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The Rights of Man Today. By Louis Henkin.

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BOOK COMMENTARY

THE RIGHTS OF MAN TODAY. By Louis Henkin.¹ Boulder: Westview Press, 1978.

*Reviewed by Irwin P. Stotzky**

At a time when the issue of human rights has become proper fare in the relations between competing nation-states, it is perhaps more than appropriate to examine the origins and sources of the concept, to explore the paths human rights have traveled in the past, and to look at the future direction in which the human rights movement may lead. An American scholar, Professor Louis Henkin, in his book entitled *The Rights of Man Today*, has recently taken a hard look at the historical effort to establish and maintain such rights. Professor Henkin begins his exploration of the topic with an historical analysis of its evolution. He then moves to a discussion of the rise of constitutionalism, the mode used to spread and universalize the idea of human rights within almost all nation-states. Professor Henkin next examines the international movement to promote and protect human rights through exertion of intergovernmental pressure. Finally, he allows us a glimpse of the future actions which may be needed in order to secure the rights of man for the as-of-yet unborn masses.

The book should be especially impressive to those who, like the present writer, tend to be interested in broad social alternatives and the slow upward rise of man, but are less conversant with the intricacies of the international order and the history of human rights on a global scale. Many readers with these tastes might have hoped for research like Professor Henkin's, but would have been hard put to find a candidate for it. It required a combination of vision, optimism, pertinacity, intellectual flexibility, and, most of all, pragmatic good sense. Distance without disinvolvement was needed—sympathy with people and nations everywhere, yet suspicion of their irregularities; awareness of a cultural debt to Democratic Western Societies without contempt for the Socialist and other third world alternatives, however repugnantly phrased they may appear to an American steeped in the "democratic" tradition; and, perhaps most important of all, a readiness to take up the contradictions inherent in the human rights movement. There was also a need to pull together an incredibly wide

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range of subjects involved in this field. Professor Henkin's essay successfully meets the demands of his enterprise. No pains that could be taken were avoided by Professor Henkin; no subjects in this highly disparate field that could be exploited were left untouched. The result of this effort is, therefore, highly impressive.

The book, however, has its flaws. Plainly, Professor Henkin has rendered a singular service in writing this book. Both the times and circumstances call loudly for such an essay. But I must register a note of skepticism about the results of his effort. One is left with the distinct impression that there is lacking a theoretical structure which links the several parts of his essay. Stated another way, it is not at all clear that the forces he describes to explain the spread of basic human rights were their only cause nor does he sufficiently explain why the next 200 years will witness a further increase in the protection of such rights. He merely works at the level of characterization and description, and it may be doubted that the matter can be settled at that level. Yet Professor Henkin never claims to do anything more than to "describe and diagnose the effort to establish and maintain human rights in our time."² Taken on its own terms, therefore, the essay is a success.

I

Thomas Paine wrote the *Rights of Man* in 1791-92. The principles enunciated in his book—principles of individual autonomy, popular sovereignty and social contract—are employed by Professor Henkin as the point of departure for his discussion of human rights. Initially, Professor Henkin defines human rights as:

claims asserted and recognized "as of right," not claims upon love, or grace, or brotherhood, or charity: one does not have to earn or deserve them. They are not merely aspirations or moral assertions but, increasingly, legal claims under some applicable law.

Human rights, I stress, are rights against society as represented by government and its officials.³

By this definition, of course, we are initially limited in our perceptions and interpretations of human rights as a concept. By this definition, Professor Henkin bypasses volumes of literature concerning one of the most fundamental quandaries in all of philosophy—the nature

2. L. HENKIN, *THE RIGHTS OF MAN TODAY* XIV (1978).

3. *Id.* at 1-2.

and scope of rights and duties, their origins, meanings, and authority. By this definition, I would argue, the author thereby misses an opportunity to delve into the deeper mysteries of a human rights theory. Stated another way, it seems to one uninitiated in international law that Professor Henkin misses an opportunity to discuss the strands of a theory that would more adequately explain how a concept of human rights developed, nurtured, and grew, and most importantly, how it will continue its ascent into the future. Through the process of definitional limits, therefore, the author becomes the chronicler of a journey rather than a theoretician and constructor of an evolving concept. Hence, I am initially uneasy about his essay.

