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# MASS KILLING BY GOVERNMENTS: LAWFUL IN THE WORLD LEGAL ORDER?

ERIC LANE\*

Following these deaths, a wave of government-sanctioned killing swept over Uganda, directed especially at Christians and educated members of Acholi and Langi ethnic groups . . . .<sup>1</sup>

DEMOCRATIC Kampuchea, according to many of the 2,000 peasants who annually risk their lives to flee across the Cambodian border into Thailand, is now a land of concentration camps; a vast Auschwitz where, as in Nazi Germany 40 years ago, the leadership is in egregious pursuit of a "final solution"—the elimination of staggering numbers of "undesirables" and "enemies" in favor of a pure class of obedient proletarians.

The estimate of 3 million dead is the figure used by the governments of Cambodia's neighbors, Western relief workers in the region, and U.S. diplomats in Bangkok.<sup>2</sup>

Until most recently, reports of mass killing by governments of their subjects were part of our daily news.<sup>3</sup> These reports were re-

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1. Amnesty International Annual Report 1977, at 111.

2. Yates, *A Nation in Agony*, Chicago Tribune, Sept. 10, 1978, at 25, col. 1.

3. Some examples are Darton, *Idi Amin: A Savior Who Became the Creator of 8 Years of Horror*, N.Y. Times, Apr. 30, 1979, § A, at 1, col. 3; Yathay, *Escapee from Cambodia*, National Review, Dec. 22, 1978, at 1588; Kamm, *The Agony of Cambodia*, N.Y. Times, Nov. 19, 1978, § 6 (Magazine), at 40; Anderson, *Misery and Torment for Cambodians*, Wash. Post, Aug. 16, 1978, at 5, col. 2; Amnesty International, Human Rights in Uganda, A.I. Index: AFR 59/05/78 (1978) [hereinafter "Human Rights in Uganda"]. For a contrary view on Cambodia, see Burnstein, *On Cambodia: But Yet*, N.Y. Times, Nov. 21, 1978, § A, at 21, col. 1.

Mass killing, as used in this article, is the denial of the right of physical existence to entire human groups. This definition has been extrapolated from the broader United Nations definition of genocide which reads as follows:

ceived with particular anguish in view of the growing world demand for the protection of human rights.<sup>4</sup>

This anguish was especially heightened because the acts from which it flowed were reminiscent of the atrocities committed by the Nazi Government against its own subjects. The recurrence of such atrocities was purportedly outlawed in the present world legal order<sup>5</sup> as a result of the Nuremberg Judgment,<sup>6</sup> which limited a sovereign's authority over its subjects with regard to international acts of aggression,<sup>7</sup> the Convention on Genocide, which

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Genocide is a denial of the right of existence of entire human groups, as homicide is a denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

The Crime of Genocide, G.A. Res. 96 (I), U.N. Doc. A/64, at 188-89 (1946), *reprinted in* U.N. Journal, No. 58: Supp. A-A/P.V/55, at 476 (1946). While reports of mass killing by governments of their own citizens have not been limited in recent years to Uganda and Cambodia, the activities of these governments have been the most gross and continuing examples of such action and, thus, are the most compelling for this study.

4. For a discussion on a growing world demand for the protection of human rights, see Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 Hofstra L. Rev. 269 (1978) [hereinafter "Lane"].

5. For the purposes of this article, the "world legal order" refers to the authority system under which world parties act and upon which world parties depend for authority and justification for their actions. The vitality of the world legal order depends on a consonance of the world legal order with world political realities; in turn, the world legal order shapes these political realities. For a discussion of the world legal order, see Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in I *The Future of the International Legal Order: Trends and Patterns* 32 (R. Falk & C. Black eds. 1969) [hereinafter "Falk"].

6. See notes 30-52 and accompanying text *infra*.

7. We negotiated and concluded an Agreement . . . which for the first time made explicit and unambiguous . . . in International Law, . . . that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible . . . . It is a basic charter in the International Law of the future.

We have also incorporated its principles into a judicial precedent

came into force in 1951,<sup>8</sup> and various other United Nations-sponsored documents relating to human rights.<sup>9</sup>

Despite these apparent post-World War II legal restraints on sovereign activity, mass killing by governments has continued unchecked by the world legal order. Only the unilateral intervention of the neighboring states of Tanzania and Vietnam, in response to border incursions by Uganda and Cambodia respectively, have brought an end to government-sanctioned mass killing in those countries. While these unilateral actions have relieved world tension and embarrassment over these particularly gross violations of human rights, they are clearly not an expression of international legal concern over a government's treatment of its own citizens. At best, these unilateral actions are a tradi-

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. . . . A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—and law with a sanction.

Jackson, *Final Report to the President Concerning the Nuremberg War Crimes Trial*, 20 Temple L.Q. 338, 342 (1946).

8. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III), U.N. Doc. A/810, at 174 (1948) [hereinafter "Convention on Genocide"]. This treaty came into force and was registered *ex officio* Jan. 12, 1951, 78 U.N.T.S. 277. For a discussion of this treaty, see text accompanying notes 80 to 95 *infra*.

9. Principal among these documents were the United Nations Charter art. 1, para. 3; the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948) [hereinafter "Universal Declaration of Human Rights"]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) [hereinafter "International Covenant on Civil and Political Rights"]; and the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1966) [hereinafter "Optional Protocol"]; Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A, 20 U.N. GAOR, Supp. (No. 14) 47, U.N. Doc. A/6014 (1965).

Furthermore, the Council of Europe sponsored the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); the Ninth International Conference of American States adopted the American Declaration of the Rights and Duties of Man, May 2, 1948, *reprinted in* L. Sohn & T. Buergenthal, *Basic Documents on International Protection of Human Rights* 187 (1973); and the Organization of American States approved a Statute of the Inter-American Commission on Human Rights, June 8, 1960, O.A.S. Doc. OEA/Ser. L/V/II.26, Doc. 10, at 1-6 (1971) (with 1968 amendments), *reprinted in* L. Sohn & T. Buergenthal, *Basic Documents on International Protection of Human Rights* 194 (1973).

tional state response to aggression, and they leave unanswered the questions raised by the killings themselves: whether the present world legal order includes within its laws prohibitions against government-sanctioned mass killing and, if so, whether it possesses the means for their enforcement.<sup>10</sup>

This article is an attempt to answer these questions. In so doing, it will focus on the Nuremberg Judgment, the United Nations Charter, and several United Nations-sponsored documents relating to the protection of human rights. Particular attention will be paid to the world legal order setting in which these documents were drafted. The thesis of this article is that an examination of these documents in this context leads to the conclusion that a government's mass killing of its own subjects is not entirely outlawed by the world community and that, to the extent that any prohibitions do exist, they are belied and even mocked by the total absence of any meaningful means of enforcement.<sup>11</sup>

### I. THE LEGAL SETTING

The present world legal order is constituted exclusively by nation-states. Within this order the states are juridically equal, and no one state is entitled to more formal recognition than any other. The basic legal tenet emanating from this arrangement is that each state is independent in the management of its own domestic affairs and is held in the international arena solely through its own will.<sup>12</sup> As Chief Justice Marshall stated some 125 years ago in

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10. This question was recently raised in reference to Cambodia by columnist James Reston: "Can nothing be done by the so-called great nations at least to investigate the reports of such human suffering? Do the sovereign rights of national states include the power to treat or dispose of their people in any way their temporary rulers decide?" Reston, *The Tragedy of Cambodia*, N.Y. Times, Jan. 11, 1978, § A, at 19, col. 1.

11. In some instances it may not be necessary to discuss existing legal norms in the context of their means of implementation. In a discussion of mass killing, however, the two areas are impossible to separate.

12. Professor Richard Falk has stated:

The basic coordinates of the present world order system are contained in the Peace of Westphalia which brought the Thirty Years War to an end in 1648. According to Westphalia logic, the world order system is constituted *exclusively* by the governments of sovereign states. These governments have complete discretion to rule *national space* (or territory), and can also enter into voluntary arrangements (e.g., treaties) to regulate external relations and interconnections of various sorts. But these govern-

a case dealing with the return of captured slaves to foreign traders, despite the illegality of the slave trade in the United States,

[no] principle of general law is more universally acknowledged, than the perfect equality of nations . . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be divested only by consent; and this [slave] trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it.<sup>13</sup>

Within this framework, the sources of international law may only be the express or tacit consent of states.<sup>14</sup> Consequently, individuals have been viewed as objects in this world legal order, and their rights can be protected only by virtue of the volition of the state. In this regard, Professor Lauterpacht aptly set forth the traditional view: "[a] state is entitled to treat both its own nationals and stateless persons at its discretion and the manner in which it treats them is not a matter with which International Law, as a rule, concerns itself."<sup>15</sup>

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ments are *sovereign* and *equal* by juridical fiat, rather than by virtue of some higher authority within the world order system. No one government is entitled to greater formal status than another by reasons of wealth or power or size. In such circumstances, "law and order" rests upon the volition of governments and upon their perception of common interests.

R. Falk, *A Study of Future Worlds* 59 (1975) (footnotes omitted) (emphasis in original).

13. *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) (emphasis added).

14. L. Oppenheim, *I International Law: A Treatise* §§ 16-17, at 25-27 (8th ed. H. Lauterpacht 1955) [hereinafter "Oppenheim"]. According to Oppenheim, a state offers its tacit consent when it acts under the conviction that its actions are obligatory under law. Law created in this fashion is called international customary law. For a discussion of customary law and genocide, see text accompanying notes 100-01 *infra*. See Statute of the International Court of Justice art. 38, para. 1(b).

15. Oppenheim, *supra* note 14, § 292, at 641. While this statement was not in L. Oppenheim, *International Law: A Treatise* (2d ed. 1912), it does not represent a substantial change from the general principles set forth in the earlier work. See also P.C. Jessup, *A Modern Law of Nations* (1948) [hereinafter "Jessup"]. In discussing the defects of the international legal system, Jessup states:

The first is the fundamental tenet of traditional international law that it

## II. HUMANITARIAN INTERVENTION

This fundamental tenet of the decentralized world legal order has not been without exception. The prime pre-World War II exception relevant to a government's mass killing of its own citizens has been characterized as humanitarian intervention.<sup>16</sup> Humanitarian intervention has been traditionally defined as "the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice."<sup>17</sup> This definition encompasses a state's intervention for the purpose of protecting its own citizens who are living abroad and, more rarely, intervention for the protection of citizens from acts of their own governments.

In practice, humanitarian intervention has usually referred to a state's right to intervene for the protection of its own nationals who are suffering harm within the territory of another state.<sup>18</sup> Examples of this are numerous; the most recent is Israel's foray into Uganda to liberate the Israeli and other hostages being held at the Entebbe airport.<sup>19</sup>

A state's mass killing of its own citizens is not included within

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is a law only between states, not between individuals or between individuals and states. The individual has been one stage removed from the application of international law, the legal jargon being that he is not a "subject" of the law but only an "object."

