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A response to James Hathaway's 'Fixing the refugee system'[2]

The geography of a global refugee system

Joris Schapendonk sees several strengths of Hathaway's global refugee system. But geographical differences, individual and collective aspirations of refugees and an emerging migration industry deserve more attention. Concrete ways will have to be sought to incorporate the socio-economic lifeworlds of refugees.

During the conference 'A human act or devil's pact? Human rights aspects of migration agreements between EU and third countries', organized by the College voor de Rechten van de Mens and the Commissie Meijers (The Hague, 18 May 2017), the Canadian Professor James Hathaway presented his straightforward five-point plan that aims to 'fix the international refugee system.' Professor Hathaway – an internationally acknowledged authority in the field of refugee law – is firm and clear in his critique of the current global refugee system. According to him, it is just highly dysfunctional.

Before I recapture his diagnosis of the current state of affairs and his proposal to fix the system, it is important to note that the so-called European refugee crisis has *not* been the main reason for him to fundamentally rethink the current refugee system. In fact, during his ESIL lecture in Amsterdam one year previously, he stressed that the developed world could now finally see and experience the horror that has routinely afflicted states of the Global South for decades.[3] This reality gives rise to his hope that the Global North now also starts to realize that the system needs some fundamental fixing.

In this commentary, I briefly outline and comment on his main ideas from my own academic point of view. That is to say that I am not a legal scholar, nor an expert on refugees per se, and for this reason I cannot provide any critique on the legal technicalities of Hathaway's global refugee system. In fact, I will use my specific disciplinary background of Human Geography as well as my research on the migration trajectories of African migrants towards Europe[4] to reflect on his main ideas.

1.   The problem and the fixing

It is crucial to note that Hathaway's diagnosis of the problem does not address the Refugee Convention itself. For Hathaway, the legal definition of a refugee has proven to be extremely flexible so that it includes initially unforeseen groups of people in need of protection. At the same time, the convention is massively attentive to the safety and security concerns of states by,[5] for instance, excluding fugitives from a legal refugee status. For Hathaway, the problem of 'the current situation is not a problem of rules and regulations, it is actually a problem of *implementation:* The refugee regime was never intended to operate in the atomized and uncoordinated way that has characterized most of its nearly 65-years of history.'[6]

One of his main concerns is that the refugee regime has placed the challenge of receiving refugees (and its financial burdens) on the shoulders of states located in the Global South. More than 80 per cent of the refugees are found in the developing world. These countries with very little resources receive very little financial support of the developed world to cope with the refugee situations at play. By looking at the numbers, Hathaway finds the efforts of the richer countries to resettle refugees from the Global South simply a joke.[7] He concludes

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2   This paper is an elaborated version of my presentation at the conference 'A human act or devil's pact? Human rights aspects of migration agreements between EU and third countries', organized by the College voor de Rechten van de Mens and the Commissie Meijers (The Hague, 18 May 2017).

3   J. Hathaway, 'Fixing the refugee system', *ESIL Lecture Series,* 13 May 2016, Amsterdam, http://bit.ly/2CgdChH; accessed 16 May 2017.

4   This project, entitled 'Fortress Europe as a mobile space? The intra-EU mobility of African migrants', is funded by a VENI grant from the Netherlands Organisation of Scientific Research (NWO – reference number: 451-14-011).

5   J. Hathaway, 'A global solution to a global crisis', *European Papers* 2016, 1(1), p. 96.

6   J. Hathaway, 'A global solution to a global crisis', *European Papers* 2016, 1(1), p. 96.

7   As he stated during his ESIL lecture: 'Not only do we [the developed world] do almost nothing to guarantee payment for this system, but in human terms our contributions are beyond pathetic. Of the 25 million or so refugees in the world, only about a 100,000 were resettled last year. And in that, really only three

that the global refugee system lacks international solidarity which, as a direct consequence, leaves many refugee communities to live in isolated but permanent refugee camps, sometimes for generations. As he underlines, the majority of refugees in the world has never been able 'to get back on their feet again' after they have left their countries of origin.[8]

The current system of ad hoc responses of single states also produces, according to this scholar of refugee law, avoidable humanitarian dramas due to the lack of binding institutional mechanisms that prepare for refugee movements. As we have seen in Greece and the rest of Europe in 2015, the lack of political organization has left many tens of thousands of refugees in desperate conditions and has produced severe limbo situations in which refugees endlessly wait in UNCHR camps at best, or in self-improvised shelters at worst. In other words, it is a dysfunctional system because it has never achieved to create order in a context of disordered refugee situations, neither for refugees – nor for states.

