IN MEMORIAM

Louis Henkin (1917–2010)

*By Lori Fisler Damrosch**

Louis Henkin died in New York City on October 14, 2010, a few weeks short of his ninety-third birthday. He was in a class by himself at the intersection of international law, international politics, and the constitutional law of foreign relations in the second half of the twentieth century and the first years of the new millennium.

I. Early Years

Eliezer Henkin was born on November 11, 1917, in the village of Smolyani in what is now Belarus. His father, Yosef Eliyahu Henkin, was a rabbi; his mother died when he was two years old, leaving him and five older siblings to be raised by a stepmother. In 1923 the family arrived at Ellis Island and settled on the Lower East Side of Manhattan, where young Eliezer became Louie. He spoke Yiddish at home, studied in Hebrew at the Rabbi Jacob Joseph School, and learned English on the streets of New York. In 1933 he entered Yeshiva University, receiving his AB in mathematics in 1937. He then matriculated at Harvard Law School, where he was elected to the *Harvard Law Review* and received the LLB in 1940. Like others of his generation who shaped the postwar field of international law in the United States,[1] Henkin did not set out to be an international lawyer and never took a course in the subject.

Henkin returned to New York City in 1940 and took on a clerkship with Judge Learned Hand of the United States Court of Appeals for the Second Circuit, widely viewed as "the greatest living Judge of the English speaking world."[2] The close rapport between young "LH" and his mentor "LH" produced a flourishing correspondence, much of which is preserved in the Hand archive at Harvard Law School.[3] Of particular interest are letters written by Henkin after he was drafted in June 1941 and sent to boot camp and then to North Africa, Sicily, Italy, France, and Germany.[4] Illustrative of his empathy for those who had suffered the ravages of war is this dispatch from Italy in March of 1944:

* Co-Editor in Chief.

[1] *See Living History Interview with Abram Chayes*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 459, 481 (1997); Lori Fisler Damrosch, *Oscar Schachter (1915–2003)*, 98 AJIL 35, 35 n.4 (2004).

[2] Letter from Louis Henkin to Learned Hand (Nov. 17, 1944), *quoted in* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 552 (1994).

[3] For references to this correspondence and selected quotations, see GUNTHER, *supra* note 2, at 535–38, 552, 682, 762 n.133. *See also infra* note 5.

[4] *See* GUNTHER, *supra* note 2, at 762 n.133.

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> The front has frozen me near a tiny mountain village for some weeks now. But soon I expect to go up to the mountain again (I've changed from Surveying to Artillery Observation). And I do so with definite regret, for this tiny spot will read in capital letters on my own map of the world. I should know better by now than to make friendships that must be severed, yet everywhere I allow myself to become attached to people, everywhere parting becomes "all we need of hell." There's a young doctor here, an intelligent man, who's taken my hand and led me into the village bloodstream. There I found great sadness, because this particular place had the enemy too much and too long with them—and now I might say the same for us. There's not a family that hasn't lost a member to a shell, or to kidnaping by the enemy; their homes are destroyed, the economy does not exist. They stand in fear before the smallest and meanest of allied soldiers, must succumb to indignities brought on by poverty and fear of us. Ordinary suffering of unknown nature to anonymous human beings weighs on us like a dull inexplicable weight. But these people are known and alive to me, and I stand helplessly by while they struggle with starvation, with the latest AmGot [Allied Military Government for Occupied Territories] bungle, with an atrocity by some allied soldier, all items that point accusingly at my comparative ease and wealth and freedom from fear.[5]

From Italy he was sent on to France, where near Toulon in 1944 his unit of thirteen men encountered three German officers. Using Yiddish, he brought about the surrender of their seventy-eight troops; for this act of valor in the face of the enemy, he was awarded the Silver Star.[6]

After the war, Henkin proceeded to Washington where he clerked for Associate Justice Felix Frankfurter in the 1946–1947 Supreme Court term. Between leaving the Supreme Court and taking up full-time employment with the U.S. Department of State, Henkin briefly served as a consultant with the United Nations Legal Department in 1947 and 1948. It was at this time that he began a collegial relationship with Oscar Schachter (then serving in the newly established UN General Legal Division), which would continue for more than fifty-five years until Schachter's death in 2003.[7] Together they successfully argued that the United Nations and its secretary-general were immune from a taxpayer's suit seeking to block the establishment of the UN headquarters in New York City.[8]

During his years as a foreign affairs officer in the International Organizations Bureau of the State Department (1948–1956), Henkin was an adviser to the U.S. delegation to the UN Economic and Social Council in 1950, U.S. representative to the Committee on Refugees and Stateless Persons in the same year, a member of the U.S. delegation to the UN General Assembly between 1950 and 1953, and a member of the U.S. delegation to the Geneva Conference on Korea in 1954. In this period he represented the United States in meetings of the ad hoc committee for negotiations on what would become the 1951 Geneva Convention on the Status

[5] Letter from Henkin to Hand (Mar. 9, 1944). I am grateful to Constance Jordan, Learned Hand's granddaughter, for providing photocopies of this and other unpublished wartime letters from Henkin to Hand, and to the Henkin family for permitting quotation. For another extract, see Lori Fisler Damrosch, *Louis Henkin: Courage and Convictions*, 49 COLUM. J. TRANSNAT'L L. 5, 5–6 (2010).

[6] *See* William Grimes, *Louis Henkin, 92, Leader in Field of Human Rights Law*, N.Y. TIMES, Oct. 17, 2010, at A28.

