood**.** Falk proposes as 'law" a set of values which is only "to some extent" realized in effective decisions, thus breaking the crucial link between authority and control central to the New Haven concept of law. (See e.g., McDougal and Lasswell, " The *Identification and Appraisal of Diverse Systems of Public Order,"* in McDougal et al., *Studies in World Public Order* 3, 13-14 (1960)). This seems an unusual position for a follower of the McDougal approach such as Falk who, while not an uncritical disciple (see *"Casting the Spell: The New Haven School of International Lazo," 104* Yale L. J. 1991, at 2001 (1995)), has not to my knowledge disagreed publicly with this aspect of the New Haven School.

In fact, Falk could be read in the above-referenced passages as claiming that the "law of humanity" is in some meaningful sense 'law' independently of even the places in which it finds authoritative and effective expression. If so, Falk leaves himself open to the charge which naturalist international lawyers faced from the positivist school and from the New Haven School itself, namely, as resting rules of great consequence on a "vague foundation of universalism." (See McDougal and Lasswell, *supra).*

It may be the case that Falk is merely engaging in a more colloquial or aspirational use of the term "law." Such use may nevertheless have the unintentional consequence of undermining Falk's basic theoretical position as suggested above, which I feel certain Falk would not take lightly, given his emphasis on the importance of international legal theory. (See e.g., *"Gaps and Biases in Contemporary Theories of International Law,'* chapter 1 of Falk's *The Status of Law in International Society (1970)).* For these reasons, I am more comfortable rearranging his quotation marks to refer to the "law" of humanity.

Returning to a discussion of his main points, Falk conceptualizes the work of civil society in implementing the "law" of humanity in two useful and insightful ways. First, transnational civil society plays what could be considered the "traditional" NGO role of information-gathering, persuasion, disclosure and appeal to world opinion, in connection with a relevant issue area such as torture and unlawful detention. In this role, civil society is focused on the well-being of the individual, one fundamental aspect of the "law" of humanity. Second, civil society plays what could be called a "militant" role, involving social movements of emancipation from oppressive structures of governance. In this role, the efforts of civil society are centered on operationalizing norms already legitimized in interstate law, often (paradoxically) by the state resisting this emancipation.

Falk briefly identifies another potential role for civil society, that of developing new independent fora for law creation and law application, but he does not emphasize this role. In this sense, Falk may be acknowledging implicitly that such a role can be problematic, in that civil society seems by definition to mediate between law creating institutions and the general polity. Moreover, the development of new fora for law creation which circumvent the established state-controlled processes, in favor of "law enacted by and for the peoples of the world," may not necessarily be prudent without strong corresponding protection for individual civil liberties. Finally, there is a very real question as to whether states would ever willingly cede such authority or suffer its exercise, as can be seen in the difficult process of creating a meaningful legislative role for the popularly elected European Parliament within the European Community.

The thrust of Falk's essay is that, beyond its traditional and militant roles, transnational civil society does indeed have a valid and attainable third role to play in realizing the "law" of humanity, namely that of focused advocacy within existing authoritative decision-making fora. This role is part of what Falk terms "globalization-from-below", in contrast to the existing propensity for globalization to occur at the control of and for the benefit of the powerful states which control the law-creating apparatus. As suggested above, a bottom-up globalism cannot as yet and perhaps should not evade the state-based system of international law. Nevertheless, in Falk's view interstate law can still provide the agents of global civil society with an instrument of potential influence for the realization of the "law" of humanity into a true "law of humanity." As evidence Falk provides a useful illustrative summary of several concrete areas where overlooked or underutilized normative

commitments on the multilateral level can be the target of focused civil society advocacy within institutions that are truly capable of generating law.

Falk's analysis finds support in recent extensions of regime theory, which has traditionally studied relations among states, to include the function of non-state actors such as NGOs in establishing the shape of the international system. Virginia Haufler characterizes the typical relationship between non-corporate non-governmental organizations (Falk's "civil society") and states as an instrumental one, with a dominant state using the organization to either develop the normative basis for an inter-state regime or to implement an inter-state regime's programs. (See *"Crossing the Boundary Between Public and Private: International Regimes and Non-State Actors,"* in Rittberger (ed.), *Regime Theory and International Relations 94 ff. (1993)).* However, while NGOs are not likely to create truly independent private regimes directly managing issue areas of international concern to states (similar to the independent law creating role Falk briefly suggests), Haufler argues that NGOs can operate directly on state preferences by forming domestic or transnational coalitions, having thereby a substantial impact on global decision making.

