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# BOOK REVIEWS

*The Age of Rights*. By Louis Henkin. New York. Columbia University Press. 1990. Pgs. xi + 220.

*Constitutionalism, Democracy & Foreign Affairs*. By Louis Henkin, New York. Columbia University Press. 1990. Pgs. viii + 125.

Over the years, no scholar or teacher of international law has done more than Professor Louis Henkin to establish the legal foundation underlying the use of international human rights norms in United States courts. His writings are models of clarity and persuasive force. They are always challenging, provocative, and confident in their scholarship. These two books, mostly essays by Henkin first presented elsewhere, are very much in keeping with the thrust of his life's work.

*The Age of Rights* argues for the 'internationalization' of human rights law, exploring the overlap and gaps between international and U.S. Constitutional protections of basic rights. Reflecting a theme common to a number of Henkin's writings, it also urges the ratification by the United States of the covenants sometimes collectively called 'the International Bill of Rights.'[1]

*Constitutionalism, Democracy, and Foreign Affairs* expands upon Henkin's 1988 Cooley Lectures at the University of Michigan. It's thesis is that U.S. courts cannot and must not, by invoking ill-conceived arguments about the separation of powers, avoid deciding cases that implicate foreign affairs. Henkin systematically disassembles the barricades erected to keep the judiciary out of foreign policy: the claimed exclusive primacy of the President, the concept of 'non-justiciability,' and the 'political question' doctrine.

The latter volume presents arguments that are more readily acceptable. The former, perhaps as a result of its diverse provenance, is harder to follow, and some of its conclusions require more support than is offered.

*The Age of Rights* suffers from its use of at least three different referents for the term 'international human rights.' Moving from the most to the least expansive, these are: (1) all of what Henkin takes to be the implications of the most advanced thinking on individual rights and entitlements; (2) the specific contents of certain international agreements (such as the Covenant on Economic, Social and Cultural Rights) whose status as normative pro-

[1] The International Covenant for Economic, Social and Cultural Rights; the International Covenant for Civil and Political Rights; and the Optional Protocol to the latter; UNGA res. 2220A, 21 U.N. *GAOR Supp.* (No.16) 49; UN Doc. A/6316 (1966). These were signed by the United States, but have not yet been ratified; they entered into force in 1976.

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nouncement is the subject of lively and sometimes heated debate; and (3) the elements of current customary international law, as determined in what might be termed the more traditional way.[2]

Yet these three concepts are very, very different, in analysis and application. The statement, for example, that international human rights law includes the right of all to benefit from liberal provisions of the Western welfare state, follows logically from conceptions (1) and (2), but it cannot pass unchallenged when presented in the context of definition (3). The advisability of the U.S. ratifying the International Bill of Rights is part of (2), but it is far from obvious to those whose view is (1) (because it would be unnecessary), or (3) (because it would be expand the law beyond its foundation). Unfortunately for Henkin's analysis, U.S. judicial precedents provide no support for the first two conceptions, and even those reflecting the adoption of human rights norms as customary law are few, rare, and in delicate health these days.[3]

Henkin's failures to observe these distinctions scrupulously—his hesitation to divorce the utopian aspects of his progressive world view from the actual and more pedestrian achievements that have actually been solidified—threatens in the end to nullify and even to reverse the persuasive force of his campaign for treaty ratification.

After arguing, for example, that the benefits of the most aspirational statements of economic equality are human rights already existing and protected in the international system, Henkin resolves that the U.S. Constitution is 'below contemporary international standards, particularly in respect to equality and economic-social rights' (p. 154). This conclusion, however, assumes a sense of 'international standards' — their content and their formation — that is radically different from that of United States judges and lawmakers. If, as Henkin correctly insists, international human rights law is first and foremost *law*, then it is very difficult to take seriously the view that States have an international legal and binding obligation to go further than does the U.S. Constitution in the protection of individual rights. There is simply no established legal basis for this claim.

