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James C. Hathaway
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Introduction

The two core concerns of international refugee law are, first, qualification for refugee status and, second, the rights that follow from refugee status. The first of these questions has attracted by far the greater attention:

> While courts have engaged heavily with the question of who qualifies as a refugee . . . there has not been the same level of engagement with the remedy: refuge. Accordingly, what can be observed are the beginnings of an asymmetrical development between questions of who qualifies for protection, and the nature of the protection that is owed.[1]

This analytical gap can be explained at least in part by reference to the tradition of most developed states simply to admit refugees, formally or in practice, as long-term or permanent residents. While not required by the Refugee Convention,[2] this approach led de facto to respect for most Convention rights (and often more). Because refugee rights were not at risk, there was understandably little perceived need to elaborate their meaning.

Today, however, governments of the industrialized world increasingly question the logic of routinely assimilating refugees, and have therefore sought to limit their access to Convention rights. Most commonly, questions are now raised about whether refugees should be allowed to enjoy freedom of movement, to work, to access public welfare programs, or to be reunited with family members. In some states, doubts have been expressed about the propriety of exempting refugees from compliance with visa and other immigration rules, and even about whether there is really a duty to admit refugees at all. There is also a marked interest in the authority of states to contract-out protection responsibilities to other countries and otherwise to divest themselves of even such duties of protection as are recognized.[3]

[1] K. Ogg, "Protection from 'Refuge': On What Legal Grounds will a Refugee be Saved from Camp Life?," (2016) 28(3) *International Journal of Refugee Law* 384, at 414–415.
[2] See Chapters 4.1 and 7.4.
[3] See e.g. G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (2000); T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011); and D. Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (2018).

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This distancing of developed states from respect for the rules of refugee protection sadly mirrors the traditional approach in much of the less developed world. For reasons born of both pragmatism and principle, poorer countries – which host the overwhelming majority of the world's refugees[4] – have rarely contested the eligibility for refugee status of those arriving at their borders.[5] Yet this conceptual generosity has not always been matched by efforts to treat those refugees allowed to stay in line with duties set by the Refugee Convention. In far too many cases, refugees in less developed states have been detained, socially marginalized, left physically at-risk, or effectively denied the ability to meet basic needs.

While law alone cannot of course ensure that refugees are protected, it nonetheless affords a means by which to contest their exclusion. Two points of departure are critical in my view.

First, there is a need clearly to understand the rights that follow from refugee status. As the analysis in this book shows, the rights set by the Refugee Convention and which bind three-quarters of states,[6] are in no sense anachronistic. Neither are they defined in absolutist terms that fail to take account of legitimate asylum state interests. Properly understood and applied, the rights regime set by the Convention is extraordinarily balanced and resilient. Indeed, senior national courts in many parts of the world are more than ever rising to the challenge of engaging with refugee rights, as the analysis of comparative jurisprudence in this book makes clear.[7] It is the responsibility of scholars and advocates to support that engagement.

Second and equally important, we must acknowledge that refugee law does not provide an answer to all threats to the dignity of refugees. Like all bodies of law, refugee law is imperfect. Some of its weaknesses are, however, remedied by reliance on general norms of international human rights law[8] – the most fundamental norms of which inhere in all persons under a state party's jurisdiction, including refugees.[9] Nearly as important, international human rights standards are continually updated and applied to emerging situations by

[4] "Countries in developed regions hosted 16 per cent of refugees, while one third of the global refugee population (6.7 million people) were in the Least Developed Countries": United Nations High Commissioner for Refugees, "Global Trends: Forced Displacement in 2018" (2019), at 2.

[5] Indeed, both Africa and Latin America have formally embraced broader understandings of refugee status than required by the Refugee Convention: see Chapter 1.5.3.

[6] There are 148 state parties to the Refugee Convention and/or Protocol: https://treaties.un.org, accessed Dec. 21, 2020.

[7] This book is conceived largely as a work of comparative international law: see A. Roberts et al., "Comparative International Law: Framing the Field," (2015) 109(3) *American Journal of International Law* 467.

