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Henry F. Carey

Stacey M. Mitchell

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## ARTICLE

# RICHARD FALK'S COSMOPOLITAN VIEW OF SOVEREIGNTY: THE AMBITION OF NECESSITY TO PURSUE WORLD ORDER THROUGH LAW

HENRY F. CAREY\* AND STACEY M. MITCHELL\*\*

Professor Richard Falk's body of work has powerfully affected the academic fields of international law and international politics. His impact can be found in not only academic but also practitioner circles, and just as importantly, in the ways in which the two fields relate. From his early involvement in the World Order Models Project (WOMP) to his more contemporary work on humane governance and law in world order, numerous themes involving sovereignty emerge, including the role of international law in international politics, and the use of law and activism to constrain power, particularly as this applies to the disenfranchised populations of the world.

Falk's public activities have also enhanced the conceptualization of sovereignty in both soft law norms and legally binding hard law. For example, Falk was a member of the Kosovo Commission Report, and wrote the key section distinguishing "legality" and "legitimacy." For the State Sovereignty Commission, which came up with R2P (Responsibility to Protect), a term of legal art, Falk was a consultant, writing one paper.

When looking at the movements Falk has been a part of, one is struck by their historical significance, marking the course of the development of human rights and justice from the past century to today. He has worked

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\* Dr. Henry F. (Chip) Carey is an Associate Professor of Political Science at Georgia State University in Atlanta. His most recent of a dozen authored or edited books is *Peacebuilding Paradigms: The Impact of Theoretical Diversity on Sustainable Peace* (Cambridge University Press, 2020). He is co-editor of the forthcoming *The Scholarship of Richard A. Falk* (Routledge). He is also editor of *United Nations Law Reports* and the *Journal of International Organization Studies*.

\*\* Dr. Stacey M. Mitchell is an Assistant Professor of Political Science at Georgia State University, Perimeter College. She specializes and is published in the areas of international criminal law, transitional justice regimes, democratization and political violence, and the Rwandan and Armenian genocides and mass atrocities.

tirelessly for justice around the world, including in Kosovo, Iraq, and the United States. Many of the judicial bodies he has been a part of are peoples' tribunals, including the Permanent Peoples' Tribunal in the Philippines (1980); the Permanent Peoples' Tribunal in Paris, France, which addressed the Armenian genocide (1984); and the Permanent Peoples' Tribunal in Brussels, Belgium, in a 1984 case pertaining to US involvement in the war in Nicaragua.<sup>1</sup> Falk provided expert testimony in a number of cases involving such issues as free speech, the right to conscientious objection, and the right to protest.<sup>2</sup> He also is a member of numerous boards and advisory councils whose objectives are to advocate for policies to protect the rights of the disenfranchised and the well-being of humanity as a whole.<sup>3</sup>

Still active at the age of ninety, Richard Falk can be appreciated for his public impacts, his social science conceptualizations, and his legal methods integrated in an interdisciplinary style. Falk's work has applied evolving theoretical frames, which have nonetheless remained grounded in broad commitments to world order and governance, and the place of law within them. His work examines contemporary challenges across the decades, from law and the use of force in the Vietnam War and in *both* US engagements in Iraq, to activities in the Occupied Palestinian Territories, accountability for serious crimes, and global environmental law and politics.<sup>4</sup> His most recent work, in which he examines various peacebuilding paradigms, emphasizes the importance of local perspective and agency in peacebuilding projects, demonstrating a constant theme to which Falk frequently returns, that of inclusion of all voices in the struggle for a better world.<sup>5</sup>

In considering the breadth and depth of Falk's work, one is continually struck by a prevailing sense of urgency, and at the same time a sense of frustration with the "one step forward, three steps back" pattern of global legal development. It becomes relatively easy to adopt a cynical perspective about humanity's ability to progress, despite its efforts, and in many examples its triumphs, over adversity on a global scale. One could look to the progress of the International Criminal Court, or even more broadly, any

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1. Richard A. Falk, *Curriculum Vitae* (Nov. 2012), <https://princeton.academia.edu/RichardFalk/CurriculumVitae>. Falk has also sat on the jury panel for a number of other peoples' tribunals, including for the London Nuclear Warfare Tribunal in 1989 and the Permanent Peoples' Tribunal in Paris, France, in 1991 in relation to a case concerning the Amazon and indigenous rights.

2. *Id.*

3. *Id.*

4. Many of these books are included in this article. However, other contributions by Richard A. Falk on these topics include *REFRAMING THE INTERNATIONAL: LAW, CULTURE, POLITICS* (Richard A. Falk, R.B.J. Walker & Lester Edwin J. Ruiz eds., 2002); *POSTMODERN POLITICS FOR A PLANET IN CRISIS: POLICY, PROCESS, AND PRESIDENTIAL VISION* (David Ray Griffin & Richard A. Falk eds., 1993); and *CRIMES OF WAR: IRAQ* (Richard A. Falk, Irene Gendzier & Robert J. Lifton eds., 2006).

5. Richard A. Falk, *A Pluralist Cosmopolitanism for the Twenty-First Century*, in *PEACEBUILDING PARADIGMS: THE IMPACT OF THEORETICAL DIVERSITY ON IMPLEMENTING SUSTAINABLE PEACE* 147, 147–59 (Henry F. Carey ed., 2020).

courts that apply universal jurisdiction for *jus cogens* offenses, such as genocide or crimes against humanity. Substantial progress has also been made in the expansion and protection of human rights and in a greater reliance on the use of soft power rather than force as a means of conflict resolution.

The complex influences of his childhood, especially his estranged parents and their families' conservative views, were formative. Having a mother who was a champion tennis player was important, even if I am not sure how. Other than that, Falk gained all the benefits of athletics, including his remarkable endurance and discipline in academic and public pursuits. The distance from his parents allowed Falk to distance himself from their political views, while retaining his father's love of writing and interests in public affairs, even if they were on the side of what he has opposed. In his recently published memoir, *Public Intellectual*,<sup>6</sup> he portrays his childhood realities, which explain Falk's "peculiar" later development, especially his standing apart from those who had similar class, ethnic, and educational background in the 1940s and 1950s. He also kept his distance from his mentors at Yale Law School, Myres MacDougal and Harold Lasswell. Despite Yale's ostensible commitment to "World Order" values, Falk's difference with this "New Haven School" was about not only MacDougal and Lasswell's deference to "effective power" but their belief that the US was using power to achieve their preferred future, which was essentially free market constitutionalism, what later became known as the "Washington consensus."<sup>7</sup>

Yet, Falk's own words decry a sense of optimism to some extent. In his poem "'Humanity' and Humanity," he states:

We are told over and over that humanity  
is truly love and goodness  
is blessed with soul and spirit  
That evil is nothing but ignorance wayward motion.  
When a new moon rises as if a child of the sky  
and birds serenade the dawn  
and high waves beat against the shore  
I glow with pride for humanity  
But then the wind comes from no where  
coloring the sky with black clouds  
And I shudder with fear if I hear that word.<sup>8</sup>

Falk stresses time and again in his writing and edited volumes the unintended consequences, and sometimes intended consequences, of globaliza-

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6. RICHARD A. FALK, *PUBLIC INTELLECTUAL: THE LIFE OF A CITIZEN PILGRIM* 7–52 (2021).

7. Kevin B. Grier & Robin M. Grier, *The Washington Consensus Works: Causal Effects of Reform, 1970–2015*, 49 J. OF COMPAR. ECON. 59, 59–72 (2021).

8. RICHARD A. FALK, *WAITING FOR RAINBOWS* 128–29 (2015). On a personal note, author Carey's late father, John, was active in Falk's early Princeton career as part of an academic circle, which indicates an openness to public activism. Both of them also have appreciated and written haiku poetry.

tion, which are grave and are mounting “black clouds” on the horizon. Whether these be the threats posed by climate change, the spread of the internet and global technology, poor environmental policies,<sup>9</sup> vast inequities in wealth and resources, global pandemics, conflicts for profit, or probably the most troubling, complacency on the parts of member states of the global community, they reflect the entrenched interests of stakeholders in the Westphalian system and the neoliberal economic model.

While not minimizing the dangers that could attend a transition to a world governed by law, Falk argues that we are currently facing a “Grotian moment,” which is a term he popularized in his 1998 book, *Law in an Emerging Global Village: A Post-Westphalian Perspective*.<sup>10</sup> *Law in an Emerging Global Village* represented the culmination of decades of efforts from the WOMP to establish a just and sustainable world order, not balanced by force of arms, but by shared norms of empathy, human worth, and dignity. Falk’s efforts to shift the perceptions of policymakers, scholars, and the wider public from the deeply engrained statist norms of the Westphalian order to those of a more humane cosmopolitan legal order have been a lifelong quest.

