Chapter Twelve

AN EXTERNAL FOCUS AT THE END OF THE COLD WAR

“International law is no longer, if it ever was, a peripheral body of law, practiced by an exclusive group of lawyers and visually personified by the International Court of Justice and the United Nations. International law is now pervasive and central to what happens internationally, nationally and even locally.”

—Edith Brown Weiss
Address, 88 ASIL Proceedings 382 (1994)

A. AN ENERGETIC TANDEM IN CHARGE

1. An Outspoken President

In his first column for the Newsletter as President in 1992, Louis Henkin asserted that “The principal challenge and the principal opportunity for the Society lie in a major new program to help make international law more relevant, more material – to help to assure that governments and peoples take international law seriously.” 1 Echoes of Elihu Root could be heard in that statement. It was not quite the way Root would have put it, but the message was essentially the same. The Society should be true to one of the purposes its constitution proclaimed: “to promote the establishment and maintenance of international relations on the basis of law and justice.” 2

In his second column for the Newsletter, Henkin took on the U.S. Supreme Court. In the Alvarez-Machain case, 3 Henkin said, “the U.S. Supreme Court had one of its infrequent opportunities to take international law seriously and to assure that the Executive Branch takes international law seriously. The Supreme

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1 Notes from Incoming President Louis Henkin, ASIL Newsletter, Apr.–June 1992, at 1, 2 (emphasis in the original).
Court failed.” In *Alvarez-Machain*, the Supreme Court found no violation of the U.S.–Mexican extradition treaty when U.S. agents kidnapped a Mexican citizen in Mexico and brought him to the United States for trial on criminal charges. Nor did the Supreme Court take note of any relevant customary international law – not even the well-known passage from the World Court’s judgment in the *Lotus* case: “[T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.”

Henkin went beyond criticizing the Supreme Court. “The larger, longer question,” he said, “is whether the Government of the United States – all branches – is prepared to commit itself to taking international law seriously.” That became the recurring theme of his two-year tenure as President of the Society. It was a theme destined to endure into later presidencies as well.

Henkin had some personal opportunities in this regard. He testified before the Senate Foreign Relations Committee in 1992 on international and constitutional law issues arising out of Chapter VII of the U.N. Charter, asserting (*inter alia*) that because Security Council decisions – as distinguished from recommendations or authorizations – under Chapter VII are binding on the United States, the U.S. President has a constitutional duty and authority to carry them out. Henkin also wrote an open letter to incoming President Clinton urging him to dedicate his administration to the rule of law in relations between nations. His hopes were dealt a blow when U.S. forces fired missiles at Iraqi intelligence headquarters in Baghdad in June 1993, claiming a right of self-defense arising out of an apparent Iraqi attempt to assassinate former President George Bush. Henkin wrote disapprovingly of reliance on flabby definitions of self-defense.

In a 1993 column, Henkin took on the Supreme Court again. This time the case was *Sale v. Haitian Centers Council, Inc.*, in which the Court held that the nonrefoulement rule in the Refugee Convention did not prohibit a state from

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