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REALITY AND HOPE IN INTERNATIONAL HUMAN RIGHTS: A CRITIQUE

*Rosalyn Higgins**

This critique of the *Hofstra Law Review's* recent human rights symposium¹ was inspired by the symposium's provocative questions concerning the relationship between reality and hope in the field of international human rights.

A REVIEW OF PROFESSOR MURPHY'S POSITION

In his contribution to the symposium, Professor Cornelius Murphy² approaches the gap between aspiration and reality in a curious way. One can certainly accept Professor Murphy's statement that "a verbal consensus—whether in a declaration, resolution, or covenant, does not determine practice,"³ and agree with him that the problem does not result only from ineffective enforcement. But it seems curious and, indeed, naive for him to assert that the divergence of reality from assertion exists also "because the verbal formulations are susceptible of great variations in interpretation," that "[w]here textual language is imprecise, the meanings attributed to the written words will not be uniform."⁴ It is not textual imprecision that leads to divergent behaviour; rather it is the inability to achieve political consensus at the desired level of detail that leads, quite deliberately, to bland and imprecise language. The aspiration becomes temporarily downgraded to standard-setting, parameter-indicating; the hope is that parallel brush strokes will get filled in over time.

It might have been instructive to take several such broadly drafted clauses from the Covenants and trace their interpretation, on a comparative basis, in state practice. Instead of doing this,

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1. *Symposium on the Future of Human Rights in the World Legal Order*, 9 HOFSTRA L. REV. 337 (1981).

2. Murphy, *Objections to Western Conceptions of Human Rights*, 9 HOFSTRA L. REV. 433 (1981).

3. *Id.* at 434.

4. *Id.*

however, Professor Murphy discusses the difficulties attributable to ambiguous language, describing it as a cause rather than a response. He identifies certain human rights whose exact meaning is controversial—the right to own property, freedom of expression, and self-determination.⁵ The examples are apposite. But it is hard to agree with his claims that the problem is “interpretative” and that human rights scholarship tends “to pass over these interpretative difficulties,” ignoring them, or minimizing their importance.⁶ There has been and will continue to be prodigious legal debate on each of the examples that Professor Murphy gives. It is true that these great debates have not been conducted as exercises in interpretation—and quite properly so. There has been, however, a keen and sophisticated awareness that the positions taken ultimately reflect preferred, alternative value positions.⁷

Professor Murphy is right that “a general allegiance to fundamental values is indispensable to the progressive realization of human rights throughout the world.”⁸ The individual scholar, however, has a difficult task in balancing an understanding of competing viewpoints on the one hand with a commitment to human dignity on the other. And the balancing itself is surely harder concerning some rights than others. Freedom from torture is not a matter to be differently appraised according to one’s political allegiance or stage of development. The same is true with the right not to be imprisoned without trial. The right to universal suffrage surely admits of no debate, of no attempt to see the alternative cultural or economic view. All that is required for these to be acknowledged as human rights is good faith.

Professor Murphy lumps together diverse intellectual problems, claiming that they all represent the problem of diverse interpretation—according to alternative values—of unclear texts. But there are really three distinct problems. First, what can we do

5. *Id.* at 434-35.

6. *Id.* at 435.

7. See, e.g., M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980); D. SANDIFER & L. SCHEMAN, *THE FOUNDATIONS OF FREEDOM* (1966); Bilder, *Rethinking Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171; McDougal, Lasswell & Chen, *Human Rights and World Public Order: A Framework For Policy-Oriented Inquiry*, 63 AM. J. INT’L L. 237 (1969); SOCIALIST CONCEPT OF HUMAN RIGHTS (J. Halász ed. 1966); Szabo, *The Theoretical Foundations of Human Rights*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 35 (A. Eide & A. Schou eds. 1968) (Nobel Symposium No. 7); U.N. LAW/FUNDAMENTAL RIGHTS (A. Cassese ed. 1979).