[7] They were colleagues at Columbia after 1975, co-editors in chief of this *Journal*, and collaborators on the *Restatement (Third) of the Foreign Relations Law of the United States*.

[8] *See* Louis Henkin, *In Memory of Oscar Schachter*, 104 COLUM. L. REV. 554 (2004) (citing Curran v. City of New York, 77 N.Y.S.2d 206, 213 (Sup. Ct. 1947), *aff'd*, 88 N.Y.S.2d 924 (App. Div. 1949)).

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of Refugees;[9] a record of his statements can be found in its *travaux préparatoires*.[10] Later in his life he would return to problems of subsequent generations of refugees, including the Cuban and Haitian "boat people" of the 1980s and 1990s.

In 1956 Henkin took leave from the State Department to spend a year at Columbia as a lecturer in law and associate director of the Legislative Drafting Research Fund. From there he moved into a junior faculty position at the University of Pennsylvania Law School in 1957.

In February 1960 in Philadelphia, he met Alice Hartman, a graduate of the Yale Law School. A whirlwind courtship led to marriage on June 19, 1960, and a fifty-year partnership.

II. ACADEMIC CAREER

Henkin spent five years on the faculty of the University of Pennsylvania, returning in 1962 to Columbia, where he became Hamilton Fish Professor of International Law and Diplomacy in 1963, Harlan Fiske Stone Professor of Constitutional Law in 1978, University Professor in 1979, and University Professor Emeritus in 1988. He regularly taught constitutional law and human rights in the law school and for most of his career also gave a course in international law at Columbia's School of International and Public Affairs. He authored and edited dozens of books and hundreds of articles,[11] but the measure of his scholarship lies in its enduring influence, not just its quantity.[12] Main themes from his scholarship are highlighted here.

Treaties in Constitutional Context

Henkin's choice of subject matter for his first scholarly article built naturally on his State Department treaty experience and also presaged themes that would occupy him throughout his career.[13] In the midst of the campaign by Senator John W. Bricker to amend the Constitution to restrict the treaty-making powers of the federal government, Henkin took up an aspect of the power of the Senate to condition its consent to treaties, arising from its attachment of a reservation to the Niagara River Treaty with Canada concerning the right to provide by

[9] Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150.

[10] For these interventions, see the summary records of the Ad Hoc Committee on Statelessness and Related Problems, meeting at Lake Success, N.Y., January 16–26, 1950, UN Docs. E/AC.32/SR.1–13 (Jan. 1950), and at Geneva, Switzerland, August 14–25, 1950, UN Docs. E/AC.32/SR.33–43 (Sept. 1950), *reprinted in* THE COLLECTED TRAVAUX PRÉPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES (Alex Takkenberg & Christopher C. Tahbaz eds., 2d ed. 1989). I am grateful to Linda K. Kerber, whose work-in-progress on statelessness (presented at the Columbia University Law and History Workshop in October 2010) draws on and quotes from Henkin's statements in these negotiations.

[11] For a bibliography of selected publications and presentations, see POLITICS, VALUES, AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY: ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN 461 (Jonathan I. Charney, Donald K. Anton, & Mary Ellen O'Connell eds., 1997) [hereinafter Festschrift]. The Festschrift, presented on the occasion of his eightieth birthday, contains essays addressing the enduring themes of Henkin's work—questions of theory, constitutional questions, human rights inquiries, ocean law, and use of force. The essays were also published under the same title in a special double-issue symposium in 36 COLUM. J. TRANSNAT'L L. 3 (1997).

[12] A tribute in a special issue of the *Columbia Human Rights Law Review* on the occasion of Henkin's fiftieth year of service at Columbia observed that references to his work appear in at least 20 Supreme Court opinions and 120 federal appellate opinions. *Foreword: Human Rights and the "War on Terror,"* 38 COLUM. HUM. RTS. L. REV. 459, 460 (2007).

[13] *See* Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151 (1956); *see also* Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959) [hereinafter Henkin, *Law of the Land*].

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act of Congress for the redevelopment of the U.S. share of the waters allocated by the treaty. In litigation brought by the Power Authority of New York, the reservation had been challenged as beyond the scope of the Senate's constitutional power. Two eminent Columbia law professors—Philip C. Jessup and Oliver J. Lissitzyn[14]—had supplied a legal opinion asserting that the reservation was in effect a constitutional nullity because it addressed a strictly "domestic" matter in which Canada could have no interest. Henkin refuted this view by closely examining the premises underlying the Senate's role in the treaty process, as well as a significant number of prior instances in which provisions of U.S. treaties had addressed matters internal to the United States.[15]

In maintaining that the Niagara treaty reservation was valid and within the Senate's constitutional power, Henkin argued for a broad, but not unlimited, power for the Senate to condition its consent to treaties. Significantly, he underscored that the Senate's stance explicitly deferred to Congress as a whole, acting through fully democratic processes, to determine how to exploit the resources allocated to the United States by the treaty. The Niagara treaty condition could thus be upheld as compatible with a proper understanding of the Senate's constitutional role as one actor in a complex constitutional democracy. The ultimate limits of the treaty-making power, or of the power of the Senate to condition its consent, did not have to be determined in the Niagara case and could be left for another day.[16]

Arms Control

In the same period, Jessup encouraged Henkin to undertake a project on arms control, which led to his first book, *Arms Control and Inspection in American Law.*[17] This study discusses in the specific context of nuclear weapons control some of the issues of scope and limitations on treaties that he had begun examining in his article on the treaty makers and would later explore in broader contexts in *Foreign Affairs and the Constitution.*[18] He offered persuasive answers to the kinds of objections that critics of potential disarmament agreements typically tried to frame as constitutional obstacles, showing that there should be little, if any, serious concern as a matter of constitutional principle.[19]

[14] Jessup was the Hamilton Fish Professor of International Law and Diplomacy and Lissitzyn was Associate Professor of Public Law, while Henkin was then a lecturer in law at Columbia.

