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THE LEGACY OF LOUIS HENKIN: HUMAN RIGHTS IN THE “AGE OF TERROR”

An Interview with Sarah H. Cleveland*

Louis Henkin and the Human Rights Idea

What effect has Professor Henkin's work had upon your own thoughts or scholarship in the human rights field?

My scholarly work spans the fields of international human rights and U.S. foreign relations law. I am particularly interested in the process by which human rights norms are implemented into domestic legal systems, the role the United States plays in promoting the internalization of human rights norms by other states, and the mechanisms by which the values of the international human rights regime are incorporated into the United States domestic legal system.

To say that Professor Henkin's work has contributed to my own thinking on these issues would be an understatement. In addition to his phenomenal work in constitutional law and international law, Professor Henkin did the pathbreaking work in developing two distinct fields of law relevant to the “war on terror”: the field of U.S. foreign relations and the field of international human rights. It was Professor Henkin, first and foremost, who resurrected foreign relations law as a field of study. Professor Henkin's scholarship pushed back forcefully against the Roman observation that in war—and, perhaps, in foreign relations generally—the law is silent. The law, he said in his brilliant book, *Foreign Affairs and the U.S. Constitution*,¹ speaks clearly and

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1. Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996).

distinctly in this area, and is equally enforceable. Henkin's foreign relations work reminds us that numerous legal constraints operate in this area—constraints from international law; constraints from constitutional separation of powers and individual rights; and constraints from sub-constitutional framework statutes.

I first read Professor Henkin's famous article, *Is There a 'Political Question' Doctrine?*,² when I was in law school representing Haitian refugees who were being interdicted by the United States and detained on Guantánamo in the early 1990s. The government's argument then (as now) was that U.S. treatment of aliens on Guantánamo or on the high seas was an unreviewable political question dedicated to the executive. Its legality therefore could not be tested in any court. Henkin's article argued that the concept of "political questions" was being used improperly to avoid adjudication by the courts, and that other, narrower doctrines adequately addressed circumstances where discretion had been dedicated to another branch of government. This view has been very influential on my own work examining the historical origins of the concept of plenary sovereign power over foreign affairs and the extent to which international law helps define and limit the U.S. foreign affairs powers.

In his human rights work, Professor Henkin has had a strongly normative focus. His writings emphasize the importance of considering human dignity in all aspects of law. He also has given us the wonderful image of the United States as the "flying buttress" of the international human rights system—a nation standing outside of the cathedral of human rights, but which supports that structure.³ My own work has focused in part on exploring that image of the U.S. relationship to the international community. I have examined the ways in which the United States fulfills this "flying buttress" role by using economic sanctions laws and domestic human rights litigation to promote compliance with human rights abroad. But I also have worked to counter this image by exploring the mechanisms by which the United States itself internalizes the broader values of the

2. Louis Henkin, *Is There a 'Political Question' Doctrine?*, 85 Yale L.J. 597 (1976).

3. Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 405, 421; see also Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 Stan. L. Rev. 1479, 1484–85 (2003) (commenting on Professor Henkin's first use of this metaphor).

international human rights community. I have written extensively on the relationship between international law and U.S. domestic law, looking in particular at the historical and ongoing conversation in this country between international law and the U.S. Constitution. As international law principles inform U.S. domestic law, the United States becomes, itself, a part of the human rights cathedral.

One interesting aspect of Professor Henkin's work is that originally he did not seem to view his work in foreign relations law and human rights law as connected. He treated them largely as distinct fields. His book on *Foreign Affairs and the U.S. Constitution*⁴ does not appear to be conceived of as a human rights text. But the period since 9/11 has underscored how deeply intertwined human rights and foreign relations law are. Guantánamo, ghost detention centers, the Military Commissions Act, and many other aspects of the "war on terror" are extremely problematic from the perspectives of both constitutional and human rights law. It is precisely the failure to recognize the operation of law in this field—the operation of international, constitutional, and statutory law—that has led directly to human rights violations. I think in his later work Professor Henkin came to recognize that foreign relations law is an important component of the human rights story. One of Professor Henkin's lasting contributions has been his insight that written constitutionalism, separation of powers, and basic principles of rule of law are integral guardians of human rights.