Notwithstanding this initial limitation, it is nevertheless intriguing to note his description of the evolution of a human rights concept. Professor Henkin sets up the evolution of human rights through the analytical construct of thesis-antithesis-synthesis; to Professor Henkin, human rights are viewed as a "twentieth-century synthesis of an eighteenth-century thesis and a nineteenth-century antithesis."⁴ The eighteenth century thesis of "natural rights" was made "secular, rational, universal, individual and democratic," through the American and French revolutions, and their declarations. Viewed through this perspective, therefore, governmental authority has implied limits which preserve private autonomy against governmental infringement. Moreover, some of these rights are inalienable; they cannot be subordinated to the government:

There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence altogether regardless of the attitude of those who wield the physical resources of the Community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.⁵

Under this theory, the retention of individual rights against governmental interference is reflected in a mythical and hypothetical social contract between man and government. It is at this point that

4. *Id.* at 5.

5. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928-29).

Professor Henkin's essay has a structural weakness; that is, Professor Henkin misses the opportunity to question the origins of his concept of human rights by failing to question the validity of the social contract theory. For example, there are very respectable authorities which disclaim the validity of the social contract theory.⁶ Yet Professor Henkin does not even make reference to these competing theories. Through this omission, the reader is left to wonder whether a theory of human rights rests upon quite a different foundation than that constructed by the author. Furthermore, a comparison with other theories of the creation of the state might lead to contradictory theories of human rights or it might show the strength of Professor Henkin's theory. The curious reader will never know the answer from Professor Henkin's essay.

Instead of presenting competing theories explaining the creation of the state and human rights, Professor Henkin forges ahead with a discussion of the content of these rights, correctly claiming that the birth date of human rights, the eighteenth century, gave shape to their content. Indeed, within the content of eighteenth century rights were such Lockean concepts as life, liberty and property, and the additional concept of the pursuit of happiness written about in the Declaration of Independence. At this point, I must once again register a note of concern about what Professor Henkin leaves out of his discussion. It is curious that Professor Henkin accepts the content of these rights without questioning their validity, since much scholarly writing exists in opposition to this perspective. For example, many Marxists view the Lockean definition of rights as a reaffirmation and protection of the propertied classes. Thus, to the Marxist, the Lockean notion of rights is not necessarily acceptable.⁷ Yet, Professor Henkin fails even to acknowledge this perspective.

Dismissing this omission, it is nevertheless interesting to note that Professor Henkin's view of eighteenth century rights finds expression in the American Constitution. For example, it was widely believed that certain principles of right and justice reconciled individual liberty and governmental power by identifying their respective roles and spheres of authority within society. More specifically, each

6. Professor Ronald Dworkin argues that citizens have individual rights against the State which arise not from the social contract as usually conceived, but from our status as "moral beings." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

7. See, e.g., C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962).

level and branch of government was seen as confined to its own sphere of authority, which was in turn defined by the nature and function of that level or branch and by the inherent rights of citizens. Thus, the three branches of the federal government were required to remain within their proper sphere of power. In a like manner, the state or federal government was required to remain within its proper sphere and thus was barred from intruding upon the prerogatives of other governmental departments, or more importantly, upon the "natural rights" inherent in their citizenship—including personal liberty, security, and private property—reserved to the people. Furthermore, these rights were to be preserved as part of the social contract between citizen and government. Interestingly enough, these conceptions took root and flowered within the rich soil of judicial literature.⁸

The Federal and State Constitutions were, however, less than the archetypical protectors of natural rights. Indeed, there were several glaring omissions in the constitutions: the concepts of equality, and economic and social rights were left unmentioned. Some of these defects were remedied by later amendments. In addition, according to Professor Henkin, the French Revolution and Declaration became symbolic bulwarks for the protection of economic and social rights and for equality. Moreover, it was intriguing for this writer to discover that the French legacy was probably more influential than the American in spreading the human rights ideology throughout the world.⁹

The second element in Professor Henkin's structure is the nineteenth century antithesis. According to Professor Henkin, the eighteenth century ideology of human rights and popular sovereignty met a contrary tendency—its antithesis—in the nineteenth century. First, natural rights based on divine natural law ran head on into rationalism, secularism and humanism; the theory of evolution was particularly destructive to the underpinnings of a theory which viewed all people as "children of God." In a like manner, positivism dealt a stunning blow to natural law on a jurisprudential level.