In *The Future of the International Legal Order Volume II* (1970), Falk and Black suggest that the mounting threats faced by the world reflect a “paradox of aggregation,” in which states shirk their responsibilities to properly maintain public goods like the ocean and the atmosphere.<sup>11</sup> This paradox is a problem that cannot be left to multinational corporations to handle effectively. As history and the current state of affairs have shown, these corporations’ ability to step in and act responsibly is contingent on their being “brought within some framework of control that is expressive of general community interests.”<sup>12</sup>

At the risk of oversimplifying a complex public life (to say little about his formal professional academic career), Richard Falk’s work as a public intellectual can be divided into five major themes, along with multitudinous

9. For some of Falk’s earlier work on the global environment, see RICHARD A. FALK, *THIS ENDANGERED PLANET: PROSPECTS AND PROPOSALS FOR HUMAN SURVIVAL* (1971).

10. RICHARD A. FALK, *LAW IN AN EMERGING GLOBAL VILLAGE: A POST-WESTPHALIAN PERSPECTIVE* (1998).

11. Richard A. Falk & Cyril E. Black, *Introduction to THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, VOL. II: WEALTH AND RESOURCES* vii, viii (Richard A. Falk & Cyril E. Black eds., 1970).

12. *Id.* at ix. However, whether this cosmopolitan quality has been achieved, or more correctly, is in the process of being achieved, depends on the author’s focus of study and which area of law is applicable. While some, such as Wolfgang Friedmann, suggest that the creation of institutions and trade regimes designed for promoting human welfare evidences a turn toward the more cosmopolitan, other contributors, including William T. Burke and Burns H. Weston (who write about the law of the sea and the processes surrounding foreign wealth deprivations, respectively), suggest that one cannot discount the power of the economic self-interests of states. This observation applies equally to Ivan A. Vlasic’s piece on the law of outer space. In fact, all of the contributions to Volume II demonstrate the lasting legacy of geopolitical interests as a constraint to global cooperation regarding redistribution.

minor ones. All of them, in a sense, “came to him” in the course of events and trends, and in Hegelian fashion, created a Hegelian dialectic of interacting ideas that synthesized into an architecture for advocacy. Unlike some critics’, Falk’s normative vision was always a partner with his condemnation of systematic and largely ignored injustices that have been perpetrated by a world characterized by willful and plain blindness.

This essay examines Richard Falk’s major theoretical approaches and their contributions to the fields of international law and politics, assessing some of his major works dealing with the use of force and accountability for serious international crimes. After a discussion of his work advocating for the end of the Vietnam War and his involvement in the World Peace through Law Movement, we assess his contributions to ending the spread of nuclear weapons. We then focus on Falk’s emphasis on the complementarity between civilizations (an “anti-clash-of-civilizations” argument). The discussion then turns to Falk’s focus on the pressing need of alleviating climate change, and lastly, to Falk’s controversial tenure as UN (Human Rights Council) special rapporteur for Palestine, during which he challenged the preferred framework applied to Israeli-Palestinian relations. In all five of these areas, international law, his academic specialty, has informed Falk’s work, especially in international humanitarian law, human rights law, and procedurally, the rules of the UN Charter. Falk has brought his expertise to his public life of prodigious essay writing in opinion journals and newspapers, panel discussions and speeches, rallies, international fact-finding missions, an enormous and generous correspondence, and even poetry.

### VIETNAM AND THE NEED FOR AN ALTERNATIVE WORLD ORDER

During and after the Vietnam War, Falk edited a four-volume series, *The Vietnam War and International Law*, and coedited *Crimes of War*.<sup>13</sup> In the former series of books, Falk and his contributors examine various facets of the international legality of the war, ranging from the legality of foreign intervention in Vietnam’s civil war to the legality of the use of force to contain the spread of the civil war into neighboring countries (like Cambodia) to the use of chemical weaponry and cluster bombs to the treatment of prisoners of war.<sup>14</sup> These themes also find a place in a more recent book of Falk’s, *Revisiting the Vietnam War* (2017).<sup>15</sup>

Falk’s views on the Vietnam War, as an example of the failure of the Westphalian system, are a matter of record. As a matter of practice, Falk

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13. 1–4 *THE VIETNAM WAR AND INTERNATIONAL LAW* (Richard A. Falk ed., 1968, 1969, 1972, 1976); *CRIMES OF WAR* (Richard A. Falk, Gabriel Kolko & Robert J. Lifton eds., 1971).

14. *THE VIETNAM WAR AND INTERNATIONAL LAW*, *supra* note 13.

15. See generally *REVISITING VIETNAM WAR AND INTERNATIONAL LAW: VIEWS AND INTERPRETATIONS OF RICHARD FALK* (Stefan Andersson ed., 2017).

also represented clients who expressed views about the war that were contrary to the government's position and policy, either in expert testimony in courts or in the court of public opinion. In his testimony on behalf of a conscientious objector, Falk argued of the necessity to absolve those who break laws that are not just immoral but illegal to obey—an argument which was based on the duty not to obey illegal orders as established by the Nuremberg principles.<sup>16</sup>

The abuse of power and prerogative of the two US administrations involved in the conflict contributed to a humanitarian crisis that spread from Vietnam and engulfed other parts of the region. In his critique of the prospects for peace as a consequence of the Paris Agreement, Falk suggests the Nixon administration's attempt to occupy a "middle ground," in its support of the administration of Nguyen Van Thieu and its ignoring of the human rights abuses and mismanagement of the Thieu government (1965–1975), was likely to reignite US intervention in the conflict and impending crisis between the two Vietnams, North and South. On this point, Falk stated,

[W]e have neither peace nor justice nor honor. We are still entangled inappropriately and ineffectually in the destinies of South Vietnam. And we still have a country that is deeply divided. A fair portion of America regards the government in Washington as lacking in sensitivity toward the claims of its citizens to have positions based on their conception of honor as associated with scruples about supporting America's involvement in the war.<sup>17</sup>

In his later work, Falk laments the fact that whatever lessons were to come from US involvement in the Vietnam War did not stick, evidenced by US engagement in Afghanistan, Iraq, and elsewhere in the twenty-first century. Falk categorizes this engagement as a failure to recognize the "virtual impossibility . . . of turning military superiority on the battlefield enjoyed by the intervening side into a favorable political outcome against an adversary that occupies the commanding heights of national self-determination."<sup>18</sup>

The importance of peace and what is required to achieve peace is a recurring theme through much of Falk's early work. For example, his involvement in the World Peace through Law Movement of the late 1950s embodied his commitment to a greater role of international and regional institutions in achieving peace. Following a series of conferences, the movement reached three major conclusions, all about what would need to take place for world peace to be achievable:

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16. See *United States v. Sisson*, 297 F. Supp. 902, 905 (D. Mass. 1969).

17. Richard A. Falk, *The Justness of the Peace: Remarks by Richard Falk*, 67 AM. J. INT'L L. 258, 262–63 (1973).

18. Richard A. Falk, *The Afghanistan War in the Mirror of the Tet Offensive: When 'Defeat' Became 'Victory'*, FOREIGN POL'Y J. (Aug. 15, 2011), <https://www.foreignpolicyjournal.com/2011/08/15/the-afghanistan-war-in-the-mirror-of-the-tet-offensive-when-defeat-became-victory>.

(1) international law-making [be] modernized and speeded up; (2) international decision-making [be] improved by creating new regional or specialized courts, as well as by better use of existing decision-making institutions; and (3) the legal profession of the world [mount] a collective and sustained program to further these goals which, when achieved, will make law a credible substitute for the use of force.<sup>19</sup>

One of the criticisms offered of the movement was of the idea that achieving peace did not necessitate the use of “‘diplomatic maneuvering’ within the context of the present system of international relations.”<sup>20</sup> In *The Future of the International Legal Order, Volume I* (1969), Falk acknowledges that the politics of power endemic to this system of international relations has also dominated the international legal order, for decades in the case of the neoliberal model, and for centuries in the case of the Westphalian system of sovereign states.<sup>21</sup>

In some of his earliest work, Falk distinguishes between two competing logics of the international system: the Westphalian decentralized system of equally sovereign states created in the seventeenth century, and its alternative, the Charter system, based in institutions of the UN as an ordering principle, centered on the United Nations Charter (1945).<sup>22</sup> He offers a strong argument that the Westphalian system, with its emphasis on sovereign states as the primary movers, and interstate cooperation based on rational consent as the foundation of international law, increasingly fails to meet global challenges, including those associated with conflict, inequality, environmental degradation, and so on.<sup>23</sup> The Charter ordering logic, in comparison, holds greater promise, although the “‘tensions,” as Falk refers to them, arising from various institutional features of the UN that perpetuate aspects of the Westphalian logic impede the institution’s ability to achieve

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19. Charles Rhyne, Notes and Comments, *World Peace Through Law Conferences*, 56 AM. J. INT’L L. 1001, 1001 (1962).

20. David Lehmen, Book Review, 19 LA. L. REV. 238, 239 (1958) (reviewing G. CLARK & L.B. SOHN, *WORLD PEACE THROUGH LAW* (1958)).

21. Falk defines the “International Legal Order” as one that “is conceived of as an aggregate conception embodying those structures and processes by which authority is created, applied, and transferred in international society.” Richard A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, VOL. I: TRENDS AND PATTERNS* 32, 33 (Richard A. Falk & Cyril E. Black eds., 1969).