How do you think that Professor Henkin's work has been influential in the human rights field and how has it shaped the ideas and direction of the recent human rights movement?

Professor Henkin has been unequalled both as a scholar and as an advocate in influencing international human rights. As a scholar, he founded the field of human rights in law and other disciplines. Many of his mantras are now central themes of the human rights movement. His ideas regarding the evolution of "the human rights idea," his conviction that states are authorized to pursue international remedies against other states for violations of mutually obligatory human rights treaties or customary international human rights law, and his criticism of sovereignty as a barrier to rights enforcement—his famous declaration "away with

4. Louis Henkin, *supra* note 1.

the 's' word"⁵—have deeply penetrated human rights scholarship and advocacy. Professor Henkin's *Human Rights* casebook⁶ and his famous volume *The Age of Rights*,⁷ among many other writings, have helped the human rights idea penetrate law schools, court decisions, and the work of scholars and activists around the globe.

Professor Henkin also embodies the model life of the scholar-practitioner. In 1978 Professor Henkin helped found the Columbia University Center for the Study of Human Rights, because he believed at that early date that human rights training should not just be for lawyers. He wanted to reach out to many different disciplines—philosophy, political science, social work—because every field that touches on human beings implicates human rights. A decade ago he founded the Human Rights Institute at the Law School, to help train human rights scholars, teachers, and advocates around the globe. The Institute seeks to build bridges between theory and practice; between law and other disciplines; and between domestic constitutional rights and international human rights. Henkin's extensive work in the State Department and later as a State Department advisor, his work on the board of the U.S. non-profit Human Rights First, his work helping to train judges in international law, his role as the President of the American Society of International Law and as the U.S. Representative on the U.N. Human Rights Committee, and his efforts in submitting significant *amicus* briefs to the U.S. Supreme Court as recently as in the *Hamdan* case⁸—all of these commitments have contributed importantly to the internalization of the human rights idea into the American psyche and around the world.

While Professor Henkin believes deeply in the international human rights system, the actor in that system that he has been most concerned with is the United States. He has recognized the central role that the United States played in developing the idea of rights, beginning with the Declaration of Independence and early state constitutions. He has also emphasized the critical role that the

5. See Louis Henkin, *That "S" Word: Sovereignty and Globalization, and Human Rights, et cetera*, 68 Fordham L. Rev. 1 (1999); Louis Henkin, *The Mythology of Sovereignty*, Am. Soc'y Int'l L. Newsl. reprinted in Proceedings in the Canadian Council of International Law 15 (1992).

6. Human Rights (Louis Henkin, Gerald L. Neuman, Diane F. Orentlicher & David W. Leebron eds., 1999).

7. Louis Henkin, *The Age of Rights* (1990).

8. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

United States played in creating the substance and architecture of the modern international human rights system following World War II. In his writings, teaching, and practice, he has struggled in the last half century to ensure that we in the United States live up to the promise of the ideals that we created for ourselves and that we have helped convey to so many others.

It has been about 20 years since Professor Henkin helped to compile the Restatement (Third) of Foreign Relations Law of the United States. In what areas relating to your work has it had the greatest influence? Are there parts of the Restatement that you feel should be updated or revised to reflect current law?

The Restatement was a massive undertaking at the time, grappling with all aspects of U.S. foreign relations law and broad swathes of international law, from the law of the sea to extraterritorial jurisdiction.⁹ Such a work cannot be all things to all people, regardless of the integrity and expertise with which it is drafted. Aspects of the Restatement were controversial when it was written, such as Section 403, which sets forth a reasonableness standard for the exercise of extraterritorial jurisdiction.¹⁰ The failure of Section 712 of the Restatement to recognize the United States' requirement of "prompt, adequate, and effective" compensation as the international rule for foreign expropriations of property would be another example.¹¹ The Reagan Administration State Department objected to a number of aspects of the Restatement, which I view as a

9. Restatement (Third) of the Foreign Rel. Law of the U.S. (1987).

10. Restatement (Third) of the Foreign Rel. Law of the U.S. § 403(1) (1987) (stating that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable").