*Id.* at 8.

16. See Oppenheim, *supra* note 14, §§ 134-140a, at 304-20.

17. E.C. Stowell, *Intervention in International Law* 53, 53 (1921), pp. 53-62, *reprinted in* L. Sohn & T. Buergenthal, *Basic Documents on International Protection of Human Rights* 137 (1973).

18. See generally Oppenheim, *supra* note 14, § 135, at 309; E.C. Stowell, *Intervention in International Law* (1921), *reprinted in* L. Sohn & T. Buergenthal, *Basic Documents on International Protection of Human Rights* 137 (1973).

19. See generally United Nations Security Council debate concerning this intervention, U.N. Doc. S/P.V. 1939-1943. Two draft resolutions were offered: one by the United Kingdom and the United States, condemning hijacking, 31 U.N. SCOR, Supp. (July-Sept. 1976) 15, U.N. Doc. S/12138 (1976); the second by Benin, Libya and Tanzania, condemning Israel, 31 U.N. SCOR, Supp. (July-Sept. 1976) 15-16, U.N. Doc. S/12139 (1976). Israeli Ambassador Herzog, in explaining Israel's action from a legal perspective, stated: "This type of action, which in principle is not unprecedented, is dealt with at considerable length in international law and there is no doubt whatsoever but that the weight of international law and precedent lies fully in Israel's favor." 31 U.N. SCOR (139th mtg.), U.N. Doc. S/P.V. 1939, at 51 (1976).

this definition of humanitarian intervention. However, it has been argued that a state may intervene to protect the citizens of another state from acts of that state if those acts constitute "cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind . . . ." <sup>20</sup> While this type of state activity against its citizens has occurred frequently, resort to humanitarian intervention to enjoin such activity has been infrequent. <sup>21</sup> The infrequency of such intervention is a consequence of the rules of the decentralized world legal order, which maintains as its goal the balancing of power for international peace and stability and deems humanitarian intervention a violation of this balance. <sup>22</sup> It is not that human rights have been totally ignored by the decentralized system but, rather, that they have been dealt with politically rather than legally. <sup>23</sup>

Some writers, expressing a view contrary to this position, have argued that the suppression of human rights in the present world order is violative of international law. <sup>24</sup> This claim is based,

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20. Oppenheim, *supra* note 14, § 137, at 312.

21. *Id.* at 312-13. Oppenheim also points out that humanitarian intervention often constitutes only a rationalization for state aggression. *Id.* at 313. In this context, a recent claim of humanitarian intervention was made by India to justify its 1971 invasion of East Bengal. For a full discussion of this claim, and of humanitarian intervention in general, see Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 Am. J. Int'l L. 275 (1973). Additionally, Senator George McGovern in August of 1978 suggested that intervention in Cambodia might be warranted in the face of the continuing allegations concerning that government's treatment of its own citizens. *Indochina: Hearings on the Current Situation in Indochina Before the Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations*, 95th Cong., 2d Sess. 23-24 (1978) (statement of Senator McGovern).

22. For an interesting account of this process, see J. Stoessinger, *Henry Kissinger: The Anguish of Power* (1976).

23. Professor Stoessinger has provided me with an interesting, albeit extreme, example of this process. According to Professor Stoessinger, on one occasion when Kissinger was in Moscow, he and Brezhnev went boar hunting. Apparently after making a successful shot, Brezhnev, in a joyous mood, offered to grant Kissinger a reasonable request, to which Kissinger responded by asking for the release of Jews wishing to emigrate. Sometime thereafter, several thousand Soviet Jews were permitted to emigrate. One can only speculate as to the reasons. The point is that, while the political approach can occasionally work, it is selective at best and does not create legal protection for human rights.

24. See, e.g., McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 59 Yale L.J. 60 (1949). According to these authors, "one of the major factors in world politics today, affecting all deci-



however, on the view that human rights violations are detrimental to world peace and not unlawful in and of themselves. Moreover, these writers do not argue in favor of unilateral humanitarian intervention; they argue for collective action through the United Nations or some regional organization.<sup>25</sup> This view was particularly popular immediately following World War II, when even the most doctrinal confidences in the decentralized system were shaken by the Nazi atrocities. Apparently, however, these tremors have stabilized, as is evidenced by the absence of a response to recent allegations of mass murder in Cambodia and Uganda.

A fair conclusion is that the decentralized world legal order does not recognize unilateral humanitarian intervention for purposes of protecting the human rights of nationals of another state as lawful, despite any apparent success that might result from such unilateral undertaking. This proposition is supported by the concepts of collective enforcement found in the United Nations Charter as well as by the Charter's non-intervention clause.<sup>26</sup>

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sions, is the accumulated resentment of countless millions of people, and even whole nations, arising from long endured discriminations, deprivations, and humiliations—a resentment capable of being discharged against many targets, internal and external." *Id.* at 66; see generally Lane, *supra* note 4.

25. See, e.g., Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention*, 67 Am. J. Int'l L. 275 (1973). Professor Richard Lillich has suggested, however, that after the Indian action in East Bengal, the doctrine of humanitarian intervention be reevaluated. International Committee on Human Rights of the International Law Association, *The International Protection of Human Rights by General International Law: Second Interim Report of the Sub-Committee* (R. Lillich, Rapporteur), reprinted in International Law Association, *Report of the Fifty-fifth Conference* 608 (1972). Senator McGovern has made a similar suggestion in response to the situation in Cambodia. See *Indochina: Hearings on the Current Situation in Indochina Before the Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations*, 95th Cong., 2d Sess. 23-24 (1978) (statement of Senator McGovern).

26. Provisions relating to collective enforcement are found in the U.N. Charter arts. 39-51. The non-intervention clause found in art. 2 reads:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. Charter art. 2, para. 7. In regard to this clause, Professor Falk has stated:

We have mentioned the saving clause in Article 2(7) of the Charter that promises to uphold the domestic jurisdiction of states. The idea of domestic jurisdiction being invested exclusively in national governments is a prime element of the Westphalia conception. The abiding strength of

It is doubtful, moreover, that the decentralized world legal order ever recognizes such unilateral intervention as lawful behavior. This is due in large part to the absence of any jurisprudential justification for its use within this legal order. It may be argued that Grotius provided a jurisprudential basis for international intervention when he wrote:

T[here] is also the problem of whether a war is lawful which is undertaken to protect the subjects of another ruler from oppression by him. Unquestionably, ever since political societies were established, every ruler has claimed a special right over his own subjects . . . . But where there is manifest oppression, where a Busiris, a Phalaris, or a Thracian Diomedes uses his power over his subjects in ways odious to every just man, his people will not be denied the rights of all human society. So Constantine took up arms against Maxentius and Licinius, and other Roman emperors either went or threatened to go to war against the Persians, unless they desisted from persecuting Christians on account of their religion.<sup>27</sup>

This view, however, was essentially a residual tenet of the pre-Westphalian centralized world legal order<sup>28</sup> and was without sig-

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this idea is suggested by the reluctance of states, even on the part of those states most committed to the growth of a stable system of world order, to entrust international institutions with the capacity to determine what falls within domestic jurisdiction.

Falk, *supra* note 5, at 59-60. For a detailed discussion of this provision, see H. Lauterpacht, *International Law and Human Rights* 166-220 (1950) [hereinafter "Lauterpacht"]; Watson, *Autointerpretation, Competence and the Continuing Violation of Article 2(7) of the U.N. Charter*, 71 *Am. J. Int'l L.* 60 (1977) [hereinafter "Watson"].

27. H. Grotius, *The Law of War and Peace*, bk. 2, ch. xxv, sec. 8, at 262-63 (L. Loomis trans. 1949) (1st ed. Paris 1625).

28. The phrase "pre-Westphalian centralized world legal order" refers to the hierarchical structure of the medieval European world, dominated by the Popes and the Emperors. The Peace of Westphalia, which ended the Thirty Years War, marks the end of that period and the beginning of the decentralized world legal order. See Lane, *supra* note 4, at 271-78; Gross, *The Peace of Westphalia, 1648-1948*, 42 *Am. J. Int'l L.* 20 (1948). According to Professor Gross:

The Peace of Westphalia, for better or worse, marks the end of an epoch and the opening of another. It represents the majestic portal which leads from the old into the new world. The old world, we are told, lived in the idea of a Christian commonwealth, of a world harmoniously ordered and governed in the spiritual and temporal realms by the Pope and Emperor. This medieval world was characterized by a hierarchical conception of the relationship between the existing political entities on

nificance for the new decentralized system. From its jurisprudential perspective, the decentralized legal order would not recognize as a binding value of international law the universal ethical standards which formed the presuppositions of Grotius' philosophy. The new legal order relied on consent to supply its objective basis, and "international law came to depend upon the will of states more concerned with preservation and expansion of their power than with the establishment of a rule of law."<sup>29</sup>

### III. CRIMES AGAINST HUMANITY

The discovery of Nazi mass murders before and during World War II exposed the narrow scope of the decentralized world legal order and created world-community pressure for an order which would in some way limit the will of the sovereign.<sup>30</sup> According to Quincy Wright:

The persecutions, expulsions and exterminations of millions of human beings since World War I has exceeded any denial of human rights recorded in previous history and has awakened world opinion to the importance of extending international protection to the individual . . . .

. . . . [T]he concept of the sovereignty of the state, and the growth of powerful sentiments of nationalism in the nineteenth century obscured the direct relationship between the individual and the international community. In the twentieth century, the degeneration of the concept of the sovereign nation by ruthless totalitarian regimes left the individual without protection in many states and *aroused a general sentiment that the international community must find practical means to assure that the state is for man, not man for the state.*<sup>31</sup>

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the one hand, and the Emperor on the other . . . . In particular the Reformation and the Renaissance, and, expressive of the rising urge of individualism in politics, nationalism, each in its own field, attacked the supreme authority claimed by the Pope and the Emperor.

*Id.* at 28 (footnotes omitted).

29. Gross, *The Peace of Westphalia, 1648-1948*, 42 Am. J. Int'l L. 20, 38 (1948).

30. See generally Lane, *supra* note 4, at 279-80; Lauterpacht, *supra* note 26, at 79.

31. Wright, *Introduction*, World Habeas Corpus i-ii (L. Kutner ed. 1962) (emphasis added).

This "general sentiment" found its first important expression in the world legal order through the London Agreement of 1945. This agreement established the International Military Tribunal for the trial of "war" criminals and a Charter setting forth the Tribunal's jurisdiction.<sup>32</sup> The Charter provides for the punishment of "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations committed" crimes against peace, war crimes or crimes against humanity.<sup>33</sup> A government's mass murder of its subjects clearly falls within this last category.<sup>34</sup> Crimes against humanity presented a novel concept to the decentralized world legal order, in that they established some limitations on a sovereign's authority over its own subjects.<sup>35</sup> Inclusion of the concept in the Charter raised seri-

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32. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (with charter of the International Military Tribunal annexed), Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280, executed by United States, France, Great Britain, and the Union of Soviet Socialist Republics, and adhered to by Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxemburg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia [hereinafter "Charter of the International Military Tribunal"].