8. Murphy, *supra* note 2, at 435.

to enforce effectively those rights whose status as human rights are not challenged in any of the diverse political, ethnic, economic or religious groupings? Freedom from torture, for example, is a generally acknowledged basic human right.⁹ Violations are not justified by perpetrators on grounds of divergent interpretation of unclear texts. Rather they are simply denied. Second, in what categories of rights is it appropriate for governments, in the public interest, to limit application with regard to a given individual, and what checks and safeguards should there be on these limitations? Here, of course, the Covenants¹⁰ and the European Convention¹¹ both contain limitation clauses respecting certain rights, worded in similar fashion. Thus, freedom of expression, the right to a public trial, freedom of religion, and freedom of movement, are *all* acknowledged as human rights; the debate is about permitted limitations. It is generally agreed, in both the Covenant on Civil and Political Rights¹² and the European Convention,¹³ that limitations must be based on a law existing prior to their enactment, and that their purpose must be to protect either specific objectives (morals, health, public order) or the rights of others. The European Convention also requires that a limitation be one that is "necessary in a democratic society."¹⁴ Therefore, Article 8 of the European Convention, which provides for respect for private and family life and correspondence, contains the typical qualification that the only interference by a public authority shall be

such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹⁵

9. See, e.g., Universal Declaration on Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948); U.N. Declaration on Torture, Inhuman and Degrading Treatment, G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/10034 (1975).

10. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966); International Covenant of Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

11. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention].

12. G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

13. European Convention, *supra* note 11.

14. *Id.*

15. *Id.*

Here again there is no serious controversy about the existence of these rights as human rights. The debate is about the application of limitation clauses. Different political systems will have different perceptions about the scope afforded by notions of public order, or about what is needed to protect public morals.¹⁶ But two points may be made: First, it is unusual for non-democratic regimes, even if parties to the Covenant,¹⁷ to defend a breach of such a human right in terms of an entitlement under a limitations clause. We have had no reasoned explanation from the Soviet Union that it is severely curtailing the right to emigrate by virtue of specific cases falling within clause 3 of Article 12 of the Civil and Political Covenant.¹⁸ The fundamental freedom, having been accepted, is breached without reference to the limitations clause, and the entitlement of others to note, comment, and protest is objected to as an impermissible intervention.¹⁹

There is obviously room for genuine debate, with respect to this cluster of rights, concerning the relationship between the rights of an individual and the entitlement of society as a whole. The recent, heated debates in UNESCO about freedom of information is a case in point, with the West emphasizing the right of newspapers to publish uncensored news, and the developing countries urging the entitlement of independent states to insure that the handling of news is not monopolized by a few privileged and unrepresentative newspaper proprietors.²⁰ That these issues are real and difficult is evident in the attempts of newly independent Zimbabwe to strike an acceptable balance.²¹

Even among the democracies, the question of interpreting the limitations clauses to such rights is much more than a matter of simple "good faith." For example, the meaning of the limitation clauses to Article 10 on freedom of expression have been keenly contested among the countries of the European Convention. May a

16. See J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 220 (1975); M. MCDUGAL, H. LASSWELL & L. CHEN, *supra* note 7, at 313-14.

17. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

18. G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

19. See Leary, *The Implementation of the Human Rights Provisions of the Helsinki Final Act, A Preliminary Assessment 1975-77*, in *HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD* 113, 115, 120 (T. Buergenthal ed. 1977).

20. N.Y. Times, July 14, 1976, at 3, col 5; *id.*, Aug. 5, 1976, at 20, col. 4.

21. London Times, Jan. 6, 1981, at 1, col. 1; The Guardian, Jan. 7, 1981, at 1, col 1.

government ban a publication aimed at schoolchildren that it regards as lewd, when other democracies have allowed the same book to circulate in their countries?²² Do newspapers and journals have an entitlement to information under Article 10, or merely an entitlement to print information that they already have?²³ May one's freedom of expression be curtailed by virtue of one's position—as a member of the armed forces, for example—or is that to read extra qualifications into Article 10?²⁴ And is a distinction to be drawn between those voluntarily joining such special groups, and those conscripted?²⁵

An important area of difficulty in resolving the proper scope of limitations upon freedom of expression has been the balancing of that right with others. The United Kingdom has—in the context of the status of its contempt laws upon the press when judicial proceedings are pending—urged the supremacy of the right of fair trial. The European Court did not find on the facts that it was necessary to answer the case in these terms. But it gave little encouragement to the view that freedom of expression is always to be read subject not only to its own limitations, but also to the right of fair trial enunciated in Article 6.²⁶ At the same time, there are significant differences between the balances being struck in the United Kingdom and the United States regarding different rights. There is, for the moment, no clear acknowledgment in European human rights law of the supremacy of freedom of expression (based on the significance of the first amendment to the United States Constitution)—with fair trial being capable of protection by means other than curbing the press.²⁷

