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HUMAN RIGHTS WITHIN THE WORLD LEGAL ORDER: A REPLY TO SOHN AND MCDougAL

Eric Lane*

The primary task of a useful teacher is to teach his students to recognize inconvenient facts . . . .

A nation is the best thing that was ever invented, mother, he would sigh . . . .

Reports of governmental violations of their citizens' human rights continuously dominate the news. These governmental atrocities are committed with apparent impunity, as neither international organizations such as the United Nations nor nation states undertake any proscriptive activities, and in fact remain hauntingly silent.

This state of affairs is, of course, profoundly disturbing to those of us who value the protection of human rights above sovereign integrity, and should prove particularly disquieting to those students of the world legal order who, to a greater or lesser degree, have argued that such protection now constitutes part of international law. Indeed, Professor Richard Falk, one of the most thoughtful and realistic members of this group, has recently stated:

For those of us who believed that international law and the United Nations could contribute to an ever-strengthening prospect of be-

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3. Even the most cursory review of the newspapers supports this point. For a systematic study of human rights violations, see AMNESTY INTERNATIONAL REPORT 1981.
4. For the purposes of this article, the term "world legal order" refers to the authority system under which world parties act and that which world parties depend upon for authority and justification for their actions. For a discussion of the world legal order, see Falk, The Interplay of Westphalia and Charter Conceptions of International Legal Order, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 32 (R. Falk & C. Black eds. 1969).
nign world order, it is especially necessary to be tough-minded at this time about the limitations of law and international organization. We are at one of the weakest points of our century in coming to terms with the fundamental challenges in international life.6

To be "tough-minded" in regard to the international protection of human rights requires a recognition that despite numerous attempts since the end of World War II to restrain governmental activities toward their own subjects,6 the predominant world legal order remains the decentralized one in which sovereign discretion continues essentially unchecked.7 This view, however, is not universally shared within the world legal order community. Recently two important publicists have expressly condemned it. Writing in a Hofstra Law Review symposium entitled The Future of Human Rights in the World Legal Order,8 Professor Louis Sohn has characterized this view as lacking an "appreciation of the tremendous changes brought by developments since the Second World War,"9 and ignoring that "the practice of states in the last thirty-five years has given


7. In making this claim, I am not unmindful that states are not as politically independent as they once were. The existence of the United Nations, regional organizations, and multinational corporations, as well as the growing recognition of the inability of single states to solve problems that essentially require multistate resolution, tends to constrain state independence and affect international norms. To concede these tendencies is not, however, to concede that they have affected the process by which law is created in the world legal order, particularly in regard to a state's treatment of its own citizens—a state freedom upon which the international order has been built. For a discussion of the decentralized world legal order, see Lane, Demanding Human Rights: A Change in the World Legal Order, 6 Hofstra L. Rev. 269, 269-86 (1978) [hereinafter cited as Lane, Demanding Human Rights]; Lane, Mass Killing by Governments: Lawful in the World Legal Order?, 12 N.Y.U. J. Int'l L. & Pol. 239, 242-48 (1979) [hereinafter cited as Lane, Mass Killing].

8. 9 Hofstra L. Rev. 337 (1981). This symposium was stimulated, to a large extent, by two recent articles expressing somewhat negative views on the ability of the decentralized world legal order to accommodate human rights demands. See Lane, Mass Killing, supra note 7; Watson, Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law, 1979 U. Ill. L.F. 609.

the Charter and documents implementing it a status equivalent to that of constitutional law in the domestic legal order.\textsuperscript{10} In the same symposium, Professor Myres S. McDougal\textsuperscript{11} argues that such attention to the decentralized world legal order blocks one's vision of a different "global or earth-space community"\textsuperscript{12} in which "an immense body of prescriptions" have emerged to prevent human rights violations.\textsuperscript{13}

These views cannot be lightly dismissed. Both of these scholars are universally considered prominent observers of, and have been participants in the world legal order, and both have dedicated much of their work to the study of the protection of human rights within this order. Despite this dedication, however, and perhaps because of it, both of these authors are mistaken. Both, determined to make what is repulsive unlawful, have failed to appreciate, or perhaps more accurately, ignored the predominance of the decentralized world legal order and its underlying state system in their attempt to describe as reality a system they wish existed. What is being objected to is not the positing of a world legal order in which human rights demands can be accommodated, but the claim that this arrangement is presently in place. Not only is this incorrect, but it is also dangerous to the extent that it creates unfulfillable expectations as to the potential for claim resolution, and to the extent that it deters scholars and other legal order actors from focusing on the proscribing process. Gunnar Myrdal has argued in regard to social research that "[b]iases lead to a false perception of reality and to faulty policy conclusions."\textsuperscript{14} The claims of Sohn and McDougal are clear examples of this phenomenon.

This criticism, of course, requires a full explanation. It is the

\begin{enumerate}
\item Id.
\item Professor McDougal's article was co-authored by Professor Lung-Chu Chen.
\item McDougal & Chen, \textit{Introduction: Human Rights and Jurisprudence}, 9 Hofstra L.
\item Rev. 337, 339 (1981).
\item Id. at 340:
\item A most significant feature in this global development of constitutive process is the emergence, in response to the intensifying demands of peoples everywhere, of an immense body of proscriptions—beginning with the United Nations Charter and extending through the Universal Declaration of Human Rights to the two major international covenants and numerous more specialized and ancillary formulations—which have taken on both the substance and form of the basic bill of rights long established and maintained in national communities.
\item G. MYRDAL, OBJECTIVITY IN SOCIAL RESEARCH 47 (1969). In making this criticism I understand that all observers suffer from bias in their observations. It is my view, however, that the biases of Sohn and McDougal are so extreme as to remove their conclusions from the range of what is presently possible.
\end{enumerate}
purpose of this article to provide one through an examination of rep-
resentative works of both of these authors with particular emphasis
on the processes through which law for each of them is created. This
lawmaking process is, of course, essential for measuring the legal le-
gitimacy of each of their claims. Ironically, perhaps, this approach
owes much to Professor McDougal, who has urged throughout his
writing careful study of the authoritative element of lawmaking.15

In proceeding in this manner, I am not unmindful of the recent
criticism of my work by Professor Lowell F. Schechter16 who, while
tentatively sharing my analysis of human rights in the decentralized
world legal order, chastises me for failing to produce "some plan
showing how the difficulties will be overcome or circumvented and
the ultimate goal [of the legal protection of human rights] reached."17
While it is not conceded that scholarship requires such
an endeavor, there is some personal need to at least probe this diffi-
cult area. Thus, a second purpose of this article is to offer some few
thoughts concerning the protection of human rights within the world
legal order.

