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# Remarks on the Awarding of the 2003 Stefan A. Riesenfeld Award: Louis Henkin and the Felicitous Expression of Reason\*

By  
David D. Caron\*\*

On behalf of the School of Law at the University of California at Berkeley, it is my pleasure to welcome our distinguished guest, Professor Louis Henkin, his wife Alice, and their son David, who we are proud to claim as a member of Berkeley's History Department.

"John Donne prayed God to deliver men 'From needing danger.' Others have in other words deplored the inability of men and societies to do what was necessary for their own salvation before war or disaster had nearly overwhelmed them. And so in wars alone men have died in numberless numbers."<sup>1</sup>

Ladies and gentlemen: Lou Henkin wrote those words. They open his first book, *Arms Control and Inspection in International Law*, published by Columbia University Press in 1958. It cost a whopping \$5.50, which is remarkable in itself.

It is a prescient work. But since I can hear Lou in his wry way remark that "prescient" is merely a euphemism for "not popularly appreciated," let me say more positively that the importance of that work was not fully grasped at that time. Indeed, *Foreign Affairs* then had a practice of giving a one sentence review to books. In reviewing Lou's book, the Journal simply wrote, "[A] potentially very important subject."<sup>2</sup>

Later, in the mid 1990s, the Chemical Weapons Convention was put before the Senate for its advice and consent. Some members of the public and the academy argued against ratification of the Convention and against the prospect of foreign inspectors conducting what they saw as unconstitutional searches in

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\* These remarks were delivered on Feb. 28, 2003 as an introduction to the 2003 Riesenfeld Award honoree, Louis Henkin, University Professor Emeritus of Columbia University Law School.

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1. LOUIS HENKIN, *ARMS CONTROL AND INSPECTION IN AMERICAN LAW* 1 (1958).

2. Henry L. Roberts, *Recent Books on International Relations*, 37 *FOREIGN AFF.* 504, 508 (1959).

the United States.<sup>3</sup> In that vein of criticism—a consequence of what Lou has often seen as a tendency of the United States to hold itself apart from a world that it is ineluctably a part of—our ratification of that historic arms control agreement hinged. An important force in that debate, which ultimately, but closely, went in favor of ratification, was Lou's book and the scholarship it informed and shaped.<sup>4</sup>

With two articles in 1956, and the book just mentioned, Lou was bursting onto the American legal academic stage. But who is this Lou Henkin?

There are gaps in the record. Public sources have been studied, friends have been consulted, and it must be said that it is not easy to uncover the early part of Lou's life. But let's apply our detective powers for a moment, drawing on the Foreword to Lou's 1958 book written by his mentor and friend, Philip Jessup of Columbia University. Jessup writes:

This study required an author with the combination of experiences and skills which Professor Henkin possesses. His years of service in the State Department's Bureau of United Nations Affairs and Office of European Regional Affairs gave him the close acquaintanceship with the practicalities of foreign policy, with the workings of the United Nations and NATO, and, from 1950 to 1954, when he was assigned to problems arising from the aggression in Korea, with the trials of patience required in seeking an agreement with a Communist power.<sup>5</sup>

Had I read nothing else, I might have concluded: "Lou Henkin was a State Department lawyer who recently retired and assumed an academic post. He's probably in his late 50s or early 60s; he has one book to get out of his system and here it is!" But Jessup goes on to say:

To his understanding of the realities of foreign policy, Professor Henkin joins rare skills in his appreciation of the whole body of constitutional doctrine,<sup>6</sup> an appreciation developed in contact with two of the keenest American legal minds, those of Judge Learned Hand,<sup>7</sup> and Mr. Justice Felix Frankfurter, both of whom he served as Law Clerk. He is now Professor of Law at the University of Pennsylvania Law School.<sup>8</sup>

So this must change our initial estimation. This 1958 Lou Henkin is significantly younger than we thought, but he can't be that young. Moreover, his presence at Pennsylvania and his prestigious clerkships indicate he did ex-

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3. See, e.g., John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998).

