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DEMANDING HUMAN RIGHTS:
A CHANGE IN THE WORLD LEGAL ORDER

Eric Lane*

The world itself is now dominated by a new spirit. Peoples more numerous and more politically aware are craving, and now demanding, their place in the sun—not just for the benefit of their own physical condition, but for basic human rights.¹

—PRESIDENT CARTER

President Carter's recognition of universal standards of human rights,² and his formulation of a foreign policy at least partially based on such recognition,³ has been the object of both foreign and domestic criticism,⁴ which at first glance appears inexplicably severe. In the context of the present world legal order,⁵ however, the administration's expressed intention to pursue a policy directed toward a worldwide guarantee of human rights represents a potentially radical departure from the legal tenets which have governed world political interaction for the last 300 years.⁶


2. See notes 91-94 infra and accompanying text.
3. See text accompanying notes 95-98 infra.
4. See notes 100 & 101 infra and accompanying text.
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 an excellent 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. Blackburn eds. 1969).
6. The 300-year period commenced with the termination of the Thirty Years War in 1648. See note 7 infra.
These tenets, formalized by the Peace of Westphalia,\footnote{The Peace of Westphalia marked the formal termination of the Thirty Years War. It incorporated two treaties: the Treaty of Munster, executed at Munster in 1648 by Austria, Spain, and France, and the Treaty of Osnabruch, executed at Osnabruch in 1648 by Austria and Sweden. See generally C. FRIEDRICH, THE AGE OF BAROQUE 1610-1660 (1962); D. OGG, EUROPE IN THE SEVENTEENTH CENTURY (1960); S. STEINBERG, THE THIRTY YEARS’ WAR AND THE CONFLICT FOR EUROPEAN HEGEMONY 1600-1660 (1966); C. WEDGEWOOD, THE THIRTY YEARS WAR (1961).} command in substance that “apart from obligations undertaken by treaty, a state is entitled to treat both its own nationals and stateless persons at discretion and that the manner in which it treats them is not a matter with which International Law, as a rule, concerns itself.”\footnote{I L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 292, at 641 (8th ed. H. Lauterpacht ed. 1955). 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.} The post-Westphalia world legal order, which evolved in opposition to the centralized spiritual and secular domination of the medieval world, ultimately compelled the creation of these tenets by its strict adherence to a decentralized world model inhabited by independent and juridically equal states. Cast in response to changing individual and community needs and demands,\footnote{These needs and demands, or more appropriately, political realities, constitute the roots of the world legal order upon which such an order must rely for its vitality. Thus, destruction of the root will necessarily destroy the system and the order.} the new decentralized legal order of the Peace of Westphalia provided a framework in which these changing political realities could be accommodated. Political realities today, however, differ dramatically from those of the midseventeenth century. Two World Wars, modern technology, and mass communications, as well as a recognition of decreasing global resources, have narrowed humankind’s divergent characteristics and have increasingly created an interdependent world.\footnote{For an excellent study of the interdependency of the world and the international legal order and the possible alternatives to this order, see R. FALK, A STUDY OF FUTURE WORLDS (1975).} Nonetheless, the order of Westphalia, with its emphasis on decentralization, remains the present world legal arrangement. As described by Professor Falk:

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 \textit{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 governments 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.\textsuperscript{11}

Thus, international recognition and protection of human rights have not historically been an ingredient of the Westphalian arrangement. Nor perhaps can they be, considering the Westphalian emphasis on territorial sovereignty and sovereign equality. Consequently, individuals are merely the "objects"\textsuperscript{12} of the international legal order and their rights can receive protection only by virtue of the volition of the individual state. However, demands for the legal protection of individual human rights have increased and expanded. The purpose of this article is to examine these demands in the framework of the present world legal order, particularly in light of President Carter's human rights policy, to determine whether these demands can be realized peacefully.

The Peace of Westphalia\textsuperscript{13} marked the formal termination of more than thirty years of European warfare which pitted Lutherans and Calvinists against Catholics and against each other; feudal lords against feudal kings; nations against the Empire; and more generally, forces for decentralization against forces for continuing secular and spiritual centralization.\textsuperscript{14} This period has been accurately characterized as the beginning of a new world order:

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

\begin{footnotes}
\item 11. \textit{Id.} at 59 (footnote omitted) (emphasis in original).
\item 13. \textit{See} note 7 \textit{supra}.
\item 14. \textit{See generally} J. BRONOWSKI & B. MAZLISH, \textit{THE WESTERN INTELLECTUAL TRADITION} (1960): "This was a war which started in 1618 for religious reasons and ended in 1648 for political ones; it was a war which saw a Catholic cardinal, Richelieu, maneuver France onto the side of the Protestant powers in order to defeat the Catholic Hapsburgs." \textit{Id.} at 105 (footnote omitted).
\end{footnotes}
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 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.15

The medieval European world was hierarchical in both its spiritual and secular spheres. Furthermore, the spiritual pyramid overshadowed the feudal pyramid and was, at least in theory, supreme in the event of conflict. Thus, in 1302 Pope Boniface VIII, in his fight over taxation with Philip IV of France, issued the following bull:

At the time of the flood there was, indeed, one ark of Noah, prefiguring one Church; it . . . had one steersman and commander, namely Noah, and we read that outside of it all things existing on earth were destroyed. . . .

. . . [S]piritual power exceeds any earthly power in dignity and nobility, as spiritual things excel temporal ones. . . .