THE WORLD ACCORDING TO PROFESSOR SOHN

Professor Sohn is the quintessential charterist.18 He views the
world legal order, at least as it pertains to human rights, as being a
centralized structure with the United Nations Charter as its base.19
"The Charter is the cornerstone of international *jus cogens*, and its
provisions prevail over all other international and domestic legislative
acts."20 According to Sohn, the Charter creates a variety of human
rights norms and authorizes their implementation and enforcement
through various United Nations organs: "These provisions express

15. See M. McDougal, H. Lasswell & L. Chen, Human Rights and World Pub-
lic Order 161-363 (1980) [hereinafter cited as M. McDougal, Human Rights]; McDougal
& Reisman, The Prescribing Function in the World Constitutive Process: How International
Law is Made, in International Law Essays 355, 355 (M. McDougal & W. Reisman eds.
16. Schechter, The Views of "Charterists" and "Skeptics" on Human Rights in the
17. Id. at 358-59.
[hereinafter cited as Sohn, Human Rights Law]; Sohn, supra note 9. For other charterist
perspectives on the world legal order, see H. Lauterpacht, International Law and
Human Rights 145-265 (1950); Humphrey, The Implementation of International Human
Rights Law, 24 N.Y.L. Sch. L. Rev. 31 (1978).
20. Id. at 131-32 (footnote omitted).
clearly the obligations of all members and the powers of the organization in the field of human rights. While the provisions are general, nevertheless they have the force of positive international law and create basic duties which all members must fulfill in good faith.21 Moreover, any concern one might have about the generality of the Charter provisions is resolved by the Universal Declaration of Human Rights,22 which, Sohn concludes, "not only constitutes an authoritative interpretation of the Charter obligations but also a 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."23 Finally, in order to resolve any lingering doubt as to the reality of his claims, Sohn informs us that "[t]he practice of the United Nations confirms this conclusion,"24 citing as evidence various resolutions of the United Nations condemning human rights violations.25

Professor Sohn's rendering of the world legal order as a descriptive exercise is significantly flawed. Two basic objections come to mind. First, his view is utopian to the extent it superimposes on the state-dominated world political order a centralized non-state world legal order.26 Professor Falk has accurately described similar proposals of Sohn's27 as without "a transition strategy that is credible."28 Second, insofar as Sohn does attempt to connect his view to political realities, he offers a source-of-law jurisprudence—an explanation of why a particular order is authoritative and its norms obligatory—which, while using the language of the decentralized world legal order, denies its meaning, experience, and function.29 Moreover,

21. Id. at 131.
23. Sohn, Human Rights Law, supra note 18, at 133.
24. Id. (footnote omitted); see Sohn, supra note 9, at 355.
26. See Sohn, supra note 9, at 355-56.
29. See Lane, Demanding Human Rights, supra note 7, at 276-86.
as a corollary to this objection, his reading of various instruments into which he has breathed constitutional life is inconsistent with their language, intention, and context, and his state practice evidence simply is not persuasive.

The first objection requires no prolonged explanation. Even from a propagandistic perspective, the vision of a charter world legal order is, if desirable, probably unattainable, short of a world conflagration. To suggest its existence without any substantial discussion of its birth strains rationality. While it may be inconvenient to acknowledge, it is reasonably apparent that states still dominate the world order, and, regardless of one's dissatisfaction with this reality, to posit the contrary without explanation evidences only structural preferences.

The second objection requires considerably more discussion. This relates to Professor Sohn's attempt, by use of the jurisprudential concept of consent, to anchor his view in the state-dominated world legal order, apparently in reluctant recognition of its continued authority. Sohn states:

While the authors are right that international law depends on clearly expressed consent of states, they do not seem to understand that in the international human rights area the states have voluntarily accepted one restriction after another; by now there is a network of instruments which together represent a rather sophisticated system of human rights principles.

The restrictions Sohn appears to be referencing are those purported to be contained in the United Nations Charter and the Uni-

30. Id. at 278-86; Lane, Mass Killing, supra note 7, at 254-68.
31. See infra notes 59-69 and accompanying text.
32. It should be obvious that states are reluctant partners in attempts to diminish their real or perceived authority and in fact may bite back. See Lane, Demanding Human Rights, supra note 7, at 285-86. Furthermore, assuming a transition to a charter form of government, it is not certain that such a government will be desirable, since some of the values protected by the state may still be important.
33. Sohn, supra note 9, at 355.
34. Sohn, Human Rights Law, supra note 18, at 130. The Preamble of the Charter reaffirms the "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," and their determination "to promote social progress and better standards of life in larger freedom." U.N. CHARTER Preamble. As one of the purposes of the United Nations, article one provides: "To achieve 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." U.N. CHARTER art. 1, para. 3. The Charter also provides for the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as
universal Declaration of Human Rights,\textsuperscript{35} as interpreted by various United Nations Resolutions\textsuperscript{36} and the International Court of Justice.\textsuperscript{37} This is not to ignore the international and regional covenants relating to human rights which Sohn claims as part of his network.\textsuperscript{38} Insofar as they have been expressly consented to by a state and contain recognizable norms, they create binding international law.\textsuperscript{39} Sohn, however, chooses not to approach them from this perspective, but rather from a charterist view in which the vote of the General Assembly in support of recommending the covenants for state adoption is considered the law-creating activity and subsequent state activity is essentially ignored.