4. LOUIS HENKIN, *Arms Control and Inspection in American Law* is cited in the Prepared Testimony of Professor Barry Kellman, DePaul University College of Law, at the *Hearing on the Constitutional Implications of the Chemical Weapons Convention Before the Senate Judiciary Comm.*, 103rd Cong. 859 (1996). At Senator Biden's request, Henkin directly addressed the CWC by letter. For a discussion of the senate vote, see Ronald D. Rotunda, *The Chemical Weapons Convention: Political and Constitutional Issues*, 15 CONST. COMMENT. 131, 131 (1998); Helen Dewar, *Senate Approves Chemical Arms Pact After Clinton Pledge*, WASH. POST, April 25, 1997, at A1; Adam Clymer, *The Chemical Arms Treaty: The Overview; Senate Approves Pact on Chemical Weapons After Lott Opens Way*, N.Y. TIMES, April 25, 1997, at A1.

5. HENKIN, *supra* note 1, at ix.

6. You should recall that "doctrine" was not a derogatory term in 1958.

7. Professor Lori Damrosch, one of Lou's colleagues at Columbia, pointed out to me the curious matter of the initials—Learned Hand and Louis Henkin—and whether anything should be made of that!

8. HENKIN, *supra* note 1, at ix-x.

tremely well at one of the best law schools, and given the identity of the judges, we know it most certainly was Harvard Law School. He is someone who as a young man served his country, perhaps during the Second World War, and most certainly throughout the American efforts to build a lasting peace after the war.

Jessup then gives us in his Foreword one more vital clue. He writes, “Even the layman will find the felicity of the author’s English style leading him through those sections of the book which of necessity deal with legal complexities.”<sup>9</sup> From this we know Lou Henkin is most likely not American by birth, because few Americans possess a felicitous style of English. Rather, it is likely the case that he, like others, came to English as a second language and learned it with the precision and determination that yields felicity. From what can be found in the public record, our extrapolations from Jessup’s few remarks are close to the mark.

As I said, it’s not easy to find much of the early story.<sup>10</sup> The first fact is that Louis Henkin was born on November 11, 1917 in Smolyani, a village 100 miles east of Minsk. (Which Lou, standing beside me, indicates is “roughly” accurate.) I don’t have time to linger on each circumstance of Lou’s early life, but this fact strikes me as again proving that truth is stranger than fiction.

First, imagine the month of November, 100 miles east of Minsk. I have had the occasion to approach Minsk from the northeast by train in early September, and I can only imagine what the mortality rate was for children born in November near Minsk at the turn of the century. It is a dark and cold place.

Second, let me add at this point that Lou and his family are Jewish, and east of Minsk at the turn of the century could be a particularly dangerous location for people of the Jewish faith.

Third, it is not only November, it is November of 1917. Ivan Bloch—Jewish, Russian, self-made man—in the early 1890s wrote that future war would be fought in the trenches, and with great armies and with commensurate losses.<sup>11</sup> Greater Europe is a very dangerous place in 1917.

Fourth, it is not only 1917 in Europe, it is 1917 in Russia. Bloch also wrote that the war in the trenches would last as long as economies could be redirected to that end. But before the breaking point there would be famine and social

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9. *Id.* at x.

10. The following remarks are cribbed primarily from a short description of Lou’s early life by some of his former research assistants: Jonathan Charney, Donald Anton, and Mary Ellen O’Connell. Jonathan I. Charney, *Introduction* to *POLITICS, VALUES AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY—ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN* at 1, 8 (Jonathan I. Charney, et al. eds., 1997) [hereinafter *POLITICS*]. I would point out, however, that they incorrectly name one of Lou’s three sons. They name the three boys as Joshua, David, and Jacob, whereas they are in fact, Joshua, David, and Daniel. David Henkin wrote “I can assure you that the three sons raised in my parents’ home are named Joshua, David, and Daniel (in birth order, and in Biblical order as well). If you meet Jacob Henkin, tell him to come home.” Although this error argues for some slight caution in relying on their brief account, I would note that Lou did not correct any of the facts above as they were recited in his presence.

11. IVAN BLOCH, *THE FUTURE OF WAR IN ITS TECHNICAL, ECONOMIC AND POLITICAL RELATIONS* (1998) (6 vols.) I discuss Bloch’s work in David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 *AM J. INT’L L.* 4 (2000).

revolution. And this is precisely what came to pass in Russia. The Russian monarchy was overthrown in 1917, and as is often the case, there is a second revolution as to who takes place of that which has gone. This second revolution, the Bolshevik Revolution, is in November 1917.