If, therefore, the earthly power err, it shall be judged by the spiritual power; if the lesser spiritual power err, it shall be judged by the higher, competent spiritual power; but if the supreme spiritual power err, it could be judged solely by God, not by man. . . .16

As the seventeenth century approached, however, notions of feudal and papal dominance were more a reactionary assertion of authority than a relevant arrangement for world order.17 The Reformation was already fully matured and the scientific revolution was thriving.18 On the political front, “the concept of the balance of power was evolved, and with it the modern notion of a community of states.”19 Machiavelli had already published The Prince and Bodin

17. See generally J. Bronowski & B. Mazlish, supra note 14; D. Ogg, supra note 7; S. Steinberg, supra note 7; C. Wedgwood, supra note 7.
18. See generally authorities cited note 17 supra.
had published *Republique Celebration*, both espousing the notion of absolute sovereignty. Economically, the Reformation had boosted the rising middle class and mercantilism was on the rise, forcing a growing emphasis on the state as the center of the world order arrangement.

Thus, when Duke John Williams died without heir in 1609, leading to a war of succession and ultimately to the Thirty Years War which involved most great powers of the time, the political realities on which the existing world order was based were so changed that the hierarchical structure could not accommodate them. Consequently, there could be no peaceful resolution of a conflict which otherwise should have been easily resolvable. Essentially, the battle for succession initiated the assertion of three different interests: religious, economic, and nationalistic. While the differences between these interests were often blurred by alliances among parties with various opposing interests, the common denominator and overriding interest in all cases was the decentralization of spiritual and secular authority. The question was no longer one of interpretation of the rules of the centralized world legal order, but rather of the validity of the system itself. Transposed into a legal order perspective, the hallmark of this period was the inability of the centralized legal order to accommodate changed political realities. The war was a direct result of this failure.

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20. *The Prince* was first published in 1513 and *Republique Celebration* was first published in 1578.

21. Another important consequence of the Reformation was its encouragement of the rising middle class. The Reformation, at least in its Calvinist version, made religion a thing of this world and achieved the miracle of identifying good works with the accumulation of riches. The shame of profiteering was wiped away and what was formerly lust for wealth became the fulfillment of God's purposes on earth.

A strengthened nation-state and a rising middle class—these are characteristics of what we have learned to call modern history. If we add to these what may at first sight appear as contradictory elements, religious and political individualism, we are well on our way to the contemporary world.


22. "The revolution of political and economic thought and action is all symbolized in the word and concept of the 'state.'" C. FRIEDRICH, *supra* note 7, at 3.

23. For a general discussion of the immediate events culminating in the Thirty Years War, see authorities cited note 7 *supra*. The great powers of the time were the Empire, including Austria and the German principalities and estates, Spain, France, and Sweden.


25. For a discussion of these interests, see authorities cited note 7 *supra*.

26. See note 14 *supra* and accompanying text.

The treaties ending the war\textsuperscript{28} set forth the legal rules for a new decentralized world legal order and, by so doing, illustrated the discordance between then-existing political realities and the old centralized arrangement. The Peace of Westphalia, which has been described as the "reflections of an emergent, widely shared, disparately formulated consensus regarding changed conditions and their juridical consequences,"\textsuperscript{29} thus mirrored all the decentralization interests. It has been noted:

In the spiritual field the Treaty of Westphalia was said to be "a public act of disregard of the international authority of the Papacy." In the political field it marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority.\textsuperscript{30}

The treaty recognized the territorial sovereignty of the European states and established procedures for peaceful resolution of disputes arising among signatories:

[If it happens any point [of this treaty] shall be violated, the Offended shall before all things exhort the Offender not to come to any Hostility, submitting the Cause to a friendly Composition, or the ordinary Proceedings of Justice.

Nevertheless, if for the space of three years the Difference cannot be terminated by any of those means, all and every one of those concern'd in this Transaction shall be oblig'd to join the injur'd Party, and assist him with Counsel and Force to repel the Injury, being first advertis'd by the injur'd that gentle Means and Justice prevail'd nothing; but without prejudice, nevertheless, to every one's Jurisdiction, and the Administration of Justice conformable to the Laws of each Prince and State; and it shall not be permitted to any State of the Empire to pursue his Right by Force and Arms; but if any difference has happen'd or happens for the future, every one shall try the means of ordinary Justice, and the Contravener shall be regarded as an Infringer of Peace.\textsuperscript{31}

\textsuperscript{28.} See note 7 supra.

\textsuperscript{29.} Falk, \textit{A New Paradigm for International Legal Studies: Prospects and Propositions}, 84 \textit{Yale L.J.} 969, 979-80 (1975). In this extremely provocative and challenging article, Professor Falk argues that the world order is already shifting toward a central guidance arrangement, requiring the imput of a humanistic vision, to avoid world hegemony. \textit{Id.}

\textsuperscript{30.} Gross, \textit{supra} note 15, at 28-29 (footnotes omitted).

Embedded in these provisions was the modern notion of “balance of power” which was to become the foundation for the decentralized world order. The Peace of Westphalia also guaranteed religious tolerance, at least within the Christian world. This tolerance was reflected in the structure of guarantees which were to operate independent of religion: “[A]ll Partys in this Transaction shall be oblig’d to defend and protect all and every Article of this Peace against any one, without distinction of Religion . . . .” Despite the great number of qualifications, reservations, and exceptions, the Peace of Westphalia recognized the modern principle of separation of church and state. “Politics became secularized, religion was left to the conscience of the individual.” In this regard, the Peace represented a denial of papal authority, as the parties chose to ignore the papal bull condemning the treaties for their inclusion of clauses granting religious freedom.