I am intrigued by the possible application of Falk's analysis on a regional level, for example to the imperfect protection of human rights in this hemisphere. As the Summit of the Americas made clear, the architects of American integration are disinclined to emulate the European emphasis on effective protection of human rights as a fundamental element in the process of economic integration. In this sense, we cannot look to the states to further realize the "law" of humanity in this hemisphere. That challenge, including the task of operationalizing existing hemispheric normative commitments, must fall to the civil societies of Anglo and Latin America.

Ultimately, the main contribution of this essay, in my opinion, is Falk's conceptualization of the advocacy role which transnational civil society can play within existing, largely state-controlled, fora for the creation of laws which more closely approximate the "law" of humanity he so eloquently maintains. In order for this advocacy to have the maximum effect, Falk's analysis should be applied in particular towards clarifying the work of "regional" civil societies.

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Working Within Falk"s "'Law of Humanity" Framework

Falk's article describes a new direction for existing supranational institutions - one that would move society toward achieving a world-wide public order based on the "law of humanity." This law, with its roots in modern human rights principles, would be enacted "by and for the peoples of the world" and focuses on the well-being of individuals. Falk believes that this new direction is necessary to fill the gap created by the modern state's failure as a guardian of individual well-being -a gap which results from "the realities of interdependence and integration [that] undermine the presupposition of autonomy." He asserts that, given modern technological advances' national boundaries are no longer secure nor are they an adequate framework for economic activity or environmental regulation. Having considered the alternatives in his earlier work, Falk has determined that society should move toward peace, justice and ecological well-being where the law of humanity reigns, through a global grass-roots revolt.

In order to achieve these changes, he promotes using the institutions of civil society -,/voluntary associations of citizens" and national emancipation movements - to encourage a greater global realization and an effective enforcement of the principles of the law of humanity. I argue that Falk's framework, in some respects, goes too far beyond human nature, economic realities and established decision-making bodies to be workable, and yet because of his distrust in the current structures, he does not seek to take full advantage of the existing system,

1. The Law of Humanity

What will constitute the law of humanity? The closest Falk comes to a definition is that it is a normative focus that is animated by humane sustainable development for all peoples and seeks to structure such commitments by way of humane geogovernance - a governance protective of the earth and its peoples that is democratically constituted, both in relation to participation and accountability, and that is responsive to the needs of the poorest 20% and of those most vulnerable, e.g., indigenous peoples. Where Falk's thesis is vague is on the question of how a humane level of sustainable development will be determined or achieved. Do we proceed under Western concepts, which form the current understanding of human rights law? Do we follow a

religious foundation, if so which? Or do we develop a new understanding of human rights based upon Asian, African, or South American beliefs or experience? Falk does not address these issues or an underlying assumption that humans must feel comfortable with and trust the system in order to want to make use of it. But achieving such a system will be difficult, if not impossible.

Our current circumstances encompass varying concepts of fundamental rights which, in many instances, directly conflict with one another. Conflicts such as freedom of choice versus the right to life permeate western society - and to take a world view would significantly multiply the problems. Thus it is likely that at least one group of world society will feel outcast and uncomfortable using the system, and may choose, or be forced by their beliefs, to exclude themselves from it. Of course, it would probably be a violation of the very law of humanity to force a people to participate in a society they distrust or dislike. Yet can two or more such systems coincide in this ever more interdependent world?

2. The Role of the Modern State

Falk asserts that states are not appropriate agents for the development of the law of humanity. To the extent that states should not create the substantive law without input from the civil society, this is true. States must go beyond national boundaries to address these issues properly, and the civil society can provide an international perspective. However, in order to implement and enforce the law -two vital functions that Falk fails to address -states are the most efficient and capable option.