The point is that no formula, no set of words, is so plain and clear that it will never need interpretation in the light of particular facts and circumstances. There are, of course, those who would disagree with this view, who believe that language represents reality

22. See *Handyside Case*, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 506 (Eur. Comm. on Human Rights).

23. See *De Geillestreerde Pers N.V. v. Netherlands*, [1977] Y.B. EUR. CONV. ON HUMAN RIGHTS 640 (Eur. Comm. on Human Rights) (Committee of Ministers agreed with Commission that Article 10 violation had not occurred).

24. See *Engel and Others Case*, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 490 (Eur. Comm. on Human Rights).

25. *Id.*

26. See *The Sunday Times Case*, [1979] Y.B. EUR. CONV. ON HUMAN RIGHTS 402 (Eur. Comm. on Human Rights).

27. See *Connecticut Bar Foundation & Freedom of Information Council, Fair Trial—Free Press* (Symposium and Workshop 1976).

and that interpretation is needed only when the meaning is not "plain and unambiguous."²⁸ What is important is not so much that the words be precise (though obviously precision is desirable), but that there be a commitment to third-party adjudication in resolving ambiguities. The failure of the Civil and Political Covenants to provide institutions to perform the interpretive task on an ongoing basis shows that the limitation clauses are not considered adequate protection by certain states, under any reasonable interpretation, notwithstanding that they have agreed to them.

The third intellectual problem that Professor Murphy fails to distinguish in his composite reference to freedom of expression, self interpretation, and the right to own property is that of clarifying whether certain claims concern human rights at all. This is a different conceptual problem from that of interpreting permitted limitations upon agreed rights. The right to own property is in this category; whether it is a legal right, still less a human right, is of course keenly contested. The ownership of property and uninterrupted enjoyment thereof is part of the liberal democratic tradition.²⁹ For the Marxist, it is less than apparent that this is a basic human entitlement, because the basic needs which property affords are better provided by the state. Indeed, in the Marxist view, the holding of private property inevitably encourages the exploitation of one class by another.³⁰ Marxist writers in the Western World are currently much taken with notions of "new" property rights, and point to a growing number of areas in which it is now accepted that the state is entitled to regulate the enjoyment of proprietary rights.³¹ Zoning and planning laws restrict individuals' rights to use their own property; state powers control production rates and free-

28. E.g., V. DEGAN, *L'INTERPRÉTATION DES ACCORDS EN DROIT INTERNATIONAL* 75 (1963); Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or Our 'Interpretation' of It?*, 65 *AM. J. INT'L L.* 358 (1971); Letter from Max Huber to M. H. Lauterpacht (Feb. 22, 1951), reprinted in Lauterpacht, *De L'interprétation des Traités*, 44 *ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL* 197, 198-99 (1952).

29. J. LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* (J. Gough ed. 1966) (3d rev. ed.); J.J. ROUSSEAU, *SOCIAL CONTRACT* (M. Cranston, trans. 1968). Rousseau believed that private ownership was only tenable as a basic right in the context of a social compact with the state. See L. HENKIN, *THE RIGHTS OF MAN TODAY* (1978); T. HOBBS, *LEVIATHAN* 382-83 (W. Smith ed. 1909).

30. K. MARX & F. ENGELS, *THE COMMUNIST MANIFESTO* 34-36 (100th Anniversary ed. 1948).

31. See, e.g., MacPherson, *Capitalism and the Changing Concept of Property*, in *FEUDALISM, CAPITALISM AND BEYOND* 105 (E. Kamenka & R. Neale eds. 1976); Reich, *The New Property*, 73 *YALE L.J.* 738 (1964).

dom of disposal concerning petroleum licenses. The right to property had its place in the Universal Declaration of Human Rights³² but does not appear in the Covenants. Although it is not in the main body of the European Convention, property rights can be found in the First Protocol, with a limitation clause that is strikingly broader and more favourable to the state than those that apply to freedom of expression or freedom of religion. Thus, Article 1 of the First Protocol provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.³³

These facts reflect only a very limited consensus that the right to property is a human right.