The jurisprudential underpinnings of this new legal order were provided by the work of the Dutch legal philosopher, Hugo Grotius. In his treatise published in 1625, The Law of War and Peace, Grotius rooted decentralized sovereignty in natural law doctrine, rationalized the absolute power of the sovereign, and

34. S. Steinberg, supra note 7, at 80.  
35. Bull Zelo domus Dei of Pope Innocent X Condemning the Religious Clauses of the Peace of Westphalia (Nov. 20, 1648), reprinted in Church and State Through the Centuries, supra note 16, at 194.  
36. See S. Steinberg, supra note 7, at 83; Gross, supra note 15, at 28. See also Commentary of the Editors, Church and State Through the Centuries, supra note 16, at 193-94.  
37.由于 widespread influence of The Law of War and Peace, Grotius has been called the “father of international law.” This work was first published in Paris in 1625 and was frequently consulted by the Founding Fathers, including James Madison, Thomas Jefferson, John Adams, and John Marshall. Dumbauld, Preface to E. Dumbauld, The Life and Legal Writings of Hugo Grotius at vii (1969).  
38. See Author’s Preface to H. Grotius, The Law of War and Peace (L. Loomis trans. 1949) (1st ed. Paris 1625). Professor Lauterpacht defined natural law as that law arising from:  
[the social nature of man; the generic traits of his physical and mental constitution; his sentiment of justice and moral obligation; his instinct for individual and collective self-preservation; his desire for happiness; his sense of human dignity; his consciousness of man’s station and purpose in life—all these are not products of fancy but objective factors in the realm of existence.  
generally created rules by which the newly established independent states could coexist. Grotius's writings focused on the creation of a rationale for the decentralized world legal order resulting from the changed political realities, and particularly on legal means for maintaining peace. Thus, it has been noted: "The modern law of nations as it came into being after the Reformation and as it was formulated by Grotius and his immediate predecessors, originated in the historic necessity of regulating the relations of the new sovereign States which arose on the ruins of the temporal unity of Christendom." 40

**THE GROWTH OF THE DECENTRALIZED LEGAL ORDER**

The period between Westphalia and World War I proved fertile for the growth of the decentralized, state-dominated legal order. Inherent in such an order, at least with regard to human rights, is the tenet that no restraints may be placed on the internal acts of a sovereign. 41

The late seventeenth and early eighteenth century maturation of mercantilism and attendant international competitiveness further secured the decentralized system, making more credible existing claims for absolute sovereignty and more tenuous any restraint on a decentralized legal order. No longer was there any promise of an international community of nations subordinated to the law of nations. 42 "[T]he idea of an international community became an al-

40. H. LAUTERPACHT, supra note 38, at 114 (1950). This book remains the most thoughtful historical study of human rights in international law. However, in reading it now, almost 30 years after its first publication, it is hard to agree with its optimism concerning the ability of the state system to accommodate human rights demands; time has proven this optimism unwarranted.

41. This tenet was foreshadowed and supported by Thomas Hobbes in discussing the rights of citizens in relation to their sovereign: "[T]here is a supreme power in some one, greater than which cannot by right be conferred by men, or greater than which no mortal man can have over himself. But that power . . . we call absolute." T. Hobbes, De Cive or The Citizen 77 (S. Lamprecht ed. 1949) (1st ed. Paris 1642) (footnote omitted). "[I]t follows manifestly, that whatsoever shall be done by him who commands, must not be punished." Id. at 76. "It follows therefore that this one, whether man or court, to whom the city hath committed the supreme power, have also this right; that he both judge what opinions and doctrines are enemies unto peace, and also that he forbid them to be taught." Id. (footnote omitted).

42. See W. DORN, COMPETITION FOR EMPIRE, 1740-1763, at 1 (1963):

'It is this very competitive character of the state system of modern Europe that distinguishes it from the political life of all previous and non-European civilizations of the world. Its essence lies in the coexistence of independent and co-ordinate states, whose expansionist drive provoked incessant military conflicts and periodical reshufflings of the territorial and
most empty phrase and . . . international law came to depend upon the will of states more concerned with the preservation and expansion of their power than with the establishment of a rule of law.”

Positivism became the prevalent international legal philosophy to the extent that denial of a natural law authority left sovereign consensus as the sole basis upon which the world order arrangement rested. The pervasiveness of this theory of international law is illustrated by Chief Justice Marshall’s opinion in *The Antelope*, 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 devested 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.

Thus, although this period saw the growth in many states of notions of natural rights, such as those expounded in the Declaration of Independence and the Bill of Rights, the sanction of these

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44. For the purposes of this article, “positivism” refers to acts or commands of the sovereign which in the international sphere are reflected in treaties.
45. As Professor Gross points out, the theories of Grotius were replaced by those of Emmerich de Vattel, who prepared the ground for the era of uninhibited positivism. He helped to establish precisely because of his popularity, perhaps more than any of his predecessors or successors, the consensual character of international law and to reduce natural law from the function of supplying an objective basis for the validity, the binding force, of the law of nations to the function of supplying rules for filling gaps in positive international law.
46. 23 U.S. (10 Wheat.) 66 (1825).
47. *Id.* at 122.
natural rights remained solely an internal affair, and thus did not spill over into the international legal order.

THE FAILURES OF THE DECENTRALIZED LEGAL ORDER

The devastation of World War I which affected "not armies alone, but peoples, and not battlefields alone, but whole continents," engendered a shift in political realities which was reflected in article 10 of the Covenant of the League of Nations:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

While this article did not outlaw wars of aggression, it represented a withdrawal from the perception of war as an end of state. To the extent that this limitation on states' activities constituted a rule of international behavior, it failed to create a procedure for the resolution of conflicts which had previously been resolved by war. Nevertheless, the willingness of the great powers to discuss the

50. LEAGUE OF NATIONS COVENANT art. 10.
51. "Throughout Europe diplomatic officials came from the same class and all of them accepted war as a necessary part of the system. In this sense warfare became a function, if not an actual necessity, of the structure of European society." W. DORN, supra note 42, at 5. See also Lieber Code art. XXX (1863), reprinted in 1 THE LAW OF WAR 158, 164 (L. Friedman ed. 1972) (instructions for governing United States' armies in field): "Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state ..." Additionally, the Kellogg-Briand Pact for the Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 58, arguably included a resolution to criminalize wars of aggression. This pact, signed in Paris in 1928, provided in part:

Article I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Id.
curtailment of state war action reflected changing political realities which were fostered by a realization that war could now wreak worldwide devastation.

