

# Book Review

## *The Rights of Refugees under International Law*



James C. Hathaway

Cambridge and New York: Cambridge University Press, 2005

For James Hathaway, the James E. and Sarah A. Degan Professor of Law and the Director of the Program in Refugee and Asylum Law at the University of Michigan Law School, *The Law of Refugee Status*<sup>1</sup> is a hard act to follow. It has become the bible for those involved in the interpretation of the *Refugee Convention* in the late 1980s and early 1990s. Published in 1988, it quickly became essential reading for refugee practitioners and members of refugee tribunals. It has been routinely relied upon by courts around the world in interpreting the definition of a Convention refugee.

As a result, when I was asked to review Hathaway's new book, *The Rights of Refugees under International Law*, I readily accepted. I was curious to see if Hathaway could produce another treatise that might revolutionize thought around such an important issue. At the same time I was somewhat surprised that a refugee practitioner would be chosen to review his new book. Practitioners are generally grounded in domestic law. Our role as refugee lawyers is to ensure that our clients are recognized as Convention refugees by the relevant tribunals and to ensure that they are afforded all the rights and protections available under domestic law. As a Canadian lawyer grounded in domestic law, I rely on Canada's *Immigration and Refugee Protection Act (IRPA)*<sup>2</sup> and the *Charter of Rights and Freedoms (Charter)*<sup>3</sup> as the sources of my advocacy on behalf of my clients. That being said, international law is becoming an increasingly important part of my practice. It is an important tool of interpretation when attempting to ascertain the meaning of our *Charter*.<sup>4</sup> For instance, the Supreme Court of Canada in *Suresh*<sup>5</sup> had recourse to international human rights law in interpreting section 7 of the *Charter* and in determining that removal to torture would in almost all cases violate the principals of fundamental justice.

Despite these advances in the use of international law in the domestic refugee context, practitioners are well aware of the difficulty of ascertaining the scope of international law in the everyday practice of refugee law. Courts have

been reluctant and cautious in using international law in the immigration context.<sup>6</sup> The applicability of international law is uncertain, and its substance is subject to differing interpretations by domestic courts.<sup>7</sup> Moreover, international human rights tribunals charged with protecting these rights have no power to effectively enforce their decisions.<sup>8</sup> It is with this background in mind that I approached Hathaway's treatise about refugee rights with caution.

Hathaway addresses this challenge head on in the first chapter of his book, when he deals with the scope of international refugee law. He argues in favour of a conservative approach to defining rights under refugee law. He suggests that there are very few rights that are universally accepted under international law—the right against discrimination and the right to be *free* from arbitrary deprivation of life, from torture, and from genocide. Given this limitation, traditional customary international law therefore cannot be a source for refugee rights. He maintains that the source for rights of refugees under international law must be found first in the *Refugee Convention* and then in the other international human rights treaties.<sup>9</sup>

He begins with the text of the *Refugee Convention* and “seeks to understand it not on the basis of literal constructions but rather in a way that takes real account of its context, and which advances its objectives and its purpose.”<sup>10</sup> Hathaway believes that by grounding his evaluation of refugee rights under international law in a contextual analysis of the *Refugee Convention*, he can put forward a more compelling argument for their acceptance as principles of international law.

Having set out the framework for his analysis in chapter 1, Hathaway begins his discussion of the rights of refugees in chapter 2. He provides us with his definition for refugee rights:

a mechanism by which to answer situation-specific vulnerabilities that would otherwise deny refugees meaningful benefit of the more general system of human rights protection.<sup>11</sup>

Hathaway argues that the *Refugee Convention* provides for a series of rights—the right to be able to escape, to be accepted, to be provided shelter, to not be penalized for seeking refuge, and to not be exposed to the risk of return; basic rights for survival, for documentation, and for access to the courts; rights of non-discrimination, religious freedom, and access to the social safety net; and the right to work.<sup>12</sup>

After discussing the general terms of the *Refugee Convention*, Hathaway then considers whether or not any of the other international human rights treaties have significantly expanded the rights of refugees. He notes that although they are extremely important documents in terms of their recognition of human rights, they do not add significantly to the protection of refugees because they are directed mostly toward persons who are citizens of states and they set out the rights of citizens inside a country. International alien law, as well, has not emerged to the point where there is any generalized consensus that will assist refugees. As a result, Hathaway concludes that when considering the rights of refugees, the primary source must be the *Refugee Convention* itself.