Though the Covenants resemble traditional international agreements which bind only those who ratify them, it seems clear that they partake of the creative force of the Declaration and constitute in a similar fashion an authoritative interpretation of the basic rules of international law on the subject of human rights which are embodied in the Charter of the United Nations. This conclusion is supported by the fact that the Covenants are even more universal in their origin than the Declaration. While the Declaration was adopted by less than fifty votes, with some important

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\textsuperscript{35} Sohn, \textit{Human Rights Law, supra} note 18, at 132-34. It is noteworthy that the Declaration merely expressed the hope that all nations would "promote respect for these rights and freedoms." G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).


\textsuperscript{39} See infra notes 41-45 and accompanying text.
\end{flushright}
abstentions, 105 states voted for the Covenants and only a few states (such as Portugal and South Africa) absented themselves at the time of the vote, not daring to interfere with the unanimous vote of the General Assembly. Consequently, although the Covenants apply directly to the states that have ratified them, they are of some importance, at the same time, with respect to the interpretation of the Charter obligations of the non-ratifying states. 40

Thus, the essence of Sohn's claim is that through participation in the United Nations processes member states have obligated themselves, from a legal perspective, to certain standards of behavior toward their own subjects.

The difficulty with this claim is that Sohn's use of consent is inconsistent with the term's meaning within the decentralized world legal order. Within this state-dominated order all states are juridically equal, and no state or group of states may impose its will on another state. 41 The relationship is basic to the existence of this legal order and reflects the value fought for in its creation and protected by its jurisprudence. 42 From this perspective, it is clear that consent is the only source of law. Professor Falk has written:

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 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. 43

Within this framework, consent—the source of law—may be either explicit or tacit. Explicit consent refers to a state's undertaking of a

40. Sohn, Human Rights Law, supra note 18, at 135-36 (footnotes omitted).
42. See Falk, supra note 28, at 975; Lane, Demanding Human Rights, supra note 7, at 271-78; Lane, Mass Killing, supra note 7, at 242-43.
43. R. Falk, supra note 7 (emphasis in original) (footnote omitted).
treaty obligation. Tacit consent refers to the practice of a state which that state believes is required of it by international law. In regard to both treaties and practice it is evident that that which is being consented to as a restriction of otherwise permissible state activities must be clear and precise.

Sohn's claim is invalid to the extent that he relies on consent for its basis. While there can be no dispute that most nations have consented to the United Nations Charter, such consent does not include a restriction on their activities toward their own citizens. The purpose of the United Nations Charter is to prevent international violence. While the Charter does contain human rights references, they are at best aspirational in nature and generally presented in a prevention of violence context. By way of example, Article 55, which contains the Charter's most direct statement on human rights, only requires the promotion and "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

This limited approach is further evidenced by article 2(7), the nonintervention clause, which provides:

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

44. 1 L. OPPENHEIM, supra note 41, §§ 16-17.
45. Id.
46. See Lane, Mass Killing, supra note 7, at 254-58.
International peace is the primary 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 [by the United Nations] 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."

Id. at 255-56 (footnote omitted) (quoting U.N. CHARTER art. 1, para. 1).

47. In this regard, Hans Kelsen has stated:
[The 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.]


48. U.N. CHARTER art. 55.
to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. 49

Professor Sohn ignores this obvious barrier to the realization of his view. This, however, does not diminish the significance of the provision which, according to one scholar, was intended to assure that "the critical ideas of Westphalia involving sovereign equality and domestic jurisdiction are formally perpetrated in the Charter." 50 The inclusion within the Charter of this clause is a clear expression of state determination to maintain sovereign integrity, a determination which from the decentralized world legal order perspective cannot be overcome except by clear state consent. The significance of this clause, moreover, is evidenced by the inclusion of similar clauses in more recent international instruments. 51

A second problem with the Charter is the absence of any particularized statement about or definition of human rights. Even Sohn concedes this problem which, however, he claims is resolved by the Universal Declaration of Human Rights. 52

As a source of law, however, the Declaration is equally flawed. While it does contain a list of specific rights and freedoms, like the Charter it states merely goals and aspirations, and not legally binding obligations. 53 Professor Sohn has taken two separate positions on

49. U.N. CHARTER 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." U.N. CHARTER art. 39; see Falk, supra note 4, at 32; Lane, Mass Killing, supra note 7, at 256-57.
50. Falk, supra note 4, at 49.
51. See, e.g., Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974). Chapter one states that the "[e]conomic as well as political and other relations among States shall be governed" by the sovereign equality of all states, nonaggression, and nonintervention. Chapter two, article one provides that "[e]very State has the sovereign and inalienable right to choose its economic system . . . without outside interference, coercion or threat in any form whatsoever," and article two reaffirms the sovereign right of every state to freely dispose of its wealth and natural resources.

The document is particularly probative of the point, since it was drafted for the most part by third world nations who have generally been the most forceful in their support for United Nations activities.

52. Sohn, Human Rights Law, supra note 18, at 132-34.
53. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 408-17 (1950). The Preamble to the Universal Declaration of Human Rights provides as follows: 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
this issue. Writing in 1967, he conceded that the Declaration was not itself binding, but when read as an interpretation of the Charter, it resolved the problem of Charter vagueness, thus creating operable restrictions on state behavior.