As an alternative, James Hathaway pleads for a global system that shares out the financial burdens and humanitarian responsibilities for any refugee movement. His proposal is based on an administrative infrastructure that creates a more orderly and dignified protection process, which would be in the end beneficial for states in the Global South, states in the Global North and, not the least important, the refugees in question. In a nutshell, Hathaway's solution to the messy refugee situations all over the world is a global distribution system that decouples the actual location of the refugee from the location of protection.

The main argument for this is that in the current situation refugees are granted limited access to '*meaningful* protection' due to the political reluctance of states to deal properly with refugees.[9] This reluctance is based on a general belief among governments that refugees impose 'unconditional and indefinite obligations on them'.[10] As Hathaway firmly states, this results in regressive political means, such as the building of fences and walls, to 'solve' unpredictable refugee movements.[11]

With the decoupling of the actual location of a refugee from the location of protection he puts emphasis on the very first priority of refugees: to get oneself in a safe place. In exchange for this, he somehow sacrifices the free will and preferences of people *where* this safe place actually should be. As he summarized during his lecture: dignity comes first, people's choices come second. With this point, he emphasizes that the refugee system is not an immigration system but a human rights system 'that provides protection for the duration of risk'.[12] Consequently, people who enter his global refugee system might be transferred to locations very far away from the locations where they found access to the refugee system. Indeed, he imagines a refugee distribution system on a global level that is based on burden and responsibility sharing between states. It is a common but differentiated system,

meaning that all states contribute though not in the same way. It is a system that moves from national administration to international quotas and status determination. In so doing, this system prepares for, rather than reacts to, refugee movements and guarantees access to meaningful protection for *all* refugees with no penalty for unlawful entry or presence.

2.   A geographical critique

2.1   Three strengths

Let me start with highlighting why I think we should embrace this proposal – or at least think with it – instead of accepting the status quo. Professor Hathaway proposes a system that is based on the principle that any refugee crisis is a global crisis, and this demands burden-sharing and international cooperation.[13] Therefore, the first major strength of his proposal is that it challenges us to go beyond the Eurocentric discourse that has somehow defined the Syrian crisis as a *European* refugee crisis. The system Hathaway proposes asks us to broaden our perspective by taking into account the realities for refugees in faraway places, such as the Somali refugee communities in Kenya,[14] the Syrian refugees in Lebanon[15] and the Rohingya refugees in Bangladesh or Indonesia.[16] Changing this Eurocentric perspective also means that we do not see Turkey, Libya or Morocco simply as 'transit states' in the framework of migration policy making,[17] nor do we approach Nigeria and Ethiopia simply as 'countries of origin'. These countries too have their complex immigration and emigration flows, and these states too have their own political concerns and policy priorities as regards migration.[18] Moving towards the global perspective that Professor Hathaway suggests is not an easy shift, but it is necessary to put the EU situation in the right perspective, both in terms of the numbers of incoming refugees and in terms of the notion that 'Europe is not the one and only political actor who is responsible for solving the problem.'[19]

The second major strength of Hathaway's proposal is that it concerns a system that *prepares* for refugee movements rather than being a system that *reacts* once 'we' think that there are too many refugees moving in our direction. By getting rid of the criminalization of refugees for crossing borders in unauthorized means, it will put an end to what is called the deterrence paradigm in which states react to refugee movements with restrictive migration control policies.[20] This would be a major step forwards.

countries – and none of them in the European Union – did the overwhelming share of the work' (J. Hathaway, 'Fixing the refugee system', *ESIL Lecture Series*, 13 May 2016, Amsterdam, http://bit.ly/2CgdChH; accessed 16 May 2017.

