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## THE INTERNATIONAL LAW OF HUMAN RIGHTS: A REPLY TO RECENT CRITICISMS

*Louis B. Sohn\**

After the Second World War, the generation scarred by excesses perpetrated by the Axis powers, especially the Nazis, developed new theories designed to protect human beings on the international plane, not only on the domestic level. Thus, between 1945 and 1980, step by step an international law of human rights was developed, designed to protect human rights and fundamental freedoms. The United Nations in 1945 promised to promote and protect them, the Universal Declaration of Human Rights in 1948 listed the rights to be protected; when the two Covenants of Human Rights came into force in 1976, States of the West, East, and South accepted detailed obligations to protect human rights. Even earlier, the European States accepted similar obligations by a regional convention, and by 1978 the States of the Americas also accepted a regional set of obligations. The two regional agreements provided effective means for dealing with complaints through not only commissions but even special courts. In addition, more than fifty international instruments dealing with particular human rights problems were adopted on the global scale and more than twenty on the regional level. Many cases on human rights were decided by the European instrumentalities, and the inter-American machinery also intervened in many situations. The International Labor Organization has dealt with a large number of violations of international-labor conventions, and UNESCO's more recent system has also started to deal with concrete issues.

In light of these developments it is surprising to see Professors James Watson and Eric Lane, members of the younger generation of international lawyers, born after the 1940's holocaust and not seeming to understand the importance of international protection of human rights, trying to turn the clock back.<sup>1</sup> They pretend that

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1. See Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269 (1978) [hereinafter cited as Lane, *Demanding Human Rights*];

all these developments never really happened, that all these changes in international law are purely illusory, and that national sovereignty can still run rampant without any restraints whatsoever.

The arguments Professors Watson and Lane use are not always logical, very often merely semantic, and frequently distort the very idea of law. Their concepts seem to be not merely nineteenth century but medieval, not Grotian but Machiavellian. To them even power politics does not mean using power to maintain a balance of power, an international order, but to use power without any international restraints, both internationally and especially domestically. In their eyes a state is all powerful, it can do what it pleases with its citizens, who are not different from cattle or other chattels and can even be exterminated like rodents without any dire consequences. In their view, international law is a mere servant of states, an instrument to be manipulated by governments to suit their whims with no need to account for any violations.

While this description may seem to be an overstatement, many of Watson's and Lane's arguments appear to flow from premises not too different from those adumbrated above. Without citing them chapter and verse, it will be useful to consider in more detail some of their arguments.

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Professor Watson, for instance, in his attack on human rights norms in international law,<sup>2</sup> starts with a semantic distinction between "international law" and "supranational law" and alleges that human rights norms belong to the second category. He argues that international law relies on reciprocal enforcement, while advocates of human rights law insist on an hierarchical, coercive order designed to act as a check on governmental malfeasance. He jumps from there to the twin ideas that state sovereignty constitutes a substantial political and legal hurdle to international protection of human rights, and that Article 2(7) of the UN Charter,<sup>3</sup> relating to

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Lane, *Mass Killing by Governments: Lawful in the World Legal Order?*, 12 N.Y.U. J. INT'L L. & POL. 239 (1979) [hereinafter cited as Lane, *Mass Killing*]; Watson, *Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the UN Charter*, 71 AM. J. INT'L L. 60 (1977) [hereinafter cited as Watson, *Autointerpretation*]; Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609 [hereinafter cited as Watson, *Legal Theory*].

2. Watson, *Legal Theory*, *supra* note 1.

3. Nothing contained in the present Charter shall authorize the United Na-

noninterference in matters of domestic jurisdiction, must be considered invalid if it does not allow a state to violate human rights. There follows the allegation that a human rights approach requires a wholesale redefinition of sources of international law, and a substitution of majority rule for state consent.<sup>4</sup>