As the Declaration was adopted unanimously, without a dissenting vote, it can be considered as an authoritative interpretation of the Charter of the highest order. While the Declaration is not directly binding on United Nations Members, it strengthens their obligations under the Charter by making them more precise.5

In a more recent article, however, he has also claimed that the “Declaration not only constitutes an authoritative interpretation of the Charter obligations but also a binding instrument in its own right, representing the consensus of the international community on . . . human rights.”55

These positions are unsupportable in a decentralized world legal order context. As Sohn himself has demonstrated, in adopting the Declaration member states did not consent to the creation of legal obligations.6 In fact, it has been argued that it was only the nonbinding nature of the Declaration that allowed for its passage.57 Given this, it strains logic to argue, from an explicit consent perspective, that the Declaration—not binding as a matter of state intention—can become binding by tying it to the Charter, or that the Charter’s conditioned nonbinding human rights provisions are con-

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.


55. Sohn, Human Rights Law, supra note 18, at 133. It is unclear whether Sohn is including within this claim all of the Declaration’s listed rights. To do so would ensure outlaw status for every nation in the world. More seriously, the very scope of the Declaration evidences its aspirational and nonobligatory nature.

56. H. LAUTERPACHT, supra note 53, at 397-408; Sohn, supra note 54, at 17-23.

57. 1 L. OPPENHEIM, supra note 41, at 745. “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. . . . This absence of the element of binding obligation probably explains the willingness of Governments to subscribe to the wide terms of the Declaration.” Id. (footnote omitted). Oppenheim also argues in this section that restraint be exercised “in describing [the Declaration] as a legally binding instrument.” Id. at 746 (footnote omitted). His concern, as is mine, is that to argue otherwise may create “an unwarranted appearance of achievement in the sphere of the effective protection of human rights” which, in turn, may retard “progress in that direction.” Id. at 745.
verted to unconditional and binding obligations as a result of the Declaration. In this respect, Professor Oppenheim has argued that "[i]n particular, there is no warrant for assuming that [the Declaration] can properly be resorted to for the interpretation of the provisions of the Charter in the matter of human rights and fundamental freedoms." 58

Sohn, however, does not rely exclusively on explicit state consent to support his view of a Charter-dominated world order. Rather, he also argues that the requisite consent is evidenced by what he considers to be state practice over the past thirty-five years. 59 Traditionally, as previously noted, state practice may constitute evidence of tacit consent, the basis of customary international law. 60 For state practice to be probative of customary international law, however, two conditions must be fulfilled:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty. 61

Sohn generally does not address these requirements, choosing rather

58. Id. at 745.
59. See Sohn, Human Rights Law, supra note 18, at 133-34; Sohn, supra note 9, at 355.
60. See supra notes 41-45 and accompanying text.
61. North Sea Continental Shelf Cases (W. Ger. v. Den.) (W. Ger. v. Neth.), 1969 I.C.J. 4, 44 (Judgment of Feb. 20). In the Asylum Case (Colom. v. Peru), 1950 I.C.J. 266 (Judgment of Nov. 20), the Court stated that the party which relies on custom . . . must prove that this custom is established in such a manner that it has become binding on the other party . . . that the rule initiated . . . is in accordance with a constant and uniform usage practiced by States in question, and that this usage is the expression of a right appertaining to the State granting the asylum and a duty incumbent on the territorial State. Id. at 276-77. Furthermore, The Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 933, refers to custom as "a general practice accepted as law." Id., art. 38 para. 1b, 59 Stat. at 1060, T.S. No. 933; see I. Brownlie, Principles of Public International Law 4-12 (3d ed. 1979); 1 L. Oppenheim, supra note 41, at 25; C. Parry, The Sources and Evidences of International Law 56-74 (1965).
to make sweeping conclusory statements. To the narrow extent that he attempts to satisfy this formula, he does so by reference to various United Nations Resolutions. Apparently it is Sohn's contention that the General Assembly's support of these resolutions evidences a form of state practice sufficient to create legal obligations for all states.

This proposition runs afoul of the rationale and logic of the decentralized world legal order. First, it raises the nonobligatory human rights norms of the Charter and Declaration to legal status by suggesting that resolutions condemning state activity as violative of any of these provisions are the equivalent of findings of unlawful behavior. That a state may contend, by its vote, that another nation may not be reaching a prescribed goal is not the same as contending that that nation has violated international law. Second, it posits as one of its presumptions that a favorable vote reflects the requisite intent. Third, it suggests that a resolution is binding on those states choosing not to support it. This consensus notion is clearly antithetical to any notion of consent. Fourth, in regard to the resolution adopting the texts for proposed treaties, this theory would undermine a state treaty ratification prerogative. Fifth, it inordinately emphasizes state language over state acts as an element of state practice, and finally, it denies the political reality that what states do in the United Nations has, in their own view, little to do with the creation of international law.

Sohn's customary international law argument, however, does not end with this point. In what he apparently considers the coup de grace to any contrary finding of state practice, he writes: "No state dares any longer to attack this system frontally; when accused of a

62. Sohn, Human Rights Law, supra note 18, at 131; Sohn, supra note 9, at 355; see supra notes 33-38, 54-58 and accompanying text.

63. Sohn, Human Rights Law, supra note 18, at 133-34; see supra note 36 and accompanying text.

64. It is generally agreed that General Assembly Resolutions themselves are not law-creating. See 1 L. Oppenheim, supra note 41, §§ 16-17, at 25-27; C. Parry, supra note 61, at 20-22. Indeed, article 38 of the Statute of the International Court of Justice does not list them as a source of international law. There is, however, some support for the proposition that a vote of a particular country on a General Assembly Resolution may have some probative value as to that state's practice. See I. Brownlie, supra note 61, at 14.


violation, it either denies it or tries to present a plausible excuse. To
deny the existence of an international law of human rights at this
time is no longer defensible.\footnote{67} Assuming this statement is correct
and that it represents, from a consent perspective, something new in
state behavior, this argument is still weak. While such behavior may
be significant and evidentiary of shifting state perception of what is
decent and what is indecent, the failure of a state to contend that
torture is lawful is not the equivalent of a state's restraint from tor-
rure because it believes that such practice violates international law,
or even a statement, regardless of practice, that such activity is un-
lawful. Additionally, such response may be motivated by an entirely
different reference point, such as qualification for United States aid.\footnote{68}

Sohn's factual claim as to state behavior (undocumented) is ex-
aggerated. As recently as 1978, for example, the Government of
Cambodia, in response to inquiries from the Commission on Human
Rights concerning purported human rights violations, stated in the
most reaffirming of sovereign terms, that such inquiries constituted
an "impudent interference in the internal affairs of Democratic
Kampuchea."\footnote{69} The significance of this response is heightened when
it is recalled that the claim against Cambodia referred to a policy of
government mass killing of its own citizens.