33. Charter of the International Military Tribunal, *supra* note 32, § 11, art. 6.

34. Crimes against humanity was defined by the Charter of the International Military Tribunal as follows:

namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, *whether or not in violation of the domestic law of the country where perpetrated*.

*Id.*, art. 6(c) (emphasis added).

35. See italicized portion of definition of "Crimes against Humanity" in note 34 *supra*. For a sweeping discussion of crimes against humanity, see Schwelb, *Crimes Against Humanity*, 23 Br. Y.B. Int'l L. 178 (1946) [hereinafter "Schwelb"].

The following three phrases appear to embody these startling and controversial changes: (1) 'before and during the war'; (2) 'against any civilian population'; (3) 'whether or not in violation of the domestic law of the country where perpetrated' . . . [T]he following principles seem to have been laid down in the Charter:

The first, indicated by the words 'before or during the war', apparently implies that international law contains penal sanctions against individuals, applicable not only in time of war, but also in time of peace; this, in other words, means that there is in existence a system of international criminal law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and

ous questions concerning a prosecution based on what arguably was an *ex post facto* formulation.

Three related arguments were advanced in favor of the prosecution. First it was argued that the acts constituting crimes against humanity were incorporated in the positive law of the decentralized world legal order.<sup>36</sup> This argument was unconvincing.<sup>37</sup> Second, some advocates believed that the prohibitions against aggressive warfare set forth in Article 10 of the Covenant of the League of Nations<sup>38</sup> and the Kellogg-Briand Pact for the Renunciation of War<sup>39</sup> also outlawed the Nazi acts against German citizens.<sup>40</sup> They thought that acts of this type threatened world peace. As a legal interpretation of the prior treaties, this position was highly suspect, given the express rejection of crimes against humanity during post-World War I negotiations.<sup>41</sup>

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that—in certain circumstances—inhumane acts constitute international crimes. The second principle, which appears to be deducible from the words 'against any civilian population', is to the effect that 'any civilian population' is under the protection of this system of international law, and this implies that civilian populations are protected against violations of international criminal law also in cases where the alleged crimes have been committed by sovereign states against their own subjects. The third principle expressed by the words 'whether or not in violation of the domestic law of the country where perpetrated', appears to establish the absolute supremacy of international law over municipal law.

If this *prima facie* impression, created by Article 6(c) of the Charter, is correct, if the community of nations is entitled to intervene judicially against crimes committed against any civilian population, before or during the war, and if for this purpose it is irrelevant whether or not such crimes were committed in violation of the domestic law of the country where perpetrated, then certainly a radical inroad has been made into the sphere of the domestic jurisdiction of sovereign states.

*Id.* at 178-79.

36. See Schick, *The Nuremberg Trial and the International Law of the Future*, 41 Am. J. Int'l L. 770, 785-88 (1947) [hereinafter "Schick"]. See also Wright, *The Law of the Nuremberg Trial*, 41 Am. J. Int'l L. 38 (1947).

37. See generally Schwelb, *supra* note 35, at 181-83. Schwelb clearly points out that attempts to regulate sovereign behavior toward a state's own subjects had been previously rejected.

38. League of Nations Covenant art. 10.

39. General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

40. See generally Justice Jackson's Report to President Truman on the Legal Basis for Trial of War Criminals (1945), Department of State Publication 2420, reprinted in 19 Temple L.Q. 144 (1945-46). Schick, *supra* note 36; Schwelb, *supra* note 35, at 181-83.

41. See generally Schwelb, *supra* note 35.

Third, some commentators argued that the acts committed by the Nazis were "so inherently wrong and injurious to others that [they] must know they will be treated as criminal."<sup>42</sup> This argument was characterized by its proponents as being rooted in natural law,<sup>43</sup> a doctrine without vitality in the decentralized world legal order.<sup>44</sup>

The Tribunal ultimately appeared to adopt the second argument by deciding to limit the definition of crimes against humanity for prosecutorial purposes to acts committed in connection with or subsequent to the commencement of the war and basing its judgment on the Kellogg-Briand Pact.<sup>45</sup> The Tribunal's limited definition of crimes against humanity was stated as follows:

With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out.

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42. Jackson, *Nürnberg in Retrospect*, 27 Can. B. Rev. 761, 778 (1949). A fuller statement of Jackson's argument is as follows:

The last stand of those implicated was not that the evidence failed to convict of the acts, but that the law had failed to make the acts crimes. Admitting that they were moral wrongs of the first magnitude, it was contended that they fell within that realm which the law leaves to the free choice of the individual and for which he must answer to no forum except his own conscience. In short, their position was that there are no binding standards of conduct for states or statesmen which they disregard at risk of answering to international law. If that is so, it is a sad conclusion for the world, for it reduces the whole body of what we have called international law to "such stuff as dreams are made of". If courses of conduct that rise so far beyond injury to mere individuals, and destroy the peace of the world and subvert civilization itself are not international crimes, then law has terrors only for little men and takes note only of little wrongs.

*Id.* at 776.

43. See *id.* at 778; Brand, *Crimes Against Humanity and the Nürnberg Trials*, 28 Ore. L. Rev. 93, 102 (1949).

44. See notes 12-15 and accompanying text *supra*.

45. General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57. See also Schick, *supra* note 36.

The persecution of Jews during the same period is established beyond all doubt. *To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal.* The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. *The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter,* but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.<sup>46</sup>

By interpreting its mandate in this fashion, the Tribunal maintained that state killings of its own citizens unconnected with aggressive acts were not international crimes. In so doing, the Tribunal succumbed to the reigning positive notion that the protection of individual rights was a matter of state and not of the world legal order. Thus, for any such acts to be internationally outlawed, they must, at a minimum, be connected to acts of aggression, despite the prosecution's contention that the Tribunal had created a legal precedent in regard to crimes against humanity as defined by the Charter.<sup>47</sup>

Moreover, any precedential value of the Judgment is rendered questionable by the Tribunal's limited duration and jurisdiction which by its own terms covered only "the trial and punishment of the major war criminals of the European Axis."<sup>48</sup> To de-

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46. Nazi Conspiracy and Aggression, Opinion and Judgment, Office of United States Chief of Counsel for Prosecution of Axis Criminality (U.S. Gov't Printing Office, Wash., D.C., 1947), reprinted in Judgment of the International Military Tribunal Against Major Nazi War Criminals and Criminal Organizations, 20 Temple L.Q. 168, 242 (1947) (emphasis added).

47. Charter of the International Military Tribunal, *supra* note 32, § 11, art. 6(c); Jackson, *Nürnberg in Retrospect*, 27 Can. B. Rev. 761, 776-77 (1949).

48. Charter of the International Military Tribunal, *supra* note 32, § 11, art. 6. Professor Schick, one of the most outspoken advocates of this limited view of the Judgment, has stated:

termine whether mass murder and other crimes against humanity are prohibited under the rules of the decentralized world legal order, it is necessary to look elsewhere.<sup>49</sup>

#### IV. UNITED NATIONS-RELATED DOCUMENTS

In this regard, four particular United Nations-related documents, drafted in immediate response to the Nazi devastation, require special attention: the United Nations Charter,<sup>50</sup> the Universal Declaration of Human Rights,<sup>51</sup> the Convention on the Pre-

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*As shown in the foregoing, the prosecuting Powers emphasized particularly that the creation of a legal precedent was the overall purpose of the Nuremberg Trial. Unless one is prepared to use the term "legal precedent" in a somewhat vague and perhaps popular manner, denoting, perhaps, a salutary political example to be followed by victorious nations in the future, it appears necessary to call attention to the fundamental fact that any future verdict pronounced in a similar case, and based on the "Nuremberg precedent" presupposes, of course, the existence of a court competent to try such a case. It is well to remember that the International Military Tribunal was created only for the "just and prompt trial and punishment of the major war criminals of the European Axis." The decision of the prosecuting Powers to conduct further trials before their respective municipal courts implies that the International Military Tribunal has, in effect, ceased to continue its functions. As pointed out, no international court is in existence which has jurisdiction over individuals for crimes such as stipulated by Article 6 of the Charter of the International Military Tribunal. Hence, such a court would have to be created by means of an international treaty which, it is quite obvious, could directly obligate only its signatories. It is an elementary principle of international law that such a treaty would have to define the jurisdiction of the court. This means, of course, that the law binding upon the court would have to be incorporated into the statute establishing the court. The idea of having established by means of the Nuremberg Trial a legal precedent binding upon courts of the future, borrowed, as it seems, from municipal law analogies, therefore must be considered as erroneous.*

Schick, *supra* note 36, at 777 (emphasis added).

49. In taking this position regarding the scope of the Nuremberg Judgment, I am not overlooking what Professor Falk has characterized as the Judgment's "second-order effects," or, in other words, the Judgment's impact on world morality. Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 Yale L.J. 969, 1019 (1975). In this same vein, see also Lauterpacht, *supra* note 26, at 73-75. Rather, I am attempting to point out that unless these moral claims are converted into legal rights in the present state system, they will be no legal bar to a sovereign's actions against its own citizens.

50. U.N. Charter.

51. Universal Declaration of Human Rights, *supra* note 9.



vention and Punishment of the Crime of Genocide,<sup>52</sup> and the International Covenant on Civil and Political Rights.<sup>53</sup>

#### A. *The United Nations Charter*

The Charter contains the basic outline of the United Nations human rights program. According to its preamble, "THE PEOPLES OF THE UNITED NATIONS . . . reaffirm [their] faith in fundamental human rights, in the dignity and worth of the human person . . . ."<sup>54</sup> The Charter also sets forth as one of its purposes the achievement of "international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . ."<sup>55</sup> Responsibility for actualizing this purpose rests with the General Assembly and, under its authority, the Economic and Social Council,<sup>56</sup> both of which are charged with particular responsibility for promoting "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."<sup>57</sup> This task, pursuant to Article 56 of the Charter, is to be shared by all members of the United Nations. The Assembly is required "to initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights and fundamental freedoms for all . . . ."<sup>58</sup> and the Economic and Social Council is to do similarly.<sup>59</sup> Additionally, the Economic and Social Council is required to establish a human rights commission for "the promotion of human rights . . . ."<sup>60</sup>

The Charter contains no particularized statement about nor definition of human rights. This failure is of particular moment for the decentralized world legal order, which requires direct and clear agreements for the creation of international law.<sup>61</sup>

52. Convention on Genocide, *supra* note 8.

53. International Covenant on Civil and Political Rights, *supra* note 9.

54. U.N. Charter Preamble.

55. *Id.* art. 1(3).

