

BOOK REVIEW

James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005).

Professor James C. Hathaway is recognised as one of the world's leading refugee law scholars. His text *The Law of Refugee Status*¹ which was published in 1991 has been used in refugee law courses in many university syllabuses and cited by courts in a number of landmark refugee law cases.² It is a very succinct, readable, and accessible introductory text to the law on refugee status. However, as it was written over 15 years ago, it does not reflect a number of important developments in refugee law which have occurred since that time.

In his most recent book, *The Rights of Refugees under International Law*, Professor Hathaway presents a voluminous, comprehensive study of the human rights of refugees. The text greatly expands the parameters of refugee law to encompass international human rights law, particularly the economic and social rights of refugees, and 'rights of solution' which include such measures as repatriation, resettlement and naturalisation. This broadened focus reflects the changes in refugee law advocacy since Hathaway's earlier work, that is, the increasing use by practitioners of international human rights treaties such as the *European Convention on Human Rights* and an emphasis on the need to find 'durable' solutions to refugee flows by the United Nations High Commissioner for Refugees (UNHCR). The emphasis on the human rights of refugees in the book is significant, as it presents a departure from Hathaway's previous (much shorter) 1991 text which focused on the legal principles of refugee status under the 1951 *Convention Relating to the Status of Refugees* (the 'Refugee Convention'). In this way, Hathaway's recent book recognises the decline in the strength of the Refugee Convention and the need to look further afield to international human rights law in order to obtain protection for refugees.

According to Hathaway, his 2005 text was inspired by a call from refugee law pioneer, Professor Grahl-Madsen, to 'link an updated study of the rights derived from the Refugee Convention with analysis of relevant norms of international human rights – thus yielding a truly comprehensive understanding of the refugee rights regime'.³ Hathaway (quite rightly) notes that states have, over the years, sought to limit refugees' access to a variety of rights. He therefore notes there is an imperative to clearly define the rights which follow from refugee status. He states that the Refugee Convention is a human rights instrument and that refugee law provides 'surrogate or substitute protection of basic human rights'.⁴ His goal is therefore to give 'renewed life to a too-long neglected source of vital, internationally

1 James C Hathaway, *The Law of Refugee Status* (1991).

2 See for instance citations by the High Court of Australia in *'Applicant A' v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 229; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1 [62].

3 James C Hathaway, *The Rights of Refugees under International Law* (2005), xiii.

4 *Ibid* 5.

agreed human rights for refugees'⁵ and to present a 'merged analysis' of the Refugee Convention and the two primary international human rights treaties: the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').⁶

In providing such a 'merged analysis', the book is broken up into seven chapters. Chapters 1-3 deal with introductory matters, namely, international law as a source of refugee rights, the evolution of the refugee rights regime and the structure of entitlement under the Refugee Convention. Chapter 1 is particularly useful in providing an in-depth analysis of the *travaux préparatoires* of the Refugee Convention and the rules of treaty interpretation. Chapter 2 includes a most interesting discussion of citizenship and aliens law and Chapter 3 examines the way in which rights are attributed and defined under the Refugee Convention.

However, it is Chapters 4-7 which are, in Professor Hathaway's words, the 'heart of the book'.⁷ These chapters analyse the rights of refugees according to their level of attachment to the state of asylum, thus Chapter 4 deals with the rights of refugees physically present, Chapter 5: the rights of refugees lawfully present and Chapter 6: the rights of refugees lawfully staying. Chapter 7 then discusses the 'Rights of Solution'.

In addition to the chapters themselves, the text helpfully contains extracts of some of the key documents in this area, including the 1951 Refugee Convention, the *Universal Declaration of Human Rights*, the ICCPR and the ICESCR. There is also an extensive index (totalling 111 pages) to assist readers in locating information – an inclusion necessary in a lengthy text of this nature.