THE WORLD ACCORDING TO PROFESSOR McDOUGAL

Professor McDougal\footnote{70} shares, at least in part, Professor Sohn's

\footnote{67} Sohn, \textit{supra} note 9, at 355-56.

\footnote{68} Specifically, United States foreign assistance may not be granted to the government of
any country which engages in a consistent pattern of gross violations of internation-
ally recognized human rights, including torture or cruel, inhuman, or degrading
treatment or punishment, prolonged detention without charges, or other flagrant de-
nial of the right to life, liberty, and the security of person, unless such assistance
will directly benefit the needy people in such country.

22 U.S.C. § 2151n(a) (1976). One of the factors to be considered in determining compliance
with § 2151n(a) is "the extent of cooperation of such government in permitting an unimpeded
investigation of alleged violations of . . . human rights by appropriate international organiza-
tions." \textit{Id.} § 2151n(a) (Supp. IV 1980).

\footnote{69} Telegram from the Minister of Foreign Affairs of Democratic Kampuchea to the

\footnote{70} Most of Professor McDougal's works have been co-authored by a variety of other
legal scholars, including Harold D. Lasswell, W. Michael Reisman, and Lung-Chu Chen. Refer-
cence to McDougal should thus be understood as reference to a wider group, often described
by commentators as the New Haven Group or the New Haven School. \textit{E.g.}, M. McDOUGAL
optimistic view of the status of human rights within the world legal order. He claims that there presently exists

an immense body of prescriptions—beginning with the United Nations Charter and extending through the Universal Declaration of Human Rights to the two major international covenants and numerous more specialized and ancillary formulations—which have taken on both the substance and form of the basic bills of rights long established and maintained in national communities.71

These prescriptions, according to McDougal, await only the perfection of institutions and procedures for implementation: "The structures and procedures for applying and sanctioning these human rights prescriptions, as for other prescriptions, remain imperfect, but continuous improvement is being made in such structures and procedures. . . ."72

Unlike Sohn, however, McDougal does not rely on any Charter or traditional notion of international lawmaking to support his claim. To the contrary, he correctly recognizes the limitations of such theories for the realization of human rights values, and attempts to avoid them by positing his own overly complex source-of-law jurisprudence:73

The conception of international law that inspires critics of the human rights developments is that of a preexisting body of rules whose exclusive function is regulating the interrelations of nation-
states. . . . Particular preexisting rules of international law can be changed, it is argued, only with the specific consent of states, and the very nature of "sovereignty," "domestic jurisdiction," "independence," and so on, precludes even a consensual change of the rules toward a greater protection of human rights. . . . It is apparently not recognized that particular rules, whatever their subject, find empirical meaning only in their use in an ongoing, comprehensive process of authoritative decision in which they are continuously being made and remade, to serve the purposes of living.74

Thus, for McDougal, the legal status he attributes to the United Nations Charter and other documents relating to human rights results not from any claim of sovereign consent thereto, but from his contention that law in the world order is a consequence of an intricate process of lawmaking he characterizes as an "authoritative decision" or more simply, perhaps, as "prescribing."75 This process he describes as one of "communication which creates, in a target audience, a complex set of expectations comprising three distinctive components: expectations about a policy content; expectations about authority; and expectations about control."76

Control apparently refers to the power of "prescribers" to enforce their decisions, authority to the right of these prescribers to make decisions, and policy content to the substance of the decisions.77 The satisfaction of community expectations concerning these three components is what, from a legal perspective, validates the prescription process and anchors it in the political order of the target community. As McDougal argues, "[i]t is these latter decisions, those taken in accordance with community expectations and enforced by organized community coercion, which are, from the perspectives we recommend, most appropriately called "law."78

Applying this paradigm to the world political order, McDougal argues:

Observers of the larger global-community process are able to note within it a process of effective power in which the rising demands of individuals for a greater production and wider sharing of

75. McDougal & Reisman, supra note 15, at 355-56; see McDougal, Jurisprudence for a Free Society, 1 GA. L. REV. 1 (1966) [hereinafter cited as McDougal, Jurisprudence]. In many ways this article contains the best presentation of McDougal's work.
77. See M. McDougal, HUMAN RIGHTS, supra note 15, at 263-64. See generally McDougal & Reisman, supra note 15.
78. McDougal, Jurisprudence, supra note 75, at 4.
values, the constraints of the interdependences that envelop all individuals and communities, and the expectations about authority and control which, in fact, transcend the boundaries of particular states all serve as important bases of power in establishing and maintaining transnational authoritative decision. 79

For McDougal, then, the outlawing of a state's mistreatment of its own subjects is a result of rising demands that such activity be proscribed, 80 the diminishing significance of state lawmakers within the world legal order, and their replacement by transnational lawmaking entities that accommodate these demands.

As a description of the present world legal order, McDougal's view, like Sohn's, is not credible. 81 Not even the most partial of observers could be as dismissive of state influence in human rights lawmaking as McDougal appears to be. 82 As discussed in regard to Pro-

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80. McDougal regards those demands as part of an evolutionary historical development: The demands for human rights being made today around the world are heir to all the great historic movements for human freedom, equality, and solidarity—including the English, American, French, Russian, and Chinese revolutions and the events they set in train. They derive also from the more enduring elements in the traditions both of natural law and natural rights and of most of the world's great religions and philosophies. They achieve support, further, from the findings of modern science about the close link between simple respect for human dignity and the shaping and sharing of all other values.

