

COMMENT

WHY REFUGEES STILL MATTER: A RESPONSE TO JAMES HATHAWAY

GREGOR NOLL*

CONTENTS

- I Introduction
- II The Right to Leave in International Law
- III Human Rights Law
- IV The Kantian Right to Hospitality

I INTRODUCTION

In the previous issue of the *Melbourne Journal of International Law*, Professor James C Hathaway, a leading authority on international refugee law, published a text based on an address delivered at The University of Melbourne on 22 February 2007.¹ Under the title ‘Why Refugee Law Still Matters’, Hathaway relaunched his proposal of a multilateral refugee protection system based on the idea of ‘common but differentiated responsibility’.² This proposal originally drew on the results of a comprehensive research project led by Hathaway in the 1990s, which culminated in two publications in 1997.³ Now, ten years later, the director of this ambitious ‘reformulation project’ reiterates the central ideas. This is done in response to both the totalising governmental policies of the past decade as well as the ‘absolutism’ of the ‘majority of the refugee advocacy community’.⁴

While Hathaway gives free rein to wit and rhetoric in his critique of both quarters, the description of his own antidote is limited to a rather sparse and general overview. To fully appreciate the current proposal, one has to read it in conjunction with the 1997 article by Hathaway and Neve, titled ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’.⁵ As the 2007 article in no way indicates that its author has distanced himself from the 1997 proposal, I think that it is adequate to resort to the latter when reading the author’s recent publication. This is all the more true as the 2007 article neither indicates that its author takes exception

* Professor of International Law, Faculty of Law, Lund University, Sweden; email <Gregor.Noll@jur.lu.se>.

¹ James C Hathaway, ‘Why Refugee Law Still Matters’ (2007) 8 *Melbourne Journal of International Law* 89 (‘2007 article’).

² Ibid 102.

³ James C Hathaway (ed), *Reconceiving International Refugee Law* (1997); James C Hathaway and R Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ (1997) 10 *Harvard Human Rights Journal* 115 (‘1997 article’).

⁴ Hathaway, 2007 article, above n 1, 101–3.

⁵ Hathaway and Neve, above n 3.

from the 1997 article, nor seems to alter or amend the details of the proposal articulated in it.

I think it is laudable that an academic attempts to regain ground in a debate that has been thoroughly appropriated by governments throughout the past ten years. Australia's policy of zero tolerance towards boat arrivals in its 'Pacific Solution' and the analogous crisis of access to asylum in the European Union are the most visible examples of how liberal democracies have afforded themselves the lethal luxury of a maritime Berlin wall. For international lawyers, the challenge is to analyse the way in which such policies of containment relate to international law. Undertaking this analysis might mean identifying concrete international obligations. It might also require analysis of how international legal thinking is drawn into the intellectual crisis expressed by containment policies.

Reiterating my respect for his position,⁶ I believe that Hathaway's 2007 article provides a strong catalyst for consideration of how concrete violations and a crisis of thinking in international law are connected. I am therefore indebted to him. This debt is best repaid by considering the implications of his proposal. In doing so in the present text, I wish to limit myself to an examination of the way Hathaway's proposals address the refugee in particular, and, in some respects, migrants at large.

In a nutshell, Hathaway's proposals aim to expand the international capacity for refugee protection. To that end, Hathaway outlines a multilateral system for the planned distribution of different responsibilities amongst participating states.⁷ The criteria for distributing responsibilities amongst states is to be set up 'in advance and supervised by a revamped UNHCR'.⁸ The proposed system also features an oversight institution responsible for monitoring the resource transfers under the system.⁹ Hathaway emphasises that allocations should 'operate against a foundational principle that even the significant assumption of fiscal burdens cannot justify withdrawing from human protective responsibilities'.¹⁰ That is, industrialised nations should not escape from a minimum obligation to provide a rudimentary form of hospitality towards refugees.