56. *Id.* art. 60.

57. *Id.* art. 55(c).

58. *Id.* art. 13.

59. *Id.* art. 62.

60. *Id.* art. 68. For the particular procedures employed by the United Nations for the examination of allegations concerning human rights violations, see text accompanying notes 125-54 *infra*.

61. Oppenheim, *supra* note 14, § 18, at 28. In this connection Hans Kelsen

According to two noted commentators, the United Nations human rights program was rooted in an international recognition that the continued abuse of human rights would result in "a resentment capable of being discharged against many targets, internal and external."<sup>62</sup> Thus, the determination to prevent international violence seems to constitute a basis of the United Nations human rights plan. This proposition is supported by the Charter itself and conditions the United Nations' commitment to the protection of human rights. In this regard, Article 55, which contains the most direct statement of United Nations responsibility for human rights, only requires the promotion of their respect and observance "[w]ith a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations . . . ."<sup>63</sup> International peace is the primary

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has stated:

[T]he Charter does not impose upon the Members a strict obligation to grant to their subjects the rights and freedoms mentioned in the Preamble or in the text of the Charter. The language used by the Charter in this respect does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects. . . . Besides, the Charter does in no way specify the rights and freedoms to which it refers. Legal obligations of the Members in this respect can be established only by an amendment to the Charter or by a convention . . . ratified by the Members.

H. Kelsen, *The Law of the United Nations* 29-32 (1950). See also Watson, *supra* note 26.

For a contrary view, see Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 Am. J. Int'l L. 337 (1972). Schwelb argues in this article that paragraphs 130 and 131 of the advisory opinion of the International Court of Justice in the Southwest Africa Case, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276* (1970), [1971] I.C.J. 57, established the Charter's human rights provisions as binding obligations. See also Sohn, note 68 *infra*. In making this argument Schwelb makes light of the international status of Southwest Africa referred to by the Court in paragraph 131 and states, in effect, that if the Charter is binding in international territory, it must be binding in domestic territory. Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 Am. J. Int'l L. 337, 342-43 (1972). This position is simply untenable in the context of the decentralized world legal order. To ignore the crucial distinction between the governance of a domestic territory and the governance of an international territory is essentially to deny the existence of the state-dominated decentralized world legal order—perhaps a hopeful thought, but not one based on present reality.

62. McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 Yale L.J. 60, 66 (1949).

63. U.N. Charter art. 55.

goal of the Charter, and it is only in connection with the breach of peace that human rights violations acquire critical significance. Thus, collective action in the name of human rights is contemplated for the "prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."<sup>64</sup> This conditioned approach is further emphasized by Article 2(7), which provides, *inter alia*, that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>65</sup>

The insertion of this non-intervention clause in the Charter affirms the traditional non-intervention tenet of the decentralized world legal order and assures that "the critical ideas of Westphalia involving sovereign equality and domestic jurisdiction are formally perpetuated in the Charter."<sup>66</sup> Thus, at least in its formulation, the human rights plan contemplated by the Charter, in addition to being extremely general, parallels the Nuremberg Judgment inasmuch as it restricts the exercise of international jurisdiction for the protection of human rights to violations connected with acts of aggression.<sup>67</sup>

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64. *Id.* art. 1, para. 1. See also *id.* arts. 39-51.

65. *Id.* art 2, para. 7. Chapter VII of the U.N. Charter only permits Security Council intervention in the event that there exists "any threat to the peace, breach of the peace, or act of aggression. . . ." *Id.* art. 39.

66. Falk, *supra* note 5, at 49. See also Watson, *supra* note 26.

67. Nazi Conspiracy and Aggression, Opinion and Judgment, Office of United States Chief of Counsel for Prosecution of Axis Criminality (U.S. Gov't Printing Office, Wash., D.C., 1947), reprinted in Judgment of the International Military Tribunal Against Major Nazi War Criminals and Criminal Organizations, 20 Temple L.Q. 168, 242 (1947). A recent example of this position is reported in *Police Official of Shah is Sentenced to Death by Islamic Tribunal*, N.Y. Times, Apr. 11, 1979, § A, at 9, col. 1 (an early edition neither retained by the publisher nor microfilmed; on file at N.Y.U. J. Int'l L. & Pol.). In turning down a request from Amnesty International to call a Security Council meeting on political executions in Iran, Secretary General Kurt Waldheim apparently stated that the request was not appropriate because the Iranian action did not "threaten the maintenance of international peace and security." *Id.*

One of the most interesting and thoughtful studies concerning the United Na-

This assessment is not without its detractors. Several distinguished commentators in recent years have expressed optimism concerning the Charter's human rights provisions.<sup>68</sup> Professor

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tions Charter and the protection of human rights based on a threat to peace is McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 Am. J. Int'l L. 1 (1968). In 1965, based on what was considered to be a threat to peace within the meaning of the Charter, the United Nations condemned Rhodesia's Declaration of Independence and called for an economic embargo. *Id.* at 3. In a legal defense of this U.N. action, against claims that no threat to peace existed, the authors argued:

The peoples in one territorial community may realistically regard themselves as being affected by activities in another territorial community, though no goods or people cross any boundaries. Much more important than the physical movements are the communications which peoples make to each other. In the case of Rhodesia, the other peoples of Africa have regarded themselves as affected by the authoritarian and racist policies of the Rhodesian elites. In the context of a world opinion which since World War II has come increasingly to recognize the intimate interdependence of the maintenance of minimum human rights and international peace and security, it would certainly not be easy to demonstrate to these peoples that their expectations of grievous injury from the Rhodesian model are ill-founded. It has been too often confirmed that practices of indignity and strife which begin as internal in physical manifestation in a single community quickly and easily spread to other communities and become international.

*Id.* at 12-13 (footnotes omitted).

Furthermore, the authors argue that "even in the absence of a finding of a threat to the peace, the United Nations could have acquired a considerable competence with respect to Rhodesia because of the systematic suppression of human rights practiced there. The concept of domestic jurisdiction in international law has never been impermeable." *Id.* at 15 (footnotes omitted).

I share Professor McDougal's and Professor Reisman's sentiments concerning what should be within the competence of the United Nations as well as their view of changing world expectations concerning human rights, which will require accommodation by the world legal order. *See id.* at 18-19. I think, however, that their article misreads the strength of the decentralized legal system, which still considers non-intervention as its major tenet. Subsequent events in Rhodesia, the recent situations in Uganda and Cambodia, and the present situation in South Africa support this fact. Additionally, the threat to peace basis for U.N. action, even if it could be read as broadly as the authors contend, is still not a satisfactory condition for the protection of human rights.

68. *See, e.g.,* Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y.L. Sch. L. Rev. 31 (1978) [hereinafter "Humphrey"]; Sohn, *The Human Rights Law of the Charter*, 12 Tex. Int'l L.J. 129, 129-30 (1977) [hereinafter "Sohn"]. *See generally* H. Lauterpacht, *International Law and Human Rights* 145, 145-54 (1950). Each of the above commentators advocates at least implicitly a United Nations perspective on international law. Under this perspective, the United Nations Charter is the constitution of the world community and contains human rights

Sohn, for example, has asserted that despite their generality, these provisions "have the force of positive international law and create basic duties which all members must fulfill in good faith."<sup>69</sup>

The difficulty with this proposition, aside from the question of particularization, is that it fails to consider the context in which the provisions are set and the conditions which limit their applicability. While the Charter provisions protecting human rights may constitute positive international law, they do so only in relation to the prevention of war. Moreover, the failure to make this distinction serves to blur the dominant decentralized state focus of the Charter and consequently diverts attention from an examination of the decentralized system in regard to its potential for accommodating world human rights demands.<sup>70</sup> This problem<sup>71</sup> is well illustrated by the failure of the decentralized system to respond to the allegations of government mass killing in Cambodia and Uganda. Such acts standing by themselves should, under a broad reading of the Charter, constitute violations of its human rights provisions. Viewed, however, in the more limited context of the decentralized world legal order with its emphasis on non-intervention, the failure to act becomes more readily explainable as it seems clear that the Charter does not prohibit a government's mass killing of its own citizens.

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norms to be defined by statements and usage of various United Nations organs. Through this process, binding obligations are created for member states and perhaps even non-member states. On this point, Professor Humphrey has stated that "[I]t is now generally agreed, particularly since the Advisory Opinion of the World Court in the *Namibia* case, that even though it neither catalogues nor defines them, the United Nations Charter imposes obligations on the member states to respect human rights." Humphrey, *supra*, at 35. Putting aside what I consider to be an exaggerated reading of the Court's opinion in the *Southwest Africa* case, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] I.C.J. 57, see text accompanying note 61 *supra*, on what basis does this or any opinion of the Court create law or legal obligations applicable to the world community as a whole? Only by analogizing the World Court to a constitutional court and the Charter to a constitution (following the U.S. model) can such a conclusion be reached. It would seem that this analogy is inconsistent with the history of the United Nations and the intention of its members. See generally Watson, *supra* note 26.

69. Sohn, *supra* note 68, at 131. See also Jessup, *supra* note 15.

70. See generally Lane, *supra* note 4.

71. See text accompanying notes 155-75 *infra*.

### B. *Universal Declaration of Human Rights*

Unlike the Charter, the Declaration of Human Rights<sup>72</sup> contains a list of specific rights and freedoms, including those traditionally found in state constitutions and others which are the product of modern economic, cultural and social ideas.<sup>73</sup> Article 3 of the Declaration provides that "[e]veryone has the right to life, liberty and the security of person."<sup>74</sup> Article 2 of the Universal Declaration provides that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>75</sup> These two provisions, read together, may be construed to cover governmental mass killing. Furthermore, these rights and the additional rights and freedoms listed in the Declaration are apparently recognized as being inherent to and inalienable from the human personality<sup>76</sup> and are not a product of sovereign beneficence.

The recognition of this relationship, however, does not constitute an agreement on the part of the signatories that these enumerated rights and freedoms are protected by international law. The Declaration, at least as it was conceived, was at best a powerful statement of aspirations and goals and was not intended as a legally binding document.<sup>77</sup> In fact, Professor Oppenheim believed that it was the non-binding nature of the Declaration which occasioned governments' subscriptions:

72. Universal Declaration of Human Rights, *supra* note 9.

73. See Sohn, *supra* note 68, at 132.

74. Universal Declaration of Human Rights, *supra* note 9, art. 3.

75. *Id.* art. 2.

76. *Id.* Preamble.

77. Lauterpacht, *supra* note 26, at 408-17. According to the Universal Declaration of Human Rights Preamble,

The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, *shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.*

Universal Declaration of Human Rights, *supra* note 9, Preamble (emphasis added). See Sohn, *supra* note 68, at 132-34.