[8] See generally Chapter 1.5.4.

[9] See Chapter 1.5.4 at notes 388–390 (re Civil and Political Covenant) and 400–403 (re Economic, Social and Cultural Covenant).

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international supervisory bodies established by states – a mechanism that refugee law sadly still lacks. International human rights law is thus a critical ally in the struggle to ensure that refugees are treated fairly. Yet as important as it is, international human rights law – just like international refugee law – is no panacea. As the analysis below shows, even as human rights law contributes in critical ways to the protection of refugees, its standards are at times insufficiently tailored, too open to exceptions, or simply not addressed to the types of dilemmas that refugees face.[10]

Taken together, these two imperatives therefore amount to a need to acknowledge both the value and the weaknesses of each of international refugee law and general international human rights law. The foundational premise that underlies the detailed analysis in the chapters that follow is that neither body of law is as effective standing alone as it is read in tandem with the other. Only by approaching refugee rights in a holistic way, blending analysis of duties under both the Refugee Convention and general human rights law, is it possible to arrive at a definition of entitlements that optimizes the ability of refugees to remake their lives.[11] This book is therefore designed clearly to adumbrate, in both theoretical and applied terms, a creative synthesis of imperfect norms.

To capture the core of this synthesized obligation, this book engages in detail not only with the norms set by the Refugee Convention, but also with the rights codified in the two foundational treaties of the international human rights system, the International Covenant on Civil and Political Rights and its companion International Covenant on Economic, Social and Cultural Rights.[12] The decision to present a merged analysis of refugee rights and rights grounded in the two Human Rights Covenants is moreover defensible in view of the unique interrelationships between these particular treaties and refugee protection. First, more than 95 percent of state parties to the Refugee Convention or Protocol have also signed or ratified both of the Human Rights Covenants.[13] Second, about 98 percent

[10] See Chapter 1.5.4 at notes 393–446.

[11] Indeed, the synthesis of refugee and international human rights law is not simply allowed, but is rather clearly mandated by refugee law itself: see Chapters 1.4.5 and 1.5.4.

[12] International Covenant on Civil and Political Rights, 999 UNTS 172 (UNTS 14668), adopted Dec. 16, 1966, entered into force Mar. 23, 1976 (Civil and Political Covenant); International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (UNTS 14531), adopted Dec. 16, 1966, entered into force Jan. 3, 1976 (Economic, Social and Cultural Covenant).

[13] Of the 148 state parties to the Refugee Convention and/or Protocol, only three have not signed or ratified either of the Human Rights Covenants: Holy See, St. Kitts and Nevis, and Tuvalu. Four have signed or ratified only the International Covenant on Civil and Political Rights: Botswana, Mozambique, Nauru, and Samoa. One state party to the Refugee Convention, Solomon Islands, has signed or ratified only the International Covenant on Economic, Social and Cultural Rights: https://indicators.ohchr.org, accessed Mar. 20, 2020.

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of the world's refugees reside in states which have signed or ratified the two Covenants on Human Rights.[14] As such, both in principle and in practice, refugee rights will in the majority of cases consist of an amalgam of principles drawn from both refugee law and the Covenants. Third, the Covenants and the Refugee Convention aspire to comparable breadth of protection, and set consistently overlapping guarantees. As will be clear from the analysis below, even when refugee law is the source of a stronger or more contextualized form of protection on a given issue, it is usually the case that one or both of the Covenants contribute in some way to clarify the relevant responsibilities of states.

In order comprehensively to define the core rights to which all refugees are entitled, this book does not address other than incidentally a variety of related issues. Most obviously, it is not a study of the refugee definition.[15] Neither does it seek to explain the work of the international institutions charged with the protection of refugees,[16] or the ways in which the refugee protection regime as a whole could be more effectively configured.[17]

Nor does this book present a detailed analysis of the full range of highly specialized human rights treaties established by the United Nations and regional bodies.[18] The decision to avoid canvassing all potentially pertinent international human rights was not taken lightly, since it is clearly correct that particular refugees also benefit from the protection of specialized branches of international human rights law. Refugees who are members of other internationally protected groups, such as racial minorities, disabled persons, women, or children, may avail themselves of specialized treaty rights in most

[14] https://indicators.ohchr.org, accessed Mar. 20, 2020, and United Nations High Commissioner for Refugees, "Global Trends: Forced Displacement in 2018" (2019), at Annex, Table 1. The two most critical exceptions are Malaysia (which hosts some 120,000 refugees) and South Sudan (which hosts more than 290,000 refugees). Neither of these countries is a party to the Refugee Convention or Protocol either.