Where is the pivot in this planned economy of protection? In the interplay of forces we witness today, governments can never fully predict first or secondary movements of migrants, including protection seekers, and therefore engage in a contingency system based on withholding protection reserves. To protect these reserves, and to avoid situations where legal obligations might be activated, migrants are intercepted and deflected to the greatest extent possible. In the regime proposed by Hathaway, these withheld protection reserves would be pooled, allowing protection dollars to flow to where they are most needed.¹¹ In isolation, this would surely be a good thing. However, to convince governments of the wisdom of releasing their protection reserves, they need to be assured of

⁶ See Gregor Noll, 'Sharing the Burden?' in *Negotiating Asylum: The EU Aquis, Extraterritorial Protection, and the Common Market of Deflection* (2000) 263, drawing on the studies of Hathaway and his colleagues within the framework of the 'reformulation project'.

⁷ Hathaway, 2007 article, above n 1, 101–3.

⁸ *Ibid* 103.

⁹ *Ibid* 102.

¹⁰ *Ibid*.

¹¹ *Ibid*.

the predictability of first and secondary movements by migrants. Only when migrants are completely disenfranchised from making the decision to move, can this succeed. This is the price at which Hathaway's expansion of protection capacities comes. As opposed to the current situation, migration movement would need to be subjected to complete control. Where this is not possible, governments will find themselves engaged in a new and ambitious protection scheme, while remaining stuck with the costs associated with spontaneous movements and arrivals. Surely, no government will accept this. Hathaway's proposals reflect an awareness of that constraint.

In the 2007 article, Hathaway underscores that refugee status is temporally limited to the duration of risk in the country of origin.¹² In their 1997 article, Hathaway and Neve provide more detail about how this is to be systematised in the proposal:

If and when the risk that gave rise to refugee status comes to an end, however, refugee status may legitimately be withdrawn and mandated repatriation pursued. Commentators sometimes fail to make clear that the issue of *refoulement* does not arise in regard to persons who have ceased to be refugees by reason of a fundamental change of circumstances in their country of origin. This transition in status is in keeping with an understanding of refugee protection as a human rights remedy, rather than an alternative path to permanent immigration. ... [T]he necessity-based logic of temporary protection is important in convincing states to end efforts to avoid responsibility toward refugees altogether.¹³

The withdrawal of protected status is made effective by the last resort of repatriation by force:

Ultimately, if true stability is restored in the country of origin yet efforts to promote voluntary repatriation do not succeed, mandated repatriation will become necessary. It should, however, be carried out in a way that is minimally violative of the dignity of returnees. Human rights groups should be involved in the return process to ensure that officials do not resort to treatment that violates the rights of the returnees.¹⁴

Let me be absolutely clear: I am fully convinced that governments have the right, as a matter of international law, to remove a person not authorised to stay on their territory where such removal respects obligations to the individual under international law. These obligations include the human right to leave a country, as well as explicit and implied prohibitions of *refoulement* under refugee and human rights law. These obligations presuppose the autonomy of the *individual* migrant, be she a refugee or not.¹⁵ A regime that nullifies the potential exercise of this autonomy in order to maximise the benefit to migrants *as a group* consumes the space needed for the individual migrant's autonomy. This is another problem with the trade-off regime proposed by Hathaway.

In the 2007 article, Hathaway emphasises that 'governments must allow all who wish to claim protection as refugees access to their territory, at least pending

¹² Ibid 101.

¹³ Hathaway and Neve, above n 3, 185 (citations omitted).

¹⁴ Ibid 186.

¹⁵ Hathaway and I seem to be in agreement on this: see Hathaway, 2007 article, above n 1, 103.

an assignment of responsibility'.¹⁶ Logically, the qualification 'at least' cannot be taken at face value. The economy of the proposed regime would falter if it permitted individual decisions to move on to other countries. Once responsibility has been assigned, the systemic right of first entry must cease lest the compromise on resource allocation is unsettled. The 2007 article and the 1997 article observe that the proposed system will not provide a back door to 'permanent immigration' for refugees.¹⁷ In the proposals, all remaining migration movements are subjected to the control of the multilateral regime: movement from the country of origin to the first country of arrival, resettlement in a third country and repatriation.

