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Spring 2022

Louis Henkin Memorial Lecture University of Miami Law School

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LOUIS HENKIN MEMORIAL LECTURE
UNIVERSITY OF MIAMI LAW SCHOOL
FEBRUARY 11, 2021

Juan E. Mendez

I.

I am deeply honored to be invited to deliver this year's version of a lecture series honoring Professor Louis Henkin whose contributions to the development of international law – and very specifically to international human rights law – are and very long will continue to be remembered. I am also a bit overwhelmed as I notice that the organizers have put me in the company of wonderful colleagues and masters of this field, several of them my friends and persons whose work I admire. It is also especially gratifying for me to have the occasion of renewing contact with the Henkin family (albeit under these strange social distancing conditions). You don't need me to recite the many ways in which Alice Henkin has made her own contributions to human rights worldwide; however, I must say that it has always been a source of enormous pride for me to recall my participation with Lou and Alice in the Aspen Institute weekend seminars for judges on international human rights law at Wye Island, as well as my "being there" (also at Wye Island) on the groundbreaking discussion on accountability for State Crimes (with giants like Lou, Ted Meron, Pepe Zalaquett and Aryeh Neier), a memorable discussion that launched a whole line of research, thought and practice on what we now call "Transitional Justice."¹ I need to mention also that Lou and Alice invited me to a week-long seminar in Aspen, Colorado in the late 1990s, no less as the beneficiary of a Harry Blackmun fellowship. And of course, my sense of being humbled by today's invitation is the same that I felt when I was invited to speak at Columbia Law School, uneasily following Jose Alvarez and Harold Koh at the podium, and with Lou himself in the audience. Alice knows

¹ See The International Center for Transitional Justice, <https://www.ictj.org> (last visited February 2021) (explaining what transitional justice is and what the International Center for Transitional Justice does).

that there could be a lot more instances of support to acknowledge today, and she knows of my abiding gratitude for all of them.

II.

The occasion is important to insist on human rights as the center of State policy (foreign as well as domestic) because we have just ended four years of an overtly anti-human rights administration,² and one that has crowned its very dubious achievements with an attempted assault on democracy itself and on the tenets of the U.S. Constitution regarding separation of powers and respect for the will of the people as expressed in genuine and fair elections.³ These are constitutional principles that Lou Henkin promoted, both as fundamental bases of the edifice we call International Human Rights Law, and as justification for a foreign policy that places human rights at the center of U.S. relations with the world. So, this is also an opportunity for us to acknowledge, with enthusiasm, the initial steps that the Biden Administration has taken to restore human rights and promotion of democracy to their rightful place in policy-formulation and execution. There is more that needs to be corrected or reinstated, and there will be moments in which policy interests of a different nature will prevail to frustrate some initiatives. But we should celebrate that now we have an arena to argue the pros and cons of what

² See The Leadership Conference on Civil and Human Rights, *Trump Administration Civil and Human Rights Rollbacks*, CIVILRIGHTS.ORG, <https://civilrights.org/trump-rollbacks/#2018> (stating Trump's policies that were a rollback of Human Rights such as the April 10, 2018 policy that a federal official announced that the Department of Justice was halting the Legal Orientation Program, which offers legal assistance to immigrants. Another example was on June 11, 2018, when U.S. Citizenship and Immigration Services (U.S.CIS) Director L. Francis Cissna announced the creation of a denaturalization task force in a push to strip naturalized citizens of their citizenship. On January 25, 2019, the Department of Homeland Security began implementing the Migrant Protection Protocols—also known as the Remain in Mexico policy—which forces Central Americans and others seeking asylum to return to Mexico, for an indefinite amount of time, while their claims are processed).

³ See Alex Woodward, *What happened in Washington DC yesterday? A timeline of insurrection*, THE INDEPENDENT (Jan. 7, 2021), <https://www.independent.co.uk/news/world/americas/us-politics/capitol-riots-what-happened-washington-dc-timeline-b1783562.html> (discussing the January 6th attack on the Capitol).

we propose in rational and values-oriented debate, hopefully not drowned out by demagoguery and authoritarianism.

III.