22. *Id.* He also considers alternative logics, or in other words, the influences of “spheres of influence,” what he refers to as “rules of the game,” and lastly, “decentralized modes of international authority,” in other words, states that implement international law in their domestic systems. *Id.* As examples of the latter, he refers to state prosecutions for crimes under universal jurisdiction (e.g., piracy, war crimes, and so forth). *See id.* at 64–69. It is somewhat difficult to discern the actual differences between some of these alternative orders (“spheres of influence” and the Westphalian system, for example), and admittedly, the use of piracy as an example of universal jurisdiction faces certain problems. Despite universal jurisdiction, few prosecutions for piracy have taken place; most states rely on a “capture and release” policy.

23. *Id.* at 55.



its goals of peaceful conflict resolution, economic equality, the promotion and protection of human rights, and so forth.<sup>24</sup>

There is a distinction to be made between what Falk terms the “pessimistic Westphalian” perspective and the “optimistic Westphalian” perspective.<sup>25</sup> Adherents of the former “believe that an essentially statist structure is incapable of solving the crisis of global governance.”<sup>26</sup> Adherents of the latter are “confident that the problem-solving potential and world order adaptability of Westphalian logic can meet the challenge, and that structural modifications of world order are not needed.”<sup>27</sup> Many policymakers in Washington, DC, fall into the latter camp and shrink from arguments (and indeed empirical evidence) that demonstrate the “post-Westphalian” trend that is actually taking place.<sup>28</sup> Instead, they advocate the US taking a lead in ensuring greater stability and well-being (a “display of wishful thinking”).<sup>29</sup> Those considered “post-Westphalian,” on the other hand, suggest that “heavy emphasis [should be placed] on global and regional law superseding international law” as a means to combat the downsides of globalization.<sup>30</sup>

All of Falk’s work—academic, policy, popular—reflects a “post-Westphalian optimist” stance, although it is fair to say that Falk is more of a pragmatic optimist, in that he acknowledges the complex concerns facing us all, while at the same time having hope that a will for a greater common good is obtainable.<sup>31</sup> Falk’s cosmopolitan argument, as an alternative to the mainstays of international relations, realism, liberalism, and constructivism, arguably grants greater agency to those—institutions of civil society and individuals working within domestic and international spheres—whose work is gradually making a difference in addressing these concerns; that is, those who have “the vision and capability to produce change without inducing chaos and catastrophe.”<sup>32</sup>

In *On Humane Governance* (1995), Falk classifies the global system as “inhumane.”<sup>33</sup> He bases this assertion on five measurable indicators: wealth inequality, prevalence of war, environmental degradation, a “failure to

24. *Id.* at 64.

25. Richard A. Falk, *International Law and the Future*, 27 *THIRD WORLD Q.* 727, 728 (2006).

26. *Id.*

27. *Id.*

28. *Id.* at 730.

29. *Id.*

30. *Id.* at 728.

31. Falk, *supra* note 25, at 732–33. You also have “post-Westphalian pessimists,” who contend that moving beyond the statist system will engender chaos and/or the necessity of hegemonic (read: US) control.

32. *Id.* at 734. To be fair, constructivists like Kathryn Sikkink, Thomas Risse, and others refer to the necessary work of “norm entrepreneurs” in effecting change. *See, e.g.*, *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

33. RICHARD A. FALK, *ON HUMANE GOVERNANCE: TOWARDS A NEW GLOBAL POLITICS* 1 (1995).

achieve a dramatic growth of transnational democracy,” and a failure to grant full protections to the more vulnerable societies on the planet.<sup>34</sup> Many of these are lingering problems resulting from the manner in which institutions of global governance—that is, those created by the UN—were set up.<sup>35</sup> Case in point: the Universal Declaration of Human Rights (1948). The fact that the human rights regime established after WWII was created in such a manner as to grant states certain “opt out” provisions laid the foundations for the current system of human rights regulation. It is a system that is fraught with never-ending frictions between state interests, particularly those of the more powerful states that fail to adequately ensure protection of their own populations’ human rights, let alone global human rights, and a cosmopolitan ideal of human dignity and “learning to live together well.”<sup>36</sup>

What Falk and other scholars working on the WOMP advocated was a global order

created by a combination of social forces acting effectively and on behalf of such world order values as nonviolence, economic and social justice, human rights and democracy, and environmental quality. . . . It is informed by a desire to improve the human condition by direct political action, deploying means that reject violence, respect truth, and rest their confidence upon democracy as both process and outcome.<sup>37</sup>

This global order must be a democratic one. So, what does that mean? Falk describes this order as one that has the potential to achieve what is necessary for global survival (as he refers to it, “horizons of necessity”), but in a manner that adheres to a “robust regime of law that is itself responsive to the values and implementing procedures of a human rights culture and to demands for global justice.”<sup>38</sup> Individuals and nongovernmental organizations (global and national civil society institutions) play an invaluable role in this order. This latter statement reflects a constant theme throughout Falk’s work.<sup>39</sup> Moreover, this order is one that maintains, or should maintain, “as much decentralism as possible, with as much centralism as neces-

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34. *Id.* at 1–2.

35. RICHARD A. FALK, *THE DECLINING WORLD ORDER: AMERICA’S IMPERIAL GEOPOLITICS* 10 (2004). Falk puts it rather bluntly (and accurately) when he states: “It would be a mistake to regard the establishment of the League of Nations or, later, the United Nations and the European Union as indications that the Westphalian statist/geopolitical framework was being superseded by either design or practice.” *Id.* Instead, these institutions, “although ambiguous with regard to overall purpose, mainly function as instruments for the attainment of statist objective.” *Id.*

36. RICHARD A. FALK, *ACHIEVING HUMAN RIGHTS* 9 (2009). The creation of “opt out” clauses is a criticism that also applies to treaties like the UN Convention on the Punishment and Prevention of Genocide, with respect to the “obligation” to respond to genocide as per Article VIII of the treaty.

37. Richard A. Falk, *From Geopolitics to Geogovernance: WOMP and Contemporary Political Discourse*, 19 *ALT.: GLOB., LOC., POL.* 145, 146 (1994).

38. FALK, *supra* note 36, at 16.

39. FALK, *supra* note 10, at 33–45. *See also* FALK, *supra* note 33, at 199–200, 236.

sary,” by which he means “central guidance and international presence for regulatory purposes in relation to [a] global interdependence agenda.”<sup>40</sup>

Falk suggests that, despite their weak points, the institutions of the UN have been a valuable forum in which relevant actors (really states) can communicate and draw attention to various needs, conflicts, and other global imbalances and, in so doing, create a discourse that, in turn, will prompt a normative shift toward an interdependent and interlinked collective.<sup>41</sup> This is not to say, of course, that merely drawing attention to issues, contributing to a growing discourse, and so forth translate into policy change. As an example, Falk cites the actions of the countries of the South in the 1970s and their attempt to create a new international economic order (NIEO). The South’s efforts to level the economic playing field so to speak with the industrialized North fell flat (or as Falk so aptly puts it, “the South was effectively slapped down”).<sup>42</sup>

In later work, Falk calls for a “global parliament.”<sup>43</sup> Extant inadequacies of the UN demonstrate that whatever form this parliament takes, it must be one in which a broader definition of citizenship is applicable, a definition that is above and beyond that defined traditionally by territorial sovereignty or even by supranational institutions such as the EU. In this global society, we are “citizen pilgrims” looking for a “sustainable, equitable, humane, and peaceable future.”<sup>44</sup> This global parliament centers on a “sense of human solidarity of a *global scope*, with allowance for plural identities.”<sup>45</sup> Although it is doubtful this goal will be achieved in the near future, and questions remain as to the form such an institution would take, Falk suggests that events, including the consequences of recent US military action in the Middle East, have increased the receptiveness of many to this idea of a global parliament.<sup>46</sup>

In *The Declining World Order* (2004), Falk refers to a “campaign for global democracy,” which

regards democratic values as pertaining to all domains of life, although adjusted to reflect the particular setting. On the one side of everyday existence, democratic accountability, procedures of participation, and transparency extend their reach to the domains of

40. FALK, *supra* note 33, at 36–37.

41. Falk, *supra* note 21, at 55.

42. FALK, *supra* note 33, at 27–29.

43. FALK, *supra* note 36, at 22.

44. *Id.*

45. *Id.* at 200.