In my critique of the proposals, I shall proceed in three steps, moving from the identification of concrete obligations over systemic questions to an examination of the idea of international law that the proposals reflect. Each step is based on a concern with Hathaway's proposal, which I shall formulate in a hypothetical form:

- The proposals are contradictory: they cannot uphold a logical account of international legal obligations while simultaneously ensuring the stability of the proposed system and the human right to leave any country.¹⁸
- The proposals are insufficiently attentive to the dynamics of human rights law: they disregard the migration incentives lawfully produced by differences in human rights obligations amongst states.¹⁹
- The proposals are illiberal: they abandon Kant's 'conditions of general hospitality' upon which cosmopolitan peace is premised.²⁰

II THE RIGHT TO LEAVE IN INTERNATIONAL LAW

I shall assume that the regime proposed by Hathaway is in operation. A protection seeker has been reallocated from a Northern country of first arrival to a country with fewer resources in the South. The latter country is supposed to provide protection by providing 'basic human rights' to the refugee. Hathaway and Neve stated in 1997 that

[a] system of collectivized responsibility would respond to the desire of Northern states to avoid the fraudulent claims resulting from the individuated duty to admit every asylum-seeker into their territories until the claim to refugee status is denied. To the extent that developed states commit themselves to membership in refugee protection interest-convergence groups, they would secure access to a legitimate means by which to dissociate the site of arrival from the place of asylum.

¹⁶ *Ibid* 101.

¹⁷ Hathaway and Neve, above n 3, 140. The 2007 article emphasises the loss of protection resources in a system where refugee status leads to permanent immigration: Hathaway, 2007 article, above n 1, 101.

¹⁸ Section II below.

¹⁹ Section III below.

²⁰ Section IV below.

With exception taken for the value-laden adjective ‘legitimate’, anyone will agree so far. The authors continue:

This is legally possible because the right of refugees to decide where to solicit protection is *not* absolute, but follows from the risk of *refoulement* or other rights abuse that might result if a refugee were compelled to rely on the efforts of a government that may have lower standards than those prevailing in the state whose protection the refugee has invoked. Governments are legally entitled to allocate the responsibility to protect refugees, so long as the assignment of protective responsibility is the result of common agreement among the states concerned, and poses no risk to the refugee’s right to protection against *refoulement*, and to enjoy other basic human rights.²¹

Here I would differ. Not because I believe that there is a right to permanent immigration from which refugees and other migrants can benefit — there is not — but because the authors’ analysis depicts migrants’ human rights as caught in a territorial stasis, while the individual’s decision to move, and the ensuing migrational process, seem to be unprotected by international law. They are, quite obviously, not. There is a right to leave any country, including one’s own, in regional as well as all universal human rights instruments. Article 13(2) of the *Universal Declaration on Human Rights*²² states: ‘Everyone has the right to leave any country, including his own, and to return to his country’. In treaty law, formulations of this right are to be found in arts 12(2), 12(3) and 12(4) of the *International Covenant on Civil and Political Rights*,²³ in a number of other human rights instruments,²⁴ and in the case law of the European Court of Justice.²⁵

Let me revert to the situation of the protection seeker who has been reallocated to a country in the South. Let us assume that she wishes to move on, for reasons we need not specify at this stage. Legally speaking, she wants to leave the country of protection for onward migration, a decision that might raise issues under the ‘right to leave any country’, which Hathaway’s regime leaves unscathed. This might not pose a problem for the regime, as long as she leaves for a state not participating in the regime. However, if she targets another regime state without being directed there by the oversight authority or otherwise invited by the target state, this poses a challenge to the regime. If the integrity of the regime is to be preserved, the target state would need to respond firmly and to

²¹ Hathaway and Neve, above n 3, 145–6 (citations omitted) (emphasis in original).

²² GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN DOC A/RES/217A (III) (10 December 1948).

²³ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²⁴ The following instruments contain provisions relating to the right to leave and the right to return: *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195, art 5(d)(ii) (entered into force 4 January 1969); *African Charter on Human and Peoples’ Rights*, opened for signature 27 June 1981, 1520 UNTS 227, art 12 (entered into force 21 October 1986); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 143, art 22 (entered into force 18 July 1978). A right to enter the country of which one is a national is enshrined in *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto*, opened for signature 16 October 1963, ETS 46, art 2 (entered into force 2 May 1968).

²⁵ See, eg, *Van Duyn v Home Office* (41/74) [1974] ECR 1337, 1351.

return her to the state to which she was allocated. In the alternative, the state to which she was allocated would need to prevent her from leaving, saving the regime from the processing and return costs resulting from her secondary move. However, it would seem to be at variance with a strict interpretation of the ‘right to leave any country’ which ‘everyone’ has. What shall I conclude?