[15] In this respect the article foreshadows the position articulated in Henkin's later writings that a "domestic jurisdiction" limitation has no application to the kinds of treaties that the Bricker movement opposed. *See, e.g.,* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 196–98 (2d ed. 1996) [hereinafter HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION]; *see also* Louis Henkin, *"International Concern" and the Treaty Power of the United States,* 63 AJIL 272 (1969) [hereinafter Henkin, *International Concern*].

[16] For later explorations, see HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, *supra* note 15, at 180–82; LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 52–57, 62–64 (1990). *See also* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker,* 89 AJIL 341, 347 n.26 (1995) (resisting an interpretation of his 1956 article in relation to conditions attached to human rights treaties in the 1980s and 1990s: "If what I wrote might be interpreted as supporting a general principle that would allow the President, or the Senate, to declare all treaties non-self-executing, that is not my opinion.").

[17] LOUIS HENKIN, ARMS CONTROL AND INSPECTION IN AMERICAN LAW (1958). Jessup's foreword commented on Henkin's unique combination of experiences and skills relevant to the project, from both his diplomatic service and his clerkships. *Id.* at ix–x.

[18] *See infra* text at notes 40–45.

[19] Reviewing Henkin's debut volume in these pages, James N. Hyde found it "literate, lean and readable, mercifully free of jargon"; it "puts him among those from whom we can expect future insights." James N. Hyde, Book Review, 54 AJIL 219, 220 (1960).

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The legal dimensions of nuclear arms control would continue to engage Henkin throughout his career, on the planes of both constitutional and international law. In frequent papers on disarmament and on particular arms control regimes, he raised his voice in vigorous defense of restraining the arms race through law rather than raw power.[20] When controversy broke out over a reinterpretation of the 1972 Anti-ballistic Missile Treaty with the Soviet Union (advanced by the Reagan administration in 1985 in an effort to allow development of exotic technologies previously considered to have been prohibited), Henkin argued strenuously that by virtue of the Senate's role in the treaty process, the treaty could not be given a new interpretation at variance with the one that the Senate had understood on the basis of executive representations made in connection with advice and consent to ratification.[21] A contrary interpretation of an arms control treaty—or any other—would be incompatible with the Senate's treaty-approval function in our constitutional democracy.[22]

International Law in International Politics

In the 1960s, at the height of the Cold War, Henkin turned his attention to the influence of international law in the world of international politics. As he observed, diplomats and political scientists tended to disparage international law and to deny its relevance to a realistic assessment of national interests; international lawyers had not adequately responded to the skeptics with explanations of whether and how international law actually works to influence state conduct. In *How Nations Behave*, Henkin rose to that challenge.[23] The thesis of this now-classic study is that international law matters:

> [I]nternational law does far better than its reputation. . . . I wish to show that cynical "realism" about international law *is* unrealistic, that it does not reflect the facts of international life: law *is* a major force in international affairs; nations rely on it, invoke it, observe and are influenced by it in every aspect of their foreign relations.[24]

Pursuing what he called a "psychological" study of state behavior—in particular of temptations toward serious (even "criminal") violations of international law—he sought to understand when and why states do comply with legal obligations.[25] Compliance, he asserted, is routine and violations exceptional: "It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*"[26] In a series of chapters exploring the interrelationship of law and politics, Henkin pointed out the many reasons why states—even powerful ones—find it in their long-range interest to conform their

[20] *See, e.g.*, Louis Henkin, *The Sea-Bed Arms Treaty—One Small Step More*, 10 COLUM. J. TRANSNAT'L L. 61 (1971). Restraint on nuclear weapons through law is likewise a recurring theme in HOW NATIONS BEHAVE, *infra* note 23, at 141–45, 149, 283–85.

[21] HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS, *supra* note 16, at 52–57 (also addressing constitutional aspects of Senate's conditions to Strategic Arms Limitation Treaty and Intermediate Nuclear Forces Treaty); *see also The ABM Treaty and the Constitution: Joint Hearings Before the Senate Comms. on Foreign Relations and on the Judiciary*, 100th Cong. 81 (1987) (testimony of Prof. Louis Henkin).

[22] *See* Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406 (1989).

[23] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (1st ed. 1968; 2d ed. 1979). All references here are to the second edition.

[24] *Id.* at 4.

[25] *Id.* at 5.

[26] *Id.* at 47.

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behavior to the requirements of international law, even when short-term interests might press them in a different direction. The argument is not that international law necessarily prevails—its limitations are duly acknowledged and investigated—but that even in time of crisis it exerts a restraining influence, though the restraints are sometimes overborne. He illustrated his thesis with close examinations of several of the most dangerous crises of the era, in which he was careful not to overstate the influence of international law but, rather, to present a balanced account of shortcomings as well as successes.[27]

How Nations Behave set the terms of debate over the "reality" of international law in international affairs for at least four decades. It remains a central reference point for both theoretical and empirical inquiries, from diverse disciplinary vantage points, into whether international law actually motivates states to behave differently than they would in the absence of law.