11. That section states that:

The United States Government has consistently taken the position in diplomatic exchanges and in international fora that under international law compensation must be "prompt, adequate and effective," and those terms have been included in United States legislation . . . That formulation has met strong resistance from developing states and has not made its way into multilateral agreements or declarations or been universally utilized by international tribunals, but it has been incorporated into a substantial number of bilateral agreements negotiated by the United States as well as by other capital-exporting states both among themselves and with developing states.

Restatement (Third) of the Foreign Rel. Law of the U.S. § 712, cmt. c (1987).

sign of the author's healthy independence from political influence. The fact that a provision was or is controversial, however, does not mean it is incorrect.

For human rights litigation in U.S. courts under the Alien Tort Statute (ATS),¹² the Restatement has been extremely influential, particularly with respect to its discussion of the human rights principles that enjoy the status of customary international law. Section 702 of the Restatement sets forth what the drafters viewed as a non-exhaustive list of the human rights principles that had acquired the status of customary international law at that time: genocide; slavery or the slave trade; summary execution; disappearance; torture or cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination.¹³ This list, together with the Restatement's recognition of the principle of universal jurisdiction and the possibility of civil liability for violations of universal customary norms in Section 404,¹⁴ has been phenomenally influential in helping U.S. courts determine which principles of international human rights law are sufficiently "specific, universal, and obligatory"¹⁵ to be enforceable in U.S. courts.¹⁶ Suits under the ATS, in turn, have contributed significantly to the refinement of these concepts internationally and have informed the development of international human rights law in many other fora. Both human rights law and international criminal law have evolved significantly since the Restatement was drafted, and the Section 702 list of customary international law principles could now be refined and updated to reflect these developments. Such an update reasonably would

12. 28 U.S.C. § 1350 (2000) (stating that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

13. Restatement (Third) of the Foreign Rel. Law of the U.S. § 702, cmt. a (1987) ("This section includes as customary law only those human rights whose status as customary law is generally accepted (as of 1987) and whose scope and content are generally agreed.").

14. Restatement (Third) of the Foreign Rel. Law of the U.S. § 404, cmt. b (1987) (stating that "international law does not preclude the application of non-criminal law on [the] basis [of universal interests], for example, by providing a remedy in tort or restitution for victims of piracy").

15. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (citing *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

16. See Restatement (Third) of the Foreign Rel. Law of the U.S. § 702 (1987), cited with approval in *Sosa v. Alvarez-Machain*, 542 U.S. at 737.

explicitly include forced labor, war crimes and crimes against humanity, imposition of the death penalty on juveniles and the mentally disabled, and recognition of state-sponsored rape as torture, among other things. This is just one sliver of the ways in which the Restatement has been influential.

One issue that was not controversial at the time, but which has become so, is the status of customary international law as federal law in the United States. Since the Restatement was written, a revisionist controversy has arisen over the discussion in Section 111 of the relationship between customary international law and U.S. law.¹⁷ The traditional view, expressed in the Restatement, was that customary international law was part of the general common law, enforceable in the federal courts, and that it remained part of the federal common law after the decision in *Erie v. Tompkins*.¹⁸ This traditional understanding had lengthy support in American legal history, and it was not controverted by the Executive Branch when the Restatement was published. The revisionist challenge, however, contends that customary international law is not federal law, but only general law, and thus lost its status as enforceable federal law as a result of the decision in *Erie*. The Restatement view largely was ratified by the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*, where the Court agreed that international law remains part of the federal common law.¹⁹ But the Court also acknowledged some of the concerns of the revisionists and appeared to back away from the broadest implication of the Restatement's approach: the claim that customary international law was directly enforceable in U.S. courts through Section 1331 federal question jurisdiction, without any other intervening action by Congress or the President to

17. Compare Restatement (Third) of the Foreign Rel. Law of the U.S. § 111, cmt. d (1987) ("Customary international law is considered to be like common law in the United States, but it is federal law."), with Curtis A. Bradley and Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319 (1997) (arguing that federal courts should not have the power to incorporate rules of customary international law without explicit authorization by statute or treaty). For criticisms of the revisionist position, see, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371 (1997).

18. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

19. *Sosa v. Alvarez-Machain*, 542 U.S. at 732.

create jurisdiction.²⁰ The discussion is brief and is dicta, so it is not clear what to make of the Court's language. But the best reading of *Sosa* is probably that customary international law is federal law for purposes of Article III jurisdiction, but that the general federal question jurisdiction statute, 28 U.S.C. § 1331,²¹ may not create jurisdiction for the federal courts to hear cases arising directly from customary international law. The Alien Tort Statute, however, does create such jurisdiction over claims by aliens alleging core violations of international human rights law, as the Supreme Court recognized. So the direct enforceability of customary international law under statutory federal question jurisdiction is one area where current doctrine may have come into tension with the Restatement.

I think the overarching contribution of the Restatement to the current "war on terror," though, is Professor Henkin's central insight that "[i]nternational law is law like other law... It is part of the law of the United States, [to be] respected by Presidents and Congresses, and by the States, and given effect by the courts."²² Any student of American legal history knows that this assertion is deeply grounded in historical U.S. law and practice. But in the period since 9/11 we have seen direct attacks on each of these principles: that international law is like other law, that it is part of our law, that it is binding on all branches of our government, and that it is enforceable in the courts. Fortunately, in response to this attack, we have seen some reaffirmation of these same principles. The importance of the U.S. commitment to the prohibition on torture has been reasserted. In *Hamdan*, the Supreme Court read the existing statutory authorization for military commissions as incorporating limits imposed by Common Article 3 of the Third Geneva Convention.²³ In *Hamdi*, the plurality suggested that the due process rights of a citizen detained as an enemy combatant should comply, at a minimum, with the procedural requirements for detention of prisoners of war set forth in the Geneva Conventions.²⁴ Reaffirming this central insight of the Restatement about the role of international law would go a long way toward reestablishing the rule of law in the

20. *Id.* at 731 n.19; Restatement (Third) of the Foreign Rel. Law of the U.S. § 111, cmt. e (1987).

21. 28 U.S.C. § 1331 (2000).

22. Restatement (Third) of the Foreign Rel. Law of the U.S., pt. I, ch. 1 (1987) (introductory note).

23. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

24. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

“war on terror.”

Are there any anecdotes from co-teaching last year with Professor Henkin that really stood out in your mind? What aspects of his approach to teaching human rights have influenced you most?

David Leebron, the former Dean of Columbia Law School, has said that being in the classroom with Lou Henkin is like being in the room with James Madison. And it is true. You are in the presence of a founding father. Students are in awe of Lou and love being in the classroom with the person who both witnessed the birth of the modern human rights movement and who has been a pillar of that regime for the last fifty years.

There are at least two themes from Lou's approach to the class that have profoundly influenced my own teaching of the subject. The first is his emphasis on a rigorous exploration of the idea of rights: Where do rights come from? How have they evolved? What do they mean in different cultures and societies in the modern era? Many law school courses address fundamental rights, but few classes challenge students to consider where such rights came from or ask how they are justified in the modern legal era. Professor Henkin starts out his course by asking students “What is a right?” They have a remarkably hard time answering that question.

Professor Henkin ultimately defines rights as “claims that a government is obligated to respect.” You will notice two things about this definition. It does not address the genesis of the claims. And it is focused on *governments*. According to this definition, rights run primarily between governments and individuals—which raises many interesting questions down the road regarding the legal obligations of private individuals, corporations, international organizations, and other non-state actors.