I have explained elsewhere that international law amplifies these dilemmas.²⁶ It offers states a right to expel aliens, which corresponds to an individual obligation under domestic law to obey an expulsion order. There is also an individual right under international law to return to one’s country, and a corresponding international duty to readmit citizens making voluntary use of that right. From a regulatory perspective, this layer of norms is too thin, and the ensuing unpredictability of outcome is potentially harmful to states as well as individuals. Beyond these two statements, choices have to be made. Whatever choices one wishes to make they need to be both internally consistent and leave the logic of international law intact.²⁷

It matters whether a set of rights is construed to apply only between the states participating in Hathaway’s regime (creating obligations strictly *inter partes*), or to a wider circle of parties, including the individual migrant and the country of origin, as well as other states outside the regime (potentially creating obligations *erga omnes*). In regards to the efficacy of the regime, as well as the impact on the human right to leave a country, it makes a significant difference whether we construe migration-related norms in the narrower or broader sense. In Table 1 below, I have compiled two versions of migration-related rights relevant under Hathaway’s regime.

In the first row, I examine a strong claim, which draws on the logic of correlates and assumes *erga omnes* obligations with regard to both the individual right to leave and return and the state’s right to expel non-citizens. In the second row, I relate a weak claim, which keeps obligations strictly within the limits of *inter partes* relations. For the migrant in my example, it will be worrisome that even a strong claim based on the right to leave any country merely allows for a temporary stay in the target state, while leaving that state’s right to expel unfettered. Whereas the weak claim makes a migrant’s access to a destination state more difficult, yet it concomitantly diminishes the efficacy of multilateral removal and readmission practices.

²⁶ Gregor Noll, ‘Return of Persons to States of Origin and Third States’ in Thomas Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (2003) 61, 61–74.

²⁷ I shall come back to whether those choices can claim to be liberal ones in Section III below.

TABLE 1: TWO VERSIONS OF MIGRATION-RELATED RIGHTS UNDER A HYPOTHETICAL ALLOCATION REGIME

	Individual	Allocation State	Target State	State of Origin
Strong claim, obligations <i>erga omnes</i>	Human right to leave opposable to all states	Duty to respect the right to leave owed to migrant	Duty to admit and right to expel opposable to the migrant	Duty to readmit owed to the citizen
		Duty to readmit owed to all states	Right to expel opposable to all states of origin or allocation	Duty to readmit owed to all destination states
Weak claim, obligations <i>inter partes</i>	Human right to leave opposable to the country of origin only	Duty to respect the exercise of the right to leave the state of origin; right to block onward migration	Duty to respect the exercise of the right to leave the state of origin, but no duty to admit owed to the migrant	Duty to readmit owed to the citizen
		Duty to respect the exercise of the target state's right, but no duty to readmit owed to that state	Right to expel opposable to the alien	Duty to respect the exercise of the target or allocation state's right, but no duty to readmit owed to those states

Neither of these interpretations gives much hope for the proposals. Either we are left with a stable regime, which does away with the right to leave 'any country'; or the letter of human rights law is respected and we cannot object to systemically ineffective secondary movements. A policy maker might suggest that the state right to remove should be combined with a weak right of the individual to leave any country, including her own. An international lawyer should be slow to forfeit the theoretical coherence of the law in this manner. This might be one of the reasons why the proposals fail to address the individual's right to leave.

III HUMAN RIGHTS LAW

Second, I would like to question whether our migrant's decision to ignore allocation by the regime and move onward to a target state of her own choosing might be supported or incentivised by human rights law other than the right to leave discussed above. I think it might.

On the incentive side, the proposals in no way suggest that the 'protection dollars' transferred from participating states in the North to participating states in the South will increase the level of human rights protection in the latter to the extent that there is no difference between the two. In all likelihood, a participating state in the North will have human rights obligations diverging

from a state in the South, due to divergences in treaty obligations entered into. This is true not only in relation to economic, social and cultural rights, but also to civil and political rights. Positive obligations feature in the latter as much as in the former, whose *in casu* extent depends, inter alia, on the resources of the state obligated under them. Even if we add the ‘protection dollars’ for defraying these additional costs, a participating state in the South will still have fewer resources at its disposal, which, in comparison to a Northern participant, will diminish the extent of positive obligations implied by the same right. The right to health is an obvious example, and the right to education is another. So, if a refugee subjected to the proposed regime continues moving after allocation, we can say that in all likelihood, they do it for the sake of human rights.