In chapter 3 Hathaway provides us with an overall framework for his analysis of the rights of refugees under international law. He argues that the *Refugee Convention* recognizes a hierarchy of rights that depend on the degree of connection that the refugee has to the country of asylum. The most basic and fundamental rights, the rights to non-discrimination and *non-refoulement*, attach as soon as a refugee comes under a state's jurisdiction, even prior to arrival in the territory. Persons who actually arrive at the territory acquire greater protection and those who are lawfully admitted or who are accepted as long-term residents would acquire the greatest rights.

In chapter 4 Hathaway considers the rights that a refugee obtains immediately upon coming under the jurisdiction of a state party. These rights may accrue even prior to arrival on the territory of the state. The most important right is the right to enter and remain in the country of asylum. Hathaway acknowledges that there is no right of asylum, and that there is no duty on a state to admit a refugee *per se* but that the obligation only arises as a negative consequence of the rule against *refoulement*. *i.e.* the right to enter a country only accrues if the refusal to admit the person might result in the Convention refugee being *refouled* back to a country where he or she is at risk of persecution.

Hathaway makes several assertions in order to delineate the scope of this right. First, the right to be protected against *refoulement* arises only in the case of Convention refugees. One consequence of this is that measures taken to prevent refugees from leaving their country are not in breach of

Article 33 because a Convention refugee is defined as a person who is outside his or her country of nationality. A second consequence is that the duty to admit would only arise when the denial of the right to admission would expose the Convention refugee to a real risk of return to a country where he or she would be subjected to persecution. Hathaway makes the point that the *Convention* applies from the moment a person arrives in the state and applies prior to the official recognition by the state. The character of being a Convention refugee exists independently of national recognition and, therefore, the duty of *non-refoulement* would apply to a refugee from the moment he or she arrives in the state until such time as the determination is made that he or she is not a refugee.

Hathaway reaches several conclusions based upon this general analysis. First, rules that prevent refugees from arriving in countries of asylum, such as visa requirements or interdiction at airports *en route*, are not inconsistent with Article 33 because they do not immediately expose a person to risk. However, the Haitian interdictions by the U.S. government are contrary to Article 33 because they exposed Haitians to a real risk of persecution upon return to their country due to the inadequacy of any determination that was done on the high seas. Second, country of asylum rules which deny a refugee admission to one country and require him or her to make a claim in the first country of asylum would not be inconsistent with Article 33 unless their application exposes the refugee to a real risk of persecution, *i.e.* a real risk of being returned to a country where he or she would be subjected to persecution, or being exposed to a determination of refugee status in a country where the standards were not acceptable, either because of its interpretation of the Convention refugee or of the quality of the determination process.

At the end of this section, Hathaway maintains that a strict interpretation of the right of entry, consistent with the requirement of Article 33 of the *Convention*, is consistent with international law. He rejects the notion that customary international law has expanded the concept of *refoulement* and suggests that those proponents who argue for an expanded understanding of the rule against *non-refoulement* are undermining the protection that is now available under the *Convention*.

In the rest of chapter 4, Hathaway engages in analysis of the other rights of a refugee upon arrival in a country of asylum. He argues that the *Convention* imposes an obligation on a state to not arbitrarily detain or otherwise penalize refugees who seek protection. This is subject, of course, to the caveat that they must, according to Article 31, make their presence known and seek protection at the earliest

possible moment. Refugees are entitled to the basic necessities of life, to protections of their life, and to their security of the person; and they are entitled to receive adequate food and shelter. They are entitled to respect for basic human dignity, which includes the right to preservation of family unity, freedom of thought, religion, and education. They are also entitled to documentation and they should have access to meaningful remedies. All of these rights flow from the clear and express provisions of the *Convention* itself. Hathaway argues that it is the *Convention* that gives refugees these rights under international law.

In chapter 5, Hathaway examines the rights of refugees who have been lawfully admitted to the country of asylum. He argues that, as a degree of attachment between the refugee and the state increases, so too do the rights that a refugee may claim. He maintains that once a refugee is lawfully in the country, he or she enjoys further rights, including the right under Article 32 to substantive and procedural protection against arbitrary expulsion. Refugees are also entitled to freedom of internal movement within the country. He notes that once a refugee is lawfully in the country, Article 18 of the *Convention* gives the refugee a right to self-employment. In chapter 6 Hathaway treats the rights of refugees lawfully staying in the country. He argues that once a refugee has been given the right to remain in the country, he or she is entitled to work, to fair working conditions, to social security, to housing, and to other basic rights, including the right of international travel.