Henkin made the political dimension of international law a central theme in his teaching of international law and in his volumes addressing the field as a whole. In 1980 Henkin and Columbia colleagues issued a revised edition of the casebook on international law that Wolfgang Friedmann and colleagues had published a decade earlier,[28] known then and now as the "Columbia book" and for at least two decades as the "Henkin book," in which the politics of international law occupies a prominent place.[29] His general course delivered at the Hague Academy of International Law in 1989 likewise elaborated on the reciprocal influence of international law and its political environment.[30] "First, law is politics," he declared.[31] "Law is made by political actors, through political procedures, for political ends."[32] To acknowledge the relationship of international law and international politics does not depreciate the role of law, which "shapes (and sometimes determines) how nations behave."[33]

Oceans: Resources and Rights

At the same time that he was developing his ideas for *How Nations Behave*, Henkin began examining the need for new law and institutions to address emerging claims to control areas of the sea and to exploit the resources of the sea and seabed. An early result was a monograph, *Law for the Sea's Mineral Resources*,[34] which led to a steady stream of papers, presentations, and congressional testimony on law of the sea topics, as well as a new chapter, "Remaking the Law

[27] Part Four: The Law in Operation includes four case studies: Suez: The Law Works, Then Fails but Is Vindicated; The Law Fails: The Case of Adolf Eichmann; The Law's Other Influences: The Cuba Quarantine; and Vietnam: The Uncertain Trumpet of Uncertain Law. *See id.* at viii.

[28] CASES AND MATERIALS ON INTERNATIONAL LAW (Wolfgang G. Friedmann et al. eds., 1969).

[29] INTERNATIONAL LAW: CASES AND MATERIALS (Louis Henkin et al. eds., 1st ed. 1980, 2d ed. 1987, 3d ed. 1993). For subsequent editions, Henkin enlisted younger colleagues in the Columbia tradition. *See* INTERNATIONAL LAW: CASES AND MATERIALS (Lori F. Damrosch et al. eds., 4th ed. 2001, 5th ed. 2009). On the Columbia scholars and their liberal internationalist orientation, see MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 477 (2001).

[30] Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 9 (1989 IV); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES (1995) [hereinafter HENKIN, POLITICS AND VALUES] (updated and revised version of the lectures).

[31] HENKIN, POLITICS AND VALUES, *supra* note 30, at 4.

[32] *Id.*

[33] *Id.*

[34] LOUIS HENKIN, LAW FOR THE SEA'S MINERAL RESOURCES (1968).

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of the Sea," in the second edition of *How Nations Behave*.[35] The law of the sea engaged his curiosity on many levels, including the complex processes by which states pursue their policy objectives through law and the institutional frameworks in which international law is made and implemented and international disputes resolved. His prior experiences in military and diplomatic service surely heightened his awareness of the security dimension of national interests at stake in the law of the sea and the desirability of achieving a negotiated resolution of the competing demands of different potential users of the sea. He devoted particular attention to specific problems involving national and international policy in rapid flux at the time, among them the expansion of jurisdictional claims in the aftermath of President Truman's continental shelf proclamation of 1945 and the design of an international regime for exploiting mineral resources in the area beyond national jurisdiction. His proposals in that regard foreshadowed solutions that would ultimately be adopted in the negotiations at the Third UN Conference on the Law of the Sea leading to the 1982 Convention on the Law of the Sea.[36] Henkin's steadfast commitment to multilateral solutions to law of the sea problems is evident in his criticism of unilateralism prior to the convening of the third UN law of the sea conference, as well as in his efforts after the conference, as chairman of the Panel on the Law of Ocean Uses, to promote adherence to the Convention on the Law of the Sea by the United States and other nations.[37]

Not incidentally, Henkin was also drawn to law of the sea issues in relation to the constitutional framework for addressing them in U.S. law. Among other questions, he was concerned with the respective roles of the political branches of the federal government in setting national policy toward the oceans, with problems of federalism regarding the overlapping competences of the national and state governments in coastal zones,[38] and with judicial control of acts of governmental power exercised at sea. Significantly, he also called for the application of constitutional principles to ensure protection of the rights of asylum seekers apprehended on the seas en route to U.S. territory.[39]

Foreign Affairs and Constitutionalism

Building on his practical experience as a federal law clerk and diplomat and on his accumulating scholarship at the intersection of constitutional and international law, Henkin undertook and accomplished what no scholar had previously essayed—a comprehensive study of the

[35] HENKIN, HOW NATIONS BEHAVE, *supra* note 23, at 212–27. For additional references, see the bibliography in the Henkin Festschrift, *supra* note 11; the contributions by five colleagues in the law of the sea field credit his pioneering work in this area.

[36] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397.

[37] *See* Louis Henkin, *Arctic Anti-pollution: Does Canada Make—or Break—International Law?*, 65 AJIL 131 (1971); Panel on the Law of Ocean Uses (Bernard H. Oxman, Rapporteur), *United States Interests in the Law of the Sea Convention*, 88 AJIL 167, 178 n.* (1994).

[38] His interests in the constitutional and international law aspects of the law of the sea came together in his expert testimony to the special master in a dispute between the federal government and certain states (successors to the original thirteen colonies plus Florida) over rights to the offshore oil and gas resources in submerged lands, which reached the Supreme Court under its original jurisdiction in the 1970s and resulted in a judgment upholding the federal position. *See* United States v. Maine, 420 U.S. 515 (1975). I am grateful to Bruce Rashkow for drawing my attention to Henkin's role as expert for the United States in this case (in which Jessup was on the opposite side).