While World War I created a demand that resort to war be limited through international law, World War II forged new concern for human rights and forced recognition that these rights cannot depend on the uncontrolled will of the sovereign state for their protection and sanctity.52

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.53

Against this background of devastation, in 1945 the International Military Tribunal (the Tribunal) was created.54 The Tribunal was given jurisdiction over crimes “against peace,” which are analogous to the principles of article 10 of the Covenant of the League of Nations,55 “war crimes,” and “‘crimes against humanity’ . . . whether or not in violation of . . . domestic law.”56 “Crimes

52. See generally H. LAUTERPACHT, supra note 38, at 77-79.
53. Wright, Introduction to L. KUTNER, WORLD HABEAS CORPUS at i-ii (1962). See also H. LAUTERPACHT, supra note 38, at 79.
55. See text accompanying note 50 supra.
56. Charter of the International Military Tribunal, supra note 54, § II. This section defined crimes against humanity as:

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 con-
against humanity” were to comprehend acts perpetrated against German nationals, in many cases pursuant to German law.\textsuperscript{57} Except that the victims of “crimes against humanity” were citizens of the same state as the perpetrators, “crimes against humanity” were similar to “war crimes.”\textsuperscript{58} The willingness to create this new category of crimes, which allowed representatives of other states to punish citizens of a sovereign state for acts committed within that sovereign state and against its own citizens, clearly contradicted the rules of the existing world legal order,\textsuperscript{59} and reflected changing political realities regarding human rights. However, if the parties intended to create an internationally recognized category of “crimes against humanity” which could be internationally enforced, the short life of the Tribunal and the restrictions placed on its jurisdiction\textsuperscript{60} precluded realization of this goal.\textsuperscript{61} Furthermore, subsequent treaties and declarations\textsuperscript{62} indicated that none of the signatories intended to restrict generally the powers of states over their own citizens by incorporating the principle underlying “crimes against humanity” into international law.\textsuperscript{63}

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\item 58. See Charter of the International Military Tribunal, supra note 54.
\item 59. Grotius wrote of the right of a sovereign to intervene in a foreign state in cases of brutal violations of the law of nature, H. Grotius, supra note 38, at 262; in addition, there have arguably been cases of “humanitarian” intervention, see generally E. Stowell, Intervention in International Law (1921). However, these cases of intervention have been essentially political in nature and have not institutionalized violations of human rights as criminal.
\item 60. The Charter of the International Military Tribunal limited the Tribunal’s jurisdiction to persons “acting in the interests of the European Axis countries.” Charter of the International Military Tribunal, supra note 54, § II.
\item 61. For a general discussion of crimes against humanity, see T. Taylor, Nuremberg and Vietnam (1970).
\item 62. See notes 64-77 infra; text accompanying notes 80-83 infra.
\item 63. Professor Oppenheim argued that there are two sources of international law: (1) the express consent of states, and (2) the tacit consent of states. The latter, which he called custom, is a source of law because it describes actions of states performed under the conviction that these actions are obligatory under law. See I L. Oppenheim, International Law: A Treatise §§ 16-17, at 25-26 (8th ed. H. Lauterpacht ed. 1955). See also Statute of the International Court of Justice, Oct. 24, 1945, art. 38(1)(b), 59 Stat. 1055, T.S. No. 993, which sets forth as a source of law “international custom, as evidence of a general practice accepted as law.” Id. Arguably, crimes against humanity have become part of customary international law, but the nonintervention clauses, see text accompanying notes 81-83 infra, undermine this position.
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In addition to the creation of the International Military Tribunal, it is also against the background of World War II’s devastation that a number of United Nations documents relating to the protection of human rights were drafted. Principal among these were the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Optional Protocol, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Prevention and Punishment of the Crime of Genocide. Furthermore, the Council of Europe sponsored the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Ninth International Conference of American States adopted the American Declaration of the Rights and Duties of Man; and the Council of the Organization of American States approved a Statute of the Inter-American Commission on Human Rights and sponsored an American Convention on Human Rights.

Basic to each of these documents is a recognition “of the inherent dignity of the equal and inalienable rights of all members of the human family” which “are not derived from the fact that [they are] national[s] of a certain state, but are based upon attributes of [their] human personalit[ies].” Moreover, the Universal

64. For a collection of these documents and others relating to human rights, see Basic Documents on International Protection of Human Rights (L. Sohn & T. Buergenthal eds. 1973).
65. See U.N. Charter ch. 1, art. 1, para. 3.
73. May 25, 1960, id. at 9 (amended June 8, 1960).
74. See note 112 infra.
76. American Declaration of the Rights and Duties of Man, May 2, 1948, Basic Documents of the Organization of American States, Inter-American Commission on Human Rights 1 (Dec. 1, 1960). To Professor Lauterpacht, the inclusion of these human rights affirmations in the declarations and treaties noted in text constituted
Declaration of Human Rights reflects an understanding that only through rules of law can human rights be protected: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." However, the declaration of the need for rules of law to protect human rights does not make law, nor does it create the mechanism for enforcement of law. Although through these documents human rights have become part of the world order lexicon, and although their incorporation reflects a recognition of changing political realities regarding human rights, the demand for human rights cannot be satisfied without providing a means of peacefully protecting individual rights against the excesses of individual states. Moreover, there is an inherent danger that this recognition without accommodation will create greater tension on the legal order.

The core problem with each of these documents is that, with the exception of the European Convention, they are either declarations, treaties not in force, or treaties in force which fail to pro-

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H. Lauterpacht, supra note 38, at 112.


