International Human Rights and US Refugee Law: Synergies and Contradictions

Deborah Anker and Josh Vittor

The relationship of the United States (US) to international human rights law appears paradoxical. On the one hand, the US was a leader in the international human rights movement born in the immediate aftermath of World War II. On the other, the US has generally eschewed ratifying major instruments of international human rights law. Yet refugee law is one field in which this apparent distancing from international human rights law on the part of the US is not so evident.¹

Indeed, the United States ratified the United Nations refugee law treaty, the Convention relating to the Status of Refugees (albeit belatedly),² and incorporated key provisions of that treaty into domestic law in 1980.³ Moreover, over the past 35 years, the United States has developed a rich body of refugee law that at times – including in Supreme Court decisions and key federal court decisions – has explicitly recognized refugee law’s international legal origins. Despite some ambivalence on the point, the United States sees itself as nation of immigrants and especially as a place of refuge for the persecuted.⁴

However, paradoxes remain. Thus, for example, even after incorporating the Refugee Convention through its 1980 Refugee Act, the US generally has not participated, as have many other States parties, in the transnationalised refugee

¹ This story of ‘distancing’ can be exaggerated, even outside the refugee law context. See Atkins v Virginia 536 U.S. 304 n.21 (2002) (holding that the execution of a minor retarded person convicted of a crime was unconstitutional, because ‘within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.’).
³ 8 U.S Code 1157, Annual admission of refugees and admission of emergency situation refugees.
law dialogue that acknowledges and even incorporates the jurisprudence of other States parties, thereby creating a culture of comity among ratifying States. In this respect, Americans consider themselves ‘mavericks,’ doing things their own way and often out of their own mixed traditions.

This chapter will show that the US has recognized the international legal foundations of its domestic refugee statute in various ways. For instance, training materials for first-tier decision makers (“asylum officers”) emphasize international human rights law and the international context of domestic refugee law. Similarly, in many instances, including in Supreme Court and key federal court decisions, the US has applied a human rights framework to refugee law decision-making, even if not done explicitly. It will be shown that this is especially in the interpretation of the key term “persecution” in the refugee definition.

As such, this chapter will show that the US has played a leadership role internationally with respect to some key areas of refugee law doctrine. Today, the US boasts a robust and, in many areas, an increasingly progressive body of refugee law. However, this is often as a result of “bottom up” change, that is, the work of practitioners representing individual clients, transforming the institutional decision-making culture, and creating pressure for formalized doctrinal change.

1 The US, Human Rights and Internationalist Approaches to Asylum Law

The paradox in the US relationship to international human rights law harkens back to the role of the US in the original development of the international human rights movement. On the one hand, in the years after World War II, the United States was one of the leaders in the movement for the formalization of international human rights principles. Especially through the efforts of Eleanor Roosevelt and Louis Henkin, it was deeply involved in drafting the foundational

---

6 Roosevelt was selected to lead the United Nations Commission on Human Rights, responsible for the daunting task of drafting an international declaration of human rights principles. The Commission’s efforts culminated in the Universal Declaration of Human Rights, about which Roosevelt was quoted as saying, ‘I really think the area in which students [of human rights] should function is first of all they should know the declaration that we agreed we would strive to implement in our own country.’ See M.A. Glendon, ‘Knowing the Universal Declaration of Human Rights’ (1998) 73 Notre Dame LR 1153, 1157.
7 Credited by some with ‘creating the field of human rights law,’ Henkin was also instrumental in crafting the post-war human rights instruments, including the Refugee Convention. See