In particular, there is no warrant for assuming that it can properly be resorted to for the interpretation of the provisions of the Charter in the matter of human rights and fundamental freedoms. This absence of the element of binding obligation probably explains the willingness of Governments to subscribe to the wide terms of the Declaration.<sup>78</sup>

This view is consistent with the tenets of the decentralized world legal order, which emphasizes non-intervention.

Recently some writers have represented that over the years the Declaration has acquired the status of international law.<sup>79</sup> The basis for this assertion is the invocation of the Declaration in a series of U.N. resolutions condemning the mistreatment of racial "minorities," primarily in southern Africa.<sup>80</sup>

This proposition is, at best, questionable. To declare that a sovereign act violates the Declaration does not convert the Declaration into international law. This would be true in the decentralized world legal order even if it could be said that the Declaration constituted an international moral code.<sup>81</sup> The reason for this is that U.N. resolutions are not a source of international law unless

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78. Oppenheim, *supra* note 14, § 340n, at 745.

79. "According to one such commentator, the Declaration constitutes "an authoritative interpretation of the Charter obligations" and "binding instrument in its own right, representing the consensus of the international community on the human rights which each of its members must respect, promote and observe." Sohn, *supra* note 68, at 133. See Humphrey, *supra* note 68, at 32-33.

80. Sohn, *supra* note 68, at 133-34.

81. The fact that the Universal Declaration of Human Rights is not a legal instrument expressive of legally binding obligations is not in itself a measure of its importance. It is possible that, if divested of any pretence to legal authority, it may yet prove, by dint of a clear realisation of that very fact, a significant landmark in the evolution of a vital part of international law. Undoubtedly, extreme care must be taken, in respect of a document of this nature, not to gauge by rigid legalistic standards what was intended by many States to be an historic demonstration of loyalty to the ideals of the Charter. Nor would even a suspicion of sterile scepticism or lack of reverence be appropriate in relation to a document which is the result of much faith, patient labour, and devotion. *But the determination to refrain from captious criticism ought not to interfere with the duty resting upon the science of international law to abstain from infusing an artificial legal existence into a document which was never intended to have that character.* Any attempt to do so much prove abortive in the long run. If made, with temporary appearance of success, it would tend to weaken efforts in the direction of true progress.

Lauterpacht, *supra* note 26, at 417 (emphasis added).

they reflect an international assent that their subject matter be so.<sup>82</sup> In the decentralized world legal order, with its emphasis on sovereign equality, international law can only be the product of consent, either tacit or express, and such consent is not reflected in the Declaration. Furthermore, for the Declaration to become part of international law, particular obstacles must be overcome, namely, the direct statements by most of the adopting governments that "the Declaration is not an instrument which is legally binding either directly or indirectly."<sup>83</sup> Therefore, if it can be said that the Declaration prohibits a government's mass killing of its own citizens, it must be said that this is a moral prohibition and not a legal one.

C. *The Convention on the Prevention and Punishment  
of the Crime of Genocide*

The Convention on the Prevention and Punishment of the Crime of Genocide<sup>84</sup> is, at first glance, the clearest response to the Nazi Government's mass killing of its own citizens. Article I of the Convention provides that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."<sup>85</sup> The inclusion of the phrase "in peace" was an intentional attempt to remedy the deficiencies of the Nuremberg Judgment.<sup>86</sup> Article IV of the Convention further provides for individual accountability for the commission of genocide.<sup>87</sup> Genocide is defined initially as the killing of members of a national, ethnic, racial or religious group with the intent of destroying the group.<sup>88</sup> The definition also includes several other acts intended to result in the group's ultimate destruction.<sup>89</sup> Political groups are excluded from the definition.<sup>90</sup> This omission creates a serious loophole in the Convention's scheme, for not only

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82. See Oppenheim, *supra* note 14, §§ 16-17, at 25-27.

83. *Id.* § 340*n*, at 745. See text accompanying notes 77-78 *supra*.

84. Convention on Genocide, *supra* note 8.

85. *Id.* art. I.

86. Comment, *Genocide: A Commentary on the Convention*, 58 Yale L.J. 1142, 1143 (1949) [hereinafter "Genocide: A Commentary"]. See also Oppenheim, *supra* note 14, § 340*p*, at 749-50.

87. Convention on Genocide, *supra* note 8, art. IV.

88. *Id.* art. II.

89. *Id.*

90. Genocide: A Commentary, *supra* note 86, at 1145.



does it leave unprotected political groups per se, but also suggests that the mass killing of protected groups may be justifiable for political reasons. This is of particular concern in the Cambodian setting, where the alleged mass killing had been directed to a large extent at the regime's middle class constituency.<sup>91</sup>

Moreover, the requirement of intent adds a subjective factor to the definition and thus potentially provides an escape from responsibility for mass killing. "[M]easures resulting in the partial or total destruction of a group but taken without the intention of such purpose and result do not fall under the definition and therefore do not constitute acts of genocide under the Convention."<sup>92</sup> An example of this type of situation may have been found in Uganda, where it was sometimes claimed that the alleged mass killings were random and without particular design.<sup>93</sup>

Despite these deficiencies, the Convention is noteworthy for its direct statement of the criminality of certain acts of a sovereign and for its creation of individual accountability for the commission of these acts. The Convention's failure, made more painful by the expectations it creates,<sup>94</sup> is a consequence of its reliance on at least a perceived reduction of sovereignty, which is inconsistent with the most central tenets of the decentralized world legal order. With regard to genocide, such an alteration of the world legal order is found in the enforcement provisions of the Convention. Two forms of enforcement are contemplated. Article VI provides that "[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed . . ."<sup>95</sup> and Article VIII provides that "[a]ny contracting party may call upon the competent organs of the United Nations to take such action . . . as they consider appropriate for the prevention and suppression of acts of genocide . . ."<sup>96</sup>

91. See, e.g., Kamm, *The Agony of Cambodia*, N.Y. Times, Nov. 19, 1978, § 6 (Magazine), at 40, and other Cambodia-related materials cited in note 3 *supra*.

92. P.N. Drost, *The Crime of State*, bk. II, 82 (1959).

93. See generally Uganda-related materials cited in note 3 *supra*.

94. The creation and frustration of expectations by the decentralized legal order and the implications of this process are discussed in Lane, *supra* note 4, at 285-86.

95. Convention on Genocide, *supra* note 8, art. VI.

96. *Id.* art. VIII. Article IX of the Convention also provides as follows:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

To avoid the problems created by the application of international law in municipal courts, Article V requires the contracting parties to "undertake to enact . . . the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide . . . ."<sup>97</sup>

Domestic enforcement of either the international or a domestic standard is at best illusory. In all but the most isolated of instances, genocide will be a government policy and, as such, will not be subjected to the jurisdiction of any municipal court, at least while the offending government is in power.<sup>98</sup> International enforcement through the General Assembly or Security Council is equally hopeless. In the case of the former, the power to recommend or report is legally meaningless in light of the nature of the prohibited activities; in the case of the latter, assuming the political dimension of the Council can be resolved, any coercive action must, as a matter of law, be connected to acts or threats of aggression.<sup>99</sup>

Furthermore, assuming for the moment the Convention was in some manner enforceable, such enforcement could only be directed against contracting parties and therefore would not be enforceable, for example, against Uganda. In regard to this, it may be claimed that the Convention has become part of international common law.<sup>100</sup> This position must be regarded skeptically in

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*Id.* art. IX. The scope of this provision is unclear, but in any event most states refused to be bound by this provision. See note 101 *infra*. See also Genocide: A Commentary, *supra* note 86, at 1147-49.

97. Convention on Genocide, *supra* note 8, art. V.

98. In this regard, it has been stated:

It is apparent that, to a considerable extent, the Convention amounts to a registration of protest against past misdeeds of individual or collective savagery rather than to an effective instrument of their prevention or repression. Thus as the punishment of acts of genocide is entrusted primarily to the municipal courts of the countries concerned, it is clear that such acts, if perpetrated in obedience to national legislation, must remain unpunished unless penalised by way of retroactive laws.

Oppenheim, *supra* note 14, § 340*p* at 751.

99. See notes 54-71 and accompanying text *supra*.

100. The argument would be similar to the one made for the inclusion of the Universal Declaration of Human Rights within customary international law. See notes 79-83 and accompanying text *supra*.

In offering this opinion, I am not ignoring the view of the International Court of Justice in Advisory Opinion on Reservations to the Convention On the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. 15. In this advi-

light of the reaction of many states which, despite the Convention's compelling motivation and unassuming legal nature, have refused to ratify it.<sup>101</sup> This refusal is inconsistent with the international common law characterization. To the contrary, it represents the state's intention not to have its sovereignty restricted. The United States' experience is illustrative. Since its execution by President Truman, the Convention has been sent to the Senate on several occasions, each time to be defeated.<sup>102</sup> Typical of the pre-

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sory opinion a majority of the Court stated: "[T]he first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." *Id.* at 23. The principles underlying the Convention, according to the Court, are found in General Assembly Resolution 96(I) (1946), in which the Assembly (fifty-six nations) unanimously affirmed that genocide was a crime under international law and that its perpetrators were punishable. G.A. Res. 96(I), U.N. Doc. A/231, at 188 (1946). This, of course, is not an argument that the Convention's provisions are part of international law, but only that the crime of genocide as defined in the resolution, *see* note 3 *supra*, is outlawed.

This claim is highly suspect. The resolution "[a]ffirms that genocide is a crime under international law . . . ." G.A. Res. 96(I), U.N. Doc. A/231, at 188 (1946). The word "affirms" implies that the General Assembly was of the view that genocide had been previously outlawed by the world legal order. As the discussion of the Nuremberg Judgment demonstrated, this is not the case. *See* notes 36-49 and accompanying text *supra*. Thus, the resolution must itself be the source of any claimed rule of international law. This is not contemplated under the U.N. Charter nor consistent with the rules of the decentralized legal order. At best, one could argue that the fifty-six nations supporting this resolution have bound themselves not to commit genocide. To argue for a broader effect is to argue that the General Assembly has legislative power which simply does not square with the reality of the prevailing jurisprudence of the decentralized world legal order.

101. As of December 31, 1978, only eighty-four states had become parties to the treaty. *See* Multilateral Treaties in respect of which The Secretary-General Performs Depositary Functions, U.N. Doc. ST/LEG/SER.D/12, at 81-83 (1979). A number of these states refused to be bound by any provision which even suggested international or transnational supervision. *See, e.g.*, the reservations of Albania, Algeria, Argentina, Bulgaria and Burma regarding articles VI and/or IX of the Convention, *id.* at 89-92.

Article IX is set forth in note 96 *supra*. Article VI provides that as an alternative to state courts, *see* text accompanying note 95 *supra*, a person "charged with genocide . . . shall be tried . . . by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Convention on Genocide, *supra* note 8, art. VI. To date no such tribunal exists.