78. See generally F. Franck & E. Weisband, World Politics: Verbal Strategy Among the Super Powers (1971). See also Author's Preface to H. Grotius, supra note 38, at 8 (footnote omitted): "Law, however, even lacking the support of force, is not entirely without influence. For justice brings peace of conscience, and injustice torment and anguish . . . . Good men unite in praising justice and condemning injustice."


80. Nov. 4, 1950, [1953] Gr. Brit. T.S. No. 71 (Cmd. 8969), 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). The European Convention provides for a European Commission on Human Rights and a European Court of Human Rights. The Commission is empowered to receive complaints from individuals and non-governmental organizations, id. art. 25. The court may only hear cases brought by the Commission or parties to the Convention, id. art. 44, against states which have granted the court jurisdiction, id. art. 45. "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties." Id. art. 53. Although states do have a right to refuse the court's jurisdiction, the right of individual petition along with the creation of a court for the adjudication of human rights disputes represents a partial modification of the world legal order, at least on a regional basis.
vide an effective mechanism for enforcement, in fact containing explicit nonintervention clauses which protect and maintain domestic jurisdiction. 81 An example of such a clause is contained in the United Nations Charter:

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. 82

The insertion of such nonintervention clauses was an affirmation of the Westphalian legal order and belied a willingness to give legal force and effect to the protection of human rights. Thus, it has been stated in reference to these clauses that “the critical ideas of Westphalia involving sovereign equality and domestic jurisdiction are formally perpetuated in the Charter.” 83

81. For example, in referring to the Universal Declaration of Human Rights, Professor Oppenheim noted:

As stated by most of the Governments which voted for its adoption, the Declaration is not an instrument which is legally binding either directly or indirectly. 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.


82. U.N. CHARTER art. 2(7). See also OAS CHARTER arts. 15, 17. While the inclusion of nonintervention clauses is a clear expression of Westphalian logic, in the Americas, the clauses have special meaning given the particular aggressive relationship the United States has had with every member of the American community. See Cabranes, Human Rights and Non-Intervention in the Inter-American System, 65 Mich. L. Rev. 1147, 1151 (1967); Fox, Doctrinal Development in the Americas, 1 N.Y.U. J. INT’L L. 44 (1968).


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 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.

Id. at 59-60.
Despite the hope held for the Charter, the increased concern and activity for the protection of human rights, and the narrowing distinctions between societies, the possibility of a peaceful modification of the world legal order to accommodate the growing demand for the protection of human rights seems remote, inasmuch as the Westphalian legal tenets have reasserted themselves.

As then-Secretary of State Henry A. Kissinger indicated in a speech before the United Nations on September 30, 1976:

With modern communications, human endeavor has become a single experience for peoples in every part of the planet. We share the wonders of science and technology, the trials of industrialization and social change, and a constant awareness of the fate and dreams of our fellow men.

The world has shrunk, but the nations of the world have not come closer together. Paradoxically nationalism has been on the rise at the precise time when the most serious issues we all face can only be resolved through a recognition of our interdependence. The moral and political cohesion of our world may be eroding just when a sense of community has become indispensable.

... Human and civil rights are widely abused and have now become an accepted concern of the world community.


And although none of these developments have had the legal effect of incorporating the fundamental rights of man as part of the positive law of nations, they are not without significance for this aspect of International Law. It is probable that the Charter of the United Nations, with its repeated recognition of "human rights and fundamental freedoms," has inaugurated a new and decisive departure with regard to this abiding problem of law and government. In some instances—as, for example, in the European Convention on Human Rights—that development has assumed the complexion of explicit rules legally binding upon States.

85. For example, the 1977 Nobel Peace Prize was awarded to Amnesty International, an international nongovernmental human rights organization which works for release of political prisoners. The citation read:

In a world of increasing brutality, internationalization of violence, terrorism and torture, Amnesty International used its forces for the protection of human values. Its efforts on behalf of defending human dignity against violence and subjugation have proved that the basis for peace in the world must be justice for all human beings.


87. Toward a New Understanding of Community, Address by Henry A. Kis-
With regard to human rights, the thirty years following World War II witnessed expanded expectation and diminished promise as sovereigns have justifiably felt their authority challenged. For at the heart of the claim for human rights is

the assertion of the value and of the freedom of the individual as against the State; the view that the power of the State and of its rules is derived ultimately from the assent of those who compose the political community, and the insistence that there are limits to the power of the State to interfere with man's right to do what he conceives to be his duty.\(^8\)

It is this "insistence," juxtaposed against the unwillingness of the Westphalian legal order to accommodate it, which results in what Dr. Kissinger has characterized as the eroding "moral and political cohesion of our world."\(^8^9\) In this context, states' continual declarations concerning their interest in the protection of human rights, without the creation of a mechanism for their protection, are at best "inefficacious, deceptive and, in the long run, a brake upon progress."\(^9^0\) To restate the point from a broader perspective,

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88. H. LAUTERPACHT, supra note 38, at 80-81.
89. Toward a New Understanding of Community, Address by Henry A. Kissinger, United States Secretary of State, Before the 31st Session of the United Nations General Assembly (Sept. 30, 1976), reprinted in OFFICE OF MEDIA SERVICES, BUREAU OF PUBLIC AFFAIRS, THE SECRETARY OF STATE (1977). While Dr. Kissinger recognized this erosion as a major problem, his response is in the traditional Westphalian mode:

The United States believes that the future of mankind requires coexistence with the Soviet Union. Tired slogans cannot obscure the necessity for a more constructive relationship. We will insist that restraint be reciprocal, not just in bilateral relations but around the globe. There can be no selective detente. We will maintain our defenses and our vigilance. But we know that tough rhetoric is not strength; that we owe future generations more hopeful prospects than a delicate equilibrium of awesome forces.

