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America's Apostasy

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Professor Hathaway has taught international human rights law since 1984, and regularly advises both governments and advocacy groups around the world. He has pioneered efforts to link refugee law to international human rights law, and is presently completing a treatise entitled The Rights of Refugees Under International Law. Last spring, he convened the First Colloquium on Challenges in International Refugee Law, bringing international experts to the Law School to collaborate with students in producing recommendations to respond to the increasing tendency of governments to require would-be refugees to accept relative safety within their own countries, instead of seeking asylum. The result of their deliberations, “Michigan Guidelines on the Internal Protection Alternative” (see story on page 30), has been disseminated to some 500 refugee judges, policymakers, and advocates.

America’s apostasy

By
JAMES C. HATHAWAY

It has often struck me that the prominence of the Restatement of the Foreign Relations Law of the United States epitomizes the plight of international law in this country. The title of this standard reference on international law does not even refer to international law, but instead to foreign relations law. That is, it is meant to set out the standards by which we may legitimately judge the conduct of others. The clear, if unintended, message is that the Restatement is not really a codification of laws that bind us. And indeed, it is explicitly not just a codification, but a restatement. It is, in other words, not a simple summation of those rules that are binding under international standards of lawmaking, but a specifically American take on the rules that (ought to?) define the global order.

This detachment from an understanding of international law as a collectively defined system that binds all states is most clearly evident in our troubled relationship with international human rights law. While the United States has been involved in the drafting of every major human rights treaty, is represented at virtually every session of every human rights monitoring body, and annually publishes its assessment of the human rights performance of every country in the world, we simply do not accept that international human rights law is about us. We cannot bring ourselves as a nation to adopt international human rights standards as domestically binding norms, and we certainly will not tolerate other states or international bodies scrutinizing the ways in which human rights are (or are not) implemented in the United States.

My own field of refugee law is rife with examples of American refusal to be part of the international human rights project. The courts routinely insist that relevant domestic law implements our obligations under international refugee law. But they seem simultaneously determined to interpret our treaty obligations in ways that diverge from the goals of the Refugee Protocol, and which bear little resemblance to interpretations of the same obligations rendered by courts in our partner states. The United States stands alone in its insistence that refugees are to be denied protection unless somehow able to prove the state of mind of the person or entity that would persecute them; specifically, we require evidence that the actions of the agent of persecution are inspired by racial, political, or other animosity. No other country
demands such feats of clairvoyance. Similarly, while most developed countries have formally committed themselves to judge the existence of a risk of persecution by whether or not basic international human rights are respected in the asylum seeker’s home country. American judges only rarely show any awareness of these standards. Instead, our courts are typically content subjectively to decide whether the harm threatened is “regarded as offensive.” And even when an individual somehow meets the peculiarly American standard of international refugee status, this is no guarantee of protection. Instead, we assert that asylum is a matter of discretion, rather than entitlement, and, unique among Western states, we explicitly reserve the right forcibly to interdict any refugees approaching our borders, even if this means taking action in international waters beyond our legal authority.

Even with all these concerns, our record on respect for international refugee law is actually one of the relative success stories in America’s relationship to international human rights law. At least with refugee law we have signed the relevant treaty, and acknowledge that our asylum law is (more or less) based on international standards. Until quite recently, we refused to be bound by any of the other major human rights treaties. And even now, we will not sign on without a reservation to guarantee that international norms cannot override the U.S. Constitution (logically raising the question of just why we accede to human rights treaties at all).

Perhaps most tragically, the United States steadfastly refuses to allow its own citizens to hold it directly accountable through the United Nations complaint procedures established to address even such presumably uncontroversial rights as freedom from torture, racial discrimination, and the violation of basic civil and political rights. Among the industrialized countries that comprise the Organization for Economic Cooperation and Development, only the citizens of the United States, Japan, Korea, and Mexico are prevented from accessing the United Nations. Even Algeria, China, and Libya have agreed that their citizens will have the right to take human rights concerns directly to the UN. Our contempt for international accountability is clear too in the outrage expressed by some political leaders when the United Nations Special Rapporteur on Summary Executions not only decided to visit the United States last year, but dared to criticize our refusal to abolish laws that authorize the execution of children (only Thailand has taken a position comparable to that of the United States).

We can, of course, credibly argue that there is less need for international involvement in human rights enforcement in the United States than in many other, much more troubled, countries. And we can always fall back on the tired old chestnut of domestic constitutional supremacy to insist that it would not be legally responsible for the United States to be a full participant in the international human rights system. But these are lame excuses for keeping our distance from international human rights law. Many other countries with excellent human rights records are quite willing to embrace international accountability. And few of their constitutions are as clear in defining an authoritative role for international law as is our own Article VI, which expressly defines treaties to be part of “the supreme Law of the Land,” which shall bind judges “... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

My own sense is that the real reason the United States rejects international human rights law is an intuitive belief that our own, domestically framed, human rights values are better than anything the world has to offer us. We just do not want to see our definitions of rights interfered with by non-Americans. Yet the truth is that access to the international human rights machinery would not allow the United Nations to overrule American law. There is a solid tradition within UN treaty bodies of deference to reasonable national interpretations of human rights, and, in any event, no United Nations human rights body can issue enforceable judgments. The United States would, however, be required to defend the treatment of persons under its authority before expert bodies elected by the governments of the world (including the United States). We would be denied the right simply to assert the domestic legality of a particular practice, and would occasionally have to face up to the logic of reconsidering our traditional views.

Experience elsewhere suggests that the rejection of a cosmopolitan approach to human rights is a substantive loss for American society. Complaints to international human rights bodies have opened the eyes of Canada to flaws in its protection of aboriginal peoples, of the Netherlands to patterns of sex discrimination, and of Switzerland to official conduct that gave rise to the risk of torture. American national human rights law is similarly in need of a mechanism that tests our accepted beliefs against the views of the broader global community. Is there no room for doubt about the sufficiency of our strictly national approach to human rights when the Constitution is invoked to defend the right to inflame hatred through violent speech, to guarantee the right of every American to possess guns without demonstration of genuine need, and to treat foreign nationals routinely incarcerated at our borders as non-persons? Are we really confident that human rights are not infringed when we do little to combat the existence of a permanent economic underclass in the midst of the world’s wealthiest nation?

There are also compelling political reasons to accept the need for a continuing dialogue of justification about the scope of human rights law. Whatever concerns we had about the risks of international accountability during the Cold War era are now clearly irrelevant. In an era where virtually all wars are civil wars, fought on the basis of irrational prejudice or discriminatory allocations of power and resources, there is no excuse for our stand-offish attitude towards an international legal system that works to defuse precisely those risks. If we continue to insist on the primacy of our own parochial way of defining rights and entitlements, we should not be surprised when others also reject accountability with predictably tragic results of the kind witnessed most recently in Kosovo.

America must learn to lead by example.