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REFUGEE LAW IN CRISIS: DECOLONISING THE ARCHITECTURE OF VIOLENCE

Eddie Bruce-Jones[*]

On the morning of 14th June 2017, all of London and much of the UK awoke to news alerts of a tower block that had caught fire at around midnight and burned through the night. Sure enough, as I stepped onto the third-story walkway of our building, above the trees I saw a tall plume of smoke, still rising. The video footage was devastating, the sides of the building had ignited, helping the flames along and around, floor after floor. The heart-rending accounts by tenants and neighbours, and prior written complaints by tenants' authority, painted a damning picture of negligence concerning the condition of the building, its fire-regulation compliance, proper wiring, and austerity-driven housing policies more broadly (Financial Times, 2017). Still other news reports made clear that the tower block housed overwhelmingly minorities, migrants, asylum applicants and white working class people (Guardian, 2017). MP David Lammy has likened this disaster to Dickens' A Tale of Two Cities (Independent, 2017), where the disparity between the richest and poorest residents is staggering (Financial Times, 2017). In terms of scholarly literature, one might also think of Franz Fanon's 'zones of being and non-being' or Balibar's 'death zones' to describe the extreme precarity and proximity to the ever-present potential for violence

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and death experienced by the people living in that tower, even in the midst of such luxurious safety and wealth (Fanon 1967; Balibar 2001; see also Gordon 2007).

What might it mean for us, as scholars and legal practitioners, to attempt to decolonise refugee law? Does identifying colonial logics within structures of border control or humanitarian protection leave no other choice than to swiftly and decisively abandon those structures in search of something new? Or can an ongoing process of critically re-considering the theory and of practice of refugee law inspire and guide other forms of engagement? According to Walter Mignolo, '[d]ecolonial thinking and doing starts from the analytic of the levels and spheres in which it can be effective in the process of decolonization and liberation from the colonial matrix.' (Mignolo 2011: 17) At stake in a project of decolonial thinking is the investment in potentially liberating modes of being in the world. In this context, one might understand decolonisation to refer to liberation from forms of thought as well as the structures and material conditions that remain, comprising contemporary coloniality, implicitly rejecting the notion that colonial logics and arrangements of power have been remedied by the formal independence of former colonial states and territories. . It is the possibility of liberation from the known harm of colonial relations that drives the decolonial project; as with any project of transformative change, it is meant to be visionary and provide theoretical foundations for radically re-imagining our world.

For those of us interested in a decolonial approach to refugee law, which involves interrogating colonial logics, investigating the interconnectedness of historical configurations that continue to shape our present, and examining global power structures not only in terms of geography or capital but also in terms of epistemology (Mignolo 2011: 17-19), we might first consider the difficult position that refugee law occupies, as a field of legal practice and as a discipline of study.

When we practice and teach refugee law, we are generally guided by doctrine and case law, as is conventional. This is to say, it is commonly regarded as good practice in teaching law, generally, to place legal rationales, particularly statutory interpretation and judicial reasoning, at the centre of the analysis; from a practice-based perspective, when litigating or legislating on refugee law, it goes without saying that a failure to stick closely to accepted modes of legal analysis may impede the success of a certain outcome for a client or constituency. However, in framing refugee law closely along the rationales of legal decisions, we risk giving license to refugee law's impoverished notions of violence, particularly when we fail to examine the continuities between persecution as defined by the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol (hereinafter: Refugee Convention) and broader forms of harm faced by people on the move. Predictably, the innovations that we might make through decolonial critiques of refugee law doctrine will not necessarily be immediately helpful to those in need of refugee protection in the current system, which is a crucial consideration.

This chapter sketches two critiques of refugee law's structures and assumptions. First, it argues that a crisis model frames our notions of the violence experienced by refugees, which entrenches the problematic idea that their legal claims reflect an exceptional and generally individualised form of violence, and that systemic violence is bound by political borders. Second, it highlights recent social imaginings of the refugee in Europe, and, in particular in the UK, as both a racialised criminal subject and a racialised subject in need of humanitarian intervention—a dual characterisation which serves both to legitimise state logics of security and further stabilise state-building discourses of human rights. This latter point is not a

particularly new one, but it serves to underscore how receiving states produce the systemic marginality of refugees.