In this context, I note with concern that the minimum requirement in the proposal of the 1997 article is that reallocation pose ‘no risk to the refugee’s right to protection against *refoulement*, and to enjoy other basic human rights’.²⁸ To my mind, any reduction of states’ human rights obligations to the abstraction of ‘basic human rights’ risks negating legally mandated benefits to individuals in concrete situations. Formal deduction cannot determine which human rights, or which components of such rights, are basic enough to satisfy the proposal’s criterion. A qualitative determination would haphazardly identify a class of human rights norms that are somehow ‘more important’ than other human rights norms.²⁹ This remains a problematic endeavour in a system of norms which purports to be universal, indivisible, independent and interrelated. A quantitative determination would fall victim to haphazardly chosen criterion regarding states’ minimum support obligations.³⁰ The precise extent of human rights obligations is always a matter of *in casu* assessment: obligations owed by a certain state to a certain person in a certain situation.

Therefore, I note with relief that Hathaway altered this aspect of the proposal in the 2007 article, in which any assignment of protection seekers to third countries is made

legally contingent on meaningful verification by the sending state that the destination country will both recognize refugee status in accordance with international standards, and respect all *Refugee Convention* and other internationally binding rights.³¹

²⁸ Hathaway and Neve, above n 3, 146.

²⁹ Inevitably, this implies the construction of a hierarchy within the body of human rights law. Often, hierarchical constructions are built around non-derogable rights. However, the group of rights identified as non-derogable by different human rights treaties is not identical. While Koji presents an excellent analysis of the problem, his affirmation of the specific quality of non-derogable rights in his hierarchical model cannot address the material indeterminacy of these hierarchically superior rights: Teraya Koji, ‘Emerging Hierarchy of Human Rights Law and Beyond: From the Perspective of Non-Derogable Rights’ (2001) 12 *European Journal of International Law* 917. To my mind, non-derogability should be treated as the result of a linguistic choice by the treaty drafters, not a substantively hierarchical one.

³⁰ To exemplify, let me name three: the human rights norm must be universally valid as a matter of general international law; the human rights norm must have been enshrined in the international Bill of Rights; or the human rights norm must have been enshrined in a binding treaty that has entered into force for a specific number or category of states. Which is the meta-norm guiding the lawyer’s choice?

³¹ Hathaway, 2007 article, above n 1, 96.

Nonetheless, his recent formulation allows a reading — or misreading — to the effect that verification comprises only such flagrant violations of rights which may render assignment illegal.³²

One should not underestimate this insecurity about what the proposed regime actually guarantees, or view it as an insignificant detail. Insecurity about what is demanded of states cooperating within the proposed regime may cause courts to quash allocation decisions. Although judges in the North remain slow to acknowledge the *non-refoulement* potentiality of all human rights,³³ they are not averse to taking issue with the implications of a broader group of rights for prohibitions of inhuman or degrading treatment. Yet what is more important is that human rights differentials keep people moving despite the fact that an explicit right to enter a state other than one's own is lacking. Some of these people are refugees, others are not. Some move lawfully, most will not.³⁴ Placing themselves under the jurisdiction of a target state with more demanding human rights obligations means that they are taking the adjective 'human' in 'human rights' seriously. In terms of efficiency and predictability, migration still has a good chance of outdoing existing monitoring mechanisms as much as Chapter VII of the *Charter of the United Nations*.³⁵ I cannot see how this will change either under the present regime or under that proposed by Hathaway. The concept of 'basic human rights' is but an equalising fantasy analogous to the proverbial right of the rich and the poor to sleep under the bridges of Paris.³⁶ Moreover, a regime that systematically discourages and frustrates human rights related movements forfeits the claim to being a human rights regime.

