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Human Rights in the United States

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FOREWORD

HUMAN RIGHTS IN THE UNITED STATES

By Sarah Cleveland and Catherine Powell*

This year marks the tenth anniversary of the founding of the Human Rights Institute (HRI) at Columbia Law School. Appropriately, it also marks the sixtieth anniversary of the Universal Declaration of Human Rights, the foundational instrument of the modern international human rights regime.

When HRI was founded in 1998, it was established as a crossroads for human rights at Columbia, which would bridge theory and practice, human rights and constitutional rights, and law and other disciplines. From its inception, HRI has been a partner with the university-wide Center for the Study of Human Rights, which was established twenty years earlier as an interdisciplinary program to bring human rights scholarship into many academic fields. The Law School-based Institute was the brainchild of Professor Louis Henkin, who, as a founder of the university-wide program, recognized the need to train a new generation of human rights advocates, scholars, and teachers through scholarship regarding the *law* of human rights.

This special volume celebrates one of HRI's signature programs: "Human Rights in the United States." While the United States played a leading role in the creation and development of modern international organizations and human rights law regimes,¹

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1. Indeed, the United States was the primary driver behind the establishment of the United Nations system and the development of

and there has been a bi-partisan commitment to advancing human rights in U.S. foreign policy for many decades,² it has been less consistent in promoting international standards guaranteeing human rights as part of U.S. domestic law and policy. The Human Rights Institute was a path-breaker in recognizing that human rights do not involve merely scholarship and activism regarding what happens “out there,” but that human rights are implicated in domestic U.S. policies as well. This goal of affirming human rights at home was part of Henkin’s holistic vision of human rights as protected through a fluid regime of national, sub-national, and international instruments. To Henkin, constitutions have been every

contemporary treaties and institutional regimes to effectuate those treaties in both public and private international law. See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) (describing the history of the Universal Declaration of Human Rights with particular focus on Eleanor Roosevelt’s role as chair of the drafting commission); President Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), reprinted in *The Public Papers and Addresses of Franklin D. Roosevelt*, 663 (Samuel I. Rosenman ed., 1941) (paving the way for critical concepts in the Universal Declaration of Human Rights); Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 405, 415 (1979) (flagging the prominence of American constitutionalism in the development of international human rights); Natalie Kaufman, *Human Rights Treaties and the Senate* 93 (1990) (describing U.S. influence in shaping the drafting of the human rights covenants); Catherine Powell, *A Tale of Two Traditions: International Cooperation and American Exceptionalism*, in *U.S. Human Rights Policy, The Future of Human Rights: U.S. Policy for a New Era* (William F. Schulz ed., 2008) (noting the contradictions and tensions between the U.S. commitments to international cooperation and exceptionalism). For the leadership role played by U.S. advocacy groups, see Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* 30–57 (2003) (describing the role of U.S. nongovernmental organizations, including, in particular, African American and Jewish organizations in securing references to human rights in the U.N. Charter).

2. Louis Henkin, *Human Rights and United States Foreign Policy*, in *The Age of Rights* 65 (1990) (discussing the evolution of U.S. human rights policy); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *Yale J. Int’l L.* 1 (2001) (examining the United States’ use of economic sanctions to promote human rights policies abroad). On the bipartisan commitment to international organizations, see Stephen C. Schlesinger, *Act of Creation: The Founding of the United Nations* 62–63 (2003) (describing the bipartisan consensus at the founding of the United Nations); Jose E. Alvarez, *Multilateralism and Its Discontents*, 11 *Eur. J. Int’l L.* 393, 404 (2000) (stating that “[f]or some 35 years, within the United States, Republicans and Democrats alike adhered to a bipartisan consensus with respect to UN financing”).

bit as important as treaties. Human rights around the globe are typically protected through domestic law, and the U.S. Constitution and U.S. domestic statutes are no different. Indeed, the U.S. Constitution has a particularly intimate relationship to the international human rights movement, since U.S. constitutionalism featured centrally in the creation of the modern conception of human rights.

Therefore, the “Human Rights in the United States” program was established as a way to create new models of social justice, among other ways, by linking domestic and human rights advocates and scholars through the Institute’s “Bringing Human Rights Home Lawyers Network.” As the founding director and current faculty co-director of HRI, we are co-writing this foreword to celebrate the first ten years of HRI’s progress—particularly its work to bridge the international law of human rights and the domestic law of constitutional rights. In examining HRI’s mission to bring human rights home in the United States, we also examine anew the opportunities and challenges that we face in the broader movement for human rights.

When HRI was established, human rights law and institutions were in a stage of rapid development and expansion. The fall of the Berlin Wall had paved the way for greater international cooperation within the U.N. Security Council, including, for example, the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. In 1998, when the Institute was founded, the post-Cold War enthusiasm for human rights was near its peak. The treaty to ban landmines had been adopted the year before, breaking new ground in participative treaty drafting. The Rome Conference was putting finishing touches on the Statute founding the International Criminal Court, and Augusto Pinochet was arrested in London, breaking a taboo on prosecution of former heads of state and introducing the world to a new paradigm of universal jurisdiction for international crimes. Mary Robinson, the dynamic former president of Ireland, was bringing a new vision and energy to the position of U.N. High Commissioner for Human Rights. The 1990s also saw the United States finally embrace a number of foundational human rights treaties. The United States ratified the International Covenant on Civil and Political Rights in 1992, as well as the Convention Against Torture and the Convention to Eliminate All Forms of Racial Discrimination in 1994.