The chapter then argues for the radical inclusion of a broader conception of systemic, transnational, and historically situated violence, particularly against people coming from the global south to Europe and North America, when we teach refugee law, rather than only that violence narrowly defined as persecution originating in a foreign state. With regard to this proposal for shifting our conceptions of violence in refugee law teaching, it is important to acknowledge the pragmatism inherent in Mignolo's assertion that decolonial praxis should begin in the spheres in which it can be most effective. I focus, therefore, more on legal teaching than refugee law practice, as the type of deep structural critique possible in academia may, in a legal setting, be considered irrelevant to the given legal issues and it could, in direct advocacy settings, put claimants at unnecessary risk of harm.

REFUGEE LAW IN CRISIS

> 'The ongoing crisis of capital in the form of migrants fleeing lives made unliveable is becoming more and more visible, or, perhaps, less and less able to be ignored. Think of the thousands of migrants rescued and those who have been allowed to die at sea over the course of the year 2015. The crisis is often framed as one of refugees fleeing internal economic stress and internal conflicts, but subtending this crisis is the crisis of capital and the wreckage from the continuation of military and other colonial projects of US/European wealth extraction and immiseration.' (Sharpe 2016: 59).

> 'If either the "crisis" or its "perpetuity" are removed from the frame, those in need of refugee protection will suffer. Underlying this conclusion is the awkward fit of refugees with international human rights law. An entitlement to human rights protection ought to be based simply on being human. That this is not, and never has been, enough, is the reason for refugee law. […] Without the crisis element, the now-all-too-evident perpetuity of refugees will lapse back into "ordinary" human rights. This would be a significant loss indeed, as international human rights law has been much less successful *as law* than international refugee law.' (Dauvergne 2013: 30).

As Hilary Charlesworth eloquently argued fifteen years ago, international law is a 'discipline of crisis.' The crisis model, that generally emphasises only the most extreme articulations of violence, human suffering and environmental degradation (Charlesworth, 2002), allows for what may seem a robust justification for the presence of international law—to intervene in situations, the magnitude of which is so great and the victims of which enjoy such empathy, that inaction invokes a sense of moral unconscionability. Yet, the language of crisis, Charlesworth points out, can obscure the systems and structures that undergird violence and suffering, focussing perhaps too exclusively on extremes rather than the quotidian suffering that refugees experience during their journeys and in their reception in host countries. It authorises action with the moral force of last-chance reasoning—evoking a duty to mitigate these extreme forms of suffering. This is not to say that Charlesworth argues that international law is a solution to all forms of violence, she does not. However, as Charlesworth and others suggest, just as we attempt to use international law to manage global crises, we use the discourse of crisis to manage our notions of which

suffering counts, what type of international action has legitimacy, and what aspects of the human rights system should be rigorously enforced.[1]

Sharpe (2016) and Dauvergne (2013) add layers to Charlesworth's analysis on crisis—layers that are central to conceptualising international refugee law as well as the violence that refugees face. Neither Sharpe nor Dauvergne is unaware of the use of 'crisis' discourse as a tool for managing and administering violence – on the contrary. However, they choose to focus on different aspects of this discourse in their critiques of dominant framings of contemporary refugee law.

Christina Sharpe, in *In the Wake: On Blackness and Being*, gives us direction as black researchers and researchers on race, law and history more broadly. She draws out the connections between the trans-Atlantic trade of human beings, the systemic violence and precarity that people racialised as black endure on an ongoing basis, and the relevance of material conditions and logics of racial capital, bodies and minds in our abilities to conceive of slavery and colonial relations as having a presence in our present. In brief, she suggests that the wake, with its multiple dimensions (e.g., the wake left behind a moving ship (p. 3), a funeral wake (p. 21), the wake in the line of recoil of a gun (p. 8) and to be awake or conscious (p. 21)) may help us frame the challenges we have in actively confronting the trauma and structures left from slavery; it is a dimension of life that encompasses the work that is left to be done. This work includes theoretical contributions towards understanding the often fatal circumstance of 'blackness and being.'

In the quote that began this section, Sharpe adds two points to the concept of crisis I have outlined. She argues that crisis is 'ongoing,' and given her articulation of

[1] This proposition, of course, does not address the question of who the actors of international law are and what countervening political, economic and social interests are at play in deciding on the content and enforcement of human rights.

the concept of 'the wake', she is not merely referring to a contemporary 'crisis,' but an ever