[39] *See, e.g.*, Louis Henkin, *The Constitution at Sea*, 36 MAINE L. REV. 201 (1984); *see also* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985) (calling for constitutional safeguards in Coast Guard's interdiction of boats carrying Haitian refugees).

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constitutional law of U.S. foreign relations.[40] *Foreign Affairs and the Constitution* begins with the constitutional authority for the exercise of foreign relations powers by the federal government, as derived not only from explicit texts—which are incomplete, ambiguous, or silent on many aspects of the powers needed for effective foreign relations—but also from nontextual theories, such as Justice Sutherland's theory of external sovereignty laid out in the *Curtiss-Wright* case.[41] It then takes up the powers of the president and Congress, as they are expressed (elliptically) in constitutional text and have evolved in two centuries of actions and interactions of the political branches. It further addresses the role of courts in foreign affairs, with particular attention to judicially created doctrines of deferring to the political branches in the exercise of their foreign relations responsibilities,[42] and examines the continuing significance of the states in a federal system where most foreign affairs authorities are exercised at the national level. It examines cooperation with other nations under the Constitution in chapters dealing with treaties and executive agreements and with constitutional issues involving international law and participation in international organizations.[43] Finally, it considers constitutional limitations deriving from the Bill of Rights and other constitutional doctrines for the protection of individual rights.

Foreign Affairs and the Constitution is not just an indispensable compendium of case law on the conduct of U.S. foreign relations—though it is indeed that. Above and beyond its doctrinal exposition, it reflects its author's lifelong commitment to visions of constitutionalism and the rule of law in which no governmental power can be exercised free of constitutional restraint and the courts are the ultimate guardians of individual rights.[44] It likewise embodies a philosophy of constitutional meaning according to which the Constitution should be given a dynamic interpretation to meet conditions that the framers could never have foreseen. In response to those who would find constitutional obstacles to participation by the United States in novel forms of international organization such as an international criminal court, Henkin wrote:

> The Framers may not have anticipated, or even conceived of, international organizations and 'international governance'. But even as conceived, surely as it has developed, the Constitution, I believe, lodges faith in the wisdom of the people and their representatives. The Constitution need not be interpreted to be a straitjacket making it impossible for the United States to participate in the affairs of its times and to respond to new needs by new means and new remedies.[45]

[40] HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, *supra* note 15. The first edition of this work was published in 1972. The second edition not only brings the volume up to date but also makes certain significant changes of organization, emphasis, and even content. References here are to the second edition.

[41] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), critiqued by Henkin in FOREIGN AFFAIRS AND THE CONSTITUTION at 16–22.

[42] For treatments of these themes in significant articles, see, for example, Louis Henkin, *Viet-Nam in the Courts of the United States: "Political Questions,"* 63 AJIL 284 (1969); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); *see also* Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805 (1964); Louis Henkin, Comments, *in Act of State:* Sabbatino *in the Courts and in Congress*, 3 COLUM. J. TRANSNAT'L L. 99, 107 (1963–64); Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967).

[43] On the place of international law in the U.S. legal system, see also Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

[44] For related work urging the courts to take these responsibilities seriously, see, for example, Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987).

[45] HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, *supra* note 15, at 254.

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Especially in the second edition (published in the Constitution's third century and looking ahead to the new millennium), Henkin advanced a forward-looking vision of dynamic constitutionalism.

In other scholarship developing the main themes of *Foreign Affairs and the Constitution* as propositions not just about U.S. constitutional law but about constitutionalism more generally, Henkin explored war powers, treaties, and the protection of individual rights against claims of national security exigencies.[46] He also promoted and contributed to scholarship examining the influence of U.S. constitutional ideas in other societies.[47]

Human Rights

Henkin began writing explicitly on human rights topics no later than the mid-1960s,[48] and by the early 1970s he had made human rights a central focus of his scholarship. Already, as noted above, he had staked out positions on fundamental questions at the intersection of the constitutional and international legal orders that underpinned his positions on human rights treaty making and implementation of international human rights law in the U.S. legal order. He elaborated these more fully in a series of articles and book chapters of the 1970s and 1980s and then in several books and edited volumes on human rights themes.[49] He also reached out to colleagues to collaborate on edited volumes concerning human rights from diverse disciplinary standpoints and in different parts of the world.[50]

Henkin began teaching human rights courses in the early 1970s and soon was engaged in interdisciplinary collaboration with colleagues at Columbia who specialized in philosophy, political science, social work, history, and other fields. These endeavors led to the establishment at Columbia in 1978 of the Center (now Institute) for the Study of Human Rights, which has spearheaded curricular innovation and research on human rights throughout the university and offered training programs for human rights advocates from every part of the world. As a complementary initiative, Henkin was instrumental in creating the Human Rights Institute at Columbia Law School in 1998. He devised his own teaching materials for a foundational course in human rights, which he then developed with colleagues into a course book.[51] Unique among teaching texts in the field, *Human Rights* takes what Henkin termed a "holistic" perspective, beginning with the philosophical underpinnings of the human rights idea, moving to human rights in the national law of the United States, and then turning to international

[46] *See* HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS, *supra* note 16.

[47] CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990).