One wishes it were so. Yet in contemporary America, it is hard to imagine that the cause of ratifying international covenants is furthered by the suggestion that it would entail new and unprecedented 'international obligations to provide . . . citizens with basic human needs' (whatever *they* are!), and 'would obligate Congress (or the states) to provide full remedies for violations of [such] rights.' *Id.* What Senator would find that those prospects encourage an 'aye' vote?

To point this out is not to espouse the jingoistic formula that our Republic

[2] Customary international law is traditionally found in the widespread and uniform practice of States when accompanied by *opinio juris*. See, for example, the Statute of the International Court of Justice, Article 38(1)(b); *Fisheries Jurisdiction Case (U.K. v. Iceland)*, [1974] I.C.J. 3.

[3] The landmark decision in the United States Court of Appeals for the Second Circuit in *Filartiga v. Peña-Irala*, 630 F.2d 879 (2d. Cir. 1980), has been followed in a few courts; see, for example, *Forti v. Suarez-Mason*, 649 F.Supp. 707 (N.D. Cal. 1988). It has also been sharply criticized; see *Tel-Oren v. Libyan Arab Jamahiriya*, 726 F.2d 774 (D.C. Cir. 1984), *cert. den.*, 470 U.S. 1003 (1985), at 813 (opinion of Bork, J.), and at 826 (Opinion of Robb, J.).

is the best of all worlds, either existing or possible. It is not to embrace the isolationist position, mercilessly and effectively demolished by Henkin especially in the first essays, that international law can or should have no bearing upon the treatment any country reserves for its own nationals.

It is rather, simply to acknowledge that international law has not yet solidified around the concept of 'human needs,' or around the obligation of States to prevent their systematic denial, much less the affirmative requirement that they be met. Henkin moves from this world to an ideal one, when he writes that existing, fundamental human rights include 'rights to the satisfaction of basic needs and to well-being that government must actively promote or guarantee.' *Id.* at 145.

In response to the obvious objections that all of these terms ('satisfaction,' 'basic needs,' 'well-being,' 'actively promote') defy definition, that commitments to them are vague and unenforceable, and that no empirical demonstration supports the claim that they are widely respected (still less out of *opinio juris*), Henkin can only respond:

> But in international law and rhetoric, they are legal rights, and in many societies, including our own, the language of rights is increasingly used and the sense of entitlement to such benefits is becoming pervasive. *Id.* at 152

Yet this assumes precisely what its proponent was asked to prove. Reliance upon how language 'is . . . used,' and upon what subjective feelings are 'becoming pervasive,' can only heighten the reader's instinct that something more ephemeral than legal principle is the currency of this rhetorical transaction. Whether the right of women to equal treatment before the law, for example, has risen to the level of an internationally-vouchsafed entitlement — a right protected by international law — is an interesting and important question. But resolution of that question is not fostered by Henkin's analysis, which merely assumes that aspirations to equality are already *lex lata*, because an international Covenant says they are. How such a legal commitment was made, how it became binding, how it survives the utter silence that attends its constant, ubiquitous violation: these are questions Professor Henkin does not address.

As a corollary to blurring the distinction between what is the law and what one fervently wishes it was, is a tendency to locate actual observance of human rights in a rhetorical commitment to them. There is no other way to explain Henkin's reference to the citizenry of socialist states (before 1989, 'perhaps a third of mankind') as persons 'whose human rights are now universally recognized.' *Id.* at 190. What can this mean? In what way can it be said that the regimes responsible for the atrocities of Tienamen Square or the gulag 'recognize' the human rights of their victims?

Surely it is true that socialist constitutions increasingly espouse the pieties recited in the Covenants. But alongside the conclusion Henkin infers, there is potentially another. The ability of the world's preeminent human rights violators to endorse, with great solemnity, language that seems to bespeak legal obligation may itself be evidence that noble aspirations have not yet become law. Yet this, perhaps more cynical, thesis is ignored.