The second antithetical element to an eighteenth century ideology of natural rights came from the concept of Socialism. While the individual rights theory emphasized rights against society, socialist

8. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Terret v. Taylor*, 13 U.S. (9 Cranch) 43 (1815).

9. The United States Constitution was, of course, more influential in Latin America than the French legacy.

theory emphasized duties to the state. Thus, under a socialist state, the greatest honor for the individual was seen as service to the state; the individual good was replaced by the good of the masses. In this manner, both society and the individual received benefits. The Socialist antithesis to individual rights implied, therefore, an activist government which had as its main duty the securing of economic advancement for the masses.

The third element in the argument—the synthesis between conflicting eighteenth century rights and antithetical nineteenth century forces—came in the twentieth century. Today, according to Professor Henkin, “sovereignty of the people is denied nowhere, asserted everywhere.”¹⁰ Constitutionalism has become the means to protect equality, liberty and justice. Yet Professor Henkin seems to overstate this point. If “sovereignty of the people is denied nowhere, asserted everywhere,”¹¹ how does one explain the extermination of millions of people in Cambodia; how does one explain the Soviet Union’s treatment of certain minorities such as Jewish “refusniks”; how does one explain the system of apartheid in South Africa; how does one explain “political prisoners” within the United States?¹² Clearly, these are not mere aberrations. Even if sovereignty of the people is proclaimed in theory, in almost all nation-states it is denied, in various degrees, in fact.

Although slightly overstating the importance of constitutionalism in his analysis, Professor Henkin is correct in noting that a constitution was a most useful device in protecting human rights and was, moreover, a strong link in the twentieth century synthesis. The main impetus in the synthesis was a remarkable philosophical development: the resurrection of natural law and natural rights and the quiescence of positivism. Natural human rights were converted through the alchemy of a written constitution into positive legal rights. The prime example, once again, is the American Constitution. Within its orbit, certain natural rights have become positive legal rights, and some of the Justices have read the totality of the Constitution as a guarantor of fundamental rights—rights that stemmed from the social compact

10. L. HENKIN, *supra* note 2, at 18-19.

11. *Id.*

12. The point is not that the United States is in the same category as Cambodia, the Soviet Union or South Africa in the mistreatment of people and their human rights, but that the nation most dedicated to the protection of human rights is, at times, not free from the charge of violating those very rights it so loudly proclaims as fundamental.

and hence did not need any explicit textual support. Justice Chase's opinion in *Calder v. Bull*¹³ makes the point. In that case, the Court rejected an attack on a Connecticut legislative act setting aside a probate court decree which had failed to approve a will, resulting in a second hearing at which the will was approved. The challenge to the legislative act came from the heirs who would have taken the property if the will had been ineffective. The Supreme Court rejected the heirs' *ex post facto* claims and held that the clause applied only to criminal laws. But more important for present purposes was the willingness of some Justices to entertain arguments on natural law grounds. Justice Chase, for example, expressed a willingness in a proper case to prevent a legislature from intruding upon private property or contract rights even if not "expressly restrained by the Constitution. . . ." ¹⁴ Moreover, "a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a *Judge in his own cause*; or a law that takes *property* from A and gives it to B," ¹⁵ according to Justice Chase, would be invalid since it exceeds the proper authority of government.¹⁶ Thus, in this manner, the Constitution preserved and protected natural rights.

A second significant step in the transformation of natural rights into positive legal rights, according to Professor Henkin, came with the development of international agreements containing human rights norms which purported to be binding on the parties. Since World War II, there has been a significant growth of such agreements. Moreover, all of these agreements possess a common denominator: they all purport to bind nation-states regardless of their own constitutions or other laws. But world events clearly belie this assumption; other national interests intrude and assume preeminence to the detriment of international human rights.