8   J. Hathaway, 'A global solution to a global crisis', *European Papers* 2016, 1(1), p. 94.

9   J. Hathaway, 'A global solution to a global crisis', *European Papers* 2016, 1(1), p. 96 emphasis added.

10   J. Hathaway, 'A global solution to a global crisis', *European Papers* 2016, 1(1), p. 96.

11   J. Hathaway, 'Fixing the refugee system', *ESIL Lecture Series*, 13 May 2016, Amsterdam, http://bit.ly/2CgdChH; accessed 16 May 2017.

12   J. Hathaway, 'Fixing the refugee system', *ESIL Lecture Series*, 13 May 2016, Amsterdam, http://bit.ly/2CgdChH; accessed 16 May 2017.

13   See also J. Schapendonk, 'Toekomstig migratiebeleid. Een stuurloos schip?', *Geografie*, November/December 2015, pp. 6-9.

14   For example C. Horst, *Transnational nomads. how Somalis cope with refugee life in the Dadaab camps of Kenya*, New York, Berghahn Books, 2006.

15   For example M. de Looijer, 'Libanese onderhandelingen om gastvrijheid', *AGORA* 2016, 32(1), pp. 22-25.

16   For example A. Fajri, 'Solidarity with neighbors. The case of Rohingya refugees in Aceh-Indonesia', presentation at the 2nd Transmobilities Conference, 8 June 2017, Ravenstein.

17   See also M. Collyer, F. Düvell and H. de Haas, 'Critical approaches to transit migration', *Population, Space and Place* 2012, 18(4), pp. 407-414.

18   See for example A. Adepoju, T. van Naerssen and A. Zoomers (Eds.), *International migration and national development in sub-Saharan Africa. Viewpoints and policy initiatives in the countries of origin*, Leiden, Brill, 2008.

19   See also M. Ignatieff, 'The refugee crisis isn't a 'European crisis', *The New York Times*, 5 September 2015. http://nyti.ms/2HaGPy9; accessed 5 February 2018.

20   T. Gammeltoft-Hansen and N. Tan, 'The end of the deterrence paradigm? Future directions for global refugee policy', *Journal on Migration and Human Security* 2017, 5(1), pp. 28-56.

Thirdly, this proposal clearly takes into account the refugees' livelihoods after they have found institutional protection. It centres around the idea that refugees deserve to have a future, *somewhere*. During his presentation on the 18th of May 2017, Professor Hathaway underlined that many discussions on the Refugee Convention overlook what he calls the 'core of the Refugee Convention'. The core of the convention is about empowering refugees to get back on their feet again, to live independent lives.

Furthermore, and unsurprisingly so, reception conditions differ significantly. There are reception centres that grant you more freedom than others, that give you more pocket money than others, that give you better legal assistance than others. Needless to indicate, the chances to 'move on in life' are of course also dependent on local conditions. That is the reason why many migrants – even if they have been granted a protection status – move unseen and sometimes undocumented to places outside Italy. A global refugee system on paper does

The proposal for a global solution challenges us to go beyond the Eurocentric discourse that has somehow defined the Syrian crisis as a European refugee crisis

2.2 Three concerns

Despite this positive foundation, I do have three interrelated concerns that I would like to raise here. The first refers to the idea that somehow 'the global' dimension of Hathaway's proposal seems to translate almost automatically into a homogeneous and universal system. Whether a refugee deserves protection is not the main concern of geographers, because that is the field of legal scholars. For us geographers, it is more interesting to raise the questions *where* this protection can be granted, and *why there*? In this sense, a global solution is never really global as there are always local dynamics that create differentiation and deviation.

To give a metaphorical example: a bottle of Fanta lemonade looks and tastes very differently in Dar el Salaam than it does in The Hague. Local twists give Fanta different characteristics across the globe. In this context, Hathaway provides very little clarity with regard to the fundamental geographical questions involved. After all, the question in the head of many refugees is: *where* is my new home? The answer that Hathaway's proposed system would provide is basically the following: your new home can be *anywhere*, because it is not you who decides where you go but the system.