Professor Henkin states what he believes to be a fundamental difference



between international human rights and the individual rights to which residents of the Western democracies are entitled under their constitutions: the latter are rights *against* governments, while the former are claims *on* governments. But even this distinction is far muddier than it appears. Those rights that are internationally protected by consensus, by international observance out of a sense of legal duty (or by the self-imposed obligation to 'justify' deviation), are precisely the ones whose correlative obligations imposed upon governments are clearest.

Thus there is a right not to be enslaved, and a corresponding obligation upon governments neither to engage in nor to tolerate slavery. The right to be free from torture entails a prohibition against governments participating in torture.

By contrast, the 'right' to fair and equal treatment does not correlate to an obligation on States, except perhaps the vague and sadly unenforceable one 'to do justice.' In the Western democracies, with centuries of experience in 'social contracts' and other theories of sovereign equality among citizens, there is no consensus as to how, when, and to what extent 'fair treatment' becomes a legal right. How can international human rights law, a mere 43 years after the Universal Declaration, have evolved to the stage where, under its guidance, the lion not only lies down with the lamb, but does so because a legal commandment requires it?

The definition of international human rights law as including the full complement of aspirational statements set out in the Covenants will not withstand scrutiny. What is more, it carries the seeds of its own destruction, because it is presented in a way that *cannot* be embraced by the West, and *will not* be observed by the developing nations without the means (even when they have the will) to see it through.

But that definition is not the only one available, nor is it the only one Professor Henkin himself develops. In Henkin's own words, 'The effort to create an international law of human rights has been largely a struggle to develop effective machinery to implement *agreed norms*.' *Id.* at 59, emphasis added.

That people should receive their 'basic needs,' is not, unhappily, an 'agreed norm.' That States should not torture their citizens, happily, is.[4]

Despite this carping, *The Age of Rights* is clearly an important book, by virtue of its exploration of dark corners of the theory and structure of international human rights. It is a thought-provoking book, which will make its readers confront the significance of human rights law for the real rights of real humans. It is an accessible book, which does not require legal training for full appreciation, and which will richly reward any reader familiar with or interested in the sea-change by which these last fifty years have inaugurated 'the age of rights.'

[4] Obviously, this is not to imply that the international human rights prohibition against torture is generally honoured by states. Amnesty International's *Annual Reports*, *inter alia*, are eloquent demonstrations that such is not the case. But the illegality of torture even when flouted, is sustained by States' responses when accused of violations. See generally, *Filartiga*, above note 3, at 833–4.

*Constitutionalism, Democracy, and Foreign Affairs* may to some seem more specialized, and indeed it may not appeal to readers unversed or uninterested in the United States Constitution. Yet it declaims persuasively, even conclusively, for the rejection of important recent trends in American political theory and jurisprudence.

Henkin presents a compelling argument against the view that the President enjoys a Constitutional grant of plenary power in the area of foreign affairs. He demonstrates that the Founders did not, by the mere stroke of creating the President 'Commander-in-Chief,' intend Congress and the Courts to abandon the oversight responsibility they are granted throughout the intricate system of checks and balances. Only Congress can declare war, and only Congress can appropriate funds for the operation of Government. Those functions mandate Congressional partnership in international adventures upon which the President may be resolved to embark.

Nor may the courts abdicate their responsibility. They may not hide, Henkin argues, behind judge-made abstention principles. They must adjudicate properly-framed and -presented disputes, including those that require resolution of competing claims of 'the political branches' to primacy in aspects of foreign policy.

Thus, submits Professor Henkin, it is a dodge for the courts to decline to rule on whether a military exercise entered by the United States without Congressional authorization is a 'war.' Suit brought by a Senator seeking a declaration that he was deprived of his Constitutional role demonstrates the need that the judiciary play its proper function as final arbiter of the functioning of our system under that venerable document.[5]

As usual, Professor Louis Henkin has broadened and deepened the debate about the United States in international affairs, and about international affairs in the United States. These two books are important contributions to the understanding of vexed and difficult issues. That they may not bring every reader to their point of view is not a derogation of their value. That they will provoke discussion and analysis is a tribute to their author.