Professor Henkin then examines the origins of the idea of rights, which he explicitly traces to the Anglo-American and European Enlightenment traditions. Students read the Magna Carta,²⁵ the French Declaration of the Rights of Man and of the Citizen,²⁶ and philosophical perspectives on rights over the past three centuries, until they reach the post-World War II era—Professor Henkin's modern “age of rights.” From the 1948 Universal

25. Magna Carta (1215).

26. The Declaration of the Rights of Man and of the Citizen (George A. Bermann et al. trans., 1998) (1789).

Declaration of Human Rights²⁷ forward, rights are defined as inherent in human dignity. They also acquire a teleological justification: to advance freedom, justice, and world peace. To some extent, I think this introduction can be hard on students. They come into the course to study wrenching contemporary problems such as torture and genocide, and they are immediately confronted with the Magna Carta, Locke, and Kant. But, in the end, I think the course is much richer as a result of this approach. It forces students to grapple with the nature and genesis of rights, and gives a philosophical grounding to the rest of the course. I don't believe that any other casebook takes a similarly thick approach to the idea of rights.

The second influential theme from Professor Henkin's approach is his idea of the holistic nature of rights. Professor Henkin's casebook and course are entitled "Human Rights," not "International Human Rights." Professor Henkin does not use language casually, and this particular choice is very intentional. Lou does not distinguish between national and international protection of rights. He views the nation state and domestic law as the critical protector of rights in the international legal order. Rights were protected in the law of nation states, particularly in the constitutional orders of the United States, long before they were defined and protected by the international legal order. Professor Henkin's casebook thus contains a very fluid examination of the elaboration and protection of rights through many legal regimes—international treaty bodies, regional tribunals, national and sub-national legal systems—which he views as engaged in a constant dialogue and common enterprise to protect rights. Most people do not think of the U.S. Bill of Rights and other national constitutions as human rights documents, but Louis Henkin does.

As a matter of style, the most lasting impression that I will have in the classroom is of Professor Henkin asking the large, sometimes unanswerable, questions: "What is constitutionalism?" "Do we need world government?" "Should law regulate morality?" He possesses an uncanny ability to combine a rich knowledge of history and legal developments with an approach that forces students to place the subject in a broad theoretical and geopolitical context.

I guess the last thing I would say about teaching with Lou is

27. Universal Declaration of Human Rights, G.A. Res. 217A, at 72, art. 1, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

that he has a phenomenally refreshing optimism. The study of human rights can be so frustrating because so much is violated, and so little is legally enforceable in the narrow way that lawyers often want to think about enforcement. But Lou has tremendous faith in the infectious power of the human rights idea, and he revels in what has been accomplished. He fully recognizes the practical limitations on implementing the human rights idea. We have U.N. "treaty bodies" that receive human rights reports from states rather than an international human rights court where states can be sued, because states would not agree to submit to a court. He accepts that fact, and he focuses on what the human rights system *can* accomplish, not on what it has not or cannot. Professor Henkin has always seen the part of the human rights glass that is full. Students respond to his optimism and it invigorates their interest in the subject.

Human Rights and the "War on Terror"

What role do you think international human rights law can play in changing the prosecution of the global "war on terror"? Is criminal law or the law of armed conflict a more effective avenue for protecting human rights in this context?

I believe that some acts of terrorism can fall within the paradigm of the law of armed conflict, also known as the law of war. The 9/11 attacks reasonably fell within the definition of an armed attack, and the military response in Afghanistan met with great international sympathy. But the armed conflict paradigm also has been applied sweepingly to aspects of the fight against terrorism that are more properly addressed through the criminal justice system.

That said, the core problem we are currently confronting, it seems to me, is not whether terrorism can be addressed under the laws of war, but that the U.S. executive branch has not been willing to accept that it is limited by *any* law in its anti-terrorism response. In other words, in its detention policies and elsewhere, the Administration has wanted to invoke powers recognized by the laws of war—the power to act in self-defense, even preemptively; the power to detain combatants—but it has not wanted to be bound by the limits that accompany those powers.

We got into the mess on Guantánamo not because the government refused to apply the criminal law paradigm to the Guantánamo detainees, but because it did not want to apply *any* legal paradigm at all: no habeas jurisdiction, no constitutional rights,

no international human rights law, no international humanitarian law. The government wants a complete legal black hole. The same is true for the military commissions. The President's initial order establishing the military commissions purported to prohibit any domestic or foreign court from reviewing any aspect of the commissions.²⁸ And the Military Commissions Act of 2006 largely accomplished this.²⁹

If the government had, from the beginning, provided the Guantánamo detainees with the very minimal process to determine their status that is required by Article 5 of the Geneva Conventions, and provided ordinary court martial type proceedings to combatants charged with war crimes, it could have avoided withering international criticism as well as multiple trips to the Supreme Court challenging the validity of the Guantánamo detentions and the jury-rigged and highly problematic Combatant Status Review Tribunal and military commission procedures that are now in place there.