In terms of coverage, it should be noted that the book does not discuss in any depth the specialised human rights treaties (such as the *Convention on the Rights of the Child*), or the various regional human rights conventions. Hathaway justifies the non-inclusion of these treaties on the basis that these do not apply universally to all refugees, only certain subsets, and thus did not fit in with the goal of his study 'to define the common core of human rights entitlements that inhere in *all* refugees, in all parts of the world, simply by virtue of being refugees'.⁸ This is understandable given the vast amount of case law relating to the *European Convention on Human Rights* and the particularities of the African and Latin American instruments. Likewise, as Hathaway notes in the introduction, the book is not designed to be a study of the definition of a refugee. Thus, it does not analyse the meaning of key legal terms under the 1951 Convention such as 'persecution' or 'particular social group'. Helpfully, Hathaway refers to other texts where those legal issues have analysed in detail, including his previous book, *The Law of Refugee Status*.⁹

5 Ibid 4.

6 Ibid 9.

7 Ibid 12.

8 Ibid 8.

9 Hathaway, above n 1.

A detailed critique of the content of all the chapters in this book, the text of which totals some 1002 pages, is beyond the scope of this review and would do little to give the reader an insight into the analysis covered in each section. Therefore, to give readers a flavour of the content of the book, one chapter – Chapter 4 – ‘Rights of refugees physically present’ will be examined in some detail.

Chapter 4 covers an important development in contemporary state practice, that is, the increasing use by states of measures to deny asylum seekers the opportunity to enter its territory, thereby preventing applications for refugee status. This chapter examines the right to enter and remain in an asylum state and associated human rights, such as freedom from arbitrary detention and penalisation for illegal entry; physical security; necessities of life (such as access to food, shelter and healthcare); property rights; family unity; freedom of thought, conscience and religion; education; identity and status documentation; and judicial and administrative assistance. According to Professor Hathaway, those rights follow ‘automatically and immediately from the simple fact of being a Convention refugee within the effective jurisdiction of a state party’.¹⁰ Given the measures taken by the Australian government to deny asylum seekers the opportunity to enter Australia to apply for refugee status, this chapter is of particular relevance to Australian readers.

Hathaway begins the chapter by setting out a diverse range of examples where states have refused entry to refugees, often with tragic results. The examples given concern both developed and developing countries and include Thailand, Nepal, Guinea, Namibia, Greece, Jordan, Zaire, Tanzania, Pakistan, France, and the UK. Hathaway reflects his understanding of the situation ‘on the ground’ by noting that refugees are not only denied entry via rejection at borders or physical ejection to the country of origin, but also more subtle forms of removal, such as refusal of access to refugee status determination and weaknesses in the operation of domestic asylum systems. Mention is made in this section of Australia’s use of interdiction at sea during the Tampa incident of 2001 and the excision of territories to create a declared ‘migration zone’. In this analysis, Hathaway demonstrates an in-depth understanding of both Australian law and the political environment in which it operates.

Hathaway also covers other *non-entrée* mechanisms such as visa control policies and the use of ‘first country of arrival’, ‘safe third country’ and ‘safe country of origin’ rules. He then goes on to discuss the duty of *non-refoulement* under Article 33 of the Refugee Convention. In doing so, he discusses the use of Article 12 of the ICCPR as a means of challenging visa control systems. In the remainder of the chapter Hathaway discusses the various economic, social and cultural rights which accrue to a refugee who is physically present in a state. In doing so, not only does he analyse the provisions of the Refugee Convention, the ICCPR and the ICESCR, but, helpfully, rather than merely discussing these instruments separately, the author compares and contrasts the various provisions of the treaties so as to demonstrate the advantages of utilising one over the other.

¹⁰ Hathaway, above n 3, 278.

The manner in which Hathaway approaches the material in this particular chapter is echoed in the Chapters 5-7: he commences with an overview of examples from various jurisdictions which illustrate the significance of the problem, notes the implications of the issue in terms of what happens in reality and draws together a vast amount of research to analyse the issues, linking refugee law with that of international human rights law. This approach is in my opinion one of the great strengths of the book.

Overall, there is much to commend in this book. The task of presenting a merged analysis of the Refugee Convention and international human rights treaty law was a huge undertaking requiring intellectual powers of the highest order and the analysis presented in the text is a testament to Professor Hathaway's skills in this regard. The breadth of research is, to put it simply, quite astonishing – it includes a broad array of domestic case law in addition to the jurisprudence and general comments of the UN Human Rights Committee, the general comments relating to the ICESCR and in-depth analysis of the Refugee Convention. Particularly striking is the inclusion of reports from domestic media and non-governmental organisations in countries such as Namibia, Swaziland, Nigeria and Guinea. The gathering of such material would have been a difficult, time-consuming process and the insight it provides into the needs of refugees and the various pressures placed on host states greatly enhances the text. This approach reflects the fact that Professor Hathaway is not only a leading academic, but also seems to have a feel for what occurs 'on the ground'. As Hathaway notes in the introduction, the book attempts to be 'attentive to the central importance of facts'. To this end, the inclusion of an overview of some of the protection problems in various parts of the world in each chapter is commendable.