102. President Carter, in his first months in office, once again sent the Convention to the Senate for ratification. *See* President's Address to the General Assembly, 13 Weekly Comp. of Pres. Doc. 397, 401 (Mar. 17, 1977).

vailing argument is the following statement of then Senator Sam Ervin:

[A]s I construe this very vaguely worded convention, it undertakes to empower the International Court of Justice to overrule the decisions of the Supreme Court of the United States, and even hand down a judgment to the effect that acts of Congress intended to implement provisions of this treaty do not constitute a sufficient implementation.

I have never been able to understand why some people think the United States would be better governed if it were governed by foreigners instead of by American citizens; or why we would have sounder judicial decisions if we empowered the International Court of Justice to overrule the Supreme Court of the United States, or to make an adjudication that Congress had not complied with the terms of the treaty.<sup>103</sup>

Thus, a document designed to afford the most minimal international protection to individuals is defeated by a characteristic appeal to nationalism, a *sine qua non* for the decentralized world legal order. This result, however, is not unexpected in light of the decentralized legal order logic, which resists standards based on the protection of individual human rights in favor of those based on sovereign volition.

#### D. *International Covenant on Civil and Political Rights and its Optional Protocol*

The International Covenant on Civil and Political Rights and its Optional Protocol<sup>104</sup> are the final documents upon which this article will focus. Unlike the previous instruments, which were adopted by the United Nations immediately following World War II and in direct response thereto,<sup>105</sup> the Covenant was adopted in 1966<sup>106</sup> and did not enter into force until 1976.<sup>107</sup> Drafts of the

103. 120 Cong. Rec. 2203 (1974).

104. International Covenant on Civil and Political Rights, *supra* note 9; Optional Protocol, *supra* note 9.

105. Universal Declaration of Human Rights, *supra* note 9; Convention on Genocide, *supra* note 8.

106. U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

107. Schwelb, *The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol*, 12 Tex. Int'l L.J. 141, 145 (1977).

Covenant, however, were submitted to the United Nations as early as 1949 as part of an attempt to create an "International Bill of Human Rights conceived as an effective part of the law of nations commensurate with the ideals of the Charter, the enduring aspirations of mankind and the requirements of international peace."<sup>108</sup> The early defeats of attempts at adoption were reflective of the unwillingness of states to consent to what they perceived to be limitations of their sovereignty.<sup>109</sup> As of 1978, only fifty-five states had become parties to the Covenant, despite the severe limitations on its provisions for implementation.<sup>110</sup>

Article 6, section 1 of the Covenant provides that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."<sup>111</sup> Assuming "arbitrary" to be a substantive term and not a procedural one,<sup>112</sup> the provision may prohibit mass killing by governments. There is no clear indication that this assumption is the correct one, but Article 6 does appear committed to the end of all state killing.<sup>113</sup> If mass killing is a violation of the Covenant, it is not an international crime, for the Covenant does not characterize a breach of any of its provisions as criminal. The civil status of any violation is further evidenced in the implementation provisions which, in effect, treat violations as civil disputes resolvable through a form of mediation. The significance of this is evident when it is recalled that what is being discussed is a government's mass killing of its own citizens.

Implementation of the Covenant's normative provisions is the

108. Lauterpacht, *supra* note 26, at 277.

109. Schwelb, *The International Measures of Implementation of the International Covenant on Civil and Political Rights and of the Optional Protocol*, 12 Tex. Int'l L.J. 141, 145-49 (1977); Lauterpacht, *supra* note 26, at 273-76.

110. See Multilateral Treaties, *supra* note 101, at 106-07. See also text accompanying notes 114-24 *infra*.

111. International Covenant on Civil and Political Rights, *supra* note 9, art. 6, § 1.

112. In using "substantive," I am referring to the acts which result in government killing and not the process used to determine whether an individual committed such acts.

113. Article 6(2) of the Covenant attempts to limit the use of the death penalty. Article 6(3) asserts the consistency of the Covenant with the Convention on Genocide, *supra* note 8, where relevant. Article 6(4) of the Covenant requires that an individual sentenced to death have the "right to seek pardon or commutation of the sentence." Article 6(5) of the Covenant prohibits, *inter alia*, the death sentence to be "imposed for crimes committed by persons below eighteen years of age . . . ." International Covenant on Civil and Political Rights, *supra* note 9.

responsibility of a Human Rights Committee.<sup>114</sup> The competence of the Committee is meager. Under Article 40 it is to consider reports required to be submitted by contracting parties. These reports are to encompass the measures the particular state has taken to effect the Covenant. The Committee is then required to comment on these reports and transmit these comments to the particular state. It may also transmit the reports and comments to the United Nations Economic and Social Council.<sup>115</sup>

The Committee has, in some cases, the further competence to consider communications from a contracting party claiming that another contracting party is in violation of Covenant obligations.<sup>116</sup> In this instance the Committee is charged with making "available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant."<sup>117</sup> This process is simply not useful for resolving disputes concerning a government's mass killing. Moreover, ratification of the Covenant alone will not subject parties to this process, for Article 41 states that the Committee's power may only be exercised if both state parties concerned have recognized this particular competence of the Committee and if ten or more states have done so.<sup>118</sup>

There is also an optional protocol attached to the Covenant.<sup>119</sup> This instrument permits the Committee to receive "com-

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114. Article 28 provides as follows:

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

International Covenant on Civil and Political Rights, *supra* note 9, art. 28.

115. Apparently the Economic and Social Council is then to make its reports and recommendations as discussed in text accompanying notes 59-60 *supra*.

116. International Covenant on Civil and Political Rights, *supra* note 9, art. 41.

117. *Id.* art. 41(1)(e).

118. *Id.*

119. Optional Protocol, *supra* note 9. As of December 1978, ten states had

munications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant."<sup>120</sup> Offering the right of petition to an individual is a significant departure from traditional international law tenets.<sup>121</sup> This accounts for the limited number of states which have adopted the protocol.<sup>122</sup>

For those states adopting the optional protocol, individual communications against them may be submitted only by individuals claiming to be victims of a violation and who have exhausted all available domestic remedies.<sup>123</sup> The practical effect of requiring such a major effort on behalf of an individual petitioner is to curtail substantially any functional value of the protocol. Moreover, the available remedy does not justify the effort. According to Article 4, the Committee, upon declaring a communication admissible, may only "bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant."<sup>124</sup> This is clearly a questionable inducement for individual participation.

#### V. GOVERNMENT MASS KILLING—A PROCEDURAL PERSPECTIVE

Heretofore the article has focused mainly on normative standards set forth in a series of international documents in an attempt to establish whether a government's mass killing of its own citizens is in violation of international law. This examination has suggested a negative answer. Additionally, this probe into the legal tenets of the world legal order has produced some information concerning available international procedures intended for the vindication of protected human rights. The conclusions concerning the efficacy of these procedures have also been quite negative. However, this latter study has been restricted to those procedural provisions which are included directly within the doc-

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filed declarations recognizing the competence of the Human Rights Committee under article 41. See *Multilateral Treaties*, *supra* note 101, at 114.

120. Optional Protocol, *supra* note 9, preamble.

121. See Lauterpacht, *supra* note 26, at 244.

122. As of December 1978, only twenty-one states had adopted the Optional Protocol. See *Multilateral Treaties*, *supra* note 101, at 116-17. Even President Carter, when signing the Covenant in the flush of his human rights campaign, failed to sign its protocol. The United States became signatory to the Covenant on Oct. 5, 1977. See *id.* at 107, 116.

123. Optional Protocol, *supra* note 9, art. 2.

124. *Id.* art. 4(1).

uments under examination. No mention has yet been made of several procedures created by the Human Rights Commission and its Sub-Commission on the Prevention of Discrimination and Protection of Minorities,<sup>125</sup> which are intended to be the principal vehicles for the examination of allegations concerning particularly gross and continuing violations of human rights.<sup>126</sup>

The first of these is the procedure created by Resolution 8 (XXIII) of the Human Rights Commission,<sup>127</sup> which requires the Commission annually to consider the "question of violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories."<sup>128</sup> It designates the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to provide for purposes of such discussion "a report containing information of violations of human rights and fundamental freedoms from all available sources."<sup>129</sup> The Resolution also authorizes the Commission to make "a thorough study and investigation of situations which reveal a consistent pattern of violations of human rights."<sup>130</sup> Apparently a study finding such violation would be referred to the Economic and Social Council in the manner contemplated in the Charter.<sup>131</sup> To date two studies have been

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125. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities was created by the Commission on Human Rights in 1947, pursuant to Resolution 9(II) of the Economic and Social Council. E.S.C. Res. 9(2), 2 U.N. ESCOR, Annex 14 (Agenda Item 9) 400 (1946). Its powers are derived from the U.N. Charter, art. 68, which states: "The Economic and Social Council shall set up commissions . . . for the promotion of human rights, and such other commissions as may be required . . ."

126. See generally Cassese, *Two United Nations Procedures for the Implementation of Human Rights—The Role that Lawyers Can Play Therein* [hereinafter "Cassese"], in *International Human Rights Law and Practice* 39 (J. Tuttle ed. 1978); van Boven, *Human Rights Fora at the United Nations: How to Select and to Approach the Most Appropriate Forum: What Procedural Rules Govern?*, in *International Human Rights Law and Practice* 83 (J. Tuttle ed. 1978).

127. Study and investigation of situations which reveal a consistent pattern of violations of human rights, Human Rights Commission Res. 8 (XXIII), 42 U.N. ESCOR, Supp. (No. 6) 131, U.N. Doc. E/CN. 4/940 (1967).

128. *Id.*

129. *Id.* sec. 2.

130. *Id.* sec. 5. The resolution actually requests authority from the Economic and Social Council for conducting these investigations. *Id.* This authority was apparently granted. See Cassese, *supra* note 126, at 40.

131. See Study and investigation of situations which reveal a consistent pat-



undertaken pursuant to this resolution.<sup>132</sup> The Commission and Sub-Commission may also pass resolutions concerning gross violations of human rights.<sup>133</sup> This is considered less significant than a study, but more significant than a mere discussion.<sup>134</sup>

Finally, as noted above, the Sub-Commission is required to discuss gross violations. Such discussions, according to one of its members, while being part of a rudimentary procedure, can "draw the attention of the public opinion at large to serious cases of manifest disregard of human rights. It can thus be instrumental in exerting a strong pressure on the Governments concerned."<sup>135</sup> Some concern may be fairly expressed about a procedure which depends largely for its vindication on the support of the mass media. However, this reliance is not to be unexpected, since again the censorship of state activity is involved. Furthermore, this dependence is additionally compelled by the focus on gross violations of human rights without distinguishing those which are violations of international law and those which are violations of international moral standards.<sup>136</sup>

The provision of information for consideration pursuant to this resolution is not limited to state sources, nor are there any tests for reliability. This informal admissibility procedure has led members of the Sub-Committee to warn that "there exists the possibility for members of the Sub-Commission or NGOs (non-governmental organizations) to level gratuitous or indiscriminate criticisms at Governments without producing any reliable evidence."<sup>137</sup> Such criticism seems somewhat misfocused, for it is not

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tern of violations of human rights, Human Rights Commission Res. 8 (XXIII), 42 U.N. ESCOR, Supp. (No. 6) 131, U.N. Doc. E/CN. 4/940 (1967).