[15] The scope of the Convention refugee definition in international and comparative law is analyzed in detail in J. Hathaway and M. Foster, *The Law of Refugee Status* (2014), conceived as the companion volume to this book. See also relevant portions of G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2007), at Part I(1), and of A. Grahl-Madsen, *The Status of Refugees in International Law* (vol. I, 1966), at 142–304.

[16] On this issue, see e.g. G. Loescher, *The UNHCR and World Politics: A Perilous Path* (2001); A. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (2002); A. Betts, G. Loescher, and J. Milner, *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the 21st Century* (2008); and K. Bergtora Sandvik and K. Lindskov Jacobsen eds., *UNHCR and the Struggle for Accountability* (2017).

[17] See e.g. J. Hathaway ed., *Reconceiving International Refugee Law* (1997); A. Betts and P. Collier, *Refuge: Transforming a Broken Refugee System* (2017); and A. Aleinikoff and L. Zamore, *The Arc of Protection: Reforming the International Refugee Regime* (2019).

[18] It is important to recognize that the UN Covenants on Human Rights set the duties that inspired and are applied in the many more specialized accords.

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states.[19] Other refugees will be entitled to claim rights and remedies in consequence of their reasons for flight, a matter of particular importance to those who have escaped from war.[20] Still other refugees will be received in parts of the world that have adopted regional human rights conventions now clearly understood to embrace non-nationals, or in which there is a regional refugee protection regime.[21]

The decision not to engage in depth[22] with the full range of regional refugee and human rights norms or even with globally applicable but more specialized human rights obligations in no way reflects a view that these standards are not of real importance to refugees. They are not, however, standards that apply universally to all refugees: only a subset of refugees are women, or children, or disabled, or members of racial minorities. An even smaller percentage of refugees can claim the protection of any one of the regional human rights or refugee treaties. Because of the specialized nature of these accords, they cannot reasonably be invoked in aid of the goal of this study, that being 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. This more foundational, and hence more limited enterprise is designed to elaborate the common corpus of refugee rights that can be asserted by refugees, whatever the refugee's specific identity or circumstances. Others have, of course, gone beyond this basic analysis to define the entitlements of sub-groups of the refugee population entitled to claim additional protections.[23]

[19] Of particular importance are the International Convention on the Elimination of All Forms of Racial Discrimination, 60 UNTS 195 (UNTS 9464), adopted Dec. 21, 1965, entered into force Jan. 4, 1969; the Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13 (UNTS 20378), adopted Dec. 18, 1979, entered into force Sept. 3, 1981; the Convention on the Rights of the Child, 1577 UNTS 3 (UNTS 27531), adopted Nov. 20, 1989, entered into force Sept. 2, 1990; and the Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (UNTS 44910), adopted Jan. 24, 2007, entered into force May 3, 2008.

[20] See e.g. T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at 3–78; and D. Cantor and J.-F. Durieux eds., *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014).

[21] See Chapter 1.5.3. See note 23 for leading analyses of these regional refugee regimes.

[22] More limited analysis of these sources of obligation is, however, provided in Chapters 1.5.3 and 1.5.4.