At this point, there is an interesting parallel with my empirical work within and beyond Europe. For many of my West African respondents who have survived the desert journey through Libya and who have reached Italy later on, the Italian asylum system is what they call 'a paper lottery'.[21] It is a paper lottery because you have no decision-making power at all where your case will be processed. And, in terms of the outcome and length of the procedures, this seems to matter. I am following six young men from Senegambia since the beginning of 2014, and they have similar narratives and socio-political backgrounds. They more or less followed the same route and even reached Lampedusa with the same boat. But from there they were transferred to different places, and the legal outcomes of their asylum cases differ considerably, from obtaining a five-year protection-based status to being undocumented ever since. Thus, while Hathaway's system seeks for global solutions, there are questions to be raised regarding the universality and standardization of asylum within the same country. Evidently, more discrepancies arise when we scale up the question of the harmonization of asylum to the level of the European Union.[22]

not wipe out geographical differences, and it is important to realize this in order to prevent the spread of false promises and high hopes.

My second concern is strongly related to the former. Hathaway's proposal is rather unclear about the foreseen directionality of the relocations that the system would produce in practice. One can interpret this in two ways. Considering Hathaway's critique of the absence of structural resettlements in the current system, the proposal can be basically approached as a redistribution model bringing more refugees from the Global South to the Global North. When this directionality is made explicit, I am less convinced than Professor Hathaway whether there is sufficient political will in the Global North to accept and embrace this new system.

Alternatively, the proposed system can indeed be a global lottery where matching may exist, but in theory refugees can be relocated within the Global South, within the Global North, from the South to the North, and maybe also from the North to the South, from, let us say, Sweden to Angola.[23] This lottery system would undoubtedly create new challenges as it pinpoints refugees to places that do not necessarily meet their aspirations.

I would like to relate this point to Hathaway's own critique regarding EU's Dublin Convention.[24] For Hathaway there is no legal reason in the Refugee Convention to assign refugee's first country of entry as his/her destination country. This regulation would actually create an incentive for refugees to move onwards in irregular ways. The lottery principle of the global system that is proposed may produce unintended and undesirable consequences for the same reason. We know from studies like that of Cindy Horst (2006) in the Dadaab refugee camp in Kenya or that of Judith Zijlstra and Ilse van Liempt (2017) on the Balkan route that refugees are 'connected' people.[25] Through their social networks, they compare their situations, discuss opportunities and navigate their journeys.[26] If you deprive refugees completely of choice, as the system does so clearly, I am afraid that we will have a flourishing industry specialized in 'reintroducing' agency and choice for the very same refugees. This

21   J. Schapendonk, 'Navigating the migration industry. Migrants moving through an African-European web of facilitation/control', *Journal of Ethnic and Migration Studies* 2017, http://bit.ly/2G8cNK9; accessed on 5 February 2018; see also M. Belloni, 'Refugees as gamblers. Eritreans seeking to migrate through Italy', *Journal of Immigrant & Refugee Studies* 2016, 14(1), pp. 104-119.
22   See also R. Bruin, S.G. Kok and A. Terlouw, Dublin: 'Blind interstatelijk vertrouwen is een fictie', *Justitiële Verkenningen*, 41 (3), pp. 71-89.

23   J. Hathaway, 'Fixing the refugee system', *ESIL Lecture Series,* 13 May 2016, Amsterdam, http://bit.ly/2CgdChH; accessed 16 May 2017.
24   J. Hathaway, 'Fixing the refugee system', *ESIL Lecture Series,* 13 May 2016, Amsterdam, http://bit.ly/2CgdChH; accessed 16 May 2017.
25   C. Horst, *Transnational nomads. How Somalis cope with refugee life in the Dadaab camps of Kenya,* New York, Berghahn Books, 2006; J. Zijlstra, I. van Liempt, 'Smart (phone) travelling. Understanding the use and impact of mobile technology on irregular migration journeys', *International Journal of Migration and Border Studies* 2017, 3(2-3), pp. 174-191.
26   See also M. Belloni, 'Refugees as gamblers. Eritreans seeking to migrate through Italy', *Journal of Immigrant & Refugee Studies* 2016, 14(1), pp. 104-119.

industry consists of the many brokering services,[27] smugglers,[28] traffickers and other actors that are specialized in arranging the paperwork,[29] providing legal gymnastics and/or facilitating the journeys of would-be movers.[30]

aspirations than seeking protection, like finding a good job, raising a family, et cetera. These aspirations are quite human – as Hathaway would say. But one could also have a very different reading of his proposal. Namely, that his plea for more social

If you deprive refugees completely of choice, we will have a flourishing industry specialized in 'reintroducing' agency, consisting of the brokering services, smugglers and traffickers.