The final twentieth century synthesis outlined by Professor Henkin is that between liberty and welfare. To Professor Henkin, the twentieth century has brought together the competing interests of the individual, his autonomy and liberty, and the emphasis on the group and on economic and social welfare for all; it "has seen essentially

13. 3 U.S. (3 Dall.) 386 (1798).

14. *Id.* at 386 (1798) (Chase, J., seriatim opinion).

15. *Id.* at 388 (emphasis supplied). Justice Chase found that the probate court's initial decree had not conferred vested property rights upon the heirs under Connecticut law. Thus, the Connecticut legislature did not exceed its proper scope of authority.

16. For a more modern day judicial discussion of the perceived limits of governmental power, see *Griswold v. Connecticut*, 381 U.S. 479 (1965).

universal acceptance of human rights in principle, and general agreement on its content.”¹⁷ This does not mean, of course, that human rights are enjoyed and respected to the same degree in every nation-state. Professor Henkin makes a more modest claim:

The significance of these intellectual-political developments for the actual condition of the individual should not be exaggerated, but neither should it be underestimated. Philosophical resistance to human rights has been essentially eliminated, and political resistance invoking philosophical resistance has been undermined. Popular sovereignty may not be meaningfully reflected in many societies, but as a universal principle it lies ever in the wings ready to be asserted and vindicated. Within nations, even socialism now acquiesces in limitations on government and cannot resist all claims for political-civil rights, and capitalist-bourgeois-libertarian states are irrevocably committed to economic and social welfare for all as of right. In international society, the most “sovereign,” the most impermeable of states cannot exclude all external scrutiny.¹⁸

II

Part II of Professor Henkin’s essay is a description of the constitutions that have evolved in the various nation-states of the world and their importance as sources of protection for human rights. Nation-states differ, of course, in their commitment to human rights. According to Professor Henkin, these differences may be explained by the political ideologies and institutions of the particular state. These different ideologies and institutions are, in turn, reflective of different conceptions of, and commitments to, human rights. And national constitutions are the devices which mirror the manner in which the scale of values concerning human rights are weighed in any given society.

This writer has absolutely no quarrel with this part of Professor Henkin’s essay except to say that it appears a bit too one dimensional an explanation for the international spread of human rights. Many forces that have shaped human history are merely glossed over or never mentioned. Take, for example, his characterization and grouping of the different political systems in the world. Professor Henkin groups “constitutions, and the political-social-economic systems and the attitudes toward individual rights that they reflect”¹⁹ into three

17. L. HENKIN, *supra* note 2, at 27.

18. *Id.* at 30.

19. *Id.* at 33-34.

models: “democratic-libertarian (Western), socialist-communist, and ‘other’” (third world).²⁰ Such a catalogue presents its own inherent problems. The vitality of a constitution in any specific society and the other forces which shape that society—political, social, and economic—are given too short a turn. On the other hand, because of the large number and differences of nation-states and constitutions, some generalizations are necessary. In sum, this section of the book has exposed the present writer to much needed information about the world order and, on that basis alone, is worthy of high praise.

III

Concern for individuals in other countries and their conditions is not a new phenomenon. But individual human rights were not the grist of international politics or law until after the Second World War. To Professor Henkin, therefore, World War II is the birth date of the international human rights movement.

More specifically, Nazi activities and the high toll of life activated a greater international concern for human rights. This increased concern for human rights, in turn, was reflected in the plans made for the postwar world. Thus, when the war ended, human rights obligations became part and parcel of the peace treaties. Prosecutions for war crimes—unspeakable crimes against individuals and their rights—saw fruition in the Nuremberg trials, and human rights were safeguarded in the new constitutions and laws of the defeated nations—West Germany, Japan, and Austria. There remained, however, a basic flaw in the spread of human rights requirements: they were not necessarily applicable to the victors. The flaw was corrected by the United Nations Charter, a document which stands as the symbol for the protection of human rights on an international scale. In time, other international agreements, such as the Universal Declaration of Human Rights, added vigor to the human rights movement. At the same time, a contrary tendency entered the picture—the problem of how to enforce human rights obligations. This is perhaps the central problem in the law governing international human rights. Yet, to Professor Henkin, the solution is quite simple:

Governments are impelled to observe international law because it is in their interest to do so, from a wish to maintain order, to keep the norms alive, to have the advantages of law they desire, and to avoid the hostile reactions of the victim and other adverse con-

20. *Id.* at 34.

sequences of violations. As a result, almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.²¹

After a discussion of some of the factors which have retarded the growth of the human rights movement and thereby led to disappointed expectations, Professor Henkin moves to an analysis of some of the factors which may allow a brighter prospect for the future protection of human rights. Perhaps the strongest inspiration and momentum, in the view of Professor Henkin, have come from the new American attitude. The history of the United States as a guarantor of human rights for its citizens, the Constitution which stands as a bulwark against arbitrary governmental infringement of human rights and as a model for other nations, and the United States effort to internationalize human rights, placed the United States at the eye of the storm. The problem, of course, is that the United States has envisioned international human rights for others only, since it views itself as the model protector of human rights. Professor Henkin makes the point:

Because we believe that human rights in the United States need no international support; because we do not think we have anything to learn in human rights from others and we even fear dilution or "contamination" from them; because, though we continue to assert that human rights are everybody's business, we make an exception where those of our own citizens are concerned; because we have always remained in some measure "isolationist," especially resisting foreign "interference" here; because we fear that foreign scrutiny might bring subversion, distortion, or hostile propaganda—the United States has refused to be a full and equal participant in the international human rights program. Most glaringly, it has adhered to virtually no human rights agreement of any importance.²²

In the 1970's, however, changes occurred. The United States enacted laws that would deny aid to foreign governments that consistently engaged in violations of human rights, and President Carter and other executives spoke out in favor of human rights.

Professor Henkin finishes his essay on an upbeat note. According to Professor Henkin, if one were to step into Thomas Paine's shoes in 1791 when he wrote *The Rights of Man* and look forward to today, or to look backward from today to 1791, it is indeed remarkable the progress we have made in the area of human rights. Yet I would

21. *Id.* at 101 (footnotes omitted).

22. *Id.* at 118.

register a note of skepticism about predictions of a proportionally similar ascent in the next 200 years. Indeed, it is not at all clear that the human rights movement is in as good condition as Professor Henkin claims. Similarly, Professor Henkin does not give us any reason to believe the future will be any brighter.

More specifically, I must register several objections to his analysis—objections which strongly challenge his thesis that international commitments on human rights have increased protection for individuals against arbitrary government intrusion. First, I do not see that the building blocks for human rights protection are securely cemented so that they can maintain their vigor if, indeed, they had any to begin with. Second, and a standard question raised about the viability of the enforcement capabilities of international human rights agreements, is the question of *sanctions*. What can be done to nations that refuse to protect human rights and, instead, deny the most basic rights to certain groups of their citizenry? Take the Soviet Union as an example. What sanctions exist to force the Soviets to treat “refusniks” and other persecuted minorities in an equal manner with other Soviet citizens? The answer, if one exists, is very little. Although the United States may exert certain economic or other pressures on the Soviet Union in order to change their treatment of these groups, the success of the pressure depends upon the incentives the United States can offer the Soviets. And, even more importantly, some critics claim that open discussion and exposure of human rights violations may cause the Soviets to be even more intransigent and therefore less willing to improve their treatment of these groups. Other nations would seem less able to influence Russian behavior.

More broadly, and certainly more importantly for the international human rights movement, is the effectiveness of international agreements in protecting individuals in the nations which are most committed to human rights. The United States, for example, preaches incessantly about the superiority of its system as a bulwark for human rights. The Constitution, it is claimed, is a remarkable document for many reasons, but particularly because it is a blueprint for the protection of individuals against government infringement. Thus, the argument goes, the United States need not concern itself with international human rights agreements. Rather, the United States should act as a catalyst to encourage other nations to create and be bound by international human rights agreements.²³

23. Indeed, even when the United States has become a signatory to an international human rights agreement, the main impetus appears to have been symbolic.

The United States, therefore, is signatory to very few international human rights agreements and ratifying state to even fewer such agreements. Moreover, a strong argument can be made that the United States does not follow even the spirit of some of the international human rights agreements to which it is a party. Instead, other concerns—economic, political, and social—assume preeminence to the detriment of human rights on an international scale.