Falk criticizes the current political system as one in which the elites in lawmaking are concerned with representing the state, rather than the people. But he ignores the fact that in a representative democracy, the understanding is that the state is essentially a voluntary association of the people working toward certain common goals and principles, organized in a fashion that reduces the inherent transaction costs of lawmaking. If his argument is that the state has become too large so that the elite no longer provide effective representation, how does increasing its size through globalization make it any more effective?

3. Falk's Proposal

Instead of seeking to reform the current lawmaking system to provide better representation and encompass more actively and completely the goals he sets out, Falk proposes to create a supra-national government out of the United Nations. He promotes reforming the United Nations with an emphasis on collective security that is less dependent on geopolitics and on a strengthening of capabilities for preventive diplomacy that seem more feasible than efforts to resolve conflicts after fundamental breakdowns have occurred.

Falk would add seats to the Security Council to include a moral superpower, a most economically deprived representative, a representative of global civil society, and a representative of the world assembly of indigenous peoples. However, while this may give the Security Council a more diverse look, it is unlikely to have any real effect without changing the voting structure to remove the veto power of the permanent representatives. It then becomes highly unlikely that the developed states will continue to finance or participate in the United Nations if their veto power is removed. I would offer a compromise system of weighted voting, where at least three permanent members would be required to vote 'no' in order to effectuate a veto. Falk declines to elaborate on the details of how these additional seats would be managed. The effectiveness of these additional seats would depend on their terms, requirements necessary to maintain their seats, and restrictions on the electing/ appointing bodies. Should we have standards which must be maintained in order to continue holding the seat? This could create a dis-incentive for the economically deprived representative to develop its economy, because it might lose its seat. And how would we have a system where if the moral superpower fell from grace in the middle of its term, it could be replaced immediately, following some sort of incompetency hearing?

Falk relies upon former Nobel Prize winners to appoint states to fill two of the additional seats. UNDP indices - as generated by the under-developed states - would determine a third representative. Falk leaves unclear how the representative for the world assembly for indigenous peoples would be selected. What Falk is essentially doing is developing a new set of elites which are not accountable to anyone. The "people" don't select the Nobel Prize winners and once selected, there is no recourse for those unhappy with the winners' decisions or with the implementation of their power. It is like re-inventing the United States' electoral college without any proportional representation. This would give a great amount of power, without any checks, to those who may not know how to or want to, appropriately use that power. Falk also assumes that the Nobel Prize winners would be willing to do the job and would be acceptable to all parties - an unlikely scenario. Additionally, while he criticizes the current elite law-makers as corrupt, he disregards the human element in his proposed replacement system. It is fairly accepted that power corrupts. Even the best people tend to lose touch will either

the people who gave them that power, or what they intended to accomplish with that power. Thus it is highly probable that any replacement system we devise will eventually develop the same underlying flaws. And to do away with any system of representation leaves us in a situation where the transaction costs to participate will be too high for most people - again creating an elite system where only those who can afford it will participate. At least under the existing systems, the elites are accountable to their electorate at frequent intervals and inordinate abuses of power are restrained by a system of checks and balances. The area represented by an i1elite" is small enough that the transaction costs for most people to participate in lawmaking is fairly reasonable, such as that of a phone call or a postage stamp.

Falk's other recommendations include 1) a volunteer force directly under United Nations' auspices and financed without the reliance on member states; and 2) independent sources of funding the United Nations, including potential taxes. Additionally, he would force a commitment by states to accept compulsory jurisdiction of the World Court and its Advisory Opinions, and push the media to pursue the truth without biasing its presentations for the sake of state or market. While I agree with both of his suggestions for a military force and alternative financing - although preferably based upon licensing resources of the global commons, it is likely that his manipulating the media to not have a bias in favor of the state or market, may result in other biases that are equally unsatisfactory, such as class tensions. The issues of a stronger court are discussed below.

4. Economic Realities

To achieve his goal, Falk promotes requiring market forces in developed states to bear the majority of the financial burden of all nations in an effort to equalize society. However, what we have seen in examples such as the former USSR is that attempts to manipulate market forces in this manner result in lost incentive, a general decline in the standards of living and animosity between the those carrying the burden and those receiving the benefit without the burden.