Fifth, this boy who would later serve the United States, his family's adopted home, is born in the same year that the United States enters the war that has Europe and Minsk in its grip.

Sixth, and last, the boy who will later as a man champion individual rights and international law is born on November 11—the eleventh day of the eleventh month, precisely one year before the armistice to end the war to end all wars, a war that claimed 8.5 million lives.

The note by Lou's former research assistants states that his family immigrated to the United States before he turned five. This suggests they left the Soviet Union shortly before Lenin's sacrifice of the people in the countryside gained its full force.

And then our story is the American story, and as with Stefan Riesenfeld, we and the world are much richer for his family making this nation their home. Lou's former research assistants report that Lou once described (with great felicity of expression!) his home as characterized by "poverty, piety and probity."<sup>12</sup>

But beyond that phrase, I can share only the milestones that mark the ascendancy of a brilliant young man: Yeshiva College—majoring in mathematics and philosophy, graduating *summa cum laude* in 1937. Harvard Law School—book review editor, graduating *magna cum laude* in 1940. Clerk for Judge Learned Hand, Court of Appeals of the Second Circuit, 1940-41. And then Louis Henkin, like so many of his generation, was swept up in the events of World War II, in his case serving from 1941-45 with the United States Army and seeing combat in Europe and North Africa with the First Field Artillery Observation Battalion. Upon returning to the United States he clerked for Justice Felix Frankfurter of the U.S. Supreme Court. He thereupon joined the U.S. State Department where he served in the United Nations Affairs Bureau from 1948-54, and the Bureau of European Affairs from 1954-57. Among other things he served as an advisor to the U.S. delegations to the UN General Assembly, the UN Economic and Social Council, the Geneva Conference on Korea, and was the U.S. representative to the UN Committee on Refugees and Stateless Persons in 1950. It was at the State Department that he met Philip Jessup, who later having left for Columbia invited him to spend time at Columbia writing his first book. And thus, we come back to that book in 1958.

Lou was forty years old, with enough experiences for several lifetimes. But before we move forward from 1958, I must first mention a singularly important event in 1960—his marriage to Alice, his partner these past forty years. You should know that Alice has carved her own paths through the wilderness, particularly in the area of human rights. But also, from 1960 forward, I doubt that one could say that Lou did this or that without mentioning Alice also.

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12. POLITICS, *supra* note 10, at 8.

For six decades—the 50s, the 60s, the 70s and so on, Lou has put pen to paper, showing that he had much more than one book in him. Indeed, he has at least fourteen books as author, nine as editor, and in the neighborhood of 250 articles or chapters in books.<sup>13</sup>

Of course, there was much more going on than his writings. Lou moved to Columbia in 1962—no doubt Jessup was conniving at this all along—and has been there ever since. He was the Hamilton Fish Professor of Law and Diplomacy and the Harlan Stone Professor of Constitutional Law until his designation as University Professor in 1981. He currently is University Professor Emeritus and Special Service Professor. During these forty years at Columbia, Lou served, among other things, as Co-Editor-in-Chief of the *American Journal in International Law*, Chief Reporter of the American Law Institute's *Restatement 3d of the Foreign Relations Law of the United States* (which was a daunting task!), President of the American Society of International Law, U.S. member of the Permanent Court of Arbitration, Member of the Board of Directors of the Lawyer's Committee on Human Rights, and Chair of the Human Rights Center at Columbia. He was a longtime member of the Secretary of State's Advisory Committee on Public International Law, and the first U.S. appointee of the Human Rights Committee under the International Covenant on Civil and Political Rights. He is a fellow of the American Academy of Arts and Sciences, and a member of the Institut du Droit International. He is a recipient of Columbia's Wolfgang Friedman Award, and last year he received the American Society of International Law's Manley Hudson Medal.

He did not write about everything, but close to it. A significant part of his work concerns the foreign affairs law of the United States. Stefan Riesenfeld described the self-executing treaty doctrine as “a product of international and domestic constitutional rules.”<sup>14</sup> That difficult terrain was mapped first, and best, by Lou Henkin in his book, *Foreign Affairs and the U.S. Constitution*, now in its second edition.<sup>15</sup> The integrity and felicity with English that distinguish this work has shaped all later expeditions. His scholarship also has focused upon human rights—very broadly conceived. Here he travels alongside others, but there is a special quality to his work, which I will address shortly. In addition to these two areas, Lou has written on international law and politics generally (here one should consult and profit from his book *How Nations Behave*<sup>16</sup>), the use of force, the United Nations, the law of the sea, Judaism and the world, legal history and comparative constitutionalism.