[48] *See* Louis Henkin, *The United Nations and Human Rights*, 19 INT'L ORG. 504 (1965). Implicitly, he had begun addressing the constitutional basis for implementing internationally protected rights in U.S. law with his early articles on treaty making and lawmaking. *See* Henkin, *Law of the Land*, *supra* note 13, at 922–23 (arguing for expansive treaty-making and lawmaking powers to give effect to international human rights norms, such as the prohibition on genocide); *see also* Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012 (1968); Henkin, *International Concern*, *supra* note 15.

[49] *See, e.g.*, LOUIS HENKIN, THE RIGHTS OF MAN TODAY (1978); THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (Louis Henkin ed., 1981); LOUIS HENKIN, THE AGE OF RIGHTS (1989); *see also* HENKIN, HOW NATIONS BEHAVE, *supra* note 23, at xiv, 228–39 (expanded treatment of human rights in second edition).

[50] *See, e.g.*, HUMAN RIGHTS IN CONTEMPORARY CHINA (R. Randle Edwards, Louis Henkin, & Andrew J. Nathan eds., 1986).

[51] HUMAN RIGHTS (Louis Henkin et al. eds., 1st ed. 1999, 2d ed. 2009).

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human rights and to comparisons of selected rights in different legal systems. Students are challenged to think deeply about the meaning of human rights through history and in different cultural contexts, as a predicate for understanding the methods for their realization through law.

In the world outside the classroom, Henkin was one of the leading figures of the international human rights movement of the late twentieth century. When the Lawyers Committee for Human Rights (now Human Rights First) was established in 1978, he became a founding director and served on its board for three decades. He was elected to the UN Human Rights Committee in 1999 to the vacancy created by the resignation of Thomas Buergenthal and served through the end of 2002. In 2001 he received the Goler Teal Butcher Medal from the American Society of International Law for outstanding contributions to the development and effective realization of international human rights law.[52]

Henkin continued teaching human rights and related subjects through 2007, in later years with the assistance of colleagues whom he had inspired in the field. The establishment of the Louis Henkin Professorship of Human and Constitutional Rights at Columbia carries his legacy forward.

III. *RESTATEMENT OF FOREIGN RELATIONS LAW*

From 1979 through the mid-1980s, Henkin served as chief reporter for the project of the American Law Institute (ALI) to revise the *Restatement of the Foreign Relations Law of the United States.*[53] This collaborative work, which involved three associate reporters and an advisory panel with both U.S. and international membership,[54] consisted not merely of updating the previous *Restatement* (published in 1965) in light of intervening developments in international and domestic law, but also of rethinking and to some extent even reconceptualizing the entire field of foreign relations law. Much of that reconceptualization bears the distinct imprint of Henkin's views on international law as *law*;[55] on the constitutional framework for the foreign relations of the United States and the place of law in U.S. foreign policy, as evidenced in *Foreign Affairs and the Constitution* and other works; and on the influence of the human rights movement on international law and U.S. foreign relations law, along lines that Henkin promoted in his own writings.[56] As the introduction to the final product observes,[57] the reporters for the *Restatement (Third)* claimed "significant change" from the previous *Restatement* in the domestic component of U.S. foreign relations law, involving "some redistribution of power among

[52] For tributes focusing on his human rights legacy, see the symposium issue of the COLUMBIA HUMAN RIGHTS LAW REVIEW, note 12 *supra.*

[53] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT].

[54] The associate reporters were Andreas F. Lowenfeld, Louis B. Sohn, and Detlev F. Vagts. I have benefited from communications with the surviving reporters about their experience working with Henkin.

[55] The *Restatement* declares that international law is "law like other law." 1 RESTATEMENT, *supra* note 53, pt. I, ch. 1, intro. note, at 17.

[56] The law of human rights was identified as one of the areas "not covered, or addressed only lightly, in the previous Restatement." *Id.*, Introduction, at 3. The reporters' notes to the *Restatement (Third)* explain the more capacious definition of international law in the new work by comparison to the *Restatement (Second)*: "international law has ceased to apply exclusively to states and international organizations and now deals also with their relations with individuals and juridical persons." *Id.*, §101 reporters' note 1.

[57] As the work proceeded, the ALI published the reporters' drafts for comment and discussion and the drafts were debated at sessions of the ALI in the mid-1980s. The final version was adopted (with some modifications) by the institute in 1986 and published in 1987.

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the three branches of government" and "some increased protection for the rights of the individual,"[58] which mitigated the tendency in prior periods for courts to defer to governmental and especially executive claims of foreign affairs authority.

Controversies over the formulation of certain aspects of the *Restatement* attracted considerable attention at the time and have been discussed extensively in this *Journal* and elsewhere in the literature.[59] The most contentious issues included the treatment of jurisdiction (notably the proposition advanced by the reporters that a requirement of reasonableness in the exercise of jurisdiction had taken hold in international law) and expropriation (especially the standard of compensation for expropriated property), but there were also other hotly debated points, including, but not limited to, the relationship of customary international law to federal statutory law[60] and the act of state doctrine.[61]

After several years of deliberation at ALI annual meetings and certain significant reformulations in relation to these and other contested points, the work was poised for adoption at the 1985 ALI session. Instead, acting in response to a joint request by the acting secretary of state and the attorney general, the ALI in plenary session approved the recommendation of its council to postpone action for one year, during which time the reporters were asked to reconsider certain aspects of the draft in relation to the government's stated concerns. In a statement after the vote, Henkin expressed his regret that the council had acceded to the government's demand for a postponement but agreed "to cooperate in a common effort" to bring the work to completion. At the same time, in response to the campaign for a postponement, which, in the view of the reporters, "was, to put it mildly, unwarranted and irresponsible, and I regret to say not without misstatements and slander," Henkin went on record to stress that the reporters understood their responsibility to be to produce a text representing their best independent judgment:

> Let me emphasize as firmly as I know how that the integrity of the work and the usefulness of the product depend on our independence, as well as on the appearance of it. Nobody abroad, and no judge here, will—or should—pay attention to what we say if we are merely a handmaiden or a mouthpiece of the United States Government.[62]

In the end, at the 1986 session, where ALI director Geoffrey Hazard commended the reporters, "and particularly the Chief Reporter, for their forbearance, for their patience, and their substantive flexibility of mind," the reporters' final draft (with modest changes) was unanimously approved.[63] After the applause, to which Henkin responded, "Thank you, but no encores," Hazard presented "a small token of our special appreciation" to the chief reporter—a certificate

[58] 1 RESTATEMENT, *supra* note 53, Introduction, at 4.

[59] *See, e.g.*, Louis Henkin, *Restatement of the Foreign Relations Law of the United States (Revised)*, 74 AJIL 954 (1980); Louis Henkin, *Restatement of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 2*, 75 AJIL 987 (1981); *see also* Louis Henkin, *The Draft Restatement of the Foreign Relations Law of the United States (Revised)*, 76 ASIL PROC. 184 (1982); Louis Henkin, Remarks, *in The Revised Draft Restatement of the Foreign Relations Law of the United States and Customary International Law*, 79 ASIL PROC. 73, 92–94 (1985); *Special Review Essays: The* Restatement (Third) of the Foreign Relations Law of the United States, 14 YALE J. INT'L L. 433 (1989).

[60] The reporters put forward a position on the possible overriding of a federal statute by customary international law, which followed Henkin's own views as articulated in other writings of approximately the same period, *see, e.g.*, Henkin, *supra* note 44, but was not embraced by the institute in the eventual text. *See* 62 ALI PROC. 374, 391–92 (1985).

[61] 63 ALI PROC. 90, 122–24 (1986).

[62] 62 ALI PROC., *supra* note 60, at 385, 387–88.

[63] 63 ALI PROC., *supra* note 61, at 91, 141.

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of shares in the Barcelona Traction company. Henkin replied, "Thank you very much. I will build my portfolio on it."[64]

The influence of Henkin's *Restatement* cannot be overstated. According to Justice Ruth Bader Ginsburg in a tribute to Henkin in 2007, it had been cited by the U.S. Supreme Court in 18 opinions and by the courts of appeals in more than 250: those numbers have continued to increase. Yet some of its key principles—especially on international law's place in the federal legal system, which might have been considered indisputable at the time of elaboration of the *Restatement*[65]—have come under attack in the intervening years. Henkin did not waver in his commitment to the applicability of international law as law in our federal system and rallied others to maintain the *Restatement*'s view.[66]

IV. American Society of International Law

Henkin joined the American Society of International Law early in his academic career and in due course held its most important leadership positions. He was elected to the Board of Editors of this *Journal* in 1967 and served as co-editor in chief from 1978 to 1984, together with his Columbia colleague Oscar Schachter. He was a frequent contributor to the *Journal*'s pages and some of his writings published here have become canonical. In addition to those previously cited, only a few of several dozen pieces published in the *Journal* or the Society's *Proceedings* can be mentioned. In 1971 he took up his pen to answer the rhetorical question posed by Thomas M. Franck, "Who killed Article 2(4)?" by asserting that "the reports of the death of Article 2(4) are greatly exaggerated."[67] In 1989 he organized and wrote the preface to a symposium on the bicentennial of the ratification of the U.S. Constitution, later published in book form.[68] His final essay in these pages was a contribution to the Agora on NATO's Kosovo intervention of 1999, in which he urged reform of the law and practice of the UN Charter both to avoid the temptation for unilateral military actions in contravention of existing international law and to enable necessary collective responses to massive violations of human rights.[69]

Henkin served as ASIL president from 1992 to 1994. It was in his presidential column for the Society's *Newsletter* that he penned his second-most-famous phrase, "Away with the S-word!"—the "sound-bite" version of the more elaborate argument in his Hague lectures, that it was time to cut "sovereignty" down to size, to banish the term from polite discourse.[70]

In 1995 Henkin was awarded the Society's Hudson Medal for lifetime achievement in international law. The annual meeting that year was held in his own city, New York, in commemoration of the fiftieth anniversary of the United Nations. A few days before the meeting, students in the annual "law revue" show at Columbia had staged their own tribute and were

[64] *Id.* at 141–42; *see also* 62 ALI PROC., *supra* note 60, at 424 (citing Barcelona Traction, Light & Power Co. (Belg. v. Spain), Second Phase, 1970 ICJ REP. 3 (Feb. 5)).

[65] *See* 1 RESTATEMENT, *supra* note 53, pt. I, ch. 2, intro. note, at 41–42 (citing Henkin, *supra* note 43).

[66] For references to the debate, see INTERNATIONAL LAW (5th ed. 2009), *supra* note 29, at 658–60.

[67] Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AJIL 809 (1970); Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AJIL 544 (1971).

[68] Louis Henkin, *The Constitution for Its Third Century: Foreign Affairs*, Preface to *The United States Constitution in Its Third Century: Foreign Affairs*, 83 AJIL 713 (1989), *reprinted as* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (Louis Henkin, Michael J. Glennon, & William D. Rogers eds., 1990).