In my viewpoint, refugees are indeed forced to leave home, but that does not mean that they have no idea about where they can build up their new homes. Many prefer to stay close to the country of origin, others try their luck further away. In order to avoid new forms of disordered migration, I think we should take the aspirations of refugees seriously into account in the relocation process. The principle of matching, which is repeatedly mentioned by Hathaway, could be an important first step towards this. However, the fact that it is not explicitly incorporated in his five-point plan makes me wonder about the strategic role matching plays in the system and the way it will be actually operationalized when it comes down to individual and collective aspirations.

My third concern points to a tension in the main line of argumentation with regard to refugees' right to live independent lives, as advocated by Hathaway. Following his arguments, refugees are sharply distinguished from economic migrants as the former find themselves in a *human rights system* and the latter in an *immigration system*. In some of his lectures, Hathaway semi-jokingly stated that students would fail his courses if they write about 'economic refugees'. To some extent, I accept this argument and I agree with him that it should *not* matter, in legal terms, whether a refugee has other

and economic rights to enable refugees to 'go on with their lives' actually challenges governments to acknowledge that every refugee is in potential an immigrant and that every refugee deserves to live in an environment in which she or he can build a new home. This message might be more controversial in the political sense, but at least it is more transparent and honest about what it entails for states when refugees are granted with social and economic rights.

In other words, the five-point plan seeks to spread two main messages that I found very hard to reconcile. On the one hand, the main message to national governments is: do not worry, these refugees are here for a specific duration of risk. On the other hand, the main message to refugees is: please do your best and invest in your futures and create your new homes, wherever the system decides it to be. Because of this tension, I foresee a highly problematic situation in which refugees who have managed to get back on their feet again are actively pushed by governments (after the duration of risk has passed) to leave their *new* homes behind again because it is assumed/preferred that their *real* homes are located somewhere else – in their country of origin.[31]

Again, I would like to express my appreciation to Professor Hathaway and the team of experts he has worked with for developing this global refugee system. However, before we continue to work with it, I think it is wise to anticipate better some of the foreseen consequences, to remain realistic about the geographical differences within a global system and to seek concrete ways to incorporate the socio-economic lifeworlds of refugees.

27 J. Alpes, *Bushfalling. How young Cameroonians dare to migrate,* Amsterdam, University of Amsterdam, 2011.
28 I.van Liempt, 'Different geographies and experiences of "assisted" types of migration. A gendered critique on the distinction between trafficking and smuggling', *Gender, Place and Culture* 2011, 18(02), pp. 179-193.
29 M. van Reisen, M. Estefanos and C. Rijken, *Human trafficking in the Sinai. Refugees between life and death,* Oisterwijk, Wolf Legal Publishers, 2012.
30 For a broader discussion of the so-called migration industry, see S. Cranston, J. Schapendonk and E. Spaan, 'New directions in exploring the migration industries. Introduction to special issue', *Journal of Ethnic and Migration Studies* 2017, online preview: http://bit.ly/2BqEajG; accessed on 5 February 2018.

31 For an elaborative argument, see L. Malkki, 'National geographic. The rooting of peoples and the territorialization of national identity among scholars and refugees', *Cultural anthropology* 1992, 7(1), pp. 24-44.

A brief response

James C. Hathaway*

James Hathaway understands the risks of his proposal, but because the present system delivers tragically little it would be wrong not to aim for a fundamental and global reform.

Dr. Schapendonk's engagement with my proposal to reform the way we implement global refugee law – his willingness 'to think with' my five-point plan – is a wonderful gift. As the plan was explicitly offered as a conversation opener rather than as a 'ready to roll out' model, his insights from the optic of migration dynamics are both welcome and important.