The world and the balance of power in the U.S. political arena both present us with new challenges, so we do not have the option of simply going back to some stage decades ago when “human rights” was a popular brand and initiatives to defend victims of abuse enjoyed bipartisan support in Congress and at the State Department, whether or not we defended victims of governments we considered friendly or unfriendly to the United States.

IV.

COVID-19 itself demands from us a careful reassessment of what we consider fundamental attributes of personal freedom, in conjunction with the right of every person to health, especially including measures for the prevention of deadly disease.⁴ The theory of restrictions and limitations on the exercise of rights is obviously still a good starting point, especially if we insist on a standard of “reasonableness” based on available science. Still, we should soon look back at this long and painful year to finetune our assumptions of what the State owes each of us and what all of us owe to other members of our society, especially the less fortunate or marginalized.

The pandemic has given excuses to authoritarian leaders to take advantage of it in order to consolidate or accumulate power, as in the suspension of scheduled elections⁵ or the shutting down of

⁴ Constitution of the World Health Organization, July 22, 1946, 14 U.N.T.S. 185, entered into force Apr. 7, 1948; *see* Universal Declaration of Human Rights, art. 25, 10 Dec. 1948, U.N.G.A. Res. 217A(III) (stating that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”).

⁵ *Global overview of COVID-19: Impact on elections*, INTERNATIONAL IDEA INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE (July 21, 2021), <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>.

parliamentary bodies,⁶ or the closure of essential State institutions like the courts.⁷ Some restrictions may be justified in the protection of employees and the public, but the State and its institutions must bear a significant burden to show the reasonable nature of the limitations, their temporary nature, and the lack of reasonable alternatives to normal functioning.

There is already a body of literature and of judicial decisions on the right balance between government-imposed restrictions and individual freedoms, prompted by measures adopted to halt the spread of the virus.⁸ We assume that a public health emergency entitles governments—perhaps even requires them—to establish and enforce rules about social distancing, face coverings and even prohibition of mass activities like closed door performances and sports events. On the other hand, as the pandemic prolongs its threat to human life and health, many persons and collectives become restless and challenge the need for these protections. Lately these forms of rebellion have been attempted to be justified in the name of “liberty,”⁹ meaning that the protection of health should be left to personal choice without interference from government. Of course, the unfettered exercise of

⁶ Claire Provost, Nandini Archer, & Lydia Namubiru, *Alarm as 2 billion people have parliaments shut or limited by COVID-19*, OPEN DEMOCRACY (Apr. 8, 2020), <https://www.opendemocracy.net/en/5050/alarm-two-billion-people-have-parliaments-suspended-or-limited-covid-19/>.

⁷ *Judiciary Preparedness for Coronavirus (COVID-19)*, UNITED STATES COURTS (Mar. 12, 2020), <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19>; *Pandemic disrupts justice system, courts*, AMERICAN BAR ASSOCIATION (Mar. 16, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/coronavirus-affecting-justice-system/>.

⁸ António Guterres, *We are all in this Together: Human Rights and COVID-19 Response and Recovery*, UN (Apr. 23, 2020), <https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and>.

⁹ Ted Galen Carpenter, *Preventing Liberty from Becoming a Coronavirus Fatality*, CATO INSTITUTE (Mar. 30, 2020), <https://www.cato.org/commentary/preventing-liberty-becoming-coronavirus-fatality>; see also Robert E. Litan & Martin Lowy, *Freedom and privacy in the time of coronavirus*, BROOKINGS (Apr. 23, 2020), <https://www.brookings.edu/research/freedom-and-privacy-in-the-time-of-coronavirus/>.

individual freedom in this context is precisely what favors the spread of the disease and its more fatal consequences.¹⁰

The question is obviously not that the epidemiological emergency permits any and all actions by the State to infringe upon individual freedom. It is also not necessary to invoke a state of emergency to suspend certain rights, as international law requires in the case of war or serious internal strife or catastrophic events.¹¹ In peacetime and non-emergency situations, the enjoyment of rights is always subject to limitations and restrictions based on the safety of others and on essential interests of the community, and this is rarely more evident when what is at stake is the health and life of our fellow citizens. In that case, however, every restriction is to be judged on the reasonableness test outlined above, as guided by science and experience. Evidently, some restrictions will prove to be unnecessary and not based in science; in those cases, courts should not uphold them. This analysis is already taking place in the jurisprudence of courts around the world, and it is guided by the experience and case law of organs of State responsibility for human rights violations since the 1950s.