Peace requires a balance of strategic power. This the United States will maintain. But the United States is convinced that the goal of strategic balance is achievable more safely by agreement than through an arms race. The negotiations on the limitation of armaments are, therefore, at the heart of U.S.-Soviet relations.

Id.

90. H. LAUTERPACHT, supra note 38, at 74. Professor Lauterpacht believes that "[i]nasmuch as, upon final analysis, [the law of nature and natural rights] are an expression of moral claims, they are a powerful level of legal reform. The moral claims of today are often the legal rights of tomorrow." Id. While the author of this article agrees with Professor Lauterpacht's belief, the concern here is the nature of the conversion from moral claims to legal rights.
if Westphalia has meaning for today, the failure or inability of the world legal order to accommodate present demands for human rights protection deprives the order of its moral authority and converts it to a mere obstacle in the path of changing political realities. Assuming the validity of this proposition, again in light of the Westphalia parallels, the preeminent foreign policy question for today is simply whether the demands for human rights protection can be peacefully realized.

HUMAN RIGHTS AND THE CARTER ADMINISTRATION

From the inception of his administration, President Carter has discussed human rights in terms which indicate that he recognizes that present political realities include demands for the protection of human rights,\(^1\) that there is a need for the accommodation of these demands,\(^2\) and that any accommodation presents a delicate and complex problem:

We can only improve this world if we are realistic about its complexities. The disagreements that we face are deeply rooted, and they often raise difficult philosophical as well as territorial issues. They will not be solved easily. They will not be solved quickly. The arms race is now embedded in the very fabric of international affairs and can only be contained with the greatest difficulty. Poverty and inequality are of such monumental scope that it will take decades of deliberate and determined effort even to improve the situation substantially.\(^3\)

91. See Inaugural Address of President Jimmy Carter, 13 WEEKLY COMP. OF PRES. DOC. 87 (Jan. 20, 1977). See also President’s Address to the General Assembly, 13 WEEKLY COMP. OF PRES. DOC. 387, 397 (Mar. 17, 1977): “I see a hopeful world, a world dominated by increasing demands for basic freedoms, for fundamental rights, for higher standards of human existence.”

92. See Inaugural Address of President Jimmy Carter, 13 WEEKLY COMP. OF PRES. DOC. 87, 88 (Jan. 20, 1977): “The passion for freedom is on the rise. Tapping this new spirit, there can be no nobler nor more ambitious task for America to undertake on this day of a new beginning than to help shape a just and peaceful world that is truly humane.” See also President’s Remarks to People of Other Nations on Assuming Office, 13 WEEKLY COMP. OF PRES. DOC. 89, 89 (Jan. 20, 1977): “I want to assure you that the relations of the United States with the other countries and peoples of the world will be guided during my own Administration by our desire to shape a world order that is more responsive to human aspirations.”

93. President’s Address to the General Assembly, 13 WEEKLY COMP. OF PRES. DOC. 397, 397-98 (Mar. 17, 1977). See also President’s Address at Commencement Exercises at the University of Notre Dame, 13 WEEKLY COMP. OF PRES. DOC. 773, 776 (May 22, 1977):

This does not mean that we conduct our foreign policy by rigid moral maxims. We live in a world that is imperfect and will always be imper-
Awareness of the complexity of the problem, however, is not its resolution. A peaceful resolution of the problem is unlikely to be forthcoming without an understanding of the lesson of Westphalia: that a substantial change in political realities will result in a change in the world legal order. As such, the measure of President Carter's human rights policy is whether he will be able to avoid the dangerous situation which might result from failing to respond to the demand for human rights, and yet avoid responding in such a manner that the proponents of the Westphalia order will see violence as their only means of survival. 94 The administration's activities must be examined in this context.

During its first year, the Carter administration criticized various human rights violations, selectively employed statutory tools which reduce aid to countries that violate certain human rights standards, 95 signed certain previously unsigned treaties, and committed itself to obtaining the necessary ratification of certain signed treaties. 96 Basic to President Carter's human rights policy has been the avoidance of direct reliance on natural law principles as the

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In formulating, interpreting and applying the prohibition of impermissible coercion, authoritative decision-makers of the world community attempt to regulate conflicting claims by states, on the one hand, to effect changes, and, on the other, to avoid changes in the patterns of power and other value allocation among the various nation-states. The decision-makers seek to prevent coercive and violent unilateral modification and reconstruction of value patterns and, simultaneously, to encourage recourse to nonviolent noncoercive methods of change and adjustment. This policy is instinct with a community recognition that coercion of provocative intensity and violence are not appropriate instruments for asserting and implementing claims to a reallocation of values; commonly intense coercive and violent unilateral redistribution of values in the world arena not only wastefully entails the expenditure of values for the destruction of values but also generates further value expenditure and destruction in the shape of a countering response.

95. See text accompanying notes 102-108 infra.

96. See President's Address to the General Assembly, 13 WEEKLY COMP. OF PRES. DOC. 397, 401 (Mar. 17, 1977):

To demonstrate this commitment, I will seek Congressional approval and sign the U.N. covenants on economic, social, and cultural rights, and the covenants on civil and political rights. And I will work closely with our own Congress in seeking to support the ratification of not only of these two instruments [sic] but the United Nations Genocide Convention and the Treaty for the Elimination of All Forms of Racial Discrimination, as well.
normative basis for its advocacy. Thus, President Carter has taken a more positivist approach, stating:

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 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.97

By following this approach,98 the Carter administration, in effect, operates within the framework of the Westphalian legal order, which relies upon treaties as a source of international law. Despite this positivist approach, however, the President's policy of reprehending foreign governments has been severely criticized by both domestic99 and foreign sources.100 Such criticism primarily reflects


To those who argue that our concern for human rights of people in other lands constitutes intervention, we say look to the Charter of the United Nations, to the Universal Declaration on Human Rights, to the Helsinki Final Act, to the Declaration Against Torture, and to similar regional instruments and resolutions. No nation in the world today can hide torture, apartheid, arbitrary imprisonment, censorship, or other such violations of human rights behind assertions of sovereignty. The denials of internationally recognized human rights and fundamental freedoms is a matter of international concern.