46. Richard A. Falk, *UN Under Siege: Geopolitics in the Time of Trump*, GLOBAL JUSTICE IN THE 21ST CENTURY (July 1, 2017), <https://richardfalk.org/2017/07/01/un-under-siege-geopolitics-in-the-time-of-trump>. Falk does not completely rule the UN out as a potential “global parliament.” He suggests that the UN is widely perceived as a legitimate organization: “A strong confirmation of the value of the UN arises from the fact that every government, regardless of ideology or relative wealth and power, has up to now regarded it as beneficial to become a member and remain in the UN.” *Id.*

gender and workplace relations, but also to the undertakings of governments themselves. No one is either above or below the law.<sup>47</sup>

At present, however, when it comes to military action or some other necessary multilateral response, spoilers remain and are not going anywhere for quite some time. Falk frequently refers to the UN Security Council as a major impediment to effective global response.<sup>48</sup> At the same time, even when more powerful states—such as the US, China, or Russia—refuse to acknowledge and act on their responsibilities to protect, through the use of their veto power on the Security Council among other measures, they are still contributing to this normative shift toward a more cosmopolitan perspective, because they adopt the language of the Charter in their discourse.<sup>49</sup>

### THE NUCLEAR ORDER

In the past, Falk suggested that change in the international legal order may occur as a consequence of some major catastrophic event or events. In his earlier work, the type of catastrophic event worthy and capable of inducing a critical junction or a major shift in the international legal order was nuclear war.<sup>50</sup> As he states on this point, “[o]ver a longer term, an evolutionary erosion of the existing national locus of power and loyalty seem[s] likely to take place, but such trends are indefinite and their eventual impact difficult to anticipate.”<sup>51</sup> This statement remains as true today as it was back in 1969. In the present day and age, a global depression brought on by the COVID-19 pandemic may just be the event that creates the critical juncture necessary to prompt a greater consensus for a move away from the decentralized Westphalian system to a more cosmopolitan international legal order. It is important to mention that, in referring to the COVID crisis, we do not suggest that the nuclear threat is off the table, or that the “nuclear genie

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47. FALK, *supra* note 35, at 28.

48. In an interview with the authors of *Weapon of the Strong: Conversations on US State Terrorism*, Falk assessed the use of the veto power of the five permanent members of the Security Council as “inappropriate” and a “remnant of a West-centric world order.” *Richard A. Falk: International Law and Human Right*, in *WEAPON OF THE STRONG: CONVERSATIONS ON US STATE TERRORISM* 47, 50 (Cihan Akson & Jon Bailes eds., 2012).

49. The fact that the veto has been used by P-5 members to evade accountability for various misdoings (e.g., the United States in the ICJ *Nicaragua* case) is certainly cause for alarm. Still, however, Falk suggests that, in the *Nicaragua* case, the fact that the U.S. admitted to violating international law demonstrates the “counter-hegemonic” power or influence of international law. *See id.* at 51–52.

50. Falk is a longtime critic of the nuclear weapons regime, which he has referred to as something that defies rationality given its consequences; as he puts it so well, “[T]o adopt a tone of rationality is to gloss over the quintessentially absurd reality of contemplating the use of apocalyptic weaponry for the sake of the secular state based upon a rushed decision by poorly qualified politicians and generals.” ROBERT J. LIFTON & RICHARD A. FALK, *INDEFENSIBLE WEAPONS: THE POLITICAL AND PSYCHOLOGICAL CASE AGAINST NUCLEARISM* 128 (1982).

51. Falk, *supra* note 21, at 38.

[has been] put back in the bottle,” to use Falk’s words.<sup>52</sup> Despite efforts to contain the spread of nuclear weaponry, horizontal proliferation has occurred and is still occurring, with India, Pakistan, North Korea, and soon, possibly Iran, members of a select and dangerous club.

Of course, this is not a club limited to more powerful states but also has the potential to include terrorist groups and organizations, like Al Qaeda or ISIS. In one of his more recent works on this topic, *Path to Zero* (2015), Falk calls for a new debate on the threat of nuclear weapons.<sup>53</sup> Falk and his coauthor, David Krieger, fault a weak international legal system for continuing its soft and somewhat hypocritical stance toward the necessity of nuclear weapons and their use as a legitimate measure of security, which Falk maintains stands as a violation of the Nuremberg principles about aggressive war.<sup>54</sup> In particular, in discussing a 1996 advisory opinion of the International Court of Justice, Falk states that the court “used the fudge word ‘generally’ before the words ‘be contrary to the rules of international law’” to create doubts about the illegality of these weapons.<sup>55</sup> Although countries around the world have made greater efforts, through the auspices of the UN, to ban all nuclear weapons, Falk acknowledges that the fatal flaw of the Nuclear Ban Treaty (NBT) is

the refusal of any of the nine nuclear weapons states to join in the NBT process even to the legitimating extent of participating in the negotiating conference with the opportunity to express their objections and influence the outcome. As well, most of the chief allies of these states that are part of the global security network of states relying directly and indirectly on nuclear weaponry also boycotted the entire process. It is also discouraging to appreciate that several countries in the past that had lobbied against nuclear weapons with great passion such as India, Japan, and China were notably absent, and also opposed the prohibition.<sup>56</sup>

Moreover, the NBT contains many opt out provisions, which Falk attributes to the treaty’s “state-centric” quality.<sup>57</sup> Nuclear weapons remain a

52. Richard A. Falk, *Nuclear Proliferation as a World Order Problem*, 1 INT’L SEC. 79, 92 (1977). Falk used this phrase not merely in regard to nuclear weaponry, but also nuclear energy as a viable alternative to fossil fuels.

53. RICHARD A. FALK & DAVID KRIEGER, *THE PATH TO ZERO: DIALOGUES ON NUCLEAR DANGERS* (2012).

54. *Id.* at 125–45.

55. *Id.* at 128.

56. Richard A. Falk, *Challenging Nuclearism: The Nuclear Test Ban Treaty Assessed*, CPPN CULTURE OF PEACE NEWS NETWORK BLOG (July 19, 2017), <https://cpnn-world.org/new/?p=10058>.

57. For example, Article 17 gives parties to the NBT a right of withdrawal. All that state parties have to do is give notice, accompanied by a statement of ‘extraordinary circumstances’ that have ‘jeopardized the supreme interests of its country.’ The withdrawal will take effect twelve months after the notice and statement are submitted. There is no procedure in the treaty by which the contention of ‘extraordinary circumstances’ can be challenged as unreasonable or made in bad faith. It is an acknowledgement that even for these non-nuclear states, nothing in law or morality or human wellbeing takes precedence over the exercise of sovereign rights.

symbol of power and, Falk would agree, a holdover of the Westphalian system and the continued preeminence given to realist thinking in many policy-making circles.

Falk considers addressing the risks associated with nuclear weapons to be a moral imperative. However, there remains the question of whether nuclear war will be a “Grotian moment.” To some extent, Falk suggests that the incremental changes that have occurred thus far (e.g., greater use of and reliance on international institutions of justice, trade, and environmental protection), which fit with Falk’s “erosion of domestic jurisdiction” characteristic of the UN, may over time produce a substantial shift in the legal order toward a more cosmopolitan one.<sup>58</sup> As Falk states with respect to the WOMP:

[Its] political ethos insists that we can never know enough to forgo necessary and desirable goals in human affairs as unattainable, and that our actions, however trivial they may appear, may generate unexpectedly large consequences because they are aspects of an obscure play of force, so that passivity and withdrawal from the wide field of political action is necessarily irresponsible.<sup>59</sup>

Falk wrote the above passage in 1994. Of course, just as it was then, perhaps even more so now, change is not going to come without resistance. A certain degree of path dependency is unavoidable. Those with a stake in the Westphalian order—elites, the wealthy, both—endeavor to hold on to the institutional status quo of power relations, or at the very least, control the direction of change once it gathers speed, if it gathers speed. To this point, Falk suggests that in the present phase of

international life it is hard to envision scenarios that liberate the more constructive tendencies in these political systems, because the strength of this developmental capitalism that has become so deeply . . . unchallenged . . . does create a kind of determinist outlook that is very distressing, I think, at least for the short term, and in view of the kinds of challenges climate change and . . . the retention of nuclear weapons pose.<sup>60</sup>

In this scenario, Falk argues that “a new cosmopolitan ideology that would dissipate the hold of the state upon the loyalty of the individual and substitute new myths and symbols capable of arousing widespread support” is crucial to move the process forward.<sup>61</sup> Again, this is an ideology that is a consequence of the discourse generated by the interplay of a number of

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*Id.*

58. Falk, *supra* note 21, at 59–60.

59. Falk, *supra* note 37, at 148.

60. Richard A. Falk, *Honoring Richard Falk's Scholarship*, Roundtable Panel Discussion at the 54th Annual ISA Convention (Apr. 4, 2013).

61. Falk, *supra* note 21, at 40.

factors. These factors include the increased activity of transnational actors in drawing our attention to global issues of concern, and “the globalization of business, finance, and popular culture, eroding the capabilities and resolve of the state as problem-solver” when it comes to these problems.<sup>62</sup>

However, if a change is coming, when will the “Grotian moment” arrive? Presently, state actors remain resistant to moving beyond state-centric notions of welfare and security to the notion of a global community whose interests are interlinked. At the turn of the last century, Falk wrote of a “normative vacuum” created by the collapse of socialist rule in the early 1990s.<sup>63</sup> In this vacuum, he said, the “dominating logic of the market in a world of greatly uneven social, economic, and political conditions and without any built-in, reliable means to ensure that continuing economic growth does not at some point and in certain respects cause decisive ecological damage” was imminent.<sup>64</sup> Now this damage is here.<sup>65</sup> In many instances, the lack of global will to effectively address these issues of human despair, even taking into consideration the greater role and voice of civil society in shaming and exposing government abuses and corruption, calls into question any realistic aspirations of a world order of the sort envisaged by Falk emerging.