We are currently confronting very real and challenging questions regarding the relationship between international human rights law and humanitarian law in various forms of international and non-international armed conflict. I believe that the best interpretation is that both bodies of law apply, but that one may serve as a *lex specialis* that informs the interpretation of the other. There are also real difficulties with applying the existing law of armed conflict to a "war" with no territorial or temporal scope. But right now it would be a significant improvement if we would concede that *some* law applied to U.S. actions on Guantánamo and elsewhere that has credibility with the international community.

Given that a central constitutional issue in the "war on terror," namely the suspension of habeas corpus for "unlawful enemy combatants" in the Military Commissions Act, is now pending before the Supreme Court, can international human rights law play a role in habeas law? If so, how?

28. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Nov. 13, 2001, § 7 (b)(2) (prohibiting any individual subject to trial by military commission from seeking "any remedy or maintain[ing] any proceeding, directly or indirectly, . . . in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal").

29. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2601 (2006) [hereinafter MCA] (codified in scattered sections of 10, 18, 28 & 42 U.S.C.).

International human rights law can certainly play a role in habeas law. The substantive content of constitutional habeas corpus³⁰ is somewhat uncertain, but the Supreme Court repeatedly has said that habeas means at least what it meant when the Constitution was adopted.³¹ We also know that habeas traditionally was understood to be an evolving standard.³² Widely embraced international human rights conceptions of basic fair procedural protections therefore can inform the procedural protections that must be afforded on habeas.

International human rights law is also relevant to the question of whether the constitutional right to habeas corpus reaches Guantánamo. Around 1900, in a series of cases called the *Insular Cases*, the Supreme Court held that only “fundamental” constitutional rights applied to all sovereign U.S. territories.³³ Recently the Supreme Court held that Guantánamo is effectively a U.S. territory.³⁴ So one critical question that remains for determining whether constitutional habeas applies on Guantánamo is whether habeas corpus is a “fundamental” right. Obviously, you would think that a venerable right like habeas is, but the Supreme Court, in the *Insular Cases*, held that the right to jury trial was not.³⁵ So how do you show that habeas corpus is fundamental? You can show that it historically has been fundamental to the Anglo-American legal system. You can show that it was fundamental in the British Empire and is now fundamental to every country in the Commonwealth. And you can look to international human rights law to show that habeas is no longer limited to being an Anglo-American right. The principle

30. U.S. Const. art. 1, § 9 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

31. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)) (stating that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789’”).

32. *Discussion of William Hurst, The Role of History, in SUPREME COURT AND SUPREME LAW* 59, 61 (Edmond Cahn ed., 1954) (statement of Paul A. Freund) (observing that institutions such as habeas corpus involve an evolutionary or “dynamic element which itself was adopted by the framers”).

33. *See, e.g., Downes v. Bidwell*, 182 U.S. 244, 292-95 (1901) (White, J., concurring) (contending that only fundamental rights applied in unincorporated U.S. territories); *Dorr v. United States*, 195 U.S. 138 (1904) (constitutional right to jury trial is not fundamental and does not apply to unincorporated Philippines).

34. 542 U.S. 466 (2004).

35. *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

that detained persons have a right to speedily challenge their detention in court is now recognized much more widely, and is incorporated into many human rights instruments, including the International Covenant on Civil and Political Rights,³⁶ the European Convention for the Protection of Human Rights and Fundamental Freedoms,³⁷ and the American Convention on Human Rights.³⁸ All of this makes it particularly embarrassing that the United States is broadly denying this right. So international human rights law definitely has a role to play in defining the substantive content and geographic scope of constitutional habeas in the Guantánamo cases before the Supreme Court.