As in all other human rights matters, an appraisal of the worth of each measure that imposes limitations of human activity requires a careful balance between every person's autonomy and the rights of all others to be free from disease. A restriction that is based on fear and not on science will not and should not stand. Similarly, one that places undue emphasis on economic activity while putting lives at risk should also be challenged.

A sensitive area on this issue is vaccination. States have a very legitimate interest in reaching a high percentage of the population and persuading each person to get the shot. But the decision remains a personal one. Unfortunately, most decisions to reject the vaccine are based on ignorance, unwarranted fear or ideology. And in many communities those attitudes threaten the successful achievement of

¹⁰ *Human Rights Dimensions of COVID-19 Response*, HUM. RTS. WATCH (Mar. 19, 2020, 12:01 AM), <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>.

¹¹ UN Comm'n on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4 (July 1, 1984).

immunity against COVID-19. In those cases, the State is amply justified in continuing to try to persuade all persons about the benefits of immunization, including through education. It is also permissible, I think, for States to condition the exercise of certain rights on proof of vaccination, such as attending concerts, boarding planes, and so on, as long as some flexibility is retained for allowing exemptions based on personal health or religious beliefs. Ultimately, even in those extreme circumstances, restrictions and limitations must always abide by the prohibition of discrimination on any of the grounds proscribed by international human rights law.

V.

Climate change, as a very real existential threat to our home in the universe, will also necessarily affect how we look at human rights.¹² Fortunately, we have the experience of ignoring both global environmental issues and the pandemic to show the disastrous results of choosing lies and immediate political gain over science and facts. And we are encouraged by the quick reversal of policy that we are seeing from the Biden Administration on both of these areas, as well as in others.¹³

VI.

Human Rights in Foreign Policy

The United States has a new chance to exercise leadership in an effort to place human rights, democracy and promotion of the rule of law as guiding principles of foreign policy and conditions for normal diplomatic relations between members of the international community. These objectives should be pursued for their own sake

¹² *Climate Change and Human Rights*, UN Env't Program (Dec. 2015), https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rights_human-rights-climate-change.pdf.pdf?sequence=2&%3BisAllowed=.

¹³ Exec. Order No. 14008, 86 FR 7619 (2021); Veronica Stracqualursi & Drew Kann, *U.S. officially rejoins the Paris climate accord*, CNN POLITICS (Feb. 19, 2021), <https://www.cnn.com/2021/02/19/politics/us-rejoins-paris-agreement-biden-administration/index.html>.

and not as tools of statecraft for the pursuit of other projections of State power. Even if “regime change” might well be in the interest of human rights in some cases, we should insist that human rights are their own justification, and that their currency is devalued when they are used as the excuse for other pursuits. This means that the U.S. should treat facts objectively and criticize abuses without double standards. It is encouraging to see that in the first days of a new administration the imprisonment of Alexei Navalny and of hundreds of demonstrators was placed at the center of highest-level conversations with the Russian Federation.¹⁴ Also commendable is the decision to distance the U.S. from the genocidal actions carried on by Saudi Arabia in the Yemen conflict.¹⁵

VII.

The U.S. must return to multilateralism as the most effective way of promoting initiatives based on moral values. In addition to returning to the UN Human Rights Council—as announced only days ago¹⁶—the U.S. should announce a policy of cooperation with all treaty bodies and special procedures, including a willingness to consider accepting the jurisdiction of the Human Rights Committee and the Committee Against Torture to entertain individual complaints against the U.S..¹⁷ With respect to Special Procedures, the U.S. must announce

¹⁴ Damelya Aitkhozhina, *Russian Court Rules to Jail Navalny*, HUM. RTS. WATCH (Feb. 2, 2021, 12:40 PM), <https://www.hrw.org/news/2021/02/02/russian-court-rules-jail-navalny>; Andrew Roth, *Alexei Navalny: 1,000 arrested after protests over jailing of Russian opposition leader*, THE GUARDIAN (Feb. 3, 2021, 1:01 PM), <https://www.theguardian.com/world/2021/feb/02/russian-opposition-leader-alexei-navalny-jailed>.