IV THE KANTIAN RIGHT TO HOSPITALITY

So far, I have tried to express my concern with the trade-off in the proposal which may prove detrimental to the individual right to leave any country, including one's own. I have also attempted to defuse ideas that technically

³² Apart from the right not to be exposed to torture, inhuman or degrading treatment or punishment, we know little about how so-called qualified human rights function in removal settings where extraterritorial risks are invoked. The extensive research presented before the House of Lords in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 provides an excellent overview of the problem of how to define the scope of extraterritorial risks raising issues in removal situations under the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*'). Here is the position adopted by Lord Steyn when agreeing with the majority to dismiss the appeal:

It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged: at 362.

³³ See *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 for further references to case law and doctrine.

³⁴ Stopping people before departure or frustrating movement by imposed return predictably augments the violence used to uphold the system.

³⁵ There seems to be qualified support for my position in the 2007 article. 'Refugee law ... is the only international human rights remedy which can be engaged directly and immediately by at-risk persons themselves': Hathaway, 2007 article, above n 1, 103. Therefore, I do believe that there is room for agreement on the necessity not to trade-off mobility in a future regime.

³⁶ Anatole France, *Le Lys Rouge* (1894) 204.

identical human rights norms apply as ‘basic human rights’ across starkly different groups of states cooperating in a regime regulating mobility. Further questions could be asked of the proposals: in their capacity as planned economies; as a ‘Convention-based regime’;³⁷ or as ‘guesstimates’ on the proper will of sovereigns.³⁸ However, I will limit myself to a consideration of the significance of the immobilising features of the proposals to an idea of international law, and perhaps deliver on my promise to explain ‘why refugees still matter’ to an idea of international law.

Human beings can be said to interact in three domains: within the state, through the state and beyond the state. Immanuel Kant’s 1795 treatise *On Perpetual Peace* assigns three spheres to human interaction: that of republican law, that of the law of peoples, and that of cosmopolitan law.³⁹ Addressing all three domains of human interaction, Kant formulated what he saw as preconditions of a gradual pacification process on a global scale. Moulded in the form of a peace treaty, he set out these preconditions in three main ‘operative articles’, prescribing republican constitutions within states; a public international law based upon legal federalism among states; and an individual right to hospitality for any ‘world citizen’. Kant formulates the right to hospitality as follows: ‘Das *Weltbürgerrecht* soll auf Bedingungen der allgemeinen *Hospitalität* eingeschränkt sein’.⁴⁰

Kant invokes two premises in justifying this right. As the Earth is formed as a globe, he argues, its inhabitants cannot disperse infinitely, but are compelled to meet sooner or later. Originally, he adds, nobody has a greater right to be at a certain place than anybody else. Kant’s conclusion limits itself to affording each individual a right of visit (*Besuchsrecht*) rather than the right of a guest (*Gastrecht*). The right to visit ‘appertains to all men, to offer themselves for company’.⁴¹ It ‘does not extend further, however, than to conditions of the possibility of *trying* an intercommunication with the old inhabitants’.⁴² A visitor must not be treated in a hostile manner due to her arrival on the soil of another individual. The original inhabitant may, however, expel her, ‘if it can be done without [her] ruin’.⁴³ This permission is rooted in the need to counter the violence flowing from European colonialism at the time Kant’s treatise was drafted. Importantly, it is structurally different from today’s state right to expel aliens under international law as Kant formulates it as an individual entitlement,

³⁷ Hathaway, 2007 article, above n 1, 103, describing the proposal as being ‘still a Convention-based regime’.

³⁸ *Ibid*:

More specifically, the practicality of refugee law follows from the need of governments committed to border control for a mechanism to respond to the arrival of involuntary migrants that is reconcilable to hard realities, as well as to states’ own basic legal and political values: at 99.

³⁹ Immanuel Kant, *Zum ewigen Frieden: ein philosophischer Entwurf* [1795] (Theodor Valentiner ed, 1958).

⁴⁰ *Ibid* 35. ‘Cosmopolitan law shall be restricted to conditions of general hospitality’. Translation in Wolfgang Schwarz, *Principles of Lawful Politics: Immanuel Kant’s Draft Toward Eternal Peace* (1988) 83.

⁴¹ Schwarz, above n 40, 83.

⁴² *Ibid* (emphasis added).

