

The Law of Refugee Status, 2nd Edition

James Hathaway and Michelle Foster
Cambridge University Press, 2014, 773 pages

Reviewed by Angus Grant*

The first edition of James Hathaway's *The Law of Refugee Status* was published in 1991 and it immediately received widespread attention from a wide range of readers: academics, jurists and advocates. Early in its existence, it was heavily relied upon by the Supreme Court of Canada in its seminal decision in *Canada (AG) v Ward*,¹ in which the Court adopted Hathaway's central operating premise that refugee protection, codified in the 1951 *Convention Related to the Status of Refugees*,² is a fundamental expression of the international community's commitment to non-discrimination and the protection of basic human rights. The *Ward* decision has been highly influential, both in Canada and internationally, and it also helped to cement *The Law of Refugee Status* as an authoritative and principled contribution to the field of international refugee protection. A quick and highly unscientific search of Canadian jurisprudence reveals that since the first edition of the *Law of Refugee Status* was published, it has been referred to, and relied upon, in over 300 judicial decisions on a myriad of refugee law themes.

Now, 23 years after the first edition, Hathaway has teamed up with Australian law professor Michelle Foster to produce a second edition that is greatly enhanced in terms of new content, while maintaining its commitment to exploring the foundational principles of international refugee law. The result is singularly impressive; *The Law of Refugee Status* reads simultaneously as a thorough conceptual exploration of international refugee law principles and a comprehensive, globe-spanning case law compendium on virtually every conceivable topic in the field. This is not, however, to suggest that the *Law of Refugee Status* is encyclopedic in nature. Indeed, the authors make clear at the outset that their agenda is an unapologetically normative one; what they seek is to "engage with the jurisprudence as a means of positing and testing a comprehensive and principled analysis of the Convention refugee definition."³

* Legal Aid Ontario

¹ [1993] 2 SCR 689 [*Ward*].

² 28 July 1951, 289 UNTS 137 (entered into force 22 April 1954).

³ James Hathaway and Michelle Foster, *The Law of Refugee Status*, 2d ed (Cambridge: Cambridge University Press, 2014) at 5.

The book is organized by theme, logically taking its structure from the 1951 Convention itself. More specifically, the authors break down the refugee definition as articulated in the Convention into seven constituent components, dedicating a deeply engaged chapter to each, namely: 1) alienage – the requirement that only those outside their own states may be considered refugees; 2) well-founded fear – the requirement that there be both a subjective and objective basis to the risk of persecution; 3) serious harm – the standard by which treatment will be considered persecutory; 4) failure of state protection – the notion that refugee protection is intended to act as a surrogate form of protection, only when such protection cannot be obtained domestically; 5) nexus to civil or political status – the requirement that persecution be on account of particular characteristics associated with the refugee claimant; 6) needing protection – related to the notion that refugee status is intended to be a transitory phenomenon; and 7) deserving protection – involving an examination of those disqualified from refugee protection because of their past actions.

Throughout the book, the authors provide detailed analysis of the Convention's terms, many of which have been extensively (some might say excessively) parsed in the jurisprudence. Hathaway and Foster also provide historical accounts of the debates that took place in negotiating the Convention, many of which have been documented in the instrument's *travaux préparatoires*. This textual and contextual approach is highly effective. As in the first edition, Hathaway and Foster provide a convincing argument that human rights principles provide both coherence and a centrally unifying core to international refugee law.

The immense strength of the *Law of Refugee Status* – its sustained exploration of the Convention refugee definition – also defines its rather deliberate limitations. Most notably, the text's focus on comparative transnational jurisprudence precludes it from any prolonged engagement with the work of other scholars in the field, including those from the field of "forced migration" studies, who critique the narrow and historically anachronistic nature of refugee protection under the 1951 Convention.

While it is true that the 1951 Convention is problematic and perhaps inadequate in several respects, it is no less true that it remains centrally relevant to refugee determination throughout the world and, as such, is perhaps the most widely interpreted treaty in the history of international law. It is for this reason that Hathaway and Foster's single-minded focus on the law of refugee status, as it has developed under the Convention, is both principled and justified. It is also vitally important. By many estimates, we are currently witnessing the worst refugee crisis since the Second World War. In this context, Hathaway and Foster's reminder that

refugee determination is, first and foremost, about the protection of fundamental human rights is as urgently needed as it is timely.