Non-state actors have begun to play an increasingly large role in international political and humanitarian crises, yet international human rights instruments focus on nation-states as the relevant unit for accession. What types of strategies might human rights advocates employ to engage such non-state actors?

The rise of non-state actors—whether rebel or paramilitary groups, corporations, private individuals, international organizations, NGOs, or other entities in civil society—has posed a fundamental challenge to the traditional conceptualization of the human rights system. As originally conceived, the state was the entity primarily responsible for respecting, protecting, and ensuring human rights. But we now recognize that non-state actors can contribute significantly both to the violation of human rights and to their prevention. International law has tried to respond in various ways. International criminal law has penetrated to the level of the individual and the corporation, extending principles of accountability directly to non-state actors. Treaty bodies have become more receptive to receiving information from non-state actors. Market-oriented strategies such as disseminating information to consumers, and labeling and boycott campaigns can be effective in influencing the behavior of certain actors, particularly name-brand corporations.

36. International Covenant on Civil and Political Rights, art. 9(4), *opened for signature* Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

37. [European] Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(4), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

38. American Convention on Human Rights art. 7(6), *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 143 (entered into force July 18, 1978).

To the extent that non-state actors operate within the boundaries of a state that can exercise effective control, states can be encouraged to fulfill their own traditional obligations to control such actors within their borders. One interesting effect of the creation of the International Criminal Court (ICC)³⁹ has been to put pressure on states that are parties to the Rome Statute to implement domestic mechanisms to enforce international criminal law and to bring their own domestic prosecutions. This has the potential to expand the impact of the ICC well beyond its own prosecutions.

Corporations are one of the many complex forms of non-state actors. Many multinational corporations have wealth, power, global reach, and influence vastly exceeding that of many states. Indeed, some corporations engage in state-like control of significant portions of territory, like Shell in the Niger Delta. And yet, the international human rights obligations of corporations are not well defined. Professor Henkin's solution to this problem was to observe that the Universal Declaration of Human Rights applies to all entities in society, including corporations, and even including cyberspace. This is true. But binding international human rights obligations that are legally enforceable have not caught up with the Universal Declaration of Human Rights.⁴⁰ Corporations, at a minimum, are subject to the liability recognized by international law for individuals. But many corporations have vastly more power than individuals, and if responsibility for corporate actors under international law ended there, we would be looking at a vast accountability gap.

What are the most troubling aspects of the Military Commissions Act of 2006? Is this law likely to stand up in a democratically-controlled Congress?

We've already discussed the provisions of the MCA that purport to deny habeas corpus jurisdiction over any alien whom the President designates as an unlawful enemy combatant. But the MCA has many other problematic aspects. It purports to give the executive branch complete discretion to determine who is an unlawful enemy combatant.⁴¹ The MCA also allows the admission of evidence

39. Rome Statute of the International Criminal Court, art. 1, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

40. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 1, U.N. Doc. A/810 (1948).

41. MCA, *supra* note 29, at §3(a)(1), subch. 1, §§ 948a(1)(ii) & 948d(c).

obtained through coercion falling short of torture but which nevertheless is utterly unlawful under international humanitarian and human rights law.⁴² It allows convictions based on secret evidence.⁴³ [CITE]

The MCA erodes U.S. enforcement of international humanitarian law. Common Article 3 of the Geneva Conventions prohibits degrading treatment,⁴⁴ and U.S. military personnel can be prosecuted under the UCMJ for violating this. But the MCA eliminates criminal penalties for violations of Common Article 3 that constitute "degrading treatment or punishment."⁴⁵ In other words, we apparently created a carve-out for the CIA and other non-military personnel who engage in abusive actions that fall short of torture or cruel or inhuman treatment, in the very narrow way that the statute defines those terms. This is a significant backstep from the War Crimes Act of 1996,⁴⁶ which had been adopted to implement U.S. obligations under the Geneva Conventions. All of these provisions encourage further hair-splitting about the legal definition of torture and other forms of abuse. For basic global rule of law, it is also very unfortunate. Logically, the conclusion drawn abroad will be that these provisions were designed to tolerate abusive interrogation practices. And if the United States can do it, why can't everyone else?