Every one of these arguments is at best based on a half-truth, and there is an obvious misunderstanding of the history of international law and its constant growth from humble beginnings to its present flowering. If Watson would just look at the United Nations Treaty Series, he would see that in the last thirty-five years most states of the world have voluntarily accepted more international obligations than in the preceding two thousand years. As in domestic law the common law in most fields has been replaced by statutory law; in international law treaties and other universally agreed-upon documents have replaced most of the customary law of the nineteenth century. Only some of the Communist States mourn this development and would like to return to the old principles which permit them to impose their will on others. Most of the new States, as well as the progressive States of the West, find this new creativity exhilarating. The main point missed by Professor Watson is that this is not a result of any imposition by some unfriendly majority, but is done by state consent, expressed either in treaty form or in decisions adopted by consensus—a method which takes into account the views of all concerned. Most of the human rights documents have been universally accepted by consent of all the governments. If Mr. Watson really believes that sovereign states are all powerful, how does he dare to deny them the power to accept any such instruments whenever they find this politically and legally desirable? As far as Article 2(7) is concerned, the Members of the United Nations found a way to reconcile it with the Charter's other provisions dealing with human rights. Some minor violations of human rights remain matters of domestic jurisdiction, unless states have accepted supplementary agreements creating international obligations even with respect to these matters (as has been done in the Covenants, the regional conventions, and various special in-

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tions to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, para. 7.

4. See Watson, *Legal Theory*, *supra* note 1, at 609-13.

struments). But gross violations of human rights have become matters of international concern and no state can hide behind the domestic-jurisdiction shield. Even in the nineteenth century, humanitarian intervention took place on several occasions, and was hailed as an important step forward in the enforcement of international law. There can be no valid objection to the community of states acting in the same way, all states acting in concert to castigate the violator.

In interpreting the Charter, Professor Watson seems to forget about the basic principles of legal interpretation. When an instrument contains two apparently conflicting provisions, one does not insist that provision A must always prevail over provision B. Instead, any reasonable interpreter tries to find a solution that would reconcile the two provisions, allowing each to rule in a separate sphere. This is the United Nations' practice with respect to the conflict between the provision concerning domestic jurisdiction and the provisions concerning human rights. This was not done by imposing a majoritarian rule, but by a generally accepted consensus. If the violator state has sometimes tried to prevent a consensus decision, it has been properly disregarded, as it is a general principle of every legal system that nobody can be a judge in his or her own case.

In his next debunking argument, Professor Watson points out that there is a very wide discrepancy between human rights law and the reality of state practice.<sup>5</sup> He notes that newspapers are full of stories about governments killing, torturing, and imprisoning their citizens. But the same newspapers are also full of local and national stories about murders, vicious attacks, and robberies—though we supposedly have an effective system of law and order on a domestic plane. The incidence of violations of international rules is not any greater than the incidence of violations of domestic laws in major American cities. Professor Watson is also wrong in citing these violations of human rights law as evidence of state practice. In order for a state's act to be accepted as evidence of international law, it is necessary for the state to believe that this practice is permitted by international law (*opinio juris sive necessitatis*). But no state has claimed that it has the right to enslave its citizens, kill them indiscriminately, or torture them. As the United States Gov-

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5. *Id.* at 626-35.

ernment pointed out in its amicus curiae brief in the recent *Filartiga v. Pena-Irala* case:<sup>6</sup>

[I]t has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.<sup>7</sup>

Such behavior does not justify Professor Watson's conclusion that this "reality" proves that there is no international law of human rights.

Having in fact failed in his "practical" argument, Professor Watson resorts to his own "crypto-metaphysics" (the use of which by others he has previously condemned) and mounts an attack on human rights as being an application of a natural law philosophy,<sup>8</sup> an interesting but irrelevant argument. Many arguments discussed by him under this heading have little to do with natural law, and are really a replay of his dissatisfaction with modern sources of international law, the impact of which—as noted above—Professor Watson has failed to grasp. He extends his scorn even to the International Court of Justice, deprecating the value of its decisions because they do not meet the outmoded test of *stare decisis*, which no domestic system any longer follows. While cases can always be distinguished, the core values are bequeathed to subsequent decision-makers, who, in the international field, as on the domestic level, follow well-reasoned opinions unless there is a good reason (for instance, because of changed circumstances) to march in a new direction.