Of course, to be fair, Falk remains clear on his position about the relationship of international law to politics. Although he advocates for an international legal order centered on humanism, he has long opted for an “intermediate position,”<sup>66</sup> one that recognizes that the application of international law is constrained by historical and political factors on the one hand, as a sort of macrolevel structure, and the behavior of sovereign states on the other.<sup>67</sup> International law is a “quasi-dependent variable,” an institution that simultaneously is influenced by and influences the international system and the individual state.<sup>68</sup> At the same time, it is crucial that in occupying an intermediate position, international law be inclusive, influ-

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62. FALK, *supra* note 33, at 35. Falk cites to these factors, which also include a reduction in the degree of legitimacy accorded to states and institutions for their handling, or mishandling, of global crises and the “move . . . of transformative political visions toward an ethos of democratization and nonviolence.” *Id.*

63. FALK, *supra* note 10, at 24–26.

64. *Id.* at 26.

65. The recent words of the UN Secretary General, António Guterres, spoken at the Climate Ambition Summit in December 2020, speak directly to this point: “Carbon dioxide levels are at record highs. Today, we are 1.2 degrees hotter than before the industrial revolution. If we don’t change course, we may be headed for a catastrophic temperature rise of more than 3 degrees this century. Can anybody still deny that we are facing a dramatic emergency?” António Guterres, Secretary General, U.N., Remarks at the Climate Ambition Summit (Dec. 12, 2020), <https://www.un.org/sg/en/content/sg/speeches/2020-12-12/remarks-the-climate-ambition-summit>.

66. Falk, *supra* note 21, at 35.

67. *Id.*

68. *Id.*

enced not merely by the interests and preferences of the elite, but also by those of the citizenry.

In the domestic sphere, international law is influenced by the normative structures within states, which are reinforced by extant legal systems in those states.<sup>69</sup> Falk's earlier work clearly reflects the importance of Cold War politics in the international legal order, and particularly the role of domestic states in upholding and shaping that order. In his 1964 book, *The Role of Domestic Courts in the International Legal Order* (1964), Falk suggests judicial deference by states is a function of a decentralized system of rules (and within each state a "continuing primacy of jurisdictional rules for a social system"), which in turn, is strongly influenced by "distribution of value, policy, interest, and power in the world," albeit that which existed at that time.<sup>70</sup> This statement describes the "external" function of judicial deference; the "internal" function, on the other hand, is the process by which domestic courts refer disputes to the executive for handling through diplomatic and other means. Falk does identify limitations to judicial deference. First, deference is "inappropriate" in cases in which there is broad consensus internationally on a rule.<sup>71</sup> The example that jumps to mind is crimes against humanity or genocide, wherein a universal mandate to prosecute exists. Falk uses the example of noneconomic human rights.<sup>72</sup>

On genocide, Falk admits to using the g-word too loosely in earlier writing. More recently, he has drawn two sets of distinctions: (1) "genocide" as the crime and "genocidal" as the behavior which, if persisting and intentional and documented, can morph into the crime of genocide; and (2) the distinction between moral, political, and legal conceptions of genocide, with the latter requiring high levels of documentary evidence as to intention according to the International Court of Justice. The Armenian massacres were "genocidal" but could not have been "genocide" as the word did not exist in 1915, much less the crime, which was not invoked even in the Nuremberg context that was very jurisprudentially correct in its insistence that allegations of criminality depended upon prior existence of the *legal* prohibition, and must never be retroactive.

The second limitation or "qualification" to which Falk refers concerns judicial independence, or the prerequisite that courts exercise due diligence in their decision to refer an international dispute to an executive for resolution.<sup>73</sup>

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69. See RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964).

70. *Id.* at 9.

71. *Id.* at 9–10. As Falk states on this point, "[A] requirement of social consensus is a condition precedent to the validity of any substantive rule of international law unless the rule is derived from a specific treaty obligation." *Id.* at 10.

72. *Id.* at 10.

73. *Id.* at 9–11.



Falk uses the judicial system of the United States as an exemplar to suggest that some sort of international consensus, really the emergence of a global community of like-minded states, within a horizontally organized international system, should be the basis of the system.<sup>74</sup> His discussion of the *Sabbatino* case, which at the time was awaiting review by the US Supreme Court, expressed a hope that the Court would rule in a manner independent of the foreign policy interests of the executive.<sup>75</sup> Instead, the Court declined to review the case for less than credible reasons.<sup>76</sup>

Falk's argument about the role of domestic jurisdictions in international law rejects definitions of legalization that describe the process as an essentially top-down one, or as Abbott et al. and others suggest, "a form of institutionalization characterized by three components: obligation, precision, and delegation."<sup>77</sup> Theirs is an argument that frames legalization as conducted by rational states that more or less agree to comply depending on the strength of the obligations involved (with *jus cogens* rules being the most binding), the specificity of the laws in question, and the manner with which violations or questions of the law are dealt.<sup>78</sup> Falk's is more in tune with constructivist explanations of legalization of international law in domestic settings as being a function of the degree of "fit" with internal values and extant normative systems.<sup>79</sup> At the same time, Falk's argument presents legalization as a much more organic process, stemming from domestic jurisdictions that together create a global order.<sup>80</sup>

At this point in time, the global order is still heavily influenced and constrained by the behavior of a powerful group of states. Arguably, the behavior of the US government over the past few years demonstrates a perception of international law as a vertical phenomenon, meeting two particular limitations of the international order: first, international law being

74. *Id.* at 21–27.

75. FALK, *supra* note 69, at 77–138.

76. The Court declined to hear the case on the basis that Communist states, and presumably their allies ("newly independent and underdeveloped states"), have no real problem with confiscating the foreign property of others. The gist of the argument is that there being a lack of general international consensus on foreign deprivation, there is no real international legal prohibition governing deprivation. See Burns H. Weston, *International Law and the Deprivation of Foreign Wealth: A Framework for Future Inquiry*, in THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, VOL. II: WEALTH AND RESOURCES 37 (Richard A. Falk & Cyril E. Black eds., 1970).

77. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000). This is the definition widely accepted, although not without criticism, by the contributing authors to the Summer 2000 edition of *International Organization*.

78. See, for example, the contributions to that volume by Karen Alter, Frederick M. Abbott and Beth Simmons. Karen J. Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, 54 INT'L ORG. 489 (2000); Frederick M. Abbott, *NAFTA and the Legalization of World Politics: A Case Study*, 54 INT'L ORG. 519 (2000); and Beth Simmons, *The Legalization of International Monetary Affairs*, 54 INT'L ORG. 573 (2000).

79. See, e.g., Martha Finnemore & Stephen J. Toope, *Alternatives to 'Legalization': Richer Views of Law and Politics*, 55 INT'L ORG. 743 (2001).

80. This is a suggestion made in many of Falk's works. See, e.g., RICHARD A. FALK, HUMAN RIGHTS HORIZONS: THE PURSUIT OF JUSTICE IN A GLOBALIZING WORLD (2000).

“subordinated to general permissive principles of State jurisdiction which are capable of almost unrestricted extension” and second, cases or behavior being made to only *appear* as if they accord with extant international rules and norms.<sup>81</sup>

The emergence of a unitary executive in the US—in the form of Donald J. Trump—was a major setback for Falk’s vision of an international legal order that respects diversity and encourages fairness. At the time of this writing, it is difficult to fully gauge the harm done to the international order by the actions taken by the Trump administration that repudiated and damaged international institutions, such as the World Trade Organization (WTO) and the World Health Organization (WHO),<sup>82</sup> not to mention international legal regimes, including the Paris Climate Accords, the Iran Agreement,<sup>83</sup> and the UN Charter.<sup>84</sup> Moreover, the behavior exhibited currently by other leaders in the world (e.g., Xi Jinping, Vladimir Putin, Min Aung Hlaing in Myanmar)<sup>85</sup> reflects the continued persistence of the realist reliance on “hard power” (albeit a passive-aggressive hard power in some cases, like that of the US) as a means of addressing policy concerns.

When it comes to the use of force, whether we are talking about wars in “self-defense” (however self-defense is conceived) or intervention in protracted conflicts like Syria, Yemen, or Kosovo, the problem is a matter of effectively addressing the uncertainty that surrounds outside intervention in another country as a means of responding to the target country’s illegal behavior. Falk refers to himself as “suspicious of intervention as a way of making things better.”<sup>86</sup> What will the unintended consequences of the use of force in this capacity be? Falk speaks of the moral and political uncertainty that accompanies intervention, an uncertainty wherein knowledge and responsibility exist in an oftentimes dialectic relationship.<sup>87</sup>

81. FALK, *supra* note 69, at 27–29.

82. This, of course, is a direct reference to the Trump administration’s refusal to appoint judges to the Appellate Board of the WTO, and his administration’s withdrawal of funding for the WHO. This latter act was intended to punish the WHO for its mishandling of the COVID-19 crisis. See Teo Armus, *Trump Threatens to Permanently Cut WHO Funding, Leave Body If Changes Aren’t Made within 30 Days*, WASH. POST (May 19, 2020), <https://www.washingtonpost.com/nation/2020/05/19/who-funding-trump/>.

83. Although the Iran Agreement was an executive agreement that included the US, Iran, and a number of other states, it can be included as an international legal regime as its intent—to monitor Iranian nuclear capabilities—certainly has international consequences.