Finally, in *Hamdan* the Supreme Court concluded that the President's military commissions would violate Common Article 3 by not observing basic principles of procedural fairness viewed as indispensable by the civilized world.⁴⁷ In a direct rejection of the *Hamdan* decision, the MCA states that the military commissions authorized by the statute comport with the obligations of Common Article 3. The statute then turns around and purports to prohibit the courts from considering international law in interpreting it,⁴⁸ despite the fact that supporters of the law claimed to preserve intact the United States' obligations under the Geneva Conventions. This reflects a very troubling attitude both toward the separation of powers and toward the United States' core international legal

42. MCA, *supra* note 29, at §3(a)(1), subch. 1, § 948r(d).

43. *Id.* at subch. 4, § 949d(f).

44. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

45. MCA, *supra* note 29, at § 6(c).

46. War Crimes Act of 1996, 18 U.S.C. § 2441 (2005).

47. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 at 6.

48. See MCA, *supra* note 29, at § 6(a)(2).

obligations.

Are these provisions likely to be changed by a democratically-controlled Congress? Senator Dodd has proposed legislation is that would eliminate most of these problems, but to date Congress has made no significant move toward adopting it.⁴⁹

Does U.S. immigration and asylum policy comport with international human rights law? How might U.S. policy be reformed to pursue a human rights agenda without damaging more strategic U.S. interests?

This is a huge agenda, and I will just touch on a few discrete aspects of the problem. Professor Henkin was the U.S. negotiator of the 1951 Refugee Convention, and there are various problems with the United States' implementation of that treaty. A personal peeve of mine is the Supreme Court's interpretation in *Sale v. Haitian Centers Council* that the Refugee Convention does not apply to U.S. actions on the high seas.⁵⁰ Apparently a multilateral treaty doesn't limit the U.S. in international waters for reasons of comity. But comity with whom? The net effect is that the U.S. can forcibly return bona fide asylum seekers to a land where they would suffer persecution. We also have an ongoing policy of differential treatment of Haitian and Cuban refugees—automatically granting permission to remain to Cubans who reach U.S. shores, and presumptively returning Haitians. The policy can be explained by our historical relationship with Cuba, but it smacks of discrimination.

Our current federal guest worker programs deny workers the right to change employers, which makes workers captive to their employers and violates basic international protections for migrant workers. Our constitutional rules regarding the government's power to expel or deny entry to aliens are based on late-nineteenth-century views of arbitrary governmental power that are inconsistent with contemporary international human rights and refugee law. Our system of employer sanctions creates plausible deniability for employers who hire undocumented aliens and places the full brunt of criminal enforcement on the aliens. Our asylum policy only very imperfectly implements our obligation not to return asylum seekers to a country where they will be tortured. The list of human rights

49. Restoring the Constitution Act of 2007, S.576, 110th Cong. (introduced by Sen. Dodd, Senior Member, S. Comm. on Foreign Rel., February 13, 2007).

50. *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

problems with our immigration and asylum policies could go on and on. Most of these are simply poor domestic policy choices that are unrelated to national security concerns.

Despite being a nation of immigrants, immigration law is not an area where the United States has a particularly admirable constitutional or human rights history. Immigration law is often made in times of domestic stress and fear, in response to pressure to keep immigrants out. But it is important to stress that a human rights agenda is in the national security interest of the United States. When the United States exercises international leadership in respect for human rights, it encourages other countries to do the same and thereby promotes both global human dignity and global security. On the other hand, flagrant human rights abuse by the United States only provides fodder for those who would threaten us.

On a more personal note, in this area we must always remember that Louis Henkin arrived at Ellis Island at age five with his widowed father and his siblings, as a Soviet immigrant from what is now Belarus. He was nearly excluded from the United States because he would not speak to the immigration officer. And yet think of the many gifts he has brought us. In devising a humane and effective immigration policy, we need to make sure that we do not exclude the Louis Henkins of the world, regardless of their class, their skin color, or their land of origin.