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### J. Shand Watson's Theory and Reality in the International Protection of Human Rights

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*Theory and Reality in the International Protection of Human Rights.* By J. Shand Watson. Ardsley NY: Transnational Publishers, 1999. Pp. x, 325. Index. \$115.

Human rights law, arguably the fastest growing field in international law, has achieved a moral plateau that is unique in international affairs. As noted by two leading human rights scholars, Henry Steiner and Philip Alston, in just over "a mere half century, the human rights movement that grew out of the Second World War has become an indelible part of our legal, political and moral landscape."<sup>1</sup> There is now a presumption that the assertion of an entitlement acquires virtually irrefutable validity once it is transformed into a human right. As Louis Henkin has noted, "human rights is today the single, paramount virtue to which vice pays homage, that governments today do not feel free to preach what they may persist in practicing."<sup>2</sup> In other words, international human rights law is real, effective, and an obligatory regime of global civilization today.

Yet it is precisely this truism that J. Shand Watson of Mercer University Law School seeks to debunk. The thrust of his argument is both simple and clear: the yawning gulf between theory and practice renders human rights law a meaningless facade that has substance only in the abstracted minds of academics. In the eleven chapters of *Theory and Reality in the International Protection of Human Rights*, Watson emphasizes the same theme over and over again: international law is impotent and cannot prevent oppression within the borders of sovereign states. Watson charges that the "academic community would be well advised to stop making extravagant claims about what international law can do for the oppressed, and instead analyse the reasons for the lack of success of the human rights idea" (p. x). Watson wants to talk about the death of the idea of

human rights. But in choosing to focus on the issue of enforcement as such, Watson fails to address the penetration of the idea of human rights within almost all states, and he does not take into account the implications of such penetration for the cultural, political, and historical legitimacy of human rights.

Wielding a relentless, if somewhat blunt, Austinian machete, Watson embarks on a positivistic crusade whose sole purposes are to disembowel the human rights movement and, conversely, to restore the supremacy of state sovereignty. The opening chapter is little more than a catalogue of human rights violations that have met with international inaction and acquiescence. He notes that atrocities of the past, such as the Inquisition and the destruction of Carthage, "are not separate and isolated historical events that occurred at a time when human nature was vastly worse than it is today" (p. 1). Nay, they are on "a continuum leading ineluctably to the massive slaughters in Russia and Cambodia, the genocide of the Indian populations in North and South America, the starvation of Ethiopian citizens by their government, and the tribal excesses in Rwanda and Burundi" (*id.*). To these, he could have added slavery, colonialism, apartheid, imperial conquests and exploitation, the vagaries of an unjust global economic order, and the Holocaust, to name just a few. Watson then mocks human rights treaties and other binding international human rights instruments as wishful thinking. He points to repeated failures to enforce these international obligations when gruesome atrocities have been committed. It is this distance between facts on the ground and lofty international human rights norms that, in Watson's view, makes human rights fictitious.

At various points in the book, Watson decries what he calls the wrong choice of legal theory in the human rights area. In one chapter, for example, he concentrates on the lack of sanctions or power to enforce human rights because of ill-conceived theories that model international law on "the typical domestic hierarchy" (p. 47). He argues in another chapter that sanctions have rarely worked because individual states cannot be forced to honor them. Moreover, the United Nations is impotent to make states comply. He notes that if custom is the true practice of states, then the norm is in the breach, not observance, of human rights. In discussing the ineffectiveness of UN resolutions on human rights, he contends that states sign on because they know that such texts are only formally binding, presumably

<sup>1</sup> See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 3 (2d ed. 2000).

<sup>2</sup> LOUIS HENKIN, *THE AGE OF RIGHTS*, at ix-x (1990).

because they have no bite. Wherever he looks, national rights trump human rights.

While Watson certainly raises several important questions, his central claims are fatally flawed in fundamental ways. It is certainly true that there is a gaping and frustrating gap between the noble aspirations of human rights and the egregious violations that continue to characterize state practice in every country in the world. International institutions, and particularly the United Nations, have been quite ineffectual—and in most instances, disastrously so—in enforcing human rights.<sup>3</sup> The failures are painfully obvious. In the recent past, failures by the international community to respond to human rights violations—even to genocide, as was the case in 1994 in Rwanda—have underscored the difficulties that bedevil the international enforcement of human rights norms. In the cases of Rwanda and Sierra Leone—and before them, Somalia—the unwillingness and inability of the United Nations to act responsibly reflected not a decision to respect the sovereignty of these states, but a decision by the West not to expend resources in a part of the world it deemed worthless.<sup>4</sup> More generally—and contrary to what Shand asserts—respect for sovereignty is only a facade that masks the underlying political or other reasons for decisions not to intervene in response to significant human rights violations.