84. With respect to the UN Charter, we specifically refer to the prohibition on the use of force as per Article 2(4) which was, at least on its face, violated by the US in the January 2020 targeted assassination of General Qassim Suleimani of Iran in Iraq. U.N. Charter art. 2, ¶ 4.

85. At the time of this writing, the military of Myanmar and its Union Solidarity and Development Party just removed Aung San Suu Kyi from power. The February 1 *coup d’état* came as a result of the November 2020 landslide electoral victories of the National League for Democracy, the party of Aung San Suu Kyi. *Myanmar Coup: Aung San Suu Kyi Detained as Military Seizes Control*, BBC NEWS (Feb. 1, 2021), <https://www.bbc.com/news/world-asia-55882489>.

86. Falk, *supra* note 60. Although suspicious, he does not suggest that this suspicion is “unconditional,” per se.

87. *Id.*

## COMPLEMENTARITY

The work of international law must be a process in which all can take part. Whatever form the WOMP, Falk's largest effort to reconceptualize sovereignty, was supposed to take during the 1970s–1980s, it clearly must have been inclusive, not exclusive. It must strive to avoid the “false universalism” of West-centric notions of human rights and governance, or “depicting the particular and partial as if it were synonymous with the general.”<sup>88</sup> Falk admits the concept of the WOMP is essentially based in “Western, even in US, specificities and preoccupations,”<sup>89</sup> but notes that it strives to overcome and move beyond these to embrace a vision of the world that is pluralistic to the extent that it “acknowledges *significant* difference, as well as sameness, in *constituting* a world order based on procedures and norms explicitly designed to ensure for equitable participation by each major world civilisation.”<sup>90</sup>

George Abi-Saab and Falk were in a minority in the regular WOMP meetings across the globe in the sense they never favored world government in any form; their frequent collaborator and friend, Saul Mendlovitz, the founding WOMP director, did advocate world government (despite graduating from the conservative University of Chicago Law School). Though the WOMP was indeed funded through Mendlovitz's fundraising to be a vehicle for the promotion of world government advocacy, Mendlovitz was the only one among the several dozen principal participants who advocated world government in any form. In practice, there was not much interest in refuting such advocacy. The greatest value of WOMP was the diversity of non-Western views, including the focus on development by those from the Global South and on war prevention by those from the Global North. Falk himself has instead favored a somewhat stronger United Nations with greater autonomy with respect to the Charter principles and purposes, and less submission to the will of the P-5, trying to distinguish his views by speaking of “central guidance” rather than world government. In that sense, he was closer to Saul Mendlovitz than the other members of the WOMP team who were high quality, very independent intellectuals. There was considerable tension at the meetings, but good camaraderie over drinks and during mealtime. Saul deserves lots of credit for recruiting participants who did not share his views but were highly regarded within their countries.

This is an assessment that also applies to cosmopolitanism more generally. Although cosmopolitanism has a “long continuous tradition” philosophically, admittedly, it is or has been largely associated with and affected by Western society, including through the work of Grotius and Kant, among

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88. Richard A. Falk, *False Universalism and the Geopolitics of Exclusion: The Case of Islam*, 18 *THIRD WORLD Q.* 7, 8 (1997).

89. Falk, *supra* note 37, at 148.

90. Falk, *supra* note 88, at 9.

others.<sup>91</sup> Yet, Falk suggests in a recent piece that cosmopolitanism's themes of humanity and peace make it a worldview that extends beyond geopolitics, and any one religion, or culture.<sup>92</sup> It is a "means and an end" that embraces not merely humankind, but ecological concerns also.<sup>93</sup> This is contrary to other major international relations paradigms referenced above.

Falk also applies this argument to much of the "New Cosmopolitanism" that emerged after the two world wars, which was focused more on process, on avoiding war, rather than shaping ideals.<sup>94</sup> To achieve real substantive change, however, Falk has always insisted cosmopolitanism must be more than just a sentiment. It must be thought of as a holistic approach that accepts as a given the essential interconnectedness of life on this planet and the pressing need for inclusive global solutions to mounting global problems.<sup>95</sup>

Again though, entrenched geopolitical statist concerns and the weakness of international regimes stand in the way of any effective "normative readjustment" to the prevailing notions of human rights, founded as they are in the principles of dignity, peace, and compassion. This observation applies particularly to those cases of human rights claims that are based on long-standing grievances on the part of a people, be they indigenous peoples or Islamic peoples or any other disenfranchised peoples.<sup>96</sup> We would also include here African Americans and persons of color in the United States. With respect to the Islamic world, Falk has always been clear on the need for its participation and inclusion in international institutions of power and authority.<sup>97</sup> The attacks of September 11, 2001, and the ensuing global "war on terror" were precipitated by the Islamic world's exclusion, which still prevails and continues to fuel, among other things, the rise of the Islamic State, Iran's propensity toward developing nuclear weapons, and the Israeli government's expansion of settlements in the West Bank.<sup>98</sup>

Against the backdrop of Falk's thesis about the complementarity of civilizations is the antithesis, Samuel Huntington's 1992 "clash of civilizations" argument. Falk describes Huntington's argument as "dangerous and simplistic, drawing ethnic and religious battle lines that anticipated a new epoch of cultural wars based on intercivilizational enmity, culminating in

91. Richard A. Falk, *Cosmopolitan Paths to Peace*, in THE PALGRAVE HANDBOOK OF GLOBAL APPROACHES TO PEACE 29, 29–30 (Aigul Kulnazarova & Vesselin Popovski eds., 2019).

92. *Id.* at 30.

93. *Id.*

94. *Id.* at 38–44.

95. *Id.*

96. One issue in particular that dogs the progress of indigenous peoples' rights is the perceived threat that an expansion of their authority means for the territorial interests of the larger state. Falk, *supra* note 88, at 11.

97. For his full discussion on the substantive bases of these grievances, see *id.* at 12–19.

98. See *Palestinians Tear Gassed in Protests Against Israeli Settlements*, AL JAZEERA (May 18, 2020), <https://www.aljazeera.com/news/2020/05/palestinians-tear-gassed-protests-israeli-settlements-200516080322410.html>.

the slogan ‘the West against the rest.’”<sup>99</sup> Falk posits the “clash argument” as a rejection of the correct, rational views associated with Western (Christian) modernity. More than that even, the argument presupposes a world in which those societies who defy or challenge the concepts of modernity (e.g., a secular state, a market economy) cannot help how they act; it is part of who they are, their very nature. Huntington offers what is essentially a primordialist argument, rooted in colonial times, wherein European powers “civilized” the barbarians or natives.<sup>100</sup>

As Falk suggests, because this thesis existed when the attacks of September 11, 2001, occurred on American soil, this enabled US policymakers to neatly associate terrorism with religion, although more in practice than in rhetoric, as the use of torture and the arbitrary arrest and detention of “terrorism” suspects in the months that followed the attacks attest.<sup>101</sup> The clash argument drove a wedge (and still does in many respects) between those who argue that not all religions are extreme, that there is a place for “religion in humane governance,” and those who find religion, in particular Islam, antithetical to the protection of human rights.<sup>102</sup>

Falk cites “failure of political imagination” as a source of the inability of the modern state system, with its emphasis on “economistic secularism,” to effectively address problems of poverty, inequality, conflict, and so forth, which continue to require (demand really) a greater public involvement at the local level and more broadly in civil society associations at the global level.<sup>103</sup> In this sense, the use of religion as a force to galvanize public action becomes useful, much as it was during the era of the civil rights movement in the US. Falk argues that the more exclusionary aspects of religion, highlighted quite often by those seeking power or to maintain power, detract from the more universalistic character of religion, which encourages inclusivity and tolerance.<sup>104</sup>

This notion of religion as a means to an end for power seekers highlights a constant theme in Falk’s work about the importance of agency and enfranchisement for all citizens. When it comes to policy, the idea of “othering” people because of their religious or even secular views encourages “intolerance and repression.”<sup>105</sup> Including religion (the “Religious Pil-

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99. FALK, *supra* note 35, at 139.

100. *Id.* at 139–40. Falk traces the roots of the belief that religion has no place in politics to the Enlightenment era and the rise of the Westphalian system in 1648. *Id.* at 142–43.

101. *Id.* at 140.

102. *Id.*

103. *Id.* at 151.

104. Falk acknowledges that early on the WOMP did not include for consideration religion as a factor of importance. However, at the same time, Falk asserts that the WOMP “did acknowledge that world order values, widely shared on an intercivilizational basis, provided the normative framing of any successful project to establish, or even to envisage, human global governance.” *Id.* at 144–45.