¹⁵ Nick Cumming-Bruce, *War Crimes Report on Yemen Accuses Saudi Arabia and U.A.E.*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/world/middleeast/un-yemen-war-crimes.html>.

¹⁶ Colin Dwyer, *U.S. Announces its Withdrawal From U.N. Human Rights Council*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621435225/u-s-announces-its-withdrawal-from-u-n-s-human-rights-council>; Press Statement, U.S. Sec. of State Anthony J. Blinken, *U.S. Decision to Reengage with the UN Human Rights Council* (Feb. 8, 2021), <https://www.state.gov/u-s-decision-to-reengage-with-the-un-human-rights-council/>.

¹⁷ International Covenant on Civil and Political Rights, art. 41, Dec. 16, 1966, 999 U.N.T.S. 171; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

a policy of inviting Special Rapporteurs and Working Groups to visit the country under conditions that apply to all member States of the United Nations and that are meant to safeguard the independence and impartiality of those bodies.¹⁸ In connection to the only regional system to which the U.S. is subject, the Biden administration should engage constructively with the Inter-American Commission on Human Rights, and consider submitting to the Senate the American Convention on Human Rights for ratification (the U.S. signed that treaty in the late 1970s).¹⁹ This could allow cases from the U.S. to be heard by the prestigious Inter-American Court of Human Rights, if an additional declaration to that effect is made.²⁰ There is an important chance to see if the United States can become, in the words of Louis Henkin, if not a pillar of the cathedral of human rights, at least a flying buttress.²¹

VIII.

It may be too much to ask (at least for the time being) for the U.S. to sign and ratify the Rome Statute for an International Criminal Court, a treaty signed by President Clinton and then “unsigned” by the George W. Bush administration.²² But at least a policy and practice of constructive engagement with the ICC, similar to that carried out under President Obama,²³ would clearly be in the interest of

[Some extremely weird formatting here. Don't know what Word is doing, but when I try to make this a single space, it duplicates FN18.]

¹⁸ *The Human Rights Council Completes Its Fourth Session*, U.N. HUMAN RIGHTS COUNCIL (July 2015), <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16257&LangID=E>.

¹⁹ Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

²⁰ Organization of American States, American Convention on Human Rights art. 45, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

²¹ Emma Brown, *Louis Henkin, Pioneer of Human Rights Law and Columbia Professor, Dies at 92*, WASH. POST (Oct. 21, 2010, 1:36 AM), <https://www.washingtonpost.com/wp-dyn/content/article/2010/10/21/AR2010102100330.html>.

²² *Q & A: The International Criminal Court and the United States*, HUM. RTS. WATCH (Sept. 2, 2020, 12:00 AM), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#2>.

²³ Christopher “Kip” Hale and Maanasa K. Reddy, *A Meeting of the Minds in Rome: Ending the Circular Conundrum of the U.S.-ICC Relationship*, 12 WASH. UNIV. GLOB.

promoting justice for mass atrocities everywhere. And in the meantime, an urgent reversal is in order for the threats of prosecution of high-ranking officials of the ICC and of American scholars and civil society activists deemed to have cooperated with or supported efforts to bring cases involving *prima facie* unlawful acts by U.S. personnel in Afghanistan.²⁴

IX.

The U.S. has never had a clear policy of preventing genocide and mass atrocities as part of its foreign policy, though on some occasions and under different administrations the U.S. did lead honest efforts in that regard. The George W. Bush administration called genocide by its name in Darfur, Sudan and then abstained at the Security Council on a motion to refer the Darfur situation to the ICC.²⁵ ICC jurisdiction on Darfur arguably had the desired effect of preventing further mass atrocities, even if the prospects of justice for the crimes already committed still proves elusive. In the Obama Administration, there were significant advances towards preparedness and inter-agency cooperation for the prevention of genocide, ultimately enacted through an Executive Order.²⁶ The Biden Administration should put that Executive Order in effect and

STUD. L. REV. 581, 588–89 (2013); Ayush Banerjee, *History of U.S.A's Relationship with International Criminal Court*, INT'L ASS'N FOR POL. SCI. STUDENTS (Oct. 23, 2018), <https://www.iapss.org/2018/10/23/history-of-the-us-international-criminal-court-relations/>.