Hathaway concludes by considering the difficult problem of enforcement of refugee rights. He notes that the United Nations High Commissioner for Refugees (UNHCR) does not have an enforcement role in its mandate and contrasts this situation to that existing under the *International Covenant on Civil and Political Rights (ICCPR)* and the *Convention Against Torture (CAT)* where the Committees entrusted with supervising compliance do have such a role. This deficiency makes enforcement of refugee rights a greater challenge. However, having noted this deficiency, Hathaway argues that the real problem is the lack of any real commitment on the part of states to comply with their obligations:

as the empirical evidence presented in this book tragically attests, the reality today is that a significant number of states in all parts of the world are withdrawing in practice from meeting their legal duty.<sup>13</sup>

Given this reality, Hathaway argues that there is a need to “design a structure for the implementation of *Convention* rights that states will embrace,”<sup>14</sup> one that does not merely

alleviate the burden on states, but one which also improves the lot of refugees themselves. This is the challenge for those involved in the debate around reforming the international refugee system today.

Those who are looking to international law to provide an expansive understanding of the rights of refugees may be disappointed with Hathaway’s conservative approach. It is Hathaway’s position that, given that states do not currently meet their existing obligations under international law, it is not a useful exercise to push the envelope further and try to interpret the *Convention* in a manner that is not consistent with the *travaux* or international jurisprudence. In my view, given this reality that Hathaway so clearly exposes, his approach is a sensible one.

As a refugee lawyer my interest in Hathaway’s latest work is not purely an academic one. By carefully delineating the scope of the rights granted to refugees and ensuring that his interpretation is in keeping with the *Convention*, the *travaux préparatoires*, and the existing jurisprudence, Hathaway has made a vital contribution. For those of us practicing refugee law, Hathaway’s careful exposition of the obligations that states have assumed under international law will become a new standard to measure the conduct of states in domestic courts. Only time will tell whether his latest opus will become a new bestseller among refugee scholars and legal practitioners. It is certainly safe to say that Hathaway’s latest book is a major work that warrants careful scrutiny.

#### Notes

1. James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991).
2. S.C. 2001, c. 27.
3. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.
4. See for example *Slaight Communications v. Davidson*, [1989] 1 SCR 1038.
5. *Suresh v. MCI*, [2001] 1 SCR 3.
6. This was highlighted recently in the case of *Bouzari v. Iran* (2004), 71 OR (3d) 675 (CA). Mr. Bouzari sought to sue the government of Iran in Canada for torture committed in Iran. He argued that his right to seek redress was a universal right under international law available to him in Canada and provided expert testimony to that effect. The government of Canada disagreed and called its own experts to assert that no such right existed. The court agreed with the government’s experts and found against Mr. Bouzari.
7. In *Suresh v. MCI*, [2000] 2 FC 592 (F.C.A.), the Federal Court of Appeal held that Article 33 of the *UN Convention relating to the Status of Refugees (Refugee Convention)* took precedence over Article 3 of the *Convention Against Torture (CAT)* and

that international law did *not* preclude return to torture. Although the Supreme Court of Canada disagreed and found that international law did prohibit *refoulement* to torture, the Court's interpretation of the *Charter* still left open the possibility that in "exceptional circumstances" return to torture could be countenanced. Indeed the Federal Court has already concluded that the Suresh decision does allow for removal to torture under exceptional circumstances (see *Sogi v. MCI*, 2005 FC 262, overturned on consent on other grounds by the Federal Court of Appeal). No case has yet been considered by the Federal Court of Appeal on this point.

8. Recourse to international human rights committees by Canadian lawyers has been met with indifference. Interim measures have been ignored. See for example *Tejinder Pal Singh v. MCI*, [1997] F.C.J. No. 1807. Indeed in *Ahani v. Canada* (2002), 58 O.R. (3d) 107 the Ontario Court of Appeal concluded that Canada did not violate the *Charter* when it refused to comply with a request to not deport Mr. Ahani pending a review by the Human Rights Committee of a complaint made under the Optional Protocol to the *International Covenant on Civil and*

*Political Rights* U.N.T.S. No. 14668, vol 999 (1976) (ICCPR), at 302.

9. See ICCPR, CAT, and the *International Covenant on Economic, Social and Cultural Rights*.
10. James Hathaway, *The Right of Refugees under International Law* (Cambridge and New York: Cambridge University Press, 2005), 74.
11. *Ibid.*, 75.
12. *Ibid.*, 94–95.
13. *Ibid.*, 998.
14. *Ibid.*, p. 999.

---

LORNE WALDMAN

---

*Lorne Waldman is a refugee lawyer in Toronto. He has appeared very frequently at all levels of the courts in Canada where he has argued many of the leading cases in immigration and refugee law.*

---