M. McDOUGAL, HUMAN RIGHTS, supra note 15, at 3 (footnote omitted).

81. In criticizing Professor McDougal, fairness demands two notes of tribute. First, my own thinking about human rights reflects his focus on the relationship between individual and community demands and the world legal order. Like McDougal, I believe that demands significantly affect the lawmaking process, but unlike him, I do not believe that intense demands constitute law. See Lane, Demanding Human Rights, supra note 7, at 283-86. Second, I share his commitment to human dignity as a basic value that ought to be (but in my view is not) realized in the world legal order. In this regard Professor David Richard aptly states in a review of a recent McDougal book: "The dividends are not only intellectual, for the book also expresses frank and moving moral passion for international justice and appeals for a moral cosmopolitanism that can assess human rights issues in a fair-minded way, free of the distortions of nationalistic ambitions that are increasingly anachronistic and dangerous." Richard, Book Review, 14 N.Y.U. J. INT'L L. & POL. 187, 188 (1981).

82. I am not arguing that Professor McDougal totally ignores the importance of states as actors in the world lawmaking process. Indeed, he often acknowledges it:

The nation-states of the world, though still the most conspicuous wielders of effective power, are no longer observed to be, if ever they were, impermeable and isolated entities; nuclear and other weapons may be making such entities as obsolete as the cannonball made walled cities. International governmental organizations and other groupings are breaking the monopoly of the nation-state as a source of authority, and a great host of private associations is widely diffusing both control and expectations about control.

McDougal & Chen, supra note 12, at 340. It is my view, however, that this acknowledgement is a superficial concession to traditionalist critics. This conclusion is based on the belief that
fessor Sohn, the extent of human rights violations occurring within the world political order quite simply belies this claim, as does a reading of the documents to which McDougal refers. Even the Secretary General of the United Nations, McDougal's most important non-state prescriber, recently affirmed this conclusion by denying that the United Nations had any competence to review Poland’s brutal suppression of its Solidarity movement.

It is my view, however, that such dismissiveness of state influence is not merely the result of faulty observational powers, but rather the consequence of McDougal's need, at all costs, to have his concept of human dignity realized by the world legal order. McDougal, in other words, despite his contrary conclusion, is not an observer of the legal order, but a social engineer who is attempting to construct a legal order in which the demand for human rights is realized: "Our overriding aim is to clarify and aid in the implementation of a universal order of human dignity." To accomplish this goal, the significance of obvious barriers, such as states, must be reduced. Thus, for McDougal, states have no objective reality, but represent merely conceptual formulations, which decrease in value in relationship to their ability to interfere with the realization of McDougal's aim. McDougal, then, has created a formula that interrelates his own constant commitment to human rights, his perception that there exists a growing universal demand that human rights be accommodated by the world legal order, and finally any perceived obstacle to this accommodation. As these demands increase, obstacles such as states must decrease.

As states decrease in importance, so does international law. Such law for McDougal does not represent a traditional system of restraints designed to maintain stability and further the values of McDougal's theory fails insofar as states are significant actors in the world legal order.

83. See McDougal & Chen, supra note 12, at 340.
84. N.Y. Times, Jan. 10, 1982, at 1, col. 3, at 9, col. 1:
The Secretary General warned . . . against United States plans to bring the Polish crisis before the United Nations as a case of violation of human rights. He noted that the United Nations Charter prohibits intervention in the internal affairs of member states. . . . The Secretary General made clear, however, that he was sensitive to the question of human rights, which he called "a moral issue that exceeds the Charter."
85. M. McDougal, Studies, supra note 70, at 16.
86. McDougal's treatment of traditional jurisprudential concepts also provide evidence for this proposition. See, e.g., McDougal, Lasswell & Reisman, Theories About International Law: Prologue to a Configurative Jurisprudence, in International Law Essays, supra note 15, at 43, 48. See generally McDougal, Jurisprudence, supra note 75.
soverignty, but rather represents a competing policy for which Mc-
Dougal’s human rights policy must be substituted. Professor Falk
has written in reference to McDougal: “[L]egal norms are under-
stood to support the realization of values rather than the restraint of
behavior.”87 To McDougal, then, law represents not what must be
changed in order to accommodate human rights demands, but the
tool by which such change is effected. Stanley Hoffman correctly
summarizes this when he states:

It is . . . essential for the social scientist to understand that law is
not merely a policy among others in the hands of statesmen, and
that it is a tool with very special characteristics and roles: the so-
cial scientist who forgets this and advises the Prince accordingly
will debase the instrument and mislead the Prince.88

McDougal, however, is not prepared to claim that these de-
mands alone create state obligations. He understands the need for
some institutional structure through which such demands are refined
into prescriptions and competing demands are disposed of. This per-
ceived need causes great difficulty for McDougal, given the actual
predominance of states as the central lawmakers in the present world
legal order. To circumvent this political reality, McDougal com-
presses the concept of law into his sociological concept of prescrip-
tion, in order to bring within his lawmaking view many processes
that would otherwise not be traditionally defined as lawmaking. He
writes:

Observers and participants accept the fact that many governmental
agencies which are not legislative make law. The point of emphasis
is that the concept of prescription allows scholarly examination of
all the processes of creating expectations about authority and con-
trol, whereas a focus on “legislation” tends to restrict the observer
to the specific actions of a legislature.89

Among these institutions in which these processes take place are the
United Nations’ organizations, regional organizations, political par-
ties, pressure groups, and private associations.80

The positing of these institutions as prescribers is consistent
with McDougal’s concept of law as a policy process, since all of