It is difficult to understand what Professor Murphy means when he says: "In human rights terms, claims of private ownership and demands for full compensation in the case of a taking are met by a preference for a collective right of peoples of self-determination and permanent sovereignty over natural resources."³⁴ He makes no attempt to analyse whether there is any real incompatibility here. In what way is the right of self-determination impaired by notions that deprivation of property entails compensation? And does exercising permanent sovereignty over one's natural resources necessarily entail freedom to alter, without compensation, arrangements freely entered? Third World views on these issues—on which there has been an enormous amount of very unmonolithic scholarship³⁵—do not necessarily coincide with East European views; but

32. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948).

33. European Convention, *supra* note 11.

34. Murphy, *supra* note 2, at 439.

35. See, e.g., Brownlie, *Legal Status of Natural Resources in International Law*, 4 RECEUIL DES COURS 249 (1978); Rozental, *The Charter of Economic Rights and Duties of States and the New International Economic Order*, 16 VA. J. INT'L L. 309 (1976); White, *A New International Economic Order*, 24 INT'L COMP. L. Q. 542 (1975); Seidl-Hohenveldern, *Confiscation and Expropriation Problems in Interna-*

these nuances are absent in Professor Murphy's statement.

So far as self-determination is concerned, there is now a widely held view that the peoples of a defined nation are entitled to determine their own political life. States that twenty years ago spoke of self-determination as mere political aspiration now use the language of legal entitlement. But there is substantial disagreement on many issues relating to this right: How does one define the geographic or ethnic unit to which it applies? Is the right only applicable (as disturbing trends in U.N. practice seem to indicate) to territories under colonial and alien domination?³⁶ In independent territories, what groups, if any, are entitled to separatist self-determination? And is such a right, if it exists, triggered only by major human rights violations? Different views on these issues reflect divisions not only between right and left, North and South, but also between the intellectual convictions of scholars within the West.³⁷

Of course, the first hurdle in answering the question whether an aspiration is indeed a human right is to clarify what one means by "human right." Again, views differ. I find persuasive the view that there is no special magic about the term, that it does not represent a finite list or relate (except historically) to notions of natural justice. Still less does the term carry with it notions of a hierarchial ordering of "basic" human rights and "less important" rights. As Professors McDougal, Lasswell, and Chen have eloquently argued, human rights are really nothing more or less than rights claimed at a very high level of intensity.³⁸

Professor Murphy states: "Legal scholars who advocate liberal values as universal rights are often unaware of the adverse consequences of unbridled individualism."³⁹ But, as shown, the great majority of agreed human rights are *not* predicated on "unbridled individualism." They have built-in limitations designed to effectu-

tional Law, 83 JOURNAL DU DROIT INTERNATIONAL 381 (1956); Weston, *International Law and the Deprivation of Foreign Wealth: A Framework for Inquiry*, 54 VA. L. REV. 1069 (1968).

36. M. MCDUGAL, H. LASSWELL & L. CHEN, *supra* note 7.

37. *E.g.*, CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 89-106 (1980); R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 90-106 (1963); S. RIGO, THE EVOLUTION OF THE RIGHT OF SELF DETERMINATION (1973); Cassese, *Political Self Determination—Old Concepts and New Developments*, in UN LAW/FUNDAMENTAL RIGHTS (Cassese ed. 1979); Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971).

38. M. MCDUGAL, H. LASSWELL & L. CHEN, *supra* note 7, at 393.

39. Murphy, *supra* note 2, at 437.

ate both the rights of others and the legitimate rights of the state in protecting the common good. Only freedom from torture, freedom from servitude, and a very few other rights are "unbridled." Surely, Professor Murphy does not think that the lack of qualification on an individual's right to be free from torture leads to "adverse consequences."

Professor Murphy complains of a failure among liberal scholars to "grasp the connections between the realm of ideas and the practical realization of values."⁴⁰ His own excursions into the realm of ideas, however, do not acknowledge the reality of contradictions. He cites Marx's observation that "[l]iberty as a right of man is not founded upon the relations between man and man, but rather upon the separation of man from man."⁴¹ It is still the right of self-interest. But once one includes in the notion of liberty—as Marx does—the constraint that liberty is the right to do everything that does not harm others, then the denial of this (limited and regulated) self-interest can only imply that the state knows best what is *good* for other individuals who are not being harmed by the exercise of one's liberty.