[23] On specialized applications of refugee law to important refugee populations see in particular E. Arbel, C. Dauvergne, and J. Millbank eds., *Gender in Refugee Law: From the Margins to the Centre* (2014); J. Pobjoy, *The Child in International Refugee Law* (2017); and M. Crock, M. Smith-Khan, R. McCallum, and B. Saul, *The Legal Protection of Refugees With Disabilities: Forgotten and Invisible?* (2017). On regional refugee regimes see generally A. Abass and F. Ippolito eds., *Regional Approaches to the Protection of Asylum Seekers: An International Law Perspective* (2016) and P. Mathew and T. Harley, *Refugees, Regionalism and Responsibility* (2016). With respect to specific regional regimes see re Europe H. Battjes, *European Asylum Law and International Law* (2006) and V. Chetail, P. DeBruycker, and F. Maiani eds., *Reforming the Common European Asylum System*

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In conceiving this work, an effort has been made to be attentive to the central importance of facts. Because a work of scholarship on refugee rights seems more likely to be of value if it does not restrict itself simply to the elucidation of legal norms in abstract terms, the treatment of each right in this book begins with an overview of relevant protection challenges in different parts of the world. Some cases present the current realities faced by refugees; others highlight important protection challenges in the recent past. An effort has also been made to include examples from all parts of the world, and impacting diverse refugee populations. The analysis that follows seeks to engage with these practical dilemmas, and to suggest how refugee law and cognate norms of human rights law should guide their resolution. This approach reflects a strong commitment to the importance of testing the theoretical elucidation of human rights standards against the hard facts of protection dilemmas on the ground. The hope is that by taking this approach, the reliability of the analysis presented here is strengthened, and the normative implications of the study are made more clear.

Chapter 1 provides an overview of the development of the international refugee rights regime. It begins by tracing the origins of refugee rights in the international law on aliens, through to its codification in the present Convention and Protocol relating to the Status of Refugees. This chapter also introduces the essential approach of the foundational refugee treaties, and shows how the Convention and Protocol have been complemented both by authoritative guidance from the Executive Committee of the High Commissioner's Program and the evolution of regional refugee rights regimes. Particular attention is paid to the role of contemporary treaties on human rights, and especially to general norms of non-discrimination law as protective mechanisms for refugees. The chapter concludes by explaining why, despite progress in related fields of law, the specific entitlements set by refugee law remain fundamental to ensuring the human dignity of refugees.

Chapter 2 introduces basic principles relevant to interpretation of the refugee and general human rights treaties that are drawn upon in the chapters that follow. The analysis here suggests that there are powerful reasons to defer neither to literalism nor to state practice in discerning the true meaning of these accords. To the contrary, it is both legally correct and more substantively productive to construe the text of refugee and other human rights treaties in the light of their context, object and purpose. Attention to context demands, in particular, consideration of the interpretations of cognate rights rendered by United Nations treaty supervisory bodies. And engagement with object and purpose must proceed from an awareness of the history of the Convention's

(2016); re Africa M. Sharpe, *The Regional Law of Refugee Protection in Africa* (2018); and re Latin America L. Jubilut, M. Vera Espinoza, and G. Mezzanotti eds., *Latin America and Refugee Protection: Regimes, Logics and Challenges* (forthcoming 2021).

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drafting, even as this evidence of historical intention is balanced against more contemporary evidence of the social and legal context within which original intentions are now to be implemented.

Chapter 3 introduces the rather unique principles governing entitlement to claim the rights set by the Refugee Convention. As a fundamental principle, the acquisition of international refugee rights is based not on formal status recognition by a state or agency, but rather follows simply and automatically from the fact of substantive satisfaction of the refugee definition.[24] Despite this critical understanding of refugee status determination as a purely declaratory process, the Refugee Convention does not grant all rights immediately and absolutely to all refugees. To the contrary, it strikes a reasonable balance between meeting the needs of refugees and respecting the legitimate concerns of state parties. In this sense, the Convention reflects the commitment of the drafters to the establishment of a treaty that is both politically realistic, and of positive benefit to refugees.[25]