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[5] Henkin attacks the courts' refusal to decide certain cases, but acknowledges the obvious conclusion that a true 'refusal' is a logical impossibility. Deference to the 'political branches' means that judicial challenges fail, and that unilateral executive action is sustained as consistent with the Constitution. See, for example, *Conyers v. Reagan*, 578 F.Supp. 324 (D.D.C. 1984) (rejecting suit against President for deployment of naval vessels in Persian Gulf during Iran-Iraq War).



*La protection des réfugiés en France.* 2e édition, Tiberghien, Frédéric. Economia. Collection de droit public. Paris, 1988, 592p.

Il y a déjà quelque temps que je me réfère, dans le cadre de mon travail, à l'ouvrage de Tiberghien. *La protection des réfugiés en France* s'est avéré être pour moi un ouvrage de référence de premier ordre. De présentation abordable, de facture rigoureuse, le texte du Maître des Requêtes au Conseil d'État de France fait autorité en matière de droit des réfugiés.

Comme l'indique le titre de son ouvrage, l'auteur a voulu cerner la problématique des réfugiés tel qu'elle se pose en France. Cela ne veut cependant pas dire que son propos est sans intérêt — voire sans importance — pour tous ceux qui, ailleurs, tentent de trouver une solution à ce problème sans cesse croissant.

Dans un premier temps, Tiberghien souligne que la politique d'accueil des réfugiés en France est incontestablement l'histoire d'un succès, mais d'un succès toujours précaire. Il ajoute que si la France est, par tradition, une terre d'accueil pour les réfugiés, son effort en ce domaine est aujourd'hui quantitativement très limité. Tableaux à l'appui, l'auteur note que si l'on fait masse des travailleurs permanents en provenance de la C.E.E., des travailleurs permanents et du regroupement familial en provenance des sept pays habituels d'immigration de main d'oeuvre, on constate que plus de 75% de la population reste, depuis 1982, liée à des mouvements passés ou actuels de main d'oeuvre. Il ajoute qu'il n'y a, pour cette composante principale de l'immigration en France, pratiquement aucune interférence avec le droit d'asile.

Tiberghien souligne par ailleurs que la plupart des réfugiés accueillis en France proviennent de pays ayant un régime communiste (80% en 1982; 76% en 1986). Si l'on ajoute aux réfugiés provenant de ces pays ceux d'Amérique Centrale et du Sud (Chili, Argentine, Uruguay, Haïti) ainsi que les victimes de persécutions qui sont surtout raciales (Arméniens, Sri-Lanka), on arrive à 92,3% du total en 1982 et à 87% en 1986.

C'est sur cette toile de fond que Tiberghien décrit ensuite les deux volets complémentaires de la politique française d'accueil des réfugiés: d'une part une procédure rapide et fiable de détermination du statut et l'institution de garanties associées à la reconnaissance et à la possession de ce statut; d'autre part une politique d'insertion sociale des réfugiés. Il souligne d'ailleurs avec raison qu'une politique cohérente d'accueil comporte au minimum deux volets complémentaires.

Après avoir rappelé la définition du réfugié, décrit la procédure de détermination retenue par la France et résumé les principales garanties dont est assorti le statut de réfugié, l'auteur dégage les principaux facteurs institutionnels qui ont permis au dispositif adopté par la France de fonctionner de manière satisfaisante et souvent dans un sens progressif.

En ce qui a trait à la notion de réfugié, Tiberghien souligne que la question a retrouvé une actualité certaine en raison de la distinction fréquemment faite entre de prétendus 'faux' et 'vrais' réfugiés. C'est pourquoi il rappelle les différentes définitions du réfugié données par les textes successivement