Unlike Professor Murphy, I do not find it disturbing that Solzhenitsyn has only "a qualified enthusiasm for Western values."⁴² In the first place, there is room for diversity of opinion even with the great intellectual heroes of our time. Secondly, we all know that there is much that is unacceptable and, indeed, deplorable in Western society. The evidence of human insensitivity, moral degeneracy, greed, and worship of the materialistic is all around us. At least some of these flaws are also evident in socialist societies and are attributable to human nature rather than to liberalism. While it behooves us all to keep ethnocentricity in check, we must not fall into the alternative error of failing to articulate publicly those values we consider essential to promote. International law itself is not value-free, and human rights concerns the promotion of declared values. Of course, values may be debated, but the debate requires the sort of detailed analysis outlined above, not sweeping generalisations. What does Professor Murphy mean when he speaks of "Liberalism's contempt of the Spiritual?"⁴³ (He appears to equate capitalism, which has a wholly secu-

40. *Id.*

41. *Id.* at 438 (quoting Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26, 42 (2d R. Tucker ed. 1978)).

42. *Id.* at 442.

43. *Id.* at 443.

lar function, with liberalism.) And what does he *mean* when he writes of liberalism's "refusal to recognise distinctions between good and evil?"⁴⁴ How does he recognise, when he sees them, "objective values superior to the individual will"?⁴⁵ What are his criteria? And what is the evidence that the "proper" distinctions are made between good and evil, and that "objective" values are promoted better in alternative systems that curtail the "irresponsible" use of liberty?⁴⁶

A RESPONSE TO PROFESSORS WATSON, SOHN, AND SCHECHTER

The debates in the literature concerning the substantive topics of international law invariably reflect the particular author's underlying suppositions about the nature and function of international law, as much as the author's views on the specific points being debated. The former necessarily (and in most cases unconsciously)⁴⁷ indicate the shape of the latter. This observation is no less true of writings on human rights questions than it is on other issues.

In the *Hofstra* symposium, Professor Louis Sohn responds to two Articles previously written by Professor J.S. Watson—which, in part, criticized Professor Sohn's views.⁴⁸ Professor Watson's position on human rights and Article 2(7)—which provided some of the impetus for the symposium—follows quite consistently from his views on the central role of Article 2(7) in the United Nations Charter.⁴⁹ That, in turn, rests (though he never suggests it himself) on his own assumptions about the nature of international law. Having myself been a prime target of Professor Watson's Article

44. *Id.*

45. *Id.*

46. *Id.*

47. *But see* Higgins, *Policy and Impartiality: The Uneasy Relationship in International Law*, 23 INT'L ORG. 914 (1969); McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

48. Sohn, *The International Law of Human Rights: A Reply to Recent Criticism*, 9 HOFSTRA L. REV. 347 (1981); Watson, *Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the U.N. 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*].

49. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.
U.N. CHARTER art. 2, para. 7.

concerning Article 2(7),⁵⁰ I may perhaps be allowed a few comments before turning to Professor Sohn's riposte.

Professor Watson writes in a striking and abrasive manner. To interpret Article 2(7) in a manner different from himself is to be a "visionary" and "more concerned with ends than means."⁵¹ The "end," apparently, is supranationalism—though I, for one, had not realised that in writing about Article 2(7)⁵² I was, in fact, writing about supranationalism. When Professor Watson speaks about Article 2(7) as being "the intersection of both law and politics," he reveals a conception of international law fundamentally different from my own. For him, law and politics are two inimical systems, whereas I believe law to be the conjoining of authority and effectiveness.⁵³ It is not surprising that Professor Shwarzenberger is just about the only person receiving favourable mention from Professor Watson. This is not the place to respond in detail to Professor Watson's views on why autointerpretation remains with Member States, notwithstanding the report of Committee IV/2 at San Francisco that: "[I]t is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers."⁵⁴ I agree with him that the above statement is not authoritative—if, by "authoritative," he means compelling per se, without reference to other indicia. I do not agree with any of his other interpretative arguments as to why the dictum in Committee IV/2's report is not significant or persuasive.⁵⁵

Professor Watson, surveying my review of U.N. practice in the area of Article 2(7), says, "Higgins' argument in favor of [U.N.] competence seems to boil down to saying that 'the political organs of the United Nations have clearly regarded themselves entitled to determine their own competence.'"⁵⁶ But the political organs *are* the members of the U.N. I was simply observing that there has

50. Watson, *Autointerpretation*, *supra* note 48.

51. *Id.* at 60.