²⁴ *U.S. Sets Sanctions Against International Criminal Court*, HUM. RTS. WATCH (June 11, 2020, 8:40 PM), <https://www.hrw.org/news/2020/06/11/us-sets-sanctions-against-international-criminal-court>; *International Criminal Court Sanctioned by U.S.*, BBC (Sept. 2, 2020), <https://www.bbc.com/news/world-us-canada-54003527>; *Afgahn Conflict: U.S. Sanctions "Kangaroo" ICC Over War Crimes Probe*, BBC (June 12, 2020), <https://www.bbc.com/news/world-us-canada-53012783>.

²⁵ Susan E. Rice, *The Genocide in Darfur—America Must Do More to Fulfill the Responsibility to Protect*, BROOKINGS (Oct. 24, 2007), <https://www.brookings.edu/research/the-genocide-in-darfur-america-must-do-more-to-fulfill-the-responsibility-to-protect/>; Eric A. Heinze, *The Rhetoric of Genocide in U.S. Foreign Policy: Rwanda and Darfur Compared*, 122 POL. SCI. Q. 359 (2007); *United States Declares Genocide in Darfur*, U.S. HOLOCAUST MEM'L MUSEUM (Sept. 9, 2004), <https://www.ushmm.org/learn/timeline-of-events/after-1945/genocide-in-darfur>.

²⁶ Exec. Order No. 13,729, 81 Fed. Reg. 32,611 (May 18, 2016).

designate focal points at the White House and at key agencies to apply its principles to specific situations that, if left unattended, may deteriorate into genocide. It is time to revive the idea of a roving U.S. Ambassador for War Crimes²⁷ who would be able to deploy significant diplomatic mobilization in prevention of atrocities and to champion efforts to insist on justice, both for its own sake and as a potentially effective preventive measure.

X.

It seems obvious to say that the office of the Assistant Secretary of State for Human Rights and Democracy (now Democracy, Rights and Labor) should be revitalized and its work highlighted.²⁸ A powerful voice is needed to amplify concerns about violations committed elsewhere, and to do so impartially and without regard to whether the government *prima facie* responsible for those abuses is a friend or a foe of the U.S. An honest and constructive criticism of allied governments can be well received because it strengthens the hand of forces in allied States who share with most Americans a commitment to institutionalization of democratic principles and of safeguards against authoritarianism. It would be very helpful if such initiatives of the Executive Branch were also accompanied independently by Congressional oversight guided by the same rationale of defense of human rights for their own sake, although I hope I am permitted to be skeptical about the immediate prospect of such bipartisanship on this area, given what we have seen in the last few decades.

²⁷ Ben Beach, *Justice Seeker*, HARV. MAG. (Mar.–Apr. 2018), <https://www.harvardmagazine.com/2018/03/justice-seeker>; Jane Stromseth, *Why the U.S. Needs the Office of Global Criminal Justice Led by a Senate-Confirmed Ambassador-at-Large*, JUST SEC. (July 26, 2017), <https://www.justsecurity.org/43554/u-s-office-global-criminal-justice-led-senate-confirmed-ambassador-at-large/>.

²⁸ *Country Reports on Human Rights Practices*, U.S. DEPT. OF STATE, <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/>.

XI.

A strong critique of the actions of some rival super-powers (like repression in Hong Kong²⁹ and suppression of religious minorities elsewhere in China³⁰) are likely to be more effective if they are not contemporary with giving “passes” to friendly States for their own violations. In all of this, U.S. human rights initiatives should not be limited to words, speeches and diplomatic messages, however forceful. They will need to be accompanied by the implicit condition that, unless the situations are remedied, our counterpart cannot expect business as usual with the United States. But it is important that we look again at sanctions as the tool of choice. Even if immediately satisfying in some cases as a moral choice, unilateral sanctions by the United States have had limited effect and at times have been counterproductive.³¹ Many examples of multilateral sanctions can also be cited for their being ineffective against callous tyrants while also inflicting great hardship on the innocent.³² But we should not fall into the trap of thinking that all human rights initiatives must be followed by sanctions or they will have no effect on the ground. Sanctions are a blunt and hard weapon, and they should be used as a last resort, after attempting persuasion and dialogue, and only after considering ways to ameliorate their unwanted consequences. Without renouncing unilateral sanctions altogether, the U.S. should demonstrate a preference for multilateral action on human rights, and – if sanctions become inevitable – promote a collective case-by-case analysis of what sanctions, for how long and for what purposes, so as to avoid the