88. Hoffman, The Study of International Law and the Theory of International Rela-
89. McDougal & Reisman, supra note 15, at 357.
90. M. McDOUGAL, HUMAN RIGHTS, supra note 15, at 357.
them certainly advocate the protection or furtherance by law of their particular concerns; but characterizing these institutions as lawmakers—in that their work product constitutes law—is inadvisable, not only because so doing deprives law of any of its substantive solemnity, but also because this claim cannot even be sustained by McDougal's own formulation. On this latter point, from a human rights lawmaking perspective, it would be few indeed who would recognize the authority of these institutions to even consider human rights demands, let alone expect such demands to be realized through them. Moreover, it is unlikely that those making such demands would even want them realized through nonnational institutions, the view here being that most now would probably prefer accommodation through national institutions, even at the cost of some violence.\(^{91}\)

Even assuming the validity of McDougal's lawmaking paradigm, a better use for it would probably be in support of claims for sovereign domination than in support of arguments for restriction on sovereign discretion. As Professor Falk states in regard to the McDougal approach, "equally ardent disciples of the method of legal analysis could come to divergent legal conclusions with regard to any particular legal controversy."\(^{92}\)

This is especially true in the human rights arena, where the success of McDougal's argument depends on evidence of a prescription process from which proscriptions against human rights violations emerge, and, more importantly, emerge as what McDougal classifies as "more intensely demanded community policies."\(^{93}\) That this is not the case in regard to human rights is evident, for example, from the lack of worldwide concern, particularly among some of McDougal's favorite institutions, about the mass killing\(^{94}\) that recently occurred in Uganda and Cambodia. In fact, during this period, Idi Amin, the then President of Uganda, served as the President of the Organization of African Unity.\(^{95}\) Moreover, the United Nations human rights organizations, when confronted with complaints about the govern-

\(^{91}\) Most movements directed toward the problem of human rights are done within the context of a sovereign system. In other words, the people making these demands want them implemented through their own government rather than through some supranational body.

\(^{92}\) R. Falk, supra note 87, at 11.

\(^{93}\) McDougal & Reisman, supra note 15, at 370.

\(^{94}\) Mass killing, as used in this article, is the denial of the right of physical existence to entire groups. Lane, Mass Killing, supra note 7, at 239 n.3. For a general discussion of mass killing in Uganda and Cambodia, see id. at 268-80.

\(^{95}\) N.Y. Times, July 3, 1976, at 3, col. 5.
ment of both of these countries, effectively chose to take no action. Contrasting these responses with the significant public and institutional outcries against American involvement in Vietnam and Russian involvement in Afghanistan, among others, it is not hard to conclude at least that nonintervention remains a much more significant standard, even under the McDougal formula.

ANOTHER WORLD VIEW

The fundamental political reality that must be addressed by any theory intended to aid in the actual realization of human rights values within the present world legal order is the domination of that order by states. To argue the existence of a world legal order in which states are merely one of many centers of power, or a world legal order in which the United Nations through its Charter and other documents has centralized authority, if not control, is, as described throughout this article, simply insupportable. Moreover, to postulate these world order views as theoretical models under which human rights values could be accommodated, while certainly a legitimate scholarly endeavor, is to offer models so remote from present political realities as to convert a flesh and blood struggle into a total abstraction. Any strategy or theory for the proscription of human rights violations by states against their own subjects must begin with a recognition that despite the 35 years that have elapsed since the discovery of Nazi atrocities, state sovereignty remains essentially intact. As Professor Falk correctly argues:

The sanctity of state sovereignty is one of the most insistent demands of strong, as well as of weak states. At the same time, the

96. See Lane, Mass Killing, supra note 15, at 274-76.
A great deal of attention has recently focused on the decision in Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980), where the Second Circuit, in order to exercise jurisdiction, found torture to be in violation of international law. Regardless of whether one agrees with the court's reasoning, which I do not, it represents even from McDougal's perspective only the smallest voice. Comparing this decision, for example, with the United States Government's decision to recognize the Pol Pot Government as Cambodia's representative in the United Nations for purported security and national interest reasons—a decision comparable to recognizing Hitler to stop the Russians—one gets a more accurate view of what policies are more intensely held.

97. Both Sohn and McDougal maintain that there has been a dramatic shift in the world legal order as a result of the realization that the exercise of state sovereignty and discretion could cause the death of countless German citizens at the hands of their own government. See McDougal & Chen, supra note 13, at 340-41; Sohn, Human Rights Law, supra note 18, at 129; Sohn, supra note 9, at 355. As I have argued on several occasions, the evidence suggests a contrary conclusion. E.g., Lane, Demanding Human Rights, supra note 7, at 279-80.
reality of interventionary statecraft is associated with the impositions of the strong upon the weak. In the present period of international history virtually all governments, however weak and dependent they may be, want to appear as sovereign as possible, and thereby make a rallying cry of norms of nonintervention. The priority accorded the nonintervention concept as the basic juridical guidelines of international behavior is also expressed by the extreme reluctance of most governments to endorse intervention in foreign societies, even if under international or regional auspices or in response to what is generally condemned as an extreme abuse of human rights. Governments seem wary that the sword used against others today could be turned against them tomorrow. Hence, there is reluctance about any undertaking that could be generalized beyond a particular situation and turned into a precedent. In this regard, anti-apartheid intervention gathers widespread support because the situation in South Africa seems sui generis, whereas anti-Amin intervention is impossible to organize because it would create a precedent perceived as dangerous. 98

This world order perspective clearly does not generate optimism concerning the creation or implementation of any external or supranational legal check on sovereign discretion. Indeed, it is my view that the realization of human rights demands can, at present, only be accomplished through a coercive political strategy. 99 By a coercive political strategy I refer to one that recognizes the predominence of states within the world legal order, and that the human rights violations discussed herein usually represent important governmental policies of these states. The termination of such policies will thus require action that will make the continuation of such policies either politically or economically unprofitable. This is not a call for direct intervention; but the actions that constitute such a strategy must be perceived as lawful within the world legal order and directed toward maximizing the participation of states as well as nongovernmental human rights groups.