52. *Id.*

53. See Higgins, *Integrations of Authority and Control: Trends in the Literature of International Law and International Relations*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* 79, 88-89 (W. Reisman & B. Weston eds. 1976).

54. 13 United Nations Conference on International Organization, San Francisco, 1945, Documents, 709.

55. Watson, *Autointerpretation*, *supra* note 48, at 62-63.

56. *Id.* at 64 (quoting R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 67 (1963)).

been no significant resistance among the U.N. membership to the notion that Article 2(7) does not entail inevitable autointerpretation. Professor Watson speaks a great deal about the consensual basis of international law: I am unclear whether he thinks that this gives each state some kind of veto against the evolution of customary practices of which it disapproves, and whether his reference to consent as virtually the *Grundnorm* of international law⁵⁷ implies that the consent of each state to be bound is a prerequisite to the formation of custom. Professor Watson's perception of law also leads him, it would seem, to assume that there can be no authoritative determination of allocations of competence without prior reference to the International Court of Justice. The political organs have, in his view, avoided judicial reference of the issue because they know that "the legal validity of their acts is highly questionable."⁵⁸ Can a political body never act authoritatively without prior clearance by a judicial body? Is the rejection of a request for such review—made by a very small minority of the membership—really tacit admission of the dubious status of the decisions taken? And, again, there is the basic point that the "political organs" do not exist separately from the Member States imposing against their will a loss of sovereignty that is acceptable to the political organ, but unacceptable to the states. This point is picked up by Professor Sohn when he writes: "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."⁵⁹

In support of his views on Article 2(7), Professor Watson also advances the argument that "[a]rticle 2(7) specifically states that it does not apply to Chapter VII enforcement measures. Thus, the one area in the Charter in which the Organization is clearly competent legally to decide on the nature of an issue and to respond to it, is the one area to which Article 2(7) does not apply."⁶⁰ This follows from the fact that the only "power to bind members substantively"⁶¹ is in Chapter VII of the Charter. Professor Watson here totally confuses authoritative decisionmaking—whether at the procedural or substantive level—with the capacity to bind. He challenges my view that "[g]iven the mutable and developing nature of

57. *Id.* at 83.

58. *Id.* at 65.

59. Sohn, *supra* note 48, at 349 (footnote omitted).

60. Watson, *Autointerpretation*, *supra* note 48, at 66.

61. *Id.*

the concept of domestic jurisdiction, a flexible approach is desirable, based on the principle that the states must be made responsible to the international community when their actions cause substantial international effects."⁶² I used the word "must" (of which Professor Watson makes much) here to mean "should, in the common interest." The statement is one of policy preference (and, in my view, also accords with state practice), and Professor Watson is of course entitled to disagree with it. But what I do not understand is his confident assertion that I am seeking to have it "take precedence over a basic principle of the U.N. Charter."⁶³ *What* basic principle? Presumably Article 2(7)—in the manner that Professor Watson chooses to interpret it—insisting that it is the "true" meaning, with interpretation being unnecessary. His criticism is of lawyers who are "visionaries," and who depart from reality. In my opinion, it is Professor Watson's views of Article 2(7) that depart from the manifest reality of state practice—and the evidence has greatly increased in the same direction since my own arguments were published in 1963.⁶⁴

It is these basic views about the nature and development of law that underlie Professor Watson's detailed and interesting treatment of human rights writings.⁶⁵ As Professor Sohn rightly points out, Professor Watson erects—on a basis that is never made clear—a distinction between international and supranational law, and assigns human rights to the second category.⁶⁶ Professor Sohn seems equally on point when he highlights the constant assumption by Professor Watson that Article 2(7) is only "valid" if it gives plenary power to all states to violate human rights. *Why* does the "validity" of Article 2(7) require such a bizarre reading?