Professor Watson also does not sufficiently appreciate the ramifications of his favorite method of law application, *i.e.*, auto-interpretation.<sup>9</sup> Even if one state can deny its duty to comply with human rights rules by applying this method, other states are entitled to apply those rules to the noncomplying state in accordance with the same principle, and to punish it—by international

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6. 630 F.2d 876 (2d Cir. 1980).

7. Amicus Curiae Brief at 16 n.34, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

8. Watson, *Legal Theory*, *supra* note 1, at 613-20.

9. See generally Watson, *Autointerpretation*, *supra* note 1.

sanctions—or the guilty officials—by subjecting them to criminal prosecution (as in the case of war criminals) or to tort liability (as in the *Filartiga* case), whenever they step outside the charmed circle of their own state.

While Professor Watson labels the human rights rules “paper rules”<sup>10</sup> because some countries, such as South Africa, defy them, he does not mention the fact that in the last few years several of the worst tyrants have proved to be “paper tigers” and have had to escape ignominiously from the countries in which a few days before they were masters of life and death. Similarly we have seen many colonial regimes depart, including those in Portuguese Africa and Rhodesia, which for some years were apparently defying the edicts of the United Nations. Because the South African regime has survived until now, it does not mean that it will forever avoid paying the price for its excesses.

Finally, Professor Watson misrepresents the arguments relating to the development of international law through various international instruments adopted by international organizations.<sup>11</sup> As in the earlier part of his essay he personifies the sovereign state and does not see the human beings manipulating the strings of government, in the second part he personifies the United Nations and the General Assembly and does not notice that they are composed of states and of representatives of governments. While he deifies the practice of states, especially when they act on their own and create new rules by autointerpretation, he does not seem to realize that the same government officials or their agents also walk down the halls of the General Assembly, negotiate there, reach compromises, and finally—often after many years of hard work—produce a consensus decision, which they are willing to accept as new international law, or a new interpretation of a previously accepted, more general, principle. The states don't have to accept a new rule as binding upon them, but once they decide to do so, there is no need for long exchanges of diplomatic notes or for collections of parchments and red seals. We are living in less formal days, and modern diplomats have not only abandoned formal dress but also the old-fashioned ways of reaching agreements. A consensus agreement need not be in the form of an old-fashioned treaty; it can be in the form of a declaration of the General Assembly or of an international conference. (The only thing that has not changed is the re-

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10. See Watson, *Legal Theory*, *supra* note 1, at 626-35.

11. *Id.*

quirement that all the important members of the international community and the major groups of states accept the new rule as binding either as a codification of customary law or as a reasonable and necessary newly developed principle.) This process has occurred in other areas of international law—even with respect to outer space; there is no reason to exclude human rights from it. To deny this possibility is clearly unrealistic. An author who prides himself on realism cannot disregard the facts of international life. One cannot hide in a nineteenth-century cocoon and deny the existence of the colorful butterflies which our century is admiring.

Professor Lane is treading a similar path, though he is mired even further back, in the seventeenth century as exemplified by the glorious Treaty of Westphalia.<sup>12</sup> Those were the grand days of powerful monarchs, diplomatic niceties (such as entering the room simultaneously by separate doors to ensure complete equality), and few rules limiting the whims of the rulers. While most laypersons and some unenlightened scholars might think that the world has changed in three hundred years, Professor Lane sees no difference between the world of Westphalia and the contemporary scene. In the good old days in Salem, Massachusetts, the citizens entertained themselves by torturing the witches; today also, it would seem, witch hunts, mass murder, and torture should be considered internationally lawful.<sup>13</sup>

Professor Lane considers Article 2(7) of the United Nations Charter as reaffirming the Westphalian legal order, and as allowing a government complete discretion in dealing with its own citizens.<sup>14</sup> Other clauses of the Charter and other instruments, discussed in the earlier part of this essay, are not considered relevant by Professor Lane, primarily because they fail to provide an effective mechanism for enforcement.

It is surprising, therefore, that Professor Lane, in discussing the Carter Administration's approach to international human rights questions, condemns President Carter's willingness to use the tools available to him to force some governments to stop violating human rights.<sup>15</sup> Being faced with an actual attempt at enforcing the

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12. See Lane, *Demanding Human Rights*, *supra* note 1, at 269-76; Treaty of Westphalia (1648), reprinted in I MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967, at 7 (F. Israel ed. 1967).