One step toward creating an environment in which such a strategy or strategies could be implemented would be limiting the num-


99. Professor Falk makes the same point. Id. at 213. Indeed, much of my thinking concerning the shortcomings of international law and the need for more political activism has been influenced by Falk's work. The preceding citation is a particularly excellent example of his thoughtfulness about the human rights problem.
ber of rights intended to be protected. McDougal, for example, lists 129 rights as those that ought to be protected within the world legal order, while Sohn incorporates within his view all of the rights set forth in the United Nation’s Declaration of Human Rights. Regardless of the normative significance of each of these rights, from the perspective of the state dominated world legal order, the inclusiveness of such a list creates discord among states and non-governmental actors, rather than the accord necessary for any meaningful change. In this respect I agree with Professor Falk that the present focus should be limited to what he calls “severe violations” of human rights or governmental acts which are self evidently wrong.

According to Falk, “these require neither proof nor assent to be authoritative. For example, whether or not there is a prohibitive norm, the practice of torture or genocide seems ‘criminal’ to the ordinary person.” A focus of this fashion will make it much more difficult politically for a government to step behind its sovereignty shield. To a large extent the success of President Carter’s human rights policy can be attributed to this type of direction as can the success of such nongovernmental organizations as Amnesty International.

A successful coercive strategy need include more than the creation of a moral climate to effect policy changes in offending governments. Some attempt must be made to impose economic sanctions. A

100. I use the term “rights” here in a loose aspirational sense. I recognize that in the strictest legal sense, the use of this term may be incorrect prior to the adoption of a particular jurisprudence.
102. Sohn, Human Rights Law, supra note 18, at 133.
103. Falk, supra note 98, at 215-17. While as a personal matter I agree with Falk’s list of severe human rights violations, it seems to me that his list is still too inclusive for general accord among nation states. My primary concern would be genocide, official racism, and largescale official terrorism. Id. at 212.
104. Id. at 215. Falk characterized this claim as an affirmation of natural law. Id. at 215-16. I am on the other hand concerned with the reinstitution of natural law doctrine for the defense of human rights because it has been used so articulately for their suppression. See, e.g., A.T. Bledsoe, Essay on Liberty and Slavery (1856). Moreover, to the extent that natural law implies historically fixed values, it is not able in my view to rationalize shared human values that evolve through continued life struggle. My own preference is for a more humanistic jurisprudence of the sort touched on by Professor Delaney, see Delaney, Towards a Human Rights Theory of Criminal Law: A Humanistic Perspective, 6 Hofstra L. Rev. 831 (1978), and more fully discussed in his yet unpublished article. Delaney, Liberation Law: Towards a Human Rights Jurisprudence (copy on file in office of Hofstra Law Review).
105. See generally Lane, Demanding Human Rights, supra note 7, at 286-94.
particularly valuable endeavor would be an intensive effort to have states, particularly those with democratic traditions, enact into law measures similar to the United States statutes linking foreign aid to certain human rights standards. Again the more limited these standards are the more chance there is for broader participation.

Any such approach, however, must be alert to traditional governmental concerns with their security. Insofar as a nation perceives that its security interests require support for an oppressive government, it is extremely difficult to wean them from that perception. An extraordinary example of this phenomena is the United States support for Pol Pot's recognition by the United Nations. There is, of course, no easy solution to this problem. Limiting the types of violations to which responses are triggered to severe violations, however, makes the invocation of security as a rationale for cooperation with oppressive governments more difficult and, at the very least,

107. See supra note 68.

108. For the Reagan Administration's view of their security interests, see Kirkpatrick, Dictatorships and Double Standards, COMMENTARY, Nov. 1979, at 35. Compare this with the Carter Administration's view:

[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 internationally, 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.


109. See supra note 96.
creates pressure on the nonoppressive government to attempt to modify the activities of oppressive governments.


One stumbling block to the success of such treaties has been the inclusion of provisions which suggest the possibility of external enforcement.\footnote{112. The Genocide Convention, for example, contains the following enforcement mechanism: Article IX. 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. Id. art. IX, G.A. Res. 260A, U.N. Doc. A/810, at 175. It has been argued that one ground for the United States Senate's refusal to ratify the Genocide Convention is their perception that it carries with it the threat of intervention and a surrender of sovereign power. Senator Ervin has argued: [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. 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. 120 Cong. Rec. 2203 (1974) (remarks of Sen. Ervin).} Insofar as these enforcement mechanisms interfere...
with this process they should be excluded, since it is more important to have as many nations as possible consenting to the right than it is to push a feeble sanction.

None of these suggestions, of course, offer great solace for those who suffer oppression or ache from the oppression of others. It is far more comforting to believe that such activity has been outlawed and that its termination awaits only the arrival of the constabulary. This delusion encourages self-satisfaction and avoidance, and discourages sorely needed political activism. Without such activism, however, the protection of human rights cannot be fully realized. As Falk succinctly summarizes:

To the degree that we tolerate torture, mass killing, and extreme repression, and to the extent that we not only tolerate such abuses but reinforce them by the kinds of foreign policies that are pursued, we deny our own dignity and esteem and condone a process that is exceedingly destructive in its consequences. In this area we see the relative impotence of formal authoritative structures to achieve desirable change and the relative impotency of informal nongovernmental action to exert significant pressure. It is primarily the world's dissidents, the resistance movements, and the human rights actors, especially those independent of state power, that are creating possibilities for change and the basis for hope, and not the codes that are drawn up by governments and ritually endorsed by international institutions. Legal instruments are all very well as background, but the foreground is the struggle of real people against real structures of domination and oppression. The future of human rights is the future of those struggles.113

113. Falk, supra note 6, at 407-08.