The populations of the economically developed states believe that they have worked for what has been accomplished, and to force reduction in their standard of living to benefit those who perhaps have not earned it, is sure to produce resentment. Further, if the developed states did pay for a perfect world to be handed to the less developed nations, would those less developed states be willing and able to live up to implicit Northern expectations of how to operate within that world? Perhaps instead it is better to supplement learning and growth in the less developed states than to remove the necessity for it. Further, Falk encourages the institutions of civil society to resist globalizing initiatives such as NAFTA and GATT because he believes that they neglect certain classes of society. Instead, perhaps it would be more productive to push for treaty provisions that would seek to protect those classes such as guarantees of fundamental freedoms or the creation of unemployment revenue in exchange for broad trade advantages. This would allow global inter-dependence to increase and should raise everyone's standard of living, even if not all levels are raised equally. This would seem preferable to a situation where everyone's overall standard decreases.

Falk's proposal centers on the well-being of the individual, but it is unclear in economic terms how he plans to achieve this aim. Economists know that this is a world of scarce resources and one where we must be concerned with the well-being of millions of people. Given such scarcity, is it feasible that the well-being of all people can be sustained all of the time? Choices will need to be made regarding the allocation of those resources, and without the system of elites, who will make those decisions? Further, given the confines of Falk's law of humanity, would it even be possible to make such decisions? Falk encourages the institutions of civil society to take a more active role in the political arena and to broaden their agenda in order to accommodate his law of humanity. However, while these organizations play a vital role outside of the political framework to promote change, once they join it their voice will become weaker and more partisan and they will be seen as acting less for the good of all and more for the good of a few.

Much of the strength of these institutions derives from being centered on one or few issues, allowing them to focus their resources. If their agenda were to become more diverse, their strength will be diluted and their goals less dear.

The world is broader than Falk's framework seems to suggest and we must find ways to protect interests not included in the law of humanity. To go as far as Falk seems to and suggest that these institutions be given unassailable power in their own right is neither useful nor desirable, nor is placing above all others, the principles they promote. To put the organizations which currently promote parts of Falk's ultimate goals - peace, justice and ecological well being - such as Greenpeace and Amnesty International into the role of a global dictator would be to remove freedom of choice, destroy economic incentive motivation and, eventually, Greenpeace and Amnesty would become as corrupt and dilute as Falk accuses our current institutions of being. If you remove the balancing of interests that currently goes on in democratic nations, the issues of human rights would eventually become so overwhelming that nothing else could function. A factory may not weave

thread for clothing because it would produce emissions that harm the environment and the air that people breathe - so people freeze. Further, as we continue to add more international, restrictions to industry, we price the development of industry out of the market for undeveloped nations or encourage states to exclude themselves from the framework order to attract industry with their lower standards, free-riding on the efforts of the rest of the world. Alternatively, we could resort to the lowest common environmental standards that permit industrial development in the less developed states. Neither appears to be an appropriate solution.

5. An Alternative Proposition

Falk wants to create a civil society that ha~ its own autonomous voice through legal 'instruments and acts. But Falk ignores the ~ac' that nothing with binding force has an entirely autonomous voice, except a dictatorship. However, perhaps the creation of an international court with compulsory jurisdiction over citizens, states and their actors, subject to a “constitution" or constitutive treaty that may only be amended by the unanimity or qualified majority of all nations who are a party to the treaty and whose judgments are fully enforceable in national courts would create this autonomous voice.

Unlike Falk, I don't recommend modifying any existing court such as the World Court, as doing so could complicate matters by leaving existing expectations in place despite attempt-~ to strengthen the court. Instead, I suggest beginning from scratch with a new constitutive treaty in order to fully inform potential parties of the available sanctions and enforcement measures. It would be necessary for the constitution of a new international court to encompass the substantive law upon which the court would base most of its decisions.

This substantive law could be drawn from the existing principles Falk discusses in hi~, references to the Universal Declaration of Human Rights, Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, the Nurenburg Principles, and the United Nations Charter. Principles relating to the fundamental freedoms and rights to which everyone is entitled, the promotion of alternatives to the nuclear arms race and war, and the concept of holding leaders accountable for the crimes of state.