The immigration policies of the United States make the point. For example, the United States has a long history as the valiant champion of the displaced refugee. The United States, it is said, has long embraced the political and social outcasts of other countries. Indeed the Statue of Liberty loudly proclaims this view:

. . . Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuge of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!²⁴

For the present-day alien who attempts to obtain the status of asylum within the United States, the majestic words inscribed on the Statue of Liberty have a certain hollow ring.

The prime example is the Haitian situation. Scores of Haitian nationals have been penetrating United States borders in recent years. In 1972, for example, approximately two thousand Haitian nationals survived treacherous ocean journeys and attempted to enter the United States.²⁵ Several thousand more made the same attempt in the intervening years between 1972 and 1978. Many of the Haitians claim they are entitled to asylum within the United States and, consequently, must be protected from return to Haiti, where they would face persecution. In addition to a national law which is meant to protect refugees against return to a nation in which they may face persecution, the United States is a signatory to an international ag-

See, e.g., Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. In his letter of transmittal to the Senate of Aug. 1, 1968, President Johnson claimed that "United States accession to the Protocol would thus constitute a significant and symbolic element in our ceaseless effort to promote everywhere the freedom and dignity of the individual and of nations, and to secure and preserve peace in the world." Letter of Transmittal, Exec. Doc. K, 90th Cong., 2d Sess. at IV (Star Print 1968).

24. E. LAZARUS, *The New Colossus*, in *THE POEMS OF EMMA LAZARUS* 202 (1888).

25. N.Y. Times, Feb. 17, 1977, at 19, col. 1.

reement which has the same purpose—to protect refugees from persecution—but which apparently is wider in scope. Yet most of the Haitian claims have been denied by United States Immigration and Naturalization officials. The basic reason is that other national concerns—mostly economic, political, and social—outweigh United States concern for international human rights.

A closer look at these provisions, and cases decided under their mandate, proves the point. For example, the trick of obtaining asylum status is to employ Section 243(h) of the Immigration and Nationality Act of 1952 which authorizes the Attorney General to “withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such a period of time as he deems to be necessary for such reason.”²⁶ Section 243(h) thus creates a means by which a refugee or other alien, already in the United States, whether legally or illegally, can remain here and avoid return to a country in which he would be subject to persecution. There is, however, no absolute right to political asylum in the United States. Rather, asylum is dispensed solely as a matter of discretion. Victims of persecution must, therefore, overcome formidable obstacles to be granted refuge in the United States. Moreover, reported cases strongly suggest that 243(h) relief is extremely difficult to obtain.²⁷

Additionally, the United Nations Protocol relating to the Status of Refugees,²⁸ to which the United States adheres, and which incorporates the 1951 Geneva Convention Relating to the Status of Refugees,²⁹ may be used in conjunction with Section 243(h) as authority for claiming asylum within the United States.

The Convention, as modified by the Protocol, defines a refugee as one who,

owing to *well founded fear* of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a re-

26. 8 U.S.C. § 1253(h) (1970).

27. *See, e.g.*, In re Dunar, Interim Decision No. 2192 (April 17, 1973).

28. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

29. 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

sult of such events, is unable or owing to such fear, is unwilling to return to it.³⁰

Article 32, section 1, of the Convention requires that "[t]he Contracting States shall not expel a refugee lawfully in their territory save on the grounds of national or public order."³¹ Finally, Article 33, section 1, requires that

[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.³²

Several differences between Section 243(h) and the Protocol are immediately apparent. First, the Protocol states that an alien need only establish that he has a "well-founded fear of being persecuted," while under Section 243(h) it must be "the opinion of the Attorney General" that the alien would suffer persecution if deported. Despite the plain difference between the language and standards of the Protocol and Section 243(h), the courts have held that the more constrained standard contained in Section 243(h) applies to asylum claims raised pursuant to the Protocol.³³ Thus, fewer aliens are permitted to remain within the United States than would otherwise be the case if the spirit of the international agreement was adhered to. Second, and perhaps the Protocol's only utility as construed by United States courts, is that it offers two additional grounds—nationality and membership in a social group—for requesting asylum. Finally, and perhaps more importantly, Article 33 appears to allow no room for the exercise of the Attorney General's discretion. The Article's provisions seem to be mandatory and therefore directly conflict with Section 243(h), which has been construed to give broad discretion to the Attorney General. Once again, however, constructions have transmuted the Convention into Section 243(h), and held that Article 33 does not affect the Attorney General's discretion.³⁴