Specifically, while all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of their attachment to the asylum state. Some rights inhere as soon as the refugee comes under a state's authority; a second set when he or she enters its territory; others once the refugee is lawfully or habitually within the territory of a state party; a fourth group only when the refugee is lawfully staying there; and a few rights govern the pursuit of a durable solution to refugeehood. The nature of the duty to extend rights to refugees is moreover defined through a combination of absolute and contingent criteria. A small number of rights are guaranteed absolutely to refugees, and must be respected even if the host government does not extend these rights to anyone else, including to its own citizens. More commonly, though, the standard for compliance varies in line with the relevant treatment afforded another group under the laws and practices of the receiving country. Under these contingent rights standards, the scope of entitlement is conceived as a function of the rights of aliens generally, of the nationals of most-favored states, or as equivalent to those afforded citizens of the host country itself. The Refugee Convention moreover incorporates an overarching duty of non-discrimination between and among refugees, and strictly limits the ability of states to suspend refugee rights, even for national security reasons.

Chapters 4–7 are the heart of this book. They offer a detailed analysis of the substance of refugee rights, drawing on both the norms of the Refugee Convention itself and on cognate standards set by the Covenants on Human Rights. Rather than grouping rights on the basis of traditional categories (e.g.

[24] See Chapter 3.1.
[25] See generally J. Hathaway and A. Cusick, "Refugee Rights Are Not Negotiable," (2000) 14(2) *Georgetown Immigration Law Journal* 481.

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civil, political, economic, social, or cultural), these chapters are structured around the evolution of the refugee experience itself. This organizational structure aligns with the Refugee Convention's commitment, described in Chapter 3, to define eligibility for protection on the basis of degrees of attachment to the host state.[26]

Chapter 4 therefore addresses those rights agreed to be immediately (if provisionally) acquired upon coming under the jurisdiction of a state party, as well as those which inhere upon reaching its territory, even before any steps have been taken to verify refugee status. These initial rights speak to the extraordinary personal vulnerability of asylum-seekers, and to the importance of safeguarding their most basic interests until and unless a decision is taken formally to verify their refugee status.

Chapter 5 examines a second set of modestly more extensive human rights deemed suited to the condition of refugees who are not simply physically present, but who are now lawfully or habitually present – including by having satisfied national requirements to undergo the assessment of their refugee status. As in the case of the first set of rights, these enhanced protections inhere until and unless a decision is reached to deny recognition of refugee status.

Chapter 6 considers the additional rights that are owed after a refugee is authorized to remain in the asylum country – that is, once having been recognized as a refugee or otherwise allowed to remain on an ongoing basis. These rights focus on interests understood to be necessary to ensuring that the refugee can establish a durable and fully dignified life until and unless the reasons for departure from the home state come to an end.

Chapter 7 takes up a final group of refugee rights associated with the movement toward the solution of refugee status, whether this is by way of repatriation, voluntary reestablishment in the home country, resettlement in a third country, or by naturalization in the host state.

The thesis driving this study is that the specificity of refugee entitlements is too often ignored – not only by those governments which often treat refugees as little more than the beneficiaries of humanitarian discretion, but even at times by scholars and advocates who too readily assume that generic human rights law is a sufficient answer to the needs of refugees. In truth, a clear understanding of the content and interrelationship of both refugee-specific and general human rights is critical. While the structures by which refugee law is implemented are no doubt in need of creative reinvigoration,[27] the fact that states have expressly recognized the Convention and Protocol as "the

[26] It is also hoped that adoption of a chapter structure which draws attention to the delays set by refugee law for the acquisition of rights will facilitate critical assessment of the Convention's implicit assumptions regarding the timing and duration of the legal commitment to protection.

[27] See note 17.

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foundation of the international protection regime [with] enduring value and relevance in the twenty-first century"[28] makes clear that refugee law remains a vitally important mechanism by which to hold states accountable for the ways they treat refugees. Indeed, in an era in which there is no more than selective ability and inclination to put down human rights abuse abroad, and in which general human rights afford few immediate and self-actuating sources of relief, refugee law stands out as the single most effective, truly autonomous remedy for those who simply cannot safely remain in their own countries. The surrogate protection of human rights required by refugee law is too valuable not to be widely understood, and conscientiously implemented.

[28] "Ministerial Communiqué," UN Doc. HCR/MIN/COMMS/2011/16, Dec. 8, 2011, at [2].

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