Enforcement of the court's decisions should rely on direct and immediate sanctions clearly spelled out in the constitutive document following an equally dear "reasonable" time limit for states to implement a decision. The sanctions should be implemented by the court and must not rely on the action of other nations to be effective. For example, a state which is found to be in violation of the law of humanity might have one year from the date of judgment to implement the decision. If the state fails to implement the judgment, fines would accrue with interest and money sufficient to cover the existing fines would be frozen in state-owned bank accounts located around the world. Alternatively, the voluntary military force of the United Nations could be sent in to protect the population from an irreverent state, if it is abusing a substantial portion of its citizens.

These sanctions and enforcement measures must also remain within the limitations of the United Nations' Charter which states that the United Nations may not become involved with anything that is considered within the domestic jurisdiction of any member state. Since the treatment of a state's citizens would normally be within its domestic jurisdiction, it might be wise to amend this provision in order to provide more effective enforcement for the law of humanity.

A court having compulsory jurisdiction with sufficient enforcement mechanisms and adequate safeguards against corruption, is a proven system for enforcing 'constitutional principles" which often go beyond statutory law. We have seen a strong judicial system work with both the Supreme Court of the United States and the European Court of Justice. Although the goals were different, both courts were set up to promote the cooperation of nations toward a union, and despite political swaying in the other relevant institutions, the courts have stayed relatively true to their purpose. Both remain somewhat constrained by the limits of their constitutions. The biggest problems with an international court system are cost and accessibility. The practice of stare decisis and the ability of national courts to interpret and apply the constitutive treaty directly as a court of first instance would drastically help reduce those problems. The court could then focus on legal issues, with the power to overturn lower court fact finding only in extreme instances. The court should be subsidized by annual payments from all signatory states, perhaps filtered through the United Nations. The court should also adopt a principle whereby parties pay their own costs unless a citizen has proven a violation, in which case the losing party should cover costs.

6. Conclusion

Falk cites many instances where states have acknowledged that fundamental human rights exist, but claims that they have failed to enforce those rights effectively. This court would create such an enforcement mechanism; beyond the immediate reach of the "elites," but with limitations which protect other interests and remain within current structures. This will keep transaction costs reasonable and is more likely to be supported by those currently in power.

Falk's distrust of our current institutions leads him to ignore their value as enforcement mechanisms for the law of humanity. He removes power from our decision-makers, but does not practically fill the gap. While the United Nations is useful for defining international law, it is too unwieldy to administer it. Lack of a common understanding frequently frustrates United Nations decision-making. He also neglects to take into account the transaction costs for the "common man" to participate directly with a world-wide body where the delegates who represent an entire country are less likely to respond to the concerns of a single constituent. Falk gives power to the United Nations that goes well beyond what it was designed to be able to use, yet he only briefly refers to modifying the World Court -a concept that could accomplish much of what he suggests with less disruption to the current system and therefore more likely to gain state support. Although Falk's article is too short for him to articulate his ideas fully, its current framework is idealistic and lacking in definition. The law of humanity is largely undefined, with no real provisions for its implementation or lack of consent. He ignores the economic principles of scarcity, human nature to be wealth maximizing, and then removes society's economic incentives. Falk's society would be unmotivated favoring leisure over work. With fewer people working as much the amount of cash earned and spent will decrease, decreasing the multiplier and the overall wealth of the world. He also shows disdain for incremental steps by suggesting that if a solution such as NAFTA cannot protect everyone it should be abandoned. This is a view that would forego national betterment for the sake of a few. His plan to give Nobel Peace Prize recipients power to select representatives for the Security Council ignores the reality that many Peace Prize winners are motivated by issues other than the general improvement of world-wide society, and assumes that they would both accept the task, and not be corruptible. Additional plans to give the institutions of civil society more responsibilities and power would dilute their effectiveness. Modification of existing legal systems to create a world court of human rights with binding jurisdiction need not be a militant revolt, rather a revolution founded by and for peace.

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Public Choice Theory and International Institutions: One More Comment on Richard Falk

Falk's discussion of the law of humanity and civil society institutions bears important connections with the conclusions reached by public choice theory and economic analysis on the ability of democratic processes to bring about the outcomes that best serve the interest of the collectivity. Contrasting these two theoretical settings, one may soon realize that the same failures of states when acting as agents of their people may also affect the activities of other decision-making institutions outside formal state frameworks. Non-governmental civil society institutions, although autonomously generated, tend -for their own nature - to give voice to special interests of the world collectivity. Whether the combined effect of competing and decentralized institutional forces may generate outcomes that approximate the result of an optimal collective decision rule, remains thus far to be established.