Although the United Nations is obviously a creature and institution of sovereign states and is therefore bound by its Charter to respect the sovereignty of its members, it has in recent years taken a more active posture toward the enforcement of human rights. The UN debacles in Rwanda and Somalia—as well as its inability to respond effectively to the atrocities in the former Yugoslavia—embarrassed the world body and drew attention to the urgent need for more effective intervention. The creation of the International Tribunals for Rwanda<sup>5</sup> and for the

Former Yugoslavia,<sup>6</sup> as well as the adoption in December 1998 in Rome of the statute of the international criminal court,<sup>7</sup> evidences the desire to create more effective organs for enforcement. It is important to note that all of these actions came after long periods of resistance and opposition by major Western powers, including the United States, and only after intense public scrutiny and unrelenting media coverage. The United Nations has a maze of Charter bodies and treaties—from the Commission on Human Rights, to the UN High Commissioner for Human Rights, to the International Covenant on Civil and Political Rights—that are slowly building practice and norms in the enforcement of human rights.<sup>8</sup> In addition, regional organizations, such as the European Union,<sup>9</sup> the Organization of American States,<sup>10</sup> and the Organization of African Unity,<sup>11</sup> have in varying degrees started to emphasize human rights and to take steps to enforce them. While grim, the picture is not as hopeless as Watson would have us believe. There is halting, if painfully slow and cautious, movement towards enforcement.

Contrary to what Watson suggests, the spread and effectiveness of human rights norms are not best assessed through the lens of international enforcement. Instead, one should look at the dramatic and transformative impact of human rights norms on the legal, constitutional, and political cultures of states. The true test for the effectiveness of human rights law is not at the vertical level—that is, where international institutions act on domestic legal orders—but rather in the assimilation and adoption of human rights norms by and within states. Seen from this perspective, human rights norms have had an almost miraculous impact on the psyches of states, cultures, and societies around the world. As is evident today, the idea of constitutionalism—and with it, liberal constitutions themselves—has spread worldwide. This legal paradigm, which is

<sup>3</sup> See *Implications of International Response to Events in Rwanda, Kosovo Examined* by Secretary-General, in Address to General Assembly, UN Press Release GA/9595 (Sept. 20, 1999), obtainable from <<http://www.un.org>> (UN NewsCentre); Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211 (1998).

<sup>4</sup> See UN DEP'T OF PUBLIC INFORMATION, UNITED NATIONS AND RWANDA: 1993–1996 (1996), UN Sales No. E.96.I.20; Peter Rosenblum, *Dodging the Challenge*, 10 HARV. HUM. RTS. J. 313 (1997).

<sup>5</sup> See Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, UN Doc. S/1995/134 (1994).

<sup>6</sup> See SC Res. 808 (Feb. 22, 1993).

<sup>7</sup> Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.138/9\* (1998).

<sup>8</sup> See THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston ed., 1992).

<sup>9</sup> See Laurence R. Helfer & Anne-Marie Slaughter, *Towards a Theory of Supranational Effective Adjudication*, 107 YALE L.J. 273 (1997).

<sup>10</sup> See Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439 (1990).

<sup>11</sup> See Chidi Anselm Odinkalu, *The Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary Assessment*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 359 (1998).

integrally connected with human rights, is creating societies whose guiding principles are driven by human rights. A case in point is the South African post-apartheid state, which I have called a "human rights state."<sup>12</sup> Henkin has captured the power of human rights in this bold passage:

Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, has been approved by virtually all governments representing all societies. Human rights are enshrined in the constitutions of virtually every one of today's 170 states—old states and new; religious, secular, and atheist; Western and Eastern; democratic, authoritarian, and totalitarian; market economy, socialist, and mixed; rich and poor, developed, developing, and less developed. Human rights is the subject of numerous international agreements, the daily grist of the mills of international politics, and a bone of continuing contention among superpowers.<sup>13</sup>

The penetration of human rights below the surface of the state—their entry into, and effective governance of, most legal systems today—is the single most important measure of the success of the idea of human rights. Instead of dying, as Watson suggests, the idea of human rights has now become an integral part of the fabric of societies throughout the world. Domestic legal systems—that is, in effect, sovereign states—are now enforcing human rights because they constitute domestic law. What is more, civil-society organizations in many countries now vigilantly police government respect for, and guarantees of, basic human rights. The fact that human rights laws are nevertheless violated does not distinguish them from other species of rights or obligations in criminal law, tort law, or contract law.

In focusing on enforcement as the exclusive measure of the success or failure of the human rights project, Watson draws attention away from the one critical shortcoming that continues to vex that project. In my view, the human rights corpus is a fundamentally Eurocentric doctrine that consequently suffers from several basic biases. Precisely because that corpus falls squarely within the historical continuum of the colonial project—in which a superior and a subordinate are the essential actors—it lacks genuine cross-cultural

legitimacy. Its rhetoric and discourse are arrogant and abusive of non-European, nonliberal traditions and cultures.<sup>14</sup> Although it is possible that a genuinely universal discourse may emerge concerning the nature of human dignity and the types of political arrangements that can best protect that dignity, there needs to be a recognition that the current human rights corpus is, in effect, just one proposal for what that universal discourse ought to be. An excavation of diverse traditions is necessary if a deep, lasting, and universal agreement on a regime of human rights is to be achieved. In the meantime, Watson's *Theory and Reality in the International Protection of Human Rights* is a valuable reminder not only of the vexing problems of enforcement, but also of the urgent need for scholarship that probes the complexity of the human rights project.

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<sup>12</sup> Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 65 (1997).

<sup>13</sup> HENKIN, *supra* note 2, at ix.

<sup>14</sup> See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001); Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).