²⁹ *China: New Hong Kong Law a Roadmap for Repression*, HUM. RTS. WATCH (July 29, 2020, 6:00 AM), <https://www.hrw.org/news/2020/07/29/china-new-hong-kong-law-roadmap-repression>; *U.S. Lawmakers Set Resolution Condemning China Over Hong Kong Rights*, REUTERS (Feb. 19, 2021, 11:35 AM), <https://www.reuters.com/article/us-usa-china-hongkong-idU.S.KBN2AJ1ZJ>.

³⁰ Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNCIL ON FOREIGN RELS. (Mar. 1, 2021), <https://www.cfr.org/background/chinas-repression-uyghurs-xinjiang>.

³¹ *Use and Effect of Unilateral Trade Sanctions*, BROOKINGS (May 1999), <https://www.brookings.edu/testimonies/use-and-effect-of-unilateral-trade-sanctions/>.

³² *Sanctions*, UNITED NATIONS SECURITY COUNCIL, <https://www.un.org/security-council/sanctions/information>.

problem of hurting the innocent and not affecting the behavior of the really guilty parties.

XII.

In the final analysis, however, the pursuit of human rights abroad needs to be credible and will be ineffective unless and until the U.S. makes a concerted effort to clean up its own house of serious abuses that have become pervasive. The original meaning of “U.S. exceptionalism” may have been lofty and inspirational, but nowadays it stands for the untenable position that rules apply to others but not to the United States.

XIII.

Human Rights at Home

First and foremost, we need to acknowledge that the foundation of democracy, an electoral system that is fair and credible, needs to be improved. On the positive side, the country has shown to the world that, even in the midst of a pandemic, it can organize a huge election with new technologies and still guarantee a result that is free from fraud or anomalies.³³ That is an important platform from which to proceed. But it is urgent to eliminate voter-suppression and gerrymandering in many States that amount to the unfair denial of the franchise to many citizens on the basis of their race.³⁴ We also need to

³³ Drew Desilver, *Turnout Soared in 2020 as Nearly Two-Thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RSCH. CTR. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/>; *Joint Statement From Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>; Arthur Herman, *2020 Is America's High-Tech Election*, FORBES (Nov 2, 2020, 2:10 PM), <https://www.forbes.com/sites/arthurherman/2020/11/02/2020-is-americas-high-tech-election/?sh=58c24e817a0c>.

³⁴ Patricia Okonta, *Race-based Political exclusion and social subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 COLUMBIA HUM. RTS. L.R. 254, <http://hrlr.law.columbia.edu/files/2018/07/PatriciaOkontaRaceBasedPo.pdf>.

take a hard look at judicial decisions that have rendered campaign financing to a way for wealthy sectors to ensure a decisive advantage and deny all citizens a level playing field. The electoral college system of choosing a President is a remnant of an unjustifiable past and one that no longer fulfills the fundamental premise of "one person one vote."³⁵

If we are to promote democracy worldwide, we need to produce serious accountability for attempts to subvert the popular will and to promote insurrection against established branches of government, as in the refusal to acknowledge results of the November 3 election, the spreading of false information about electoral fraud, culminating in the shameful acts of deadly violence on January 6 of this year. The impeachment proceedings already under way must be concluded with a serious examination of the undeniable facts surrounding these episodes.³⁶

XIV.

There are many aspects of the Global War on Terror launched after the terrorist attacks of September 11, 2001 that require correction. First, the ignominious prison in Guantanamo Bay must be closed as it is a symbol of the kind of negative U.S. exceptionalism that the rest of the world rightfully condemns.³⁷ The Biden Administration should also promote a repeal of the Military Commissions Act, and remand to federal courts the handful of cases still making an embarrassing and

³⁵ Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145 (2002); Mara Liasson, *A Growing Number of Critics Raise Alarms About the Electoral College*, NPR (June 10, 2021, 5:03 PM), <https://www.npr.org/2021/06/10/1002594108/a-growing-number-of-critics-raise-alarms-about-the-electoral-college>.