13. See Lane, *Mass Killing*, *supra* note 1, at 278-80.

14. *Id.* at 256.

15. Lane, *Demanding Human Rights*, *supra* note 1, at 286-94.

international law of human rights, Professor Lane complains that this enforcement is improper because it is selective, taking United States' security interests into account. But this merely shows that in our imperfect world, where the international order is not sufficiently strong to protect the security of all the states, countries must give priority to protecting their own citizens against a foreign attack before they can help in protecting foreign citizens against their governments. The Charter itself gives priority to self-defense,<sup>16</sup> despite the *jus cogens* character of the prohibition on the use of force in international relations;<sup>17</sup> similarly, national security has to be given priority over human rights abroad. Even domestically, human rights instruments allow derogations in "time of public emergency which threatens the life of the nation."<sup>18</sup> It would be illogical to give foreign human rights priority over national security interests.

In his other article, relating to mass killing by governments,<sup>19</sup> Professor Lane emphasizes that the Westphalian legal order does not recognize the right of unilateral humanitarian intervention, as states are more concerned with preserving and expanding their power than with the establishment of a rule of law or the enforcement of universal ethical standards. He interprets the Nuremberg precedent with respect to crimes against humanity in a narrow fashion,<sup>20</sup> and pays no attention to the universalization of this experience by the International Law Commission and the General Assembly. Similarly, Professor Lane dismisses the United Nations Charter on the flimsy pretext that its only aim is prevention of war, and considers the Universal Declaration of Human Rights not binding on the basis of 1948 statements, disregarding express acceptance of that document as binding by later documents adopted by universal consensus.<sup>21</sup> Similar short shrift is given by Professor Lane to other documents on human rights approved by the United Nations, and to procedures developed for dealing with their violations.

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16. U.N. CHARTER art. 51.

17. *Id.*, art. 2, para. 4.

18. International Covenant on Civil and Political Rights, art. 4, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966); see European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

19. Lane, *Mass Killing*, *supra* note 1.

20. *Id.* at 248-53.

21. Compare *id.*, at 254-61 with Sohn, *The Shaping of International Law*, 8 GA. J. INT'L & COMP. L. 1, 18-21 (1978).

Professor Lane concludes that there is insufficient evidence that the world legal order values human rights above state supremacy, and that consequently a government's mass killing of its own citizens is not unlawful. Any changes are likely to be slow and dangerous.<sup>22</sup> This is as pessimistic a conclusion as the one in his earlier article, where, looking at the problem from a different angle, he admitted that the failure to achieve adequate international protection of human rights carries with it the probability of catastrophic repercussions.<sup>23</sup>

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This is not the place to deal with the details of Professors Watson's and Lane's arguments and the accuracy and completeness of the "facts" presented by them. What is, however, most bothersome is their lack of appreciation of the tremendous changes brought by developments since the Second World War. As realists and positivists they should have acknowledged the fact that the world of 1980 is quite different from the world of 1939, 1856, or 1648. The disappearance of colonial empires, the diminution of the influence of Europe, the development of new centers of political and economic power, and the triple increase in the number of states are facts which no scholar can disregard. While the authors seem to think that the United Nations Charter and other United Nations documents do not have much legal value, the practice of states in the last thirty-five years has given the Charter and documents implementing it a status equivalent to that of constitutional law in the domestic legal order. As it happened in the United States and other countries, vague constitutional precepts have been translated by general agreement of states into more detailed principles, which, because of their higher precision, impart a more definite character to the whole international legal order. At the same time, the limits of autointerpretation are narrowed, and in one area after another the writ of the international community starts prevailing. 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. No state dares any longer

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22. Lane, *Mass Killing*, *supra* note 1, at 277-80.

23. Lane, *Demanding Human Rights*, *supra* note 1, at 294-95.

to attack this system frontally; when accused of a 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. Even if it is not possible to remedy all violations of human rights immediately, one needs to do all one can, whenever there is an opportunity. The United States has adopted this policy recently, and it would be a shame if it were abandoned at the very moment when it is starting to have an impact.