132. See Cassese, *supra* note 126, at 40. The two countries investigated were South Africa and Chile.

133. *Id.* at 41.

134. The Sub-Commission has adopted a resolution on Uganda. See note 164 *infra*.

135. Cassese, *supra* note 126, at 40.

136. It is my view that one of the significant obstacles to the international protection of human rights is the United Nations' failure to distinguish in this positivist world legal order between that which is unlawful and that which is immoral. While I understand this approach to be an attempted expansion of United Nations competence, the coupling of law and morality in this fashion confuses the United Nations' human rights efforts and limits its remedial activity to censorship. To move toward substantial legal protection of human rights, it is first necessary that the acts to be prevented or terminated are made unlawful. See generally Watson, *supra* note 26.

137. Cassese, *supra* note 126, at 41.

the existence or nonexistence of written tests, but rather the actual process by which information is weighed, which causes the problems. In the context of a government's mass killing of its own subjects, however, this debate is of little significance when, at best, what is at consequence is the integrity of a resolution disapproving such activity.

The second and more well-known procedure for stimulating United Nations action concerning gross violations of human rights is the "1503" procedure.<sup>138</sup> Established by the Economic and Social Council in 1970, this procedure suffers from none of the informalities of its 1967 counterpart. Article I authorizes the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to create a working group to meet once a year in private

to consider all communications including replies of Governments thereon, received by the Secretary-General under Council Resolution 728 F (XXVIII) of 30 July 1959 with a view to bringing to the attention of the Sub-Commission those communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission.<sup>139</sup>

The terms of the Sub-Commission's "reference," that is, the standards for the admissibility of communications, are set forth in the Sub-Commission's Resolution 1 (XXIV) of August 13, 1971.<sup>140</sup> On a substantive level, "the object of the communication must not be inconsistent with the relevant principles of the Charter, of the Universal Declaration of Human Rights and of the other applicable instruments in the field of human rights."<sup>141</sup>

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138. Procedure for dealing with communications relating to violations of human rights and fundamental freedoms, E.S.C. Res. 1503 (XLVIII), 48 U.N. ESCOR, Supp. (No. 1A) 8, U.N. Doc. E/4832/Add. 1 (1970).

139. *Id.* art. 1.

140. Questions of the violation of Human Rights and Fundamental Freedoms, including Policies of Racial Discrimination and Segregation and of *Apartheid*, in all countries, with particular reference to Colonial and other Dependent Countries and Territories, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights, Res. 1 (XXIV), U.N. Doc. E/CN.4/1070, at 50-52 and E/CN.4/Sub.2/323 (1971) [hereinafter "Resolution of the Sub-Commission"].

141. *Id.* sec. 1(a).

The inclusion of the Declaration evidences the non-legal, or at least mixed non-legal and legal, focus of the procedures since, as has been discussed above, acts contrary to the provisions of the Declaration are not unlawful.<sup>142</sup> Moreover, this conclusion is supported by the non-sanctioning structure of the procedure.<sup>143</sup>

In addition to these normative standards for the admissibility of a communication, there are a series of procedural requirements. No communications, for example, are admissible unless "there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms . . . ."<sup>144</sup> The standards of reasonable grounds and reliable attestations are further expanded upon by Article 2, which authorizes the submission of communications by individuals or non-governmental organizations who have "direct and reliable knowledge of such violations."<sup>145</sup> If the word "direct" is interpreted to mean "first-hand," this condition would severely limit the availability of the procedure, especially in the case of mass killing. Hearsay communications, however, are admissible "provided that they are accompanied by clear evidence,"<sup>146</sup> although communications "based exclusively on reports disseminated by mass media" are inadmissible.<sup>147</sup>

Additional conditions on the admissibility of communications are that they neither be anonymous<sup>148</sup> nor contain language which "is essentially abusive and in particular . . . contain insulting references to the State against which the complaint is directed."<sup>149</sup> This final requirement of civility in the face of a government's mass killing of its own citizens is symbolic of the inappropriateness of the entire process.

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142. It should be remembered that acts contrary to the provisions of the Declaration are not unlawful. See notes 77-83 and accompanying text *supra*.

143. Indeed, one member of the Sub-Commission has stated:

The procedure's primary purpose is not to condemn states or to hold them up to public opprobrium, but rather to find out whether allegations of gross violations of human rights are substantiated and, if so, to help the states concerned put an end to or at least curtail such violations. The implements used by the United Nations in this area are enquiry, report and recommendation.

Cassese, *supra* note 126, at 43.

144. Resolution of the Sub-Commission, *supra* note 140, sec. 1(b).

145. *Id.* sec. 2(a).

146. *Id.* art. 2(c).

147. *Id.* art. 3(d).

148. *Id.* art. 2(b).

149. *Id.* art. 3(b).

In the event that a communication survives the conditions for admissibility, it may upon majority vote of the working group be submitted to the Sub-Commission, which is then to determine whether it should be referred to the Commission.<sup>150</sup> The Commission, upon such reference, is to determine whether a study and a report and recommendations thereon are merited.<sup>151</sup> The Commission may also conduct an investigation through an *ad hoc* committee as a basis for its study report and recommendation.<sup>152</sup> All work of the Commission under this procedure is confidential and may become public only upon a Commission determination "to make recommendations to the Economic and Social Council."<sup>153</sup>

This procedure, at least in the mass killing context, is, at best, unworkable. Not only does there facially appear to be little hope of success, but any possible success hardly seems worth the effort. The logic of this procedure, however, is clear in the context of the decentralized world legal order which is structured to permit no meaningful interference with sovereign prerogatives.<sup>154</sup>

A more skeptical commentator might conclude that the process, rather than being directed to the ultimate vindication of human rights, is instead a deception creating an illusion of concern and activity. Certainly, in the case of government mass killing, no evidence to the contrary exists to date. Moreover, it should be remembered that even if the process is not entirely "pointless," the remedy is.

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150. Procedure for dealing with communications relating to violations of human rights and fundamental freedoms, E.S.C. Res. 1503 (XLVIII), 48 U.N. ESCOR, Supp. (No. 1A) 8, sec. 5, U.N. Doc. E/4832/Add. 1 (1970).

151. *Id.* sec. 6(a).

152. *Id.* sec. 6(b).

153. *Id.* sec. 8.

154. Even advocates of the procedure do not deny this conclusion, but only its implications. As one recently stated:

Is it then time for intoning a *de profundis*? I submit that it would not be correct at this stage to pass an altogether negative judgment. International procedures for implementing human rights should not be assessed necessarily on their face, but against the wide and complex background of both the current international situation of human rights and the domestic conditions of States. It should be borne in mind that it takes years to convince Governments that international protection of human rights does not entail undue interference in their domestic affairs, but serves the primary purpose of helping them restore respect for the basic rights and freedoms of human beings. It is therefore too early to say that the "1503 procedure" has turned out to be pointless.

Cassese, *supra* note 126, at 44.

## VI. GOVERNMENT MASS KILLING—BUSINESS AS USUAL

To this point the article has undertaken an analysis of certain international legal practices and documents in order to establish the validity of the thesis concerning the absence of sufficient legal norms and institutions for the prevention of a government's mass killing of its own subjects. Some references have been made to the allegations of mass killing by the former governments of Uganda and Cambodia in order to demonstrate the immediacy and importance of the analysis.

Details of the allegations concerning the mass killing by the former governments of Uganda and Cambodia are more than adequately set forth elsewhere.<sup>155</sup> It is sufficient for the purposes of this article to note that the victims of the killings in Uganda were "Christians and educated members of the Acholi and Langi ethnic groups . . ."<sup>156</sup> and that the victims of the Cambodian killings were in many cases urban members of the middle class.<sup>157</sup> This characterization of victims is significant since it is one of the factors in determining whether the particular mass murder constitutes genocide under the Genocide Convention.<sup>158</sup> The killing in Uganda generally seems to satisfy this condition. The mass killing in Cambodia, on the other hand, appears to be political and, therefore, outside the Convention's scope.

The acts of both former governments, if in fact committed, do constitute gross and continuing violations of human rights. This is important theoretically because it places such government activity within the jurisdictions of the United Nations' Human Rights organizations.<sup>159</sup> It should be recalled, however, that the remedy available through these institutions is ultimately only the mere criticism of such governments' activity.<sup>160</sup>

Submissions alleging, *inter alia*, mass murder in both Uganda and Cambodia have been made to the United Nations Commission on Human Rights. In 1974 and 1976, the International Commission of Jurists<sup>161</sup> submitted allegations concerning mass

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155. See, e.g., sources cited in note 3 *supra*.

156. Amnesty International Report 1977, at 111.

157. See generally materials on Cambodia cited in note 3 *supra*.

158. Convention on Genocide, *supra* note 8; see notes 86-91 and accompanying text *supra*.

159. See notes 125-53 and accompanying text *supra*.

160. *Id.*

161. The International Commission of Jurists is a non-governmental organization, as that term is understood in the context of the United Nations Charter

killing in Uganda.<sup>162</sup> No action was taken at the 1975 meeting, but in 1976 the Sub-Commission on Prevention of Discrimination and Protection of Minorities, pursuant to Resolution 8 procedure,<sup>163</sup> "[r]ecommend[ed] to the Commission on Human Rights that it make a thorough study of the human rights situation in Uganda, based on objective and reliably attested information, and seek the cooperation of the Government of Uganda for this purpose."<sup>164</sup> Before any such study was commenced, however, Uganda was seated on the Commission, and the Commission then, during its 1977 meeting, decided only to keep the situation under review.<sup>165</sup> In May of 1977, Amnesty International instituted an action under the confidential 1503 procedure,<sup>166</sup> the results of which remain unknown.<sup>167</sup>

The experience with Cambodia has been somewhat similar. In 1975, Freedom House<sup>168</sup> petitioned the Human Rights Commission to inquire into the allegation of mass killing in Cambodia.<sup>169</sup> Despite this petition and growing international concern over the illegal mass killings, no action was taken by any UN institution until March of 1978, when the Commission, under its Article 8 procedure,<sup>170</sup> decided as follows:

The Commission decided to request the Secretary-General to transmit to the Government of Democratic Kampuchea the documents and summary records of the

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and United Nations practice. *See generally* Shestack, *Sisyphus Endures: The International Human Rights NGO*, 24 N.Y.L. Sch. L. Rev. 89 (1978).