³⁶ Weiyi Cai, *A Step-by-Step Guide to the Second Impeachment of Donald J. Trump*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/interactive/2021/02/08/us/politics/trump-second-impeachment-timeline.html>.

³⁷ "It's Not Just About Closing Guantánamo, But Also Ensuring Accountability," *UN Rights Experts Say*, UNITED NATIONS OFF. HIGH COMM'R FOR HUM. RTS. (Feb. 26, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17097&LangID=E#sthash.WTRo8YZS.dpuf>; Inês Daniela Pereira da Costa, *The Influence of American Exceptionalism on Latin American Foreign Affairs: A Case Study of Guantánamo Bay, Cuba*, 3 J. POL. SCI. & INT'L RELS. 34, 46 (2016).

painfully slow progress through egregious violations of due process and fair trial guarantees, almost two decades after arrest.³⁸ Around thirty inmates who have long been cleared of any charges should be released.³⁹

It may be too much to ask for full investigation, prosecution and punishment of the many acts of torture that resulted from the shameful “torture memos” and their free interpretation by agents who understood they were given a free pass to conduct “extraordinary renditions” and to interrogate suspects with means that violate international obligations of the United States as well as established domestic law.⁴⁰ At the very least the full report of the Senate Select Committee on Intelligence⁴¹ should be published as a way of honoring Truth, if not full Justice.

XV.

In the administration of criminal justice and prison systems the U.S. has a lot to do to bring up its practices to accepted international standards. The most urgent, of course, is to pursue the painfully frequent acts of deadly violence and abuse of authority against

³⁸ Miami Herald Staff Report, *Who's still held at Guantánamo*, Miami Herald (Aug. 24, 2016, 1:47 AM), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2203501.html>.

³⁹ *Active Case: Guantánamo*, CTR. FOR CONSTITUTIONAL RTS., https://ccrjustice.org/home/what-we-do/active-cases?f%5B0%5D=im_field_issues%3A139 (last visited June 30, 2021).

⁴⁰ See Memorandum from John Yoo, Deputy Assistant Att’y Gen., U.S. Dep’t of Just., to William Haynes II, Gen. Couns., Dep’t of Def. (Mar. 14, 2003) (on file with the U.S. Dep’t of Just.) (concluding that the U.S. Supreme Court interprets the Fifth and Eighth Amendments to deny alien enemy combatants held abroad from protections under the Fifth and Eighth Amendments); see also David Cole, *The Torture Memos: Rationalizing the Unthinkable* (David Cole ed., 2009) (explaining that the ‘torture memos’ refer to the August 2002 Torture Memo for Alberto R. Gonzalez, the August 2002 Interrogation Memo for John Rizzo, the December 2004 Public Memo, the May 2005 Techniques Memo, the May 2005 Combined Use Memo, and the May 2005 CID Memo).

⁴¹ Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program together with Foreword by Chairman Feinstein and Additional and Minority Views (Dec. 2014), <https://www.govinfo.gov/content/pkg/CRPT-113srpt288/pdf/CRPT-113srpt288.pdf>.

members of racial minorities.⁴² The Department of Justice should seek clarification and correction of judicial decisions regarding the “presumption of legality” of actions by law enforcement that have been in practice the argument for non-prosecution of excessive use of deadly force when the victims are African Americans. The manipulation by prosecutors⁴³ of grand juries operating in secrecy is another factor leading to the loss of civic trust in our institutions.⁴⁴ The Department of Justice must adopt a forceful position in favor of accountability for these racially-motivated crimes.

The state of prisons throughout the country was highlighted as a blight on the US record during the Obama Administration⁴⁵ and gave rise to a rare case of bipartisan agreement during the Trump government,⁴⁶ but those welcome steps have not resulted in any meaningful change. We must find ways to reduce the rate of incarceration, especially for non-violent crimes, and to promote the larger use of alternatives to preventive detention. Such measures will reduce overcrowding and will by themselves contribute to more humane treatment of persons deprived of liberty. But prison reform needs to go deeper. Most urgent in the United States, in federal and in State prisons alike, is to review the use and abuse of prolonged or indefinite solitary confinement as “prison management” (i.e., without relevance to disciplinary action) and particularly its widespread use against persons with mental disabilities. There has been some progress in a few States to ban solitary confinement or to strictly regulate its use. The federal government should promote the adoption of the articles relevant to solitary confinement contained in the Nelson Mandela

⁴² Hatfield, Michelle M. K., *Can Police Unions Help Change American Policing?*, 5 UCLA Crim. Just. L. Rev. 211 (2021).