[69] Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention,"* 93 AJIL 824 (1999).

[70] Louis Henkin, *The Mythology of Sovereignty*, ASIL NEWSLETTER, Mar.–May 1993, at 1; *see also* Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, et Cetera*, 68 FORDHAM L. REV. 1 (1999).

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willing to bring it to the ASIL banquet at the Waldorf-Astoria, where they performed a choreographed setting of "Fish gotta swim and birds gotta fly . . . Can't help lovin' that Lou Henkin!"

V. Rule-of-Law Advocacy

Henkin's advocacy for full U.S. participation in the international human rights system has already been noted. He was no less passionate in his insistence that the United States should live up to the ideals of constitutional control of war powers, compliance with the UN Charter prohibition on use or threat of force, and fulfillment of obligations under customary and treaty-based international law. In his writings of the 1960s and 1970s he articulated these ideas in the context of the Vietnam War.[71] In the 1980s and 1990s he mounted sharp criticism of U.S. unilateralism in overseas military actions and of presidential circumvention of constitutional requirements for congressional participation in decisions to authorize major hostilities. He thus opposed the bombardment of Libya in 1986, the invasion of Panama in 1989, and other military adventures.[72] He likewise endorsed the proposition that U.S. courts could, in principle, exercise judicial competence to determine whether presidential resort to force without congressional authorization violated the requirements of constitutional or statutory law.[73]

In line with his firm belief that international human rights law should be applied in claims involving rights of asylum seekers and other aliens in U.S. courts, Henkin provided expert opinions on the customary law of human rights and joined amicus briefs in support of such claims. He played an active part in efforts to persuade U.S. courts to give effect to orders and judgments of the International Court of Justice in the decade-long litigation involving violations of the Vienna Convention on Consular Relations.[74] He took a strong stand for the rights of Guantánamo detainees and the Supreme Court cited his amicus brief in ruling for one such petitioner.[75]

VI. Conclusion

Henkin's ideas on law and rights were the secular embodiment of his deeply grounded Jewish faith. In this way he carried forward his father's rabbinical learning, in a nonreligious vocabulary that he believed to have universal appeal. In his personal life he followed Jewish laws and

[71] *See, e.g.*, HENKIN, HOW NATIONS BEHAVE, *supra* note 23, at 303–12.

[72] HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, *supra* note 15, at 99 n.* (Libya); Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293 (1991); Louis Henkin, *The Use of Force: Law and U S. Policy*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 52–56 (Louis Henkin et al. eds., 2d ed. 1991) (criticizing U.S. military actions in Grenada, Libya, Nicaragua, and elsewhere, in light of U.S. interest in maintaining UN Charter constraints on use of force).

[73] He thus subscribed to amicus statements urging that military action should not proceed without the constitutionally required congressional participation and that courts could in principle address legal challenges arising from such actions. Brief of Amici Curiae Ackerman et al., Dellums v. Bush, 752 F.Supp. 1141 (D.D.C. 1990) (No. 90-2866), *reprinted in* 27 STAN. J. INT'L L. 257 (1991); Letter from Bruce Ackerman et al. to President William J. Clinton (Aug. 31, 1994), *reprinted in* Contemporary Practice of the United States, app., 89 AJIL 127 (1995).

[74] Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AJIL 679 (1998) (regretting that the executive branch had treated the order in the *Breard* case as not creating a binding obligation).

[75] Brief for Louis Henkin et al. as *Amici Curiae*, Hamdan v. Rumsfeld, 548 U.S. 557, 628 n.58 (2006). For the brief, see 2005 U.S. Briefs 184, 2006 U.S. S. Ct. Briefs LEXIS 52.

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traditions, observing the Sabbath (arriving at professional meetings before sundown on Friday) and keeping kosher. He would not write on the Sabbath, but he would speak, and thousands listened.

Lou and Alice Henkin were full partners in all aspects of life during their half-century together—in raising their sons, Joshua, David, and Daniel, and in their shared labors on behalf of human rights and international law. Their joint achievements were celebrated on December 10, 2010, the sixty-second anniversary of the adoption of the Universal Declaration of Human Rights, when Secretary of State Hillary Rodham Clinton conferred on Lou posthumously, and on Alice in person, the Eleanor Roosevelt Award for Human Rights.

Henkin exuded energy in all his endeavors and conveyed his passionate commitments to the rule of law in countless ways. Students flocked to his courses despite his well-deserved reputation as a hard grader. Many of them found their most intense intellectual experiences through working as his research assistant. He held his students—and colleagues—to the most exacting standards, motivating them—and us—to do more than we might have thought possible. Students from his fall 2001 human rights course recalled after his death how moved they had been by his reflections shared in class on the day after the attacks of September 11, 2001. In the last years of his active life, he pressed his audiences to carry on the hard work of realizing the core values of constitutional and international law in tumultuous times, with rigorous attention to law reform and institutional development rather than unrestrained claims of essentially unlimited power to wage "war" or combat "terrorism" (loose terms, like "sovereignty," that he thought should be banished from the lexicon). His valedictory article ends with the following words:

> [U]niversities need to educate themselves and others in the commitment to the rule of law, including international law, even in the age of terrorism.
>
> Constitutional law as well should, and will, survive and govern us in the age of terrorism, however long it lasts. The Age of Terrorism cannot, should not, be allowed to supersede the Age of Rights. Respect for our Constitution and its values depends on us, on you and me, especially on you.[76]

[76] Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 827 (2005).

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