Then came the 2001 September 11th terror attacks on New York and Washington and the response to the threat of global terrorism that shook the foundations of the human rights movement. Suddenly, longstanding taboos, such as the prohibition on torture, returned to the forefront of serious policy debate. Rather than merely fulfilling its longstanding role as a “flying buttress” of the human rights community,³ the United States appeared to be affirmatively dismantling the international human rights system. President Bush withdrew the United States’ signature to the Rome Statute, and the U.S. government asserted sweeping claims that human rights treaties did not bind U.S. activities abroad, that human rights treaties did not apply in military contexts, and that conduct such as water boarding did not constitute torture. Unilateralism and hostility toward international law also found articulation in a pointed domestic debate over the appropriateness of citing international and foreign sources in construing the U.S. Constitution, even while the U.S. Supreme Court seemed newly open to considering international law in groundbreaking decisions protecting the rights of gays and lesbians and of juveniles on death row.⁴

In this new post-9/11 environment, the Institute’s work on human rights in the United States has proven more crucial than ever. The Institute’s U.S. human rights project has expanded into multiple project areas: promoting the implementation of U.S. treaty obligations through the development of domestic institutions and the enforcement of treaties in U.S. courts; protecting the human rights of immigrants; training lawyers and developing strategies for using the Inter-American human rights system to promote domestic policy change; and a project on national security and human rights. Although on the surface, many of the problems confronting the status of human rights in the United States appear to be new, the challenges faced by the Institute in bringing human rights home in

3. See Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in *Realizing Human Rights* 19 (Samantha Power & Graham T. Allison eds., 2000).

4. See *Roper v. Simmons*, 543 U.S. 551, 575–78 (2006) (citing international law prohibiting the imposition of the death penalty on child offenders); *Lawrence v. Texas*, 539 U.S. 558, 576 (noting the rejection of criminalization of homosexual sex by the European Court of Human Rights); Sarah H. Cleveland, *Our International Constitution* 31 *Yale J. Int’l L.* 1, 2–4 (2006) (describing judicial, academic, congressional, and public criticism of the use of international and foreign sources in constitutional analysis).

many ways are familiar. The Institute continues to take up the challenge of harmonizing U.S. law with international standards regarding the death penalty and life imprisonment of juveniles without parole. The Institute continues to press for the recognition of positive domestic governmental obligations to protect the populace from harm in a constitutional regime that was founded largely on eighteenth century concepts of negative rights. The Institute continues to work to educate U.S. students, lawyers, judges, and policy makers about the law and practice of human rights. In all of its project areas, the Institute works to synthesize scholarship and activism, to develop capacity for human rights advocacy within the legal community, and to devise new strategies for securing human rights compliance.

Nor has the response to global terrorism wholly derailed the human rights movement. Areas such as business responsibility for human rights violations, respect for women's human rights, and the global protection of economic and social rights have developed apace, largely unaffected by the post-9/11 environment. As HRI's founding chair, Louis Henkin observed:

I don't think the age of terrorism has replaced the age of rights. We are an age of rights but we're subject to the consequences of terrorism. Keep in your mind that terrorism has never been defined. It's not a word in international law—that I know of. So we are in the age of rights subject to terrorism, not the age of terrorism, I don't accept the concept. And I think those of us that care about rights have to keep the idea of rights alive and kicking, and to keep whatever is done in opposition to terrorism limited to what is necessary and not as an excuse for getting rid of the U.N. etc. . . . [W]e expect the age of rights to take account of terrorism, but not to bow to it.⁵

The Human Rights Institute looks forward to stepping boldly into its second decade of promoting the age of rights. Several decades before launching the Institute, Louis Henkin worked for the U.S. State Department on U.N. affairs.⁶ Upon graduating from law school

5. Catherine Powell, *Louis Henkin and Human Rights: A New Deal at Home and Abroad* (Oral History of Louis Henkin's life), in *Bringing Human Rights Home*, 69–70 (Catherine Albisa, Martha Davis, Cynthia Soohoo, eds., 2008).

6. *Id.* at 61–62.

at the close of World War II, he thought about a career in public service, having been enamored by the New Deal period in American politics. A friend told him, "You wanna work for The New Deal, you got to work for the U.N., because that's the [new] New Deal. That's the New Deal of the post war period."⁷ As Henkin's example demonstrates, U.S. leadership in international law and institutions remains part of the nation's proud tradition. Indeed, America's commitment to international human rights law promotes not only the values we hold dear, but also U.S. national interests, at home as well as abroad.

7. *Id.* at 61.