⁴³ *Ibid*.

stretching merely to the removal from ‘another person’s ground’.⁴⁴ Cosmopolitan law secures the preconditions for human communication (Kant uses the term *Verkehr*, which suggests a certain duration or iteration) between visitors and ‘old inhabitants’. This interpersonal aspect is lost where the state inserts itself as an intermediary and rejects the visitor’s offer of communication on behalf of all citizens. The territorial aspect is also lost where the potential visitor’s offer can only be made as a diplomatic representation to the target state. In the Kantian version, acceptance or rejection is only an option where a meeting on the property of the ‘old inhabitants’ is taking place. Opportunities for exchange provide possibilities beyond mere offer and rejection. The irregular labour market for undocumented migrants is a current illustration of this, although one needs to acknowledge that it remains gravely distorted by the intervention of the state.⁴⁵

Kant justifies the necessity of the world citizen’s right with the fact that the effects of legal violations can no longer be limited to one part of the world:

Da es nun mit der unter den Völkern der Erde einmal durchgängig überhandgenommenen (engeren oder weiteren) Gemeinschaft so weit gekommen ist, daß die Rechtsverletzung an *einem* Platz der Erde an *allen* gefühlt wird: so ist die Idee eines Weltbürgerrechts keine phantastische und überspannte Vorstellungsart des Rechts, sondern einen notwendige Ergänzung des ungeschriebenen Kodex sowohl des Staats- als Völkerrechts zum öffentlichen Menschenrechte überhaupt, und so zum ewigen Frieden, zu dem man sich in der kontinuierlichen Annäherung zu befinden nur unter dieser Bedingung schmeicheln darf.⁴⁶

Kant uses the term *Kontinuierliche Annäherung* — to be in a state of continuing approach towards eternal peace — or, to put it differently, to be in a movement of progress in which liberal thinkers, as well as liberal democracies, have invested their credibility. Kant emphasises that our participation in that progress is conditioned on the ‘necessary complement’ of the right to hospitality. That is, arresting individual movements across international boundaries means arresting the movement towards eternal peace. On the ideational level, it means cancelling out the liberal promise of progress.

The separation of cosmopolitan law from international law also hints at why the right to hospitality remains frail, fragmented and extremely open textured in contemporary international law. It belongs to the law, yet a proper analysis of who holds the power to consent will easily suggest that this law is of a different

⁴⁴ Ibid.

⁴⁵ See Gregor Noll, ‘The Asylum System, Migrant Networks and the Informal Labour Market’ in Per Cramér and Thomas Bull (eds), *Swedish Studies in European Law — Volume 2* (2007) (forthcoming).

⁴⁶ Kant, above n 39, 39 (emphases added).

As the generally prevailing (more or less close) community among the peoples of the earth has now undeniably reached the point that the violation of right in *one* place of the earth is felt in *all* places, the idea of a cosmopolitan law is not a fantastic and extravagant conception of right but a necessary complement of the unwritten code of both the law of the state and the law of nations for an encompassing public law and right of men and thus for eternal peace, which to approach continually one can flatter oneself only on this condition.

Translation in Schwarz, above n 40, 87 (emphases added).

order than international law, with which it merely interacts.⁴⁷ The right of hospitality is simply not part of the jurisdiction of states alone, but pertains to that of individuals. You are at liberty to offer yourself; I am at liberty to accept. Therefore, refugees still matter to the idea of an international law maintaining within itself ideas of enlightenment, liberty and progress towards a 'public human right' and peace. Without the irregular movements of refugees and other migrants, the black box of a cosmopolitan law would simply vanish, and the idea of international law would collapse into divinations of the sovereign's will.

At this point, I think that I have confirmed the three hypotheses on the contradictory, analytically unsatisfactory and illiberal aspects of the proposals. I do think that it is a good thing that researchers propose how the protection of refugees can be better organised. I also think that they should avoid consuming the preconditions for a cosmopolitan law in doing so. Therefore, I do believe that, if possible, Hathaway's proposal should be reformulated accordingly.

⁴⁷ Kant describes cosmopolitan law as sharing the maxims of public international law due to its 'analogy' to the latter. However, he upholds the idea of both being separate bodies of law: Kant, above n 39, 73.