

BOOK REVIEW: *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*

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James C Hathaway The Rights of Refugees Under International Law (Cambridge University Press, New York, 2005) (1200 pages) NZ\$155.

In the belief that a comprehensive text on the position of refugees under international law was lacking, James C Hathaway, an American academic, has produced a book seeking to explore the nexus between human rights and refugee rights at international law, and to argue for a dynamic and purposive interpretation of the Convention Relating to the Status of Refugees.¹ Hathaway believes that whilst there has been an increased willingness to engage with the "definitional complexities" over who is entitled to recognition of refugee status,² there has been insufficient attention paid to the specific rights and duties that flow from that status.³ This in turn has led to incomplete compliance by many States of their obligations under the Convention. It is Hathaway's position that the fundamental goal of refugee law is to restore refugees to affirmative protection through a positive entitlement to assert rights against any State party to the Convention.⁴ This is best pursued by "... the invocation of indisputable legal authority, and in particular by reliance on widely ratified treaty law."⁵ The book builds on his earlier seminal text, *The Law of Refugee Status*,⁶ and is an invaluable reference source for students and academics alike.

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1 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 2545.

2 James C Hathaway *The Rights of Refugees Under International Law* (Cambridge University Press, New York, 2005) 1-2.

3 Hathaway, above n 2, 13.

4 Hathaway, above n 2, 5.

5 Hathaway, above n 2, 6.

6 James C Hathaway *The Law of Refugee Status* (Butterworths, United States, 1991).

Taking on the entirety of this weighty tome would be a daunting task, but the book is structured in such a fashion that one can dip into specific sections with ease. There are only seven chapters, and an intriguing epilogue. In the first three chapters Hathaway sets out the background and evolution of the contemporary international refugee rights regime, finding the development of international human rights law and the Convention to be the most significant sources of refugee rights. Hathaway concedes that a conservative and positivist approach to the sources of international law has been taken.⁷ Students of legal, historical or political disciplines will find these chapters an illuminating starting point for further research. Hathaway is particularly successful in studying refugee rights through an analysis of international human rights norms in order to deliver a more comprehensive view of the rights that does not merely concentrate on the Convention as the source of entitlement and duties. This is in line with the purposive approach advocated by senior appellate courts.⁸ He concludes that the duty to protect refugees at international law is founded on both the Convention and international human rights law. The Convention is regarded as the primary source of substantive entitlements, supplemented by international human rights law.⁹ He views these twin foundations as giving greater strength to the rights claims of refugees, as they are not solely reliant on multilateral treaty provisions or general principles.

The remainder of the book then focuses on substantive rights under the Convention itself, explaining the "structure of entitlement" under it,¹⁰ followed by a detailed canvassing of the rights. These are separated into the categories of rights of refugees physically present; rights of refugees lawfully present; rights of refugees lawfully staying and rights of solution. This is accompanied by reference to their application by senior courts from both national and international jurisdictions. Hathaway proceeds from the assumption that law will make a critical difference to the plight of refugees and a concern that governments in the industrialised world have moved to a less robust form of refugee protection.¹¹ The case studies are by and large from the Western, democratic, developed world. However, as Hathaway observes, most refugees are increasingly concentrated in less developed countries. Practice other than judicial decisions is not really examined. Nevertheless, the case studies are detailed and extensive in the jurisdictions covered.

New Zealand has several cases used as examples – most notably *Attorney-General v Zaoui*¹² and *Attorney-General v Refugee Council of New Zealand Inc.*¹³ For those who have followed the

7 Hathaway, above n 2, 15.

8 Hathaway, above n 2, 72-73.

9 Hathaway, above n 2, 74.

10 Hathaway, above n 2, 154.

11 Hathaway, above n 2, 3.

12 *Attorney-General v Zaoui* [2006] 1 NZLR 289 (SC); *Attorney-General v Zaoui* [2005] 1 NZLR 690 (CA).

13 *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA).

Zaoui case with interest, it may be interesting to note that Hathaway seems to cite the Court of Appeal judgment with some approval insofar as it concerned international law.¹⁴ However, Hathaway may not have had sufficient time to consider the Supreme Court's decision in detail before publication, although it is cited once.¹⁵ This possibly demonstrates a flaw of this book – it will quickly be out of date, especially because, as Hathaway notes, the area is undergoing rapid change. However, the jurisprudential developments of the past decade in the Western world are comprehensively explored, with the tables of cases at the front being particularly useful for anyone wanting to do further research on the subject.

Being someone with a general interest in the topic, rather than the possessor of detailed knowledge, I found the book to be mostly an advanced introduction to the topic of refugee rights. In other places, a basic level of knowledge was assumed in order to allow the author to pursue his objectives and conduct detailed analysis of the specific entitlements flowing from refugee status. Overall, the book was surprisingly accessible and interesting. Background knowledge of international law and the way United Nations multilateral treaties operate was helpful, although a brief description is proffered by the author, (but, as noted above, it is restricted to the positivist approach). It is targeted to graduate students and above. Hathaway openly approaches his topic from a conservative standpoint, rejecting the "New Haven" school approach of the law in action being more important than the law on the books. Hathaway is an unashamed positivist; he is more interested in what the law says than what States are doing. His observational framework is clear. This accords with his aim to set out a comprehensive analysis of the law as it currently exists, with some ideas for reform. To this end he neglects social and cultural impacts on the law as practised by States. The book does not represent an enquiry into the origins and features of the modern refugee phenomenon; for example, Hathaway states that most of the world's refugees are now situated in less developed countries, but he does not probe the reasons for this. Instead, analysis is restricted to the law. However, he is open about this, and offers criticisms about the theory while acknowledging its innovativeness. His most forceful arguments are based on the lack of certainty of law.

Perhaps the most interesting parts of the book are Hathaway's confrontations of the challenges to the viability of providing protection to refugees through the modern human rights regime in the epilogue. His discourse is distinctly legalistic – he avoids getting involved in political debate, but the political context of his analysis is ever present. He argues that the concerns of refugees rather than governments must remain central to the process of reform. He identifies the key tension facing development and reform of refugees' rights under international law.¹⁶

14 Hathaway, above n 2, 352-355. See also *Attorney-General v Zaoui* [2005] 1 NZLR 690 (CA).

15 Hathaway, above n 2, 427.

16 Hathaway, above n 2, 1002.

The real challenge is to ensure that the reform process is actually driven by a determination fully and dependably to implement the agreed human rights of refugees, even as it simultaneously advances the interests of government.

By linking refugee rights to international human rights law, Hathaway provides a stronger normative basis for arguing for the continued protection of refugees under international law. He remains true to the text of the Convention, while re-locating it in a broader context that gives it a dynamic and purposive interpretation. This in turn gives his arguments force in a time when the rights of refugees are increasingly under threat.