I am in sympathy with the view that a desire for particular outcomes must not lead us to ignore reality. Community expectations are a vital element in identifying the content of contemporary international law. Professor Schwarzenberger, perceiving deviance

62. R. HIGGINS, *supra* note 37, at 62.

63. Watson, *Autointerpretation*, *supra* note 48, at 69.

64. Professor Watson also finds that I do not deal with problems surrounding the meaning of "consensus" and "majority", but does not cite Higgins, *The United Nations and Lawmaking: The Political Organs*, AM. J. INT'L L., Sept. 1970, at 37 (Proceedings of 64th Annual Meeting of American Society of International Law); Higgins, *The Development of International Law by the Political Organs of the United Nations*, 1965 PROC. SOC'Y INT'L L. 116.

65. See Watson, *Autointerpretation*, *supra* note 48; Watson, *Legal Theory*, *supra* note 48.

66. Sohn, *supra* note 48, at 348.

from long-accepted legal norms, deplors persistent breaches of the law of nations. (For those of a different school of law, such breaches may in certain defined circumstances⁶⁷ form the basis of the evolution of new norms). Professor Watson goes further and insists that major breaches are evidence that no law *exists*.⁶⁸ Professor Sohn correctly points out that this view ignores the role of *opinio juris*, and that “no state has claimed that it has the right to enslave its citizens, kill them indiscriminately, or torture them.”⁶⁹ “Reality” requires us to acknowledge that there are appalling violations of human rights; it does not require us to assert that there is no international law of human rights.

Professor Lowell Schechter’s Article in the *Hofstra* symposium⁷⁰ is an outstanding contribution to the debate at hand. Professor Schechter provides a very balanced assessment of the evidence we must look at to see whether there is any efficacy at all in the international law of human rights. He fully acknowledges the massive violations, but pertinently observes that it is more difficult to produce the evidence for another part of the picture—that certain violations have not occurred, or have taken a milder form, because of the existence of international standards and enforcement machinery.⁷¹ He reminds us that the European experience in the field of human rights as well as the work of non-governmental organizations are also significant. His detailed survey of the debate on the compatibility of basic civil and political rights with the urgent needs of the Third World to develop economically and to resist centrifugal forces goes considerably beyond the usual bland generalisations on this topic.⁷²

In looking at the relative success of the development of substantive and effective human rights law in Western Europe, it would seem that there are two central factors. It is, of course, essential that proclaimed rights, if they are to be adhered to, represent genuinely agreed values. Commentators have noted both the limited number of human rights in the European Convention and

67. An example would be where the practice has come to represent shared expectations, is based on *opinio juris*, and is compatible with the promotion of objectives sustained by international law.

68. Watson, *Legal Theory*, *supra* note 48, at 626-35.

69. Sohn, *supra* note 48, at 350.

70. Schechter, *The Views of “Charterists” and “Skeptics” on Human Rights in the World Legal Order*, 9 HOFSTRA L. REV. 357 (1981).

71. *Id.* at 363.

72. *See id.* at 370-83.

the like-minded democratic nature of the parties to it.⁷³ But the other side of the coin, and in my view an equally important aspect, is that the institutional organs dealing with this matter should be seen as reasonable, consistent, and impartial. The fact that Western European countries renew their periodic acceptances of the individual petition jurisdiction of the Commission is testimony to the confidence in that body as much as to the commitment to the democratic promotion of human rights. The task of human rights activists in urging renewal of the United Kingdom's acceptance of the Article 25 procedure—given that a singularly large number of cases have been brought, and are still pending, against the United Kingdom⁷⁴—has been greatly facilitated by the Commission's high standard of work and the way it has comported itself. Those of us concerned with the promotion of human rights would do well to remember that intellectual efforts to urge behaviour conducive to human rights should be directed to these bodies as well as to governments. The Human Rights Committee, operating under the Covenant on Civil and Political Rights, has made an impressive start in building up this respect and confidence. But the same respect cannot be accorded to many other U.N. bodies who have a role to play in human rights.

73. E.g., A. H. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 8-17 (2d ed. 1977).

74. A survey of cases brought can be found in European Commission of Human Rights, *Stock-Taking on the European Convention on Human Rights—A Periodic Note on the Concrete Results Achieved Under the Convention* 144 (Jan. 1, 1979) (copy on file in office of *Hofstra Law Review*), which also lists individual applications according to the state complained against.