According to the public choice models, one should expect to see that the different degrees of concentration in the underlying interests induce different degrees of participation in the political or social process. The various public choice theorems (e.g., the rational abstention and rational ignorance theorems, etc.) developed during the last few decades shed some light on the relative ability (or lack thereof) of various decision processes to generate optimal rules for the well-being of the collectivity. As obvious, the underlying problem is that individual members of a group are likely to have different preferences, values, and perceptions of the common good.

The choice of the social decision mechanism for reconciling conflicting interests and reaching an optimal collective choice is heavily dependent upon the underlying assumptions on the distribution of preferences within the group, and the existence of opportunities for strategic interaction in the decision making process. Public choice theory and game theory provide us with the analytical tools for addressing these two interrelated issues.

1. Institutional Choice and Geogovernance: The Game-Theoretic Dimension

Legal scholars have long recognized the significance of strategic behavior when considering the emergence of law through collective decision-making processes. The challenge for Richard Falk is to apply the sophisticated tools of game theory to an appraisal of non-traditional sources of law and order such as those considered in his work.

One may approach this task by considering the incentive structure of the originating environment as well as the possible role of strategic behavior in affecting the equilibrium outcome. One of the key insights of evolutionary game theory applied to law is that, under most environmental conditions, spontaneous non-governmental institutions and customary legal rules have a comparative advantage over other sources of law in generating optimal outcomes. (See F. Parisi, *Law as a Voluntary Enterprise,* in Gabriel Moens and Suri Ratnapala (eds.), *The Jurisprudence of Liberty,* Butterworth (1996)) This conclusion is obviously at odds with the traditional conception of a legal system where rules are characterized as precepts generated by formal institutional structures within their respective domain of jurisdiction * In the field of international law, relatively little attention has been devoted to the role of nongovernmental actors in generating decentralized sources of world order. While some consideration has been given to the interaction between treaty formation among sovereign states and the spontaneous responses to interstate law, scholars of international law should build upon the findings of evolutionary game theory for a better understanding of the other sources of world order. Revisiting the familiar problem of the spontaneous emergence of law in a lawless environment, it is indeed possible to explore new ways of thinking about the issue of world order. Richard Falk is a true pioneer in this front of legal scholarship, but his work risks remaining mostly inspirational, unless he carries his task to its conclusion by appraising the reach of his theory with more formal and testable models.

The traditional skepticism surrounding the notion of civil society institutions fails to consider the ability of social organizations to generate endogenous corrections to sub-optimal arrangements. Evolutionary game theory suggests that spontaneous law can do more than the common wisdom may lead us to believe. The identification of cases characterized by incentive misalignment yields no conclusion as to the optimality of the emerging rule, given the evolutionary and competitive responses generated by sub-optimal practices among the collectivity (whether ignored or even implicitly endorsed through conscious acquiescence of state actors). Falk's law of humanity may truly benefit from an analysis of the conditions for the internal destabilization of inferior international equilibria, through the action of civil society institutions. Contrary to the traditional belief, spontaneous and decentralized correctives may prove successful in coping with inferior strategic stalls. In a recent paper of mine (F. Parisi, *Toward a Theory of Spontaneous Law,* 6 Constitutional Political Economy (1995)), 1 argued that spontaneous rules that emerge under conditions of repeated interaction with role-reversibility or structural reciprocity can correct (rather than being constrained by) the challenges posed by the parties' conflict of interests. These propositions rely upon the findings of much socio-biological experimental evidence and indicate that the supply of rules and norms from groups (and institutions) that operate in a freely competitive environment may evolve toward optimality even in the absence of a perfect alignment of incentives or central institutional correctives.

This perspective shows the fallacy of the traditional claim according to which the insufficiency of civil society institutions has to give way to formal inter-state law, as the challenges posed to the world order become more complex. Just as an increase in the complexity of an economic system calls for greater reliance on markets and spontaneous prices, an increase in the complexity of a legal system calls for greater attention to decentralized law-making processes. The reader can easily realize that this approach is quite different from the more common uses of game theory in the law. Game theory is not used as a tool for the identification of failures in legal relationships in need of correction through enforceable legal rules, but rather to explain the dynamic of law formation outside state frameworks, and to consider the incentive structure of the originating environment as well as the possible impact of individual strategies on the equilibrium rule.