105. FALK, *supra* note 35, at 141.

lars of Human Global Governance”) as a basis for social movements may breach the statist divide that still prevails in global affairs and that allows, intentionally or not, these unfavorable conditions to persist.<sup>106</sup>

### ENVIRONMENTAL CONCERNS

Falk’s concept of global democracy would counteract the privileged status of great powers in formal international institutions by empowering peoples’ movements that would build global civil society, which is a necessary tool with which to tackle mounting concerns about climate change. The protection of human dignity, a large part of which entails access to decent living standards, clean water and air, sustainable food sources, and so forth, and the culture of peace must come before states’ interests through a pedagogy of human security that should be taught as a human right. To build peace, structures of human security must be developed through the teaching of tolerance and an educational component that opposes the supposed “lessons of history,” which are based on cultures of revenge, war, and militarism that are so common in the world. As Falk wrote in *Human Rights Horizons*,

Hope begins when we have the moral courage and intellectual energy to transcend what seems possible by considering carefully what seems necessary and desirable, and then having the daring to plan for the ‘impossible.’ I think the changing parameters of debate on climate change, facing that ‘inconvenient truth,’ on the environment, [are] an encouraging sign of an emerging receptivity to an acceptance of constraints on all forms of political behavior for the sake of a humane future.<sup>107</sup>

Education is needed to help inspire such civil society actions necessary to protect the world from environmental (or military) Armageddon.

Falk’s publications, conferences, and speaking engagements, which stretch back decades and relate to his concerns about environmental degradation, have become even more important in light of the present global environment. From *This Endangered Planet* (1971) to *A Study of Future Worlds* (1975) to more recent works, including *(Re)Imagining Humane Global Governance* (2014), Falk has always insisted that these environmental challenges that persist (and have subsequently worsened over time) are linked with issues of injustice and inequity.<sup>108</sup>

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106. By “Religious Pillars,” Falk suggests those aspects of religion that appreciate the need to alleviate problems of human suffering, its legitimacy in popular culture, “the unitive feature of religious consciousness,” and its ability to inspire hope and the ability to engage in nonviolent forms of struggle among other positive features. *Id.* at 157. For the complete list, see *id.* at 155–63.

107. FALK, *supra* note 36, at 66.

108. See FALK, *supra* note 9; RICHARD A. FALK, *A STUDY OF FUTURE WORLDS* (1975); RICHARD A. FALK, *(RE)IMAGINING HUMANE GLOBAL GOVERNANCE* (2014).

Like all the other risks associated with globalization, environmental degradation is one that international institutions and their member states have failed to fully appreciate. Once again, this failure is another holdover of the old Westphalian logic of world affairs. As Falk puts it, "The Westphalian political reality, having demonstrated an impressive degree of resilience in addressing intra-systemic challenges, shows a lemming-like refusal to acknowledge, [much] less adapt to systemic crises, even if threatening to human survival."<sup>109</sup> These are matters that no balance of power or hegemonic state can address. Rather, it is incumbent on people working through institutions in which they have a greater voice to effectively tackle environmental degradation.

Addressing climate change requires statist actors to set aside their short-term interests and look at the big picture, which is to say the impact environmental degradation has on all life on the planet. By shifting the dialogue about global warming to include voices at the local level, a shift in perspective on the parts of elites may occur and hopefully will. Just as with all of his other academic endeavors, in the case of environmental degradation, Falk engages in advocacy intended to redress problems.<sup>110</sup>

Environmental concerns represent a human rights issue to Falk, one closely linked with nuclear war, human insecurity, and violence:

The notion of human rights is incomplete to the extent that it fails to encompass those forms of deliberate behavior that produce serious environmental damage. This set of concerns is not an exotic or marginal category. In an increasingly interdependent global setting, where elaborate technology is used and where even higher levels of industrialization are contemplated, environmental quality is a critical dimension of human dignity that may have a significant impact on the development, and even survival, of mankind.<sup>111</sup>

## PALESTINIAN OCCUPATION

Falk's criticism of Israeli policy and behavior toward the Palestinian people demonstrates the problems that the preeminence awarded to the intertwined influences of geopolitics and state security interests have for the strength of the international order. In this situation, behavior that on its face is illegal under international law becomes reasonable; it "will not be censured and will indeed form a precedent for others similarly situated."<sup>112</sup> Simultaneously, though, the actions of civil society institutions and influen-

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109. Richard A. Falk, *A Radical World Order Challenge: Addressing Global Climate Change and the Threat of Nuclear Weapons*, 7, Nos. 1–2 *GLOBALIZATIONS* 137, 138 (Mar.–June 2010).

110. Falk has been a member of a number of commissions and groups concerned with issues facing the environment. See Falk, *supra* note 1.

111. RICHARD A. FALK, *HUMAN RIGHTS AND STATE SOVEREIGNTY* 167 (1981).

112. FALK, *supra* note 10, at 202.

tial states in protest of Israeli policy in Gaza and the West Bank, such as the Boycott, Divestment and Sanctions, or “BDS,” movement launched by the Palestinian Solidarity Movement against Israeli businesses, exemplify a trend toward a global system in which international law is an essential part of the dialogue.<sup>113</sup>

As Falk maintains, there is a “double standard” at play, which is clearly exemplified by the response of the international community, and the global legal order, to the Israeli-Palestinian conflict.<sup>114</sup> With respect to the Oslo negotiations conducted by the Clinton administration back in the 1990s, Falk asserts that the concerns of the Palestinians were “brushed aside as interferences with the peace process or as matters to be resolved by the negotiations.”<sup>115</sup> Rather than adhering to the principles of international law and being conducted pursuant to global public opinion, the Oslo negotiations prioritized the interests (statist objectives) of Israel and the US over those of the Palestinians.

What has resulted is a standard that creates “an impression [a norm, really,] that Israeli violence against Palestinian refugees and others is generally acceptable as an act of war and expression of security policy, while Palestinian violence is treated as ‘terrorism’ of a character that undermines whatever political and moral claims may exist to support the Palestinian struggle.”<sup>116</sup> Falk considers the apartheid-like structure of Israeli institutions of authority in the Palestinian territories and in Israel proper to be one that is bolstered by the West, in particular, the United States, but also institutions of the UN in its application of international law.<sup>117</sup> On the one hand, there is the 2004 ruling of the International Court of Justice that declared as unlawful Israel’s construction of the wall in the Occupied Palestinian Territory.<sup>118</sup> On the other, there are the findings of the Palmer Commission, created by the secretary-general of the UN, which ruled that Israel’s attack on the humanitarian flotilla attempting to deliver aid to the Palestinian people in 2010 was a legitimate exercise of its security policy.<sup>119</sup> Added to this is the modification of the Goldstone report by its chief author, Richard Goldstone, specifically, his retraction of portions of the report accusing

113. See RICHARD A. FALK, *PALESTINE’S HORIZON TOWARD A JUST PEACE* (2017).

114. FALK, *supra* note 35, at 130.

115. *Id.* at 131. In this instance, the “brushing aside” of the concerns of the Palestinians detracted from the legitimacy of the Oslo proceedings, making them appear one-sided.

116. Falk, *supra* note 88, at 15.

117. See RICHARD A. FALK, *PALESTINE: THE LEGITIMACY OF HOPE* (2014).

118. *Id.* at 117–18. See also *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, INTERNATIONAL COURT OF JUSTICE 136 (2004), <https://www.icj-cij.org/en/case/131>.

119. FALK, *supra* note 117, at 121–25. See also *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, (Sept. 2011), <https://unispal.un.org/UNISPAL.NSF/0/1922B40C9F4575598525790300457132>.



Israel of committing war crimes and his accusations of slander directed at the Russell Tribunal in South Africa.<sup>120</sup>

Falk has consistently argued, since the time of Israel's founding, that the UN has failed the Palestinians.<sup>121</sup> Unlike for many ethnic groups, the de-colonization process for Palestine did not end in statehood, although Palestinians were supposedly promised statehood by the UN, after the United Kingdom abandoned its colonies.<sup>122</sup> Falk has never shied away from criticism for his views. Rather, Falk—like Edward Said, Noam Chomsky, and Bertrand Russell—has stated that “[w]e are living at a time when a much more widely engaged citizenry is urgently needed within the academy, citizens dedicated to speaking truth, empathy, and love to power, who are able to put aside the willful national and class evasions of global common interests.”<sup>123</sup>

Falk's advocacy for justice for the Palestinians is exemplified by his tenure on the UN Human Rights Inquiry Commission for the Palestinian Territories in 2001 (for the UN High Commissioner for Human Rights). Although Falk by no means campaigned for this job, his effectiveness drew the intense scrutiny of the American Israel Public Affairs Committee and other pro-Israel human rights nongovernmental organizations, such as the Simon Wiesenthal Center in Los Angeles, California.<sup>124</sup> His criticisms of Israeli human rights violations were accurate, but he did not see his role in this job as being to criticize those Palestinians who used terrorism to resist Israeli occupation of territories Israel claimed were not owned by anyone (even though the State of Israel was effectively legalized by a UN resolution that also designated law for a Palestinian state). This apparent double standard of Falk's could be considered hypocrisy if one were to argue that

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120. FALK, *supra* note 117, at 160–65. Falk lauded the report in its original form as “breaking the sound barrier” (paraphrasing here) in its forthrightness and clarity about Israeli violations of international humanitarian law. As he put it, “[T]he report is an excellent example of an international inquiry mandated by the UN in adhering to the highest standards of liberal legality given the circumstances of Israeli noncooperation and the overall problems associated with ‘the fog of war.’” See Richard A. Falk, *The Goldstone Report: Ordinary Text, Extraordinary Event*, 16 GLOB. GOVERNANCE 173, 180 (Apr.–June 2010). On a separate but related note, the views expressed by the Russell Tribunal held in South Africa in 2011 were that Israeli rule over the Palestinians amounted to apartheid. Goldstone shortly thereafter wrote an op-ed piece for the *New York Times*, wherein he characterized the findings of the Russell Tribunal as slander against the state of Israel. See Richard J. Goldstone, Opinion, *Israel and the Apartheid Slander*, N.Y. TIMES (Oct. 31, 2011), <https://www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html>.