162. Human Rights in Uganda, *supra* note 3, at 2.

163. *See* notes 127-37 *supra* and accompanying text.

164. Res. 2B (XXIX) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. No. E/CN.4/1218/Sub.2/378, at 44 (1976).

165. Human Rights in Uganda, *supra* note 3, at 2.

166. *See* notes 138-53 and accompanying text *supra*.

167. Human Rights in Uganda, *supra* note 3, at 2.

168. Freedom House, Inc. is a not-for-profit corporation established in 1941 for the purpose of promoting freedom. For United Nations purposes, it is affiliated with the International League for Human Rights, a non-governmental organization within the meaning of the United Nations Charter and practice. *See generally* Shestack, *Sisyphus Endures: The International Human Rights NGO*, 24 N.Y.L. Sch. L. Rev. 89 (1978).

169. Information about this petition is found in Cherne, *Cambodia—Auschwitz of Asia*, in *Indochina: Hearings on the Current Situation in Indochina Before the Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations*, 95th Cong., 2d Sess. 91-92 (1978).

170. *See* notes 127-37 and accompanying text *supra*.

thirty-fourth session of the Commission relating to the human rights situation in that country, with a view to inviting that Government to send its comments and observations, and to transmit the response of the Government of Democratic Kampuchea, together with all the information that might be available about the situation, to the Commission at its thirty-fifth session, through the Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>171</sup>

As a consequence of this decision, relevant documents were transmitted to the Government of Cambodia for comment.<sup>172</sup> Late in 1978, the Government of Cambodia responded by characterizing the inquiry as "impudent interference in the internal affairs of Democratic Kampuchea . . . ."<sup>173</sup> Finally, in apparent agreement with the Cambodian position, the Commission on March 13, 1979, voted to postpone for one year consideration of the allegations of gross and continuing violations of human rights in Cambodia.<sup>174</sup>

Responses of this nature are a reflection of the rules of the decentralized world legal order. More importantly, the entire procedural experience regarding allegations of mass killing by the governments of Uganda and Cambodia against their own citizens was entirely predictable in the context of this decentralized legal system. Complaints of mass killing were lodged in both cases, several years passed and, in the end, nothing was done. Evidence was not taken, studies were not made, and recommendations were not forthcoming. Thus, even the mechanics necessary for affording the most meager of United Nations sanctions were, in essence, not undertaken. In the end, ironically, it was only war which has apparently ended the killing.<sup>175</sup> International law, as it now is consti-

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171. Commission on Human Rights Report on the Thirty-Fourth Session, Decision 9, U.N. Doc. E/CN.4/1292, at 137 (1978), *reprinted in* Bull. Human Rights 24 (1978).

172. Report of the Sub-Commission Under Commission on Human Rights, Note by the Secretary-General, Resolution 8 (XXIII), U.N. Doc. E/CN.4/Sub.2/414 (1978).

173. Telegram dated 16 September 1978 from the Minister of Foreign Affairs of Democratic Kampuchea, addressed to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/414/Add. 9 (1978).

174. Commission on Human Rights Report on the Thirty-Fifth Session, Decision 6, U.N. Doc. E/CN.4/1347, at 135 (1979).

175. In April of 1979, after a successful invasion by Tanzanian troops in re-

tuted, cannot prevent mass killing. This is not a failure of individual concern, but of institutions and a jurisprudence which remain steadfastly tied to the state as the supreme authority of the legal order.<sup>176</sup>

## VII. CONCLUSION

Since the end of World War II, many of the most thoughtful and progressive international law commentators have expressed optimism concerning the international human rights program initiated by the United Nations Charter and developed through the series of declarations and treaties discussed herein.<sup>177</sup> To these authors this program has become part of international law.<sup>178</sup>

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sponse to alleged Ugandan border incursions, a new government was installed in Uganda. *See* N.Y. Times, Apr. 15, 1979, § 4, at 1E, col. 1. During the same period of time, in response to alleged incursions, Vietnam successfully invaded Cambodia and installed a new government. Interestingly, in his first speech as President, Heng Samrin charged his predecessor, Pol Pot, with having murdered millions of Cambodians. *See* N.Y. Times, Jan. 31, 1979, § A, at 3, col. 1.

176. In this regard, Professor Falk has stated:

The treatment of Jews in Nazi Germany and the treatment of blacks in South Africa suggest the impotence of the world order system. Indeed, there is a normative contradiction, as the affirmation of internal sovereignty gives a government complete authority to decide how to treat its own *subjects*. Since governments have a mutual interest in upholding internal sovereignty, especially in a period of ideological strife, efforts to protect human rights rarely progress beyond the stage of censure—even when, as with respect to Rhodesia, the international community has agreed to impose economic sanctions. Statist interests take precedence over the pretensions of international solidarity and concern for human rights.

R. Falk, *A Study of Future Worlds* 68 (1975).

A most recent and shocking illustration of this principle is the United Nation's decision to seat the Pol Pot Government in the General Assembly despite the overwhelming evidence of its mass killing of its own subjects. The story of this United Nations action is found in *U.N. Assembly, Rebuffing Soviet, Seats Cambodia Regime of Pol Pot*, N.Y. Times, Sept. 22, 1979, § A, at 1, col. 4.

177. *See, e.g.*, Humphrey, *supra* note 68; Sohn, *supra* note 68; Schwelb, *supra* note 61; Lauterpacht, *supra* note 26; Jessup, *supra* note 15.

178. Typical of this view is the argument of one commentator that "it is already law, at least for Members of the United Nations, that respect for human dignity and fundamental human right is obligatory." Jessup, *supra* note 15, at 91. President Carter has also stated:

All the signatories of the U.N. Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is solely its



This article arrives at a different conclusion, at least in regard to preventing a government's mass killing of its own citizens. An examination of those documents and practices purporting to outlaw such activity indicates that at best, under the Genocide Convention,<sup>179</sup> certain types of mass killing, if performed by contracting parties, are outlawed. In those covered cases, however, the enforcement procedures are so meager as to make the designation of "crime" meaningless. To the extent that other documents can be said to prohibit mass killing, they do so from a moral perspective and not a legal one. This is not to diminish the importance of moral claims nor their significance for legal reform, but rather to indicate that this reform has not yet been accomplished. The international legal response to the allegations of mass killing in Uganda and Cambodia evidence this point.

The difficulty in outlawing mass killing and, indeed, in protecting human rights in general within the world legal order is not in the first instance, however, one of process but rather one of jurisprudence. Clearly, it is possible to amend the Genocide Convention<sup>180</sup> to include political groups within its definition of genocide and to conceive of institutions through which its substantive provisions might be implemented.<sup>181</sup> However, these changes cannot occur in a legal order which has as the basic postulate of its jurisprudence the absolute power of a sovereign over its own subjects.<sup>182</sup>

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own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world.

President's Address to the General Assembly, 13 Weekly Comp. of Pres. Doc. 397, 401 (Mar. 21, 1977).

179. The Convention on Genocide, *supra* note 8.

180. *Id.*

181. The creation of an international court was, in fact, contemplated by Article 6 of the Convention on Genocide, *supra* note 8. See note 101 *supra*; Genocide: A Commentary, *supra* note 86, at 1149.

182. This view was recognized some thirty years ago by Philip Jessup when he wrote:

Two points in particular are singled out as keystones of a revised international legal order. The first is the point that international law, like national law, must be directly applicable to the individual. It must not continue to be remote from him, as is the traditional international law, which is considered to be applicable to states alone and not to individuals. The second point is that there must be basic recognition of the interest which the whole international society has in the observance of its law. Breaches of the law must no longer be considered the concern of

The critical conditions necessary for the prevention of mass killing by a world legal order depend upon the formulation and acceptance of a jurisprudence which values human rights above state supremacy and which locates the sources of its law in other than positivist terrains.<sup>183</sup> The acceptance of such a jurisprudence requires a change in conception of sovereign power. This cannot be easily accomplished. In fact, it is more difficult now than when it was first considered in the aftermath of World War II and during the early years of the United Nations. Today, state tremors over sovereign atrocities have stabilized, and sovereign self-concern has reasserted itself as the dominant focus of the world legal order. As is evidenced by the experience in Uganda and Cambodia, the legal protection of human rights continues to remain solely a state matter.<sup>184</sup> This focus, however, is not without some distraction. The growing world demand for the protection of human rights is exerting pressure for accommodation within the world legal order. Additionally, the existence of the United Nations as at least a partially independent institution, with its own Charter-directed goals, creates an alternative power center which can sometimes be used for pressure as a check against wayward state activities.<sup>185</sup> While these conditions may inevitably result in

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only the state directly and primarily affected. There must be something equivalent to the national concept of criminal law, in which the community as such brings its combined power to bear upon the violator of those parts of the law which are necessary to the preservation of the public peace.

Jessup, *supra* note 15, at 91.

183. In this regard, see particularly McDougal, *International Law Power and Policy: A Contemporary Conception*, Academie de Droit International, 82 *Recueil des Cours* 137 (1953). For more recent attempts at a new jurisprudence, see R. Dworkin, *Taking Rights Seriously* (1978); Delaney, *Towards A Human Rights Theory of Criminal Law: A Humanistic Perspective*, 6 *Hofstra L. Rev.* 831 (1978). See also Falk, *supra* note 5.

184. This situation is even more troublesome in light of the growing worldwide demand for the protection of human rights, which, if not accommodated, carries with it the threat of catastrophe. See Lane, *supra* note 4. See also McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 59 *Yale L.J.* 60 (1949). Some evidence of this position may be found in the recent Iranian upheaval. In an interview with New York Times reporter Nicholas Gage, an Iranian mullah stated, "It was President Carter who made the world conscious of human rights and gave us courage to demand ours." Gage, *For Iranians, The Mullah's Orders Are Law*, N.Y. Times, Dec. 9, 1978, at 3, col. 1.

185. In this regard, Professor Falk has stated:

the necessary change in the world legal order, the pace is slow, and the course is dangerous.<sup>186</sup> The realization of these changes, moreover, will not be aided by the continuing claim that activity such as a government's mass killing of its own citizens is unlawful. The persistent advocacy of this position, regardless of its humanistic roots, obscures the dominance of the state within the present world legal order. Such dominance must be confronted if peaceful change is to be accomplished.

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The gradual reorientation of national elites toward the impartial acceptance of world community legal standards may be the most significant, if occasionally invisible, contemporary trend in support of world order. The Charter conception, by its authoritative formulation of governing norms, is a crucial factor encouraging this trend. The principal organs of the United Nations often provide communication facilities wherein international adversaries meet in periods of crisis and violence. Invoking norms to rationalize a national position may lead to a gradual assimilation of the normative directive as part of what is perceived to be reasonable behavior.

Falk, *supra* note 5, at 52.

186. See Jessup, *supra* note 15, at 91.