I cannot speak to you of all Lou's writings, but I have read and sampled his body of work, and I am struck by something behind the words—not only intelligence, but also the imprint of a soul possessed of a deep respect for humanity

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13. A list of his writings, approximately five years out of date, may be found in POLITICS, *supra* note 10, at 461.

14. Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892, 900 (1980).

15. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996).

16. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979).

and the necessity of reason in human affairs. I'd like to sample just two pages for you in this regard.

First, on the place of reason in foreign affairs, I refer to a monograph Lou wrote on the proposed law of the sea regime for deep seabed mineral resources.<sup>17</sup> (Incidentally, Lou mentioned this book fortuitously to Professor Harry Scheiber and me as we were standing outside just before this ceremony.) At the end of his analysis, Lou argues for the place of reason in politics:

New law . . . is law for an indefinite future. It is important that it not be made prematurely or too fast, so that it will not prove to be a straitjacket, hampering healthy development of new human activity, or become unworkable and irrelevant. It is important, on the other hand, that bad law should not "happen," unwittingly or by default, that opportunities to make good law should not be lost.<sup>18</sup>

Now what's striking to me about this passage, beyond the words themselves, is that one colleague to whom I read this quotation remarked, "Ah, to have lived in a time when policymaking was so deliberate, that reason was such at the fore." But, I think to do that is to privilege the present too much, and to underestimate the world that Lou dealt with in those decades past. After all, let us recall that Lou knew the McCarthy Era from a rather close distance. Lou's mentor Jessup was one of those "damn internationalists."<sup>19</sup> Lou commented on numerous uses of force, including Vietnam, and grappled with the legal and moral aspects of the most egregious abuses of human rights. Lou has always advanced the case of reason and humanity—not when it is easy, but amidst the worst circumstances. Professor Frank Newman of this law school, now deceased, used to say of such matters that "the questions are too important for there to be room for despair." Lou Henkin's work and efforts remind us that reason is not given a place; rather it earns its place by the integrity, brilliance, and felicity of its expression. Reason in this form will demand its place. And for Lou's example, we are thankful.

As to the deep respect for humanity, I would just give you a brief quote from his 1990 book, *The Age of Rights*:

Human Rights may have become the idea of our time in part because ours is the age of development, industrialization, urbanization, which in many parts of the world have helped undermine what religion and tradition long offered the individual. In this modern, modernizing world, the human rights idea may sometimes appear as an ideology competing with religion, as a threat to traditional societies, as an obstacle to totalitarian socialism or to development in a hurry. But the idea of rights is not a complete, all-embracing ideology, is not in fact in competition with other ideologies. Religion explains and comforts, tradition supports, socialism cares, development builds; the human rights idea does none of these. . . . [T]here is now a working consensus that every man and woman, between birth and death, counts, and has a claim to an irreducible core of integrity and dignity. In that consensus, in the world we have and are shaping, the idea of human rights is the essential idea.<sup>20</sup>

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17. LOUIS HENKIN, *LAW FOR THE SEA'S MINERAL RESOURCES* (1968).

18. *Id.* at 75.

19. "Next to General George Marshall, [Jessup] was the most prominent target of McCarthy." Oscar Schacter, *Philip Jessup's Life and Ideas*, 80 AM. J. INT'L L. 878, 885 (1986).

20. LOUIS HENKIN, *THE AGE OF RIGHTS* 193 (1990).

For me, no other person in human rights moves with that appreciation for the place in our world of religion and of tradition. It pervades the work of Lou, and again, for that we are thankful.

The world shifts, but I find the work of Louis Henkin remains—and it does so because of its integrity and humanity. Lou's efforts and examples are appreciated in groups large and small around the world. His efforts remind us of the force of reason and the compassion of the human spirit, and inspire us to strive for a more just world.

Berkeley's motto is *fiat lux*: let the brightest of minds illuminate that which is hidden. It is with great pleasure that Boalt Hall School of Law and the Berkeley Journal of International Law award the 2003 Stefan A. Riesenfeld Prize to Louis Henkin for doing precisely that.