His first concern is that even with the shift I propose from state-by-state to common international administration there would still likely to be variations in the way that refugees are treated in different regions of the world. I suspect he is correct that it will be difficult to attain a completely 'homogeneous and universal' system. But given the truly massive disparities in the way refugees are treated today from one country to another, I'd say that the shift to international administration is still worth contemplating. After all, some progress toward seeing all refugees as equally worthy of dignified treatment is surely better than none. The efficiencies of the shift would also yield many millions of euros that could be used to fund other critical aspects of the proposed protection regime, such as providing start-up grants for refugees to collaborate with host communities in developing shared economies. A common status assessment system would moreover provide the basis for global responsibility sharing, since there would be a single mechanism for assessing entitlement to protection. And once refugees are allocated for protection, I believe that we can at least attenuate differences of treatment by means of the real incentives built into the proposed system for host states to meet international protection standards: specifically, verifiable respect for refugee rights would be the quid pro quo for receiving both guarantees of burden sharing and offers of residual resettlement places for refugees unable either to go home or to integrate locally.

But will some refugees resist a managed process of assignment to a state – usually in their region of origin in order to maximize cultural and functional compatibility – for the maximum 6-year 'duration of risk' phase? And might some refugees not be keen to accept a residual offer of permanent resettlement to a state – normally in another region, and predominantly in the developed world – if unable to go home or to integrate locally? I find this concern especially troubling; as a human rights lawyer I'm loathe to impose a solution on anyone. But again it's important to think about the ground reality: most refugees today have no meaningful choice about where to go, and are often stuck for decades in protracted refugee situations in countries that are unable really to protect them. We should of course attenuate the element of compulsion by building on new insights about 'preference matching' – giving individual refugees some voice in the assignment process. But in the end, isn't it more important to give every refugee a dignified alternative to being persecuted at home than it is to guarantee all refugees perfect choice about where to go?

And yes, I agree with Dr. Schapendonk that some refugees will find ways – no doubt abetted by smugglers – to evade the managed regime. But that would be no more true than it is under extant completely arbitrary assignment regimes, such as that established by the Dublin Regulation. At least under the proposed approach, more refugees would have more dignified options than they do now.

The third concern is that it may be difficult to reconcile a commitment to empowering refugees – in particular by ensuring that they can work and start businesses – with the model's two-phase protection process comprising up to 6 years in a regional host state followed by extraregional permanent resettlement if necessary. It's of course true that the best result would be to give all refugees an immediate and permanent new home. But the commitment to guaranteeing all refugees unable to go home permanent resettlement depends on keeping the numbers manageable. Since about 1/3 of refugees can and do safely repatriate within 6 years and recent research suggests that almost as many may be offered local integration under an empowering approach to 'protection for duration of risk,' the 6-year buffer is an important means of ensuring that the number of refugees needing resettlement is kept in check – and hence the residual resettlement guarantee can be honoured. More generally, though, research on refugee economies suggests that even refugees not granted a permanent status can and do become economically productive quite quickly, often able not only to meet their own needs but even to produce employment opportunities for host populations. This makes them more viable candidates for local integration or, if they either repatriate or resettle, can provide them with a new and valuable set of skills and connections.

In the end, I agree with Dr. Schapendonk that it is best to identify and to begin thinking about responses to the concerns that he and others have raised. The key imperative, though, is to reorient that conversation away from the piecemeal tinkering now on offer under the UN's global compact process. For the first time, powerful states are experiencing some of the dysfunctionality of the way refugee law is implemented, thus giving us a perhaps unique opportunity to enlist them in the global reform process. It would literally be a tragedy to squander that opportunity, as the UN now seems poised to do. Yes, there are clearly risks in changing the way to protection. But since we know that the present system delivers tragically little both to most refugees and to the overwhelmingly impoverished states that host them, it would be wrong not to aim for a truly fundamental and global reform. My sincere hope is that others will join Joris Schapendornk and me in 'thinking with' the reformulation proposal as the starting point for that much-needed critical engagement.