⁴³ Davis, Angela J., *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA Crim. Just. L. Rev. 1 (2019).

⁴⁴ Roger Roots, *If It's not a Runaway, It's not a Real Grand Jury*, 33 CREIGHTON L. REV. 821 (2000), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ri-chlapin14&div=21&id=&page>.

⁴⁵ Remarks by the President at the NAACP Conference (July 2015), <https://obama.whitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

⁴⁶ Ames Grawert, *What is the First Step Act – And What's Happening with It?* Brennan Center for Justice (June 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>.

Rules of 2015 (current version of the Standard Minimum Rules for the Treatment of Prisoners), a non-binding but highly authoritative instrument of international law that several democratic nations are adopting.

It will also be important to bring the United States into the universal consensus to abolish the death penalty.⁴⁷ The US already executes about half of the convicts as it did twenty years ago, and it does so in a small number of States and counties within those States. A dishonorable exception, of course, is the shameful 13 federal executions in the course of the Trump administration alone (as opposed to one in the preceding three decades).⁴⁸ A first step is to adhere to the UN moratorium on executions, that has had significant success in reducing capital punishment around the world. Consideration should be given to Department of Justice active participation in litigation opposing the death penalty in the remaining States.

XVI.

In only a few weeks we have seen encouraging steps to restore decency and reasonableness to management of migration flows, including abandonment of racial or religious standards for admission to the US, active work towards the reintegration of families separated by a cruel and callous policy of the Trump administration, and restoration of a sensible asylum review process.⁴⁹ We need to get back to full compliance with the three fundamental principles of refugee and asylum law: non-discrimination, fair opportunity to state a claim, and non-refoulement (the latter also a specific, more narrow yet more absolute, prohibition under the Convention Against Torture).⁵⁰ Of

⁴⁷ Resolution Adopted by the General Assembly on death penalty (A/67/279)(Aug. 2012)http://antitorture.org/wp-content/uploads/2013/03/A67279_Death_Penalty.pdf.

⁴⁸ Barbara Campbell & Suzanne Nuyen, *U.S. Executes Dustin Higgs In 13th and Final Execution Under Trump Administration* (Jan. 2021), <https://www.npr.org/2021/01/16/957559566/u-s-executes-dustin-higgs-in-13th-and-final-execution-under-trump-administration>.

⁴⁹ Brendan Lokka, *Trumps Torture Legacy: Isolating, Incarcerating and Inflicting Harm Upon Migrant Children*, 35 *American University Int'l Law Review* 169 (2019).

⁵⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *General Comment No. 3, Implementation of article 14 by States parties*,

course, the Biden Administration announcement of comprehensive immigration reform deserves careful consideration and enthusiastic support.⁵¹

XVII.

Conclusion

Needless to say, I have only stated a list of priorities that respond to my own biases and preferences. There are many other ways in which the US must restore credibility and effectiveness in human rights protection at home and abroad. Most importantly, the measures I propose – some immediate, others long term – should not be seen only as policy formulation for the new administration. The responsibility lies also with us as citizens and with the independent organizations of civil society that we form to pursue our values and our causes in the public arena. Lou Henkin, the ultimate citizen-scholar, understood this as no one else, including the need to maintain our autonomy and independence even as we sympathize with the initiatives already under way. There will be occasions to criticize as well, and at that time we—as responsible citizens and activists—will continue to draw inspiration from the example that Louis Henkin continues to offer us.

Thank you.

CAT/C/GC/3 (Dec. 2012), https://www2.ohchr.org/english/bodies/cat/docs/gc/cat-c-gc-3_en.pdf; *see also* United Nations High Commissioner on Refugees, *Note on Non-Refoulement*, U.N. Doc. EC/SCP/2 (Aug. 23, 1977), <https://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>.

⁵¹ Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System (Jan. 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>.