30. 19 U.S.T. 6260, 6261, *as modified* by Art. I § 2, 19 U.S.T. 6223, 6225, T.I.A.S. No. 6577, Art. I. § a(2), 189 U.N.T.S. 152.

31. 19 U.S.T. 6260, 6275, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

32. 19 U.S.T. 6260, 6276, T.I.A.S. No. 6577, 189 U.N.T.S. 176.

33. *See Pierre v. United States*, 547 F.2d 1281, 1288 (5th Cir. 1977), *vacated and remanded*, 98 S.Ct. 498 (1977); *Ming v. Marks*, 367 F. Supp. 673, 677-78 (S.D.N.Y. 1973), *aff'd.*, 505 F.2d 1170 (2d Cir. 1974); *Kan Kam Lin v. Rinaldi*, 361 F. Supp. 177 (D.C.N.J. 1973), *aff'd.*, 493 F.2d 1229 (3d Cir. 1974), *cert. denied*, 419 U.S. 874 (1974). *But see Sannon v. United States*, 427 F. Supp. 1270 (S.D.Fla. 1977), *vacated and remanded*, 566 F.2d 104 (5th Cir. 1978).

34. *See, e.g.*, *In re Dunar*, *supra* note 27.

What explanations exist for these strained interpretations? What answers exist for the United States' reluctance to serve as a humanitarian refuge for some of the world's displaced? Why is the United States, the leading exponent of human rights in the world today, refusing to accept even the spirit of an international agreement?

Several observations are in order. First, it is abundantly clear that other factors besides an international agreement motivate nation-states. Second, since the United States is abridging its international obligations, can one expect other nations perhaps less committed to human rights to live up to any international human rights agreements? Third, and more generally, construction of Section 243(h) and the Convention raise the question of whether meaningful provisions for asylum are compatible with a national policy, reflected in a quota system, that severely limits entry to the United States. Moreover, a fundamental tension exists between the economically-motivated exclusionary provisions of the Immigration and Nationality Act of 1952 and the nation's presumed public ideology of protecting such important human rights as political, social, and religious freedoms. Given the national practice prior to the adoption of a limited immigration policy—wide open acceptance of aliens—it is difficult to argue that such an ideology finds meaning only within the boundaries of the United States. Further exacerbating this tension are the political imperatives of a world power which apparently undercut both the public ideology and the practical effect of the refugee provisions.³⁵

More broadly, the argument made by Professor Henkin—that international agreements on human rights will buttress and promote rights on a worldwide basis—seems particularly suspect. And this criticism, of course, speaks largely to his description of the historical

35. This tension is seen in other immigration laws which protect aliens who have fled from Communist nations while aliens who have fled from non-Communist nations are not similarly protected. See 8 U.S.C. 1153(a)(7) (1970). The contrast is particularly sharp when Haitian aliens are compared with those from a "Communist or Communist dominated country." Literally scores of aliens have been admitted to the United States under this statute. The same, of course, cannot be said for the Haitians since they have not fled from a Communist nation. In addition, thousands of Cubans have been granted refuge in the United States under a statute enacted specifically to protect those who have fled from Castro's Cuba. Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, 8 U.S.C. 1255 (1970). Query: Is a dictatorial regime which blatantly abuses the human rights of its citizens to be favored over another nation because the former is not defined as Communist while the latter is? Are human rights violations to be tolerated because of the definition of a political/economic system as capitalist as opposed to Communist? The immigration policies of the United States answer a resounding yes to this question.

development of human rights. Perhaps positivist law in the form of binding international agreements is not the solution. In sum, a prognosis on the progress of human rights appears less optimistic than Professor Henkin asserts. Perhaps Thomas Paine would be less impressed with the future of human rights than Professor Henkin.