98. In regard to this approach, 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, 52 (R. Falk & C. Black eds. 1969):

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.


1. Giving human rights a central place subordinates, blurs or distorts all other relevant considerations. After all, the central objectives of our foreign policy are security and peace... 

2. Advocates of the "human rights standard" fail to appreciate the legal and practical limits of foreign policy. International law forbids any state from interfering in the internal political, judicial and economic affairs of another.

100. See, e.g., Address by Leonid I. Brezhnev, Chairman, Soviet Communist...
the tenuous position presently occupied by human rights when balanced against sovereign independence of the Westphalian legal order, which considers security the only international question.\textsuperscript{101} It is not that human rights have been entirely ignored by the Westphalian order, but rather that they have been dealt with in political, rather than legal, fashion. While the occasional effectiveness of such a political approach cannot be denied, it is selective at best and does not create legal protection for human rights. Thus, this approach fails to assure that human rights will become a primary concern of the decentralized Westphalian world legal order.

The tension in the current administration's policy and the complexity of negotiating it through the Westphalian legal order is most clearly illustrated by President Carter's use of legislative tools. Acting pursuant to statute,\textsuperscript{102} President Carter has selec-


\textsuperscript{102} See 22 U.S.C.A. § 2304(a) (West Supp. 1977). This section provides:

(1) It is the policy of the United States, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, to promote and encourage increased respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. To this end, a principal goal of the foreign policy of the United States is to promote the increased observance of internationally recognized human rights by all countries.

(2) It is further the policy of the United States that, except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.

(3) In furtherance of the foregoing policy the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.
tively denied foreign aid to countries which have "engage[d] in a consistent pattern of gross violations of internationally recognized human rights." Of the fifty-seven countries found, in 1977, pursuant to section 2304(b), to be in "gross violation of internationally recognized human rights," the Carter administration decided to reduce aid to only three. This reduction in aid based on human

Id.

See also 22 U.S.C. § 2301 (1970), which explicitly sets forth the congressional statement of policy in regard to foreign military assistance and sales. This section provides in relevant part:

The Congress of the United States reaffirms the policy of the United States to achieve international peace and security through the United Nations so that armed force shall not be used except for individual or collective self-defense. The Congress finds that the efforts of the United States and other friendly countries to promote peace and security continue to require measures of support based upon the principle of effective self-help and mutual aid. It is the purpose of this subchapter to authorize measures in the common defense against internal and external aggression, including the furnishing of military assistance, upon request, to friendly countries and international organizations.

Id.


104. Id. § 2304(d)(1). This section states: "[T]he term 'gross violations of internationally recognized human rights' includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, and other flagrant denial of the right to life, liberty, or the security of person."

Id.

105. N.Y. Times, Mar. 13, 1977, at 1, col. 6. The three countries to which aid was reduced were Argentina, Uruguay, and Ethiopia. The Department of State report furnished to Congress contained a list of 82 countries which were receiving some form of "security assistance." For the statutory definition of this term, see 22 U.S.C.A. § 2304(d)(2) (West Supp. 1977). Of the 82 countries receiving security assistance, only 25 were found to be basically free of violations. N.Y. Times, May 13, 1977, at 1, col. 6. According to 22 U.S.C.A. § 2304(b) (West Supp. 1977), the Secretary of State must present a report to Congress of human rights practices for each country for which foreign aid has been proposed. This section provides in relevant part:

The Secretary of State shall transmit to the Congress, as part of the presentation materials for security assistance programs proposed for each fiscal year, a full and complete report, prepared with the assistance of the Coordinator of Human Rights and Humanitarian Affairs, with respect to practices regarding the observance of and respect for internationally recognized human rights in each country proposed as a recipient of security assistance. In determining whether a government falls within the provisions of subsection (a)(3) of this section and in the preparation of any report or statement required under this section, consideration shall be given to—

(1) the relevant findings of appropriate international organizations, including nongovernmental organizations, such as the International Committee of the Red Cross; and

(2) the extent of cooperation by such government in permit-
rights violations, in addition to supporting and reflecting changing political realities, is an alien currency to this system of aid which previously exacted only political and military support; as might be expected, the criticism has reflected this. In addition, the selective application of this new legislation has been severely criticized by human rights proponents.

Responding to both of these criticisms, Zbigniew Brzezinski, Presidential Assistant for National Security Affairs, has explained the administration’s policy:

[W]hat we have tried to do in the human rights issue, and I think it is a point worth bearing in mind, is to confirm the American commitment to the notion that this is an idea whose time has come; that the strength of that idea and its specific political expression within individual countries really is very much dependent on the conditions within these countries. We are not making human rights the condition for dealing with governments. We see movement toward human rights as inherent in the present evolution of mankind, the rising demands, more literacy, more communications. All of that is producing many more demands for human rights and we want to encourage that. . . . But when we get to specific bilateral discussions of important bilateral issues, we obviously will not make it the precondition or the central issue of our bilateral relations.