In this setting, legal rules are no longer seen as exogenous corrections to game inefficiencies, but rather as endogenously generated devices that improve upon the current equilibrium outcome: the decentralized law of humanity generates what proper interstate law is unable to deliver, successfully by-passing to the public choice and strategic failures of interstate political interaction.

2. Public Choice and Credible Political Commitments

According to the evolutionary framework described above, the economic and normative implications of Falk's law of humanity yield relatively more optimistic predictions than one might otherwise be willing to concede. These theoretical conclusions obviously call for the empirical verification of time, but undoubtedly command greater attention to spontaneous social institutions. Future research should appraise - with more rigorous and formal modeling - the ever-changing boundaries between inter-state law and law of humanity, and investigate the public choice implications and game-theoretic conditions of these two competing process. Just as the traditional confidence in domestic legislation has been reappraised in light of the failures of the political process, so should the idea of interstate law be evaluated in light of the possible bias in the political representation of shared convictions and individual values.

The formative process of international law should also be re-evaluated in light of the practical constraints to universal participation. Although popular sovereignty is, under ideal conditions, the best source of justice, in a world characterized by information costs and rational abstentions, public deliberation does not guarantee optimal collective outcomes. Under such condition, there is no single technique that guarantees optimal social choices, unless individuals have a viable exit option and can reorganize themselves into independent social or political units.

In economic terms, a just world is a public good, while an unfair advantage is a private good. A common sense of justice does not guarantee that principles of justice will be articulated and accepted by all members, unless the parties are given the opportunity to impose competitive constraints upon their lawgivers, exercising a credible threat of individual exit or group secession. Unless the voice option is accompanied by other conditions, the practical leverage of such option remains quite limited. In this case, the resulting pessimism is not due to the realization of the risk of external interference or internal usurpation by part of governments, but rather to the realization of the self-defeating dynamics of collective action. It is old news that government cannot realistically free themselves from the bias of those interests embedded in their constitutive fabric, and that there is no mechanism of collective choice that can deliver upon its promise to represent the interest of all its people.

Falk further contemplates the selection of agents on the basis of their recognized stature in the world community. His insight is certainly on the mark: reputational stock may alleviate the ex post conflictuality of principal agent relationships, by imposing additional constraints on the agent's ability to diverge from the interest of the principal. But the problem is far from being solved.

Reputational costs are contingent upon the availability of information. Agency problems remain whenever principal and agent have different information and different incentives to reveal information. Such asymmetric information creates the conditions for the well known problems of adverse selection (ex ante hidden information) and moral hazard (ex post opportunism). Screening and selection of agents is an important -but hardly sufficient –device for solving such difficulties. Contract design, monitoring, and institutional controls become necessary, but hardly available in this context. Because of the diffuse equity interest and the absence of a residual property claim, free rider problems are likely to emerge in the monitoring of the agents' activity, with obvious impediment to the successful utilization of external monitoring and control devices for international institutions that serve the world community as their principal.

3. Conclusion: Taking Institutional Analysis Seriously

Professor Falk's engaging and thought provoking analysis is developed around crucial questions. The issue of the allocation of authority between interstate mechanisms and law of humanity is paramount for a modern understanding of international law. Falk's analysis unavoidably will influence what one views as the correct approach for dealing with an increasingly complex global reality.

The choice of one institutional framework over the other cannot rest on mere ideological differences. The issue then becomes one of deciding who should decide. Professor Richard Falk argues in the right direction when he suggests that international law can play an important role in the legitimation of civil society institutions and voluntary associations that compete with traditional interstate law in promoting a new world order. A true representation of the diverse and conflicting interests of the world community can only be achieved and maintained through decentralized institutional arrangements, or, as Richard Falk puts it, through "globalization-from-below. " But Falk underestimates the principal-agent dilemmas that would affect civil society institutions once effective control is gained, and his influential analysis leaves the reader with the demanding task of ascertaining the structural conditions for such an ideal to become true.

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