My criticisms of the book are as follows. First, as I have stated above, Hathaway's 'merged analysis' of the Refugee Convention and international human rights law is one of the key strengths of the book. However, the nature of this undertaking can make for complicated analysis and, at times, difficult reading. Thus, I found the book to be quite unwieldy when I wanted to 'dip into' the text to obtain information on a certain issue. For instance, in the section on Article 1C(5) of the Refugee Convention dealing with cessation of refugee status (which is the subject of my PhD thesis), I found it difficult to follow the thread of Hathaway's argument and at times thought the detailed nature of the material obscured his line of reasoning. This may be because I am accustomed to those refugee law texts which discuss the legal content of particular provisions and then place them into a policy context, rather than the approach taken by Hathaway in this book, which is to conflate those two things. This is something to bear in mind when considering the text for students. The readability of the text could perhaps be improved if the issues were 'flagged' more clearly, perhaps by some liberal use of sub-headings or an indication at the start of each section as to the principal issues or controversies in the particular area. Given this, I would not recommend this text as an introductory book for undergraduate students. I would, however, recommend the text for advanced refugee law courses, practitioners and academics.

For Australian readers, the book mentions a number of key Australian cases and the author reflects a sound understanding of the political and legal environment for refugee law in Australia. It is suitable for inclusion in the syllabus of an Australian refugee law course for its explanation of international law. However, the Australian material is not extensive (for instance, there is no analysis of the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth), nor the details of Australia's temporary protection regime). It would therefore need to be supplemented by a book with an Australian focus.

As to the substance of Hathaway's arguments throughout the book, one debate is worthy of particular mention. In Chapter 7, entitled 'Rights of Solution', Hathaway explicitly disagrees with the emphasis placed by United Nations agencies (particularly the UNHCR) on the concept of 'durable solutions' to refugee flows. The UNHCR has repeatedly emphasised the need to not only refer to the rights contained in the Refugee Convention, but also to find 'durable solutions' to refugee flows, that is, voluntary repatriation, local integration in the country of first asylum or resettlement in a third country.¹¹ Hathaway argues that 'the main goal of a refugee protection regime oriented towards durable solutions is effectively to find a way to bring refugee status to an end' and that 'those who focus on achieving durable solutions increasingly regard respect for refugee rights as little more than a "second best" option, to be pursued only until a durable solution can be implemented'.¹² Hathaway notes that he is not suggesting there is 'any inherent contradiction between a commitment to honouring refugee rights and the pursuit of durable solutions' but rather he is concerned that 'much current practice reverses the emphasis of refugee law on the primacy of respect for refugee rights in favour of the pursuit of durable solutions'.¹³ Thus, Hathaway's concerns appear to be related to the *priority* given to durable solutions rather than dismissing the concept altogether.

Whilst it is true that UNHCR has repeatedly emphasised the need to find 'durable solutions' to refugee flows, my understanding is that this was in response to the need to address problems arising from 'protracted' refugee situations and thus as a means of addressing a gap in refugee protection. For instance, UNHCR notes that there were 'more than 6 million refugees stranded in a "long-lasting and intractable state of limbo" at the end of 2004'.¹⁴ Thus, I do not see UNHCR's emphasis on 'durable solutions' as necessarily rendering respect for refugee rights as a 'second best' option, but rather, as a recognition of the need to address protection needs 'on the ground'. Indeed, UNHCR has stated publicly that the Refugee Convention and its 1967 Protocol 'remain the foundation for the international protection

11 See, eg; UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern*, Core Group on Durable Solutions, UNHCR Geneva, May 2003, 5-6.

12 Hathaway, above n3, 913.

13 Ibid 915.

14 UNHCR, 'Protracted Refugee Situations', *Executive Committee of the High Commissioner's Programme, Standing Committee, 30th Mtg*, UN Doc. EC/54/SC/CRP.14 (2004).

of refugees'.¹⁵ Some may therefore disagree with the way in which Hathaway addresses this particular issue.

In conclusion, this book constitutes an outstanding contribution to the contemporary understanding of refugee law and practice. It reflects wide-ranging research and scholarship of the highest quality. It is strongly recommended to those seeking a deeper understanding of the myriad of issues involved in refugee law today.

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¹⁵ UNHCR, above n12, 3.