. . . You see in South Africa the connection between that fundamental moral issue and political change both within the country and externally. The increasing political and social consciousness of the black majority in South Africa is bringing that issue to the fore in terms of the very nature of South African society. And internationally, the conjunction between the aspiration for true equality and true opportunity on the part of the blacks and the black states, the conjunction of this with ideological conflicts, really is posing the challenge that the black-white conflict could simultaneously become a white-red conflict—if you will, a conjunction of racial war and ideological war. This is what transforms a moral issue into an immediate political issue; whereas in some other places, either domestically or internation-

ally, that issue has not surfaced to some extent. One has to make one’s judgment not only on the basis of what one would like to see in the world but also in terms of what is actually happening and where the most pressing issues are surfaced.\(^{108}\)

The complexity of Brzezinski’s answer reflects the complexity of the problem he is trying to solve. On the one hand, he is faced with changing political realities in the increasing demands for vindication of individual human rights, which he sees as a central world issue. On the other hand, he is confronted with the traditional “balance of power” needs generated by the logic of the Westphalian system, which requires nonintervention. His solution to this dilemma is to opt for the Westphalian security interest, unless the demand for the accommodation of human rights has reached a point where the failure to recognize those demands might result in immediate catastrophe. The core problem with this solution is that it attempts to accommodate human rights demands through the political process, without raising them to the level of internationally protected legal rights. This solution can only create an atmosphere of confusion and danger.\(^{109}\) One example of such an atmosphere is that human rights advocates might regard violence as the only means of obtaining United States support.

The aspects of the administration’s human rights policy most directed toward accommodating human rights demands in the legal order are its decision to sign the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the American Convention on Human Rights, and to seek their ratification along with the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, and the International Convention on the Elimination of All Forms of Racial Discrimination.\(^{110}\) Although none of these documents, with the exception of the American Convention on Human Rights, permits the right of individual petition,\(^{111}\) or pro-


\(^{111}\) President Carter has refused to sign the Optional Protocol to the Interna-
vides any meaningful mechanism for the adjudication of human rights disputes,\textsuperscript{112} the long delay in their execution and ratification is testimony to Westphalian logic's extraordinary hold on United States policy. Even a document as compelling and legally unassuming as the Genocide Convention, adopted by the United Nations General Assembly in 1948, was denied Senate ratification as recently as 1974 on the grounds that its ratification constituted a surrender of sovereign power.\textsuperscript{113} Under Westphalian logic, the danger of these documents is that they introduce legal order standards based not on the volition of the sovereign, but on human personalitiy.\textsuperscript{114} Thus, the minimum human standard set forth in these documents tends to interfere with the Westphalian notion of sovereign independence. From the perspective of accommodating human rights demands, however, the danger of these documents is that the narrowness of their scope will belie any affirmative perception

\textsuperscript{112} The procedure contemplated under each of these documents is for a Human Rights Committee to make a report concerning claims made to it, and investigated by it, from other State parties who have also accepted the Committee's jurisdiction. See, e.g., 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).

The American Convention on Human Rights, however, is modeled after the European Convention; it creates a Human Rights Court and permits some right of individual petition through its Commission. However, the Convention is not presently in force, and, although ratification by the United States would have significant regional impact, it would not be the deciding vote. For a general review of the Convention, see Buergenthal, The American Convention on Human Rights: Illusions and Hope, 21 BUFFALO L. REV. 121 (1971); Landry, The Ideals and Potential of the American Convention on Human Rights, 4 HUMAN RIGHTS 395 (1975).

\textsuperscript{113} See 120 CONG. REC. 2203 (1974) (remarks of Senator Ervin):

\textquote{As 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.

This treaty undertakes to say that every nation which becomes bound by it shall pass legislation to implement it. So it obligates the United States to implement with legislation and, at the same time, gives the International Court of Justice the authority to see to it that the U.S. legislation is sufficient to enable the United States to perform its duties under the treaty.

\textsuperscript{114} See notes 75 & 76 supra and accompanying text.
they create, further diminishing the authority of the Westphalian legal order without offering a substitute for it.

**CONCLUSION**

An administration spokesman, in reviewing the administration's human rights policy before the House Subcommittee on International Organizations, listed the following as the major accomplishments of its policy: recognition by foreign states and their citizens of United States concern for human rights; consideration by foreign states of the cost of repression; a changed worldwide perception of the United States; the release of some political prisoners; the admission in several foreign states of international organizations for purposes of investigating claims of human rights violations; and the signing of the American Convention.115 Measured against current allegations of genocide and the reported worldwide increase in human rights violations,116 the administration's claimed accomplishments appear meek and overstated, and its policy unsuccessful. This need not result from a lack of good faith, but rather from a world legal order which has traditionally extolled sovereign independence and has condemned any form of intervention. This dilemma was reflected in questions recently raised by columnist James Reston, writing on Cambodia: "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?"117 Quite simply, the answer to the important second question is yes, or at least yes until the central nonintervention tenet of the world legal order is replaced. For here the problem arises, and as long as the legal order continues to regard the protection of individual human rights as outside its jurisdiction, the vindication of human rights demands will have to rely on political solutions.

Measured against this standard, President Carter's policy and accomplishments fare somewhat better. Despite the complexity of weighing human rights against balance of power, there has been

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some attempt to modify the world legal order to accommodate demands for the protection of human rights. Particularly interesting in this regard is the signing of the American Convention. Although this policy provides no remedy to the victims of the present world legal order, and perhaps especially in the face of the gruesome allegations concerning Uganda and Cambodia, the alternatives, given the present legal order and the history of the last thirty years, are either worse, a matter of degree, or nonexistent. Imagine, for example, the response to a decision by President Carter to convene an international tribunal to try crimes against humanity committed in Cambodia, or a decision to have an international police force land there for the purpose of arresting the perpetrators. To accommodate the changing political realities regarding human rights in the world order requires a change in the world legal order. Until individuals are treated as the subject of the world legal order, and until procedures are provided for the vindication of their human rights, there can be no adequate safeguards against the acts of sovereigns perpetrated upon their own citizens. To accomplish this goal, sovereign power must be reduced, and plenary jurisdiction must be granted to a transnational body. This would, of course, strike at the heart of the world legal order. However, if the lessons of Westphalia are valid for today, the failure to accomplish this goal carries with it the probability of continued human suffering and the possibility of catastrophic repercussions.

118. See note 112 supra.