121. In *Palestine's Horizon*, Falk discusses the “deadly dance between Zionism and the UN [that] has now come full circle,” in that the Zionism once condemned by the UN in the 1970s has become a tool used by Israel, through its UN membership, to condemn the BDS movement of the Palestinians. FALK, *supra* note 113, at 112–13.

122. *Id.* at 3–4.

123. Richard A. Falk, *Edward Said and the Future of Palestine*, 34 RARITAN 1, 2 (2015).

124. The Simon Wiesenthal Center ranked Falk as number three on its list of the “ten most dangerous anti-Semites in the world.” He shared his inclusion on this list with such other notables as author Alice Walker and Sayyid Ali Hosseini Khamenei, the Supreme Leader of Iran. FALK, *supra* note 113, at 116.

nonviolent resistance, or violent resistance without terrorism, was a viable option.

Clearly, on this controversial issue, saying anything will displease opponents, but Falk's statements from the viewpoint of international law gave rise to unfounded claims of "conspiracy mongering" because he wrote a passage on his blog as well as a forward in a book that praised the author David Ray Griffin for raising questions (but not for providing a conspiracy theory) about what happened on 9/11.<sup>125</sup> Equally troubling, though perhaps personally worse in exacting an enormous toll, Falk was subjected to the canard that his political criticism of Israel's actions (as opposed to its right to exist) was evidence of anti-Semitism and that Falk is a self-hating Jew.<sup>126</sup> While he was not raised in an Orthodox household, Falk has never denied his Jewish identity in any way, and that polemic was designed to delegitimize him the way actual anti-Semites attempt to delegitimize Israel with false claims, for example, that Zionism is racism.

Falk's categorization of the Palestinian-Israeli relationship as "apartheid" in his 2017 report as UN special rapporteur on Occupied Palestine, coauthored by Virginia Tilley and published by the Economic and Social Commission for Western Asia (ESCWA), was roundly criticized.<sup>127</sup> And UN Secretary-General António Guterres subsequently rejected the report.<sup>128</sup> All this occurred despite the authors' findings that the conditions in the Palestinian Authority and for Palestinians in Israel as a whole meet the legal definition of apartheid as established by the UN Apartheid Convention.<sup>129</sup>

## CONCLUSION

Falk walks a fine line when it comes to criticizing the current state of global geopolitics. His calls for greater conversations about issues associated with addressing global injustice (see, for example, his 2002 edited vol-

125. Colum Lynch, *Richard Falk: I'm Not a 9/11 Conspiracy Theorist*, FOREIGN POL'Y (Jan. 28, 2011), <https://foreignpolicy.com/2011/01/28/richard-falk-im-not-a-911-conspiracy-theorist>. In this article, Falk clearly states that he is concerned that investigations into 9/11 and other events "must be seen to be[] transparent, exhaustive and honest." *Id.* See also Natasha Mozgovaya, Shlomo Shamir & Reuters, *Ban Ki-Moon Condemns UN Palestinian Human Rights Official for Backing 9/11 Slurs*, HAARETZ (Jan. 25, 2011), <http://www.haaretz.com/news/world/ban-ki-moon-condemns-un-palestinian-human-rights-official-for-backing-9-11-slurs-1.339181>.

126. Patrick Lawrence, *A Conversation with Richard A. Falk, Part 2: On Israel, Palestine, and His Work as a UN Special Rapporteur*, NATION (Jan. 31, 2018), <https://www.thenation.com/article/archive/a-conversation-with-richard-falk-part-2>.

127. Richard A. Falk & Virginia Tilley, *Israeli Practices towards the Palestinian People and the Question of Apartheid*, U.N. Doc. E/ESCWA/ECRI/2017/1 (2017).

128. *UN Chief Rejects Richard Falk's ESCWA Report Accusing Israel of 'Apartheid'*, UN WATCH (Mar. 16, 2017), <https://unwatch.org/un-chief-rejects-richard-falks-escwa-report-accusing-israel-apartheid>.

129. Falk & Tilley, *supra* note 127.

ume *Reframing the International*)<sup>130</sup> stand in contrast (to some extent) to his efforts to more directly affect policy, as the reaction to the 2017 report demonstrates. We say “to some extent” because Falk’s efforts to influence US foreign policy are really a natural outgrowth of his decades-long effort to broaden the discourse on injustice and inequality. Yet, as a consequence of his more general criticisms of US policy, Falk has come to be considered one of the more “dangerous” professors in the US. In a 2007 piece written for *International Studies Perspectives*, he addresses the McCarthy-like atmosphere that prevailed in US academia during the Bush administration after 9/11, in which professors were denied tenure or suspended for their vocal criticisms of US military policies in Iraq and elsewhere: “A witch hunt that focuses on the most visible academic critics of present policy has the intended effect of generating an overall climate of intimidation within university settings. It becomes costly to express dissident ideas, and professionally seems imperative, or at least prudent, to shut up.”<sup>131</sup> Falk’s concerns for the ability of academics to effectively challenge and debate extant US policies gather even greater importance in the era of Trump (and his allies), whose schizophrenic foreign policies posed a grave danger to the well-being of not only the US but also the entire global system.

Falk’s desire to challenge these powerful actors, really remnants or holdovers of an outdated Westphalian order, for their intransigent need to control and maintain a system of inequality and injustice is perhaps his greatest legacy, not only to academia but also to the world at large.

In a speech given in 2019, Falk lamented “the absence of the kind of global problem-solving framework that is needed to address the sort of agenda of problems that face humanity at this stage,” which he attributed to the vacuum in global leadership that has emerged over the past few years and created an “extreme version of a state-centric world” based on nationalism.<sup>132</sup> To achieve this “problem-solving framework,” we must expand our notion of who the key actors are and what their purpose is.

In 2017, Falk characterized a world in which “three distinct identities” had been created,

‘the Geopolitical Person’ who was increasingly dominating world politics, including the UN, ‘the Davos Person’ who at the World Economic Forum was mounting strong pressures on all govern-

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130. *REFRAMING THE INTERNATIONAL: LAW, CULTURE, POLITICS* (Richard A. Falk, R.B.J. Walker & Lester Edwin J. Ruiz eds., 2002). WOMP as a whole has been criticized for, among other things, its “utopian” vision for the post-Westphalian world. Much of this criticism Falk attributes to realists and those wedded to the statist simplicity of the Westphalian geopolitics. For more on this point, see Falk, *supra* note 37, at 150–51.

131. See Richard A. Falk, *Academic Freedom under Siege*, 8 INT’L STUD. PERSPS. 369, 372 (2007).

132. Richard A. Falk, *Current Global Crises: Toward a More Humane Global Governance*, Public Lecture at the University of Western Australia, Institute of Advanced Studies (July 11, 2019), <https://www.ias.uwa.edu.au/lectures/falk>.

ments to privilege the interests of market forces, essentially banks and corporations, above that of their own citizens, and ‘the Perugia Person’ who was on the sidelines whispering words to the grassroots community conveying the needs and aspirations of ordinary people, and by so doing, highlighting problems of poverty, peace, environment, biodiversity, health, and justice. In one sense, my analysis is an argument for a concerted public and grassroots transnational effort to magnify the Perugia whisper until it becomes a stentorian voice that is heard and heeded within the halls and conference rooms of the UN in Geneva and New York.<sup>133</sup>

We must adopt a “moral epistemology that is overtly value oriented and normatively ambitious without being oblivious to the structural characteristics of collective political behavior that tends to privilege the self, and especially the national self, at the expense of the other.”<sup>134</sup> Moreover, it must be an epistemology that is “civilizationally grounded” and inclusive and that permits a diversity of opinions or interpretations about what is good not merely for one society, but for all societies.<sup>135</sup> In the context of peacebuilding, this means different paradigms—realism, constructivism, liberalism—communicating with one another in such a way as to enable the best insights from each paradigm to be incorporated into a more effective peacebuilding strategy.

It is worth stating that Falk is not overly idealistic. Throughout his work, Falk fully acknowledges and expertly communicates the obstacles to achieving the shift in perspective necessary to achieve an expanded ideal of citizenship, a commonality of interests; as well as a “collective will to survive,” as a species.<sup>136</sup> At the same time, Falk does not lose his sense of optimism that such a shift will occur, but it must be one that is led by ordinary people, not elites; the former essential to create a global order “that is sustainable and satisfying.”<sup>137</sup> In a world of “radical uncertainty,” Falk suggests that it is incumbent upon all of us to “struggle for what we believe [the world] should be.”<sup>138</sup>

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133. Falk, *supra* note 46.

134. Falk, *supra* note 5, at 147.

135. *Id.* at 150.

136. Falk, *supra* note 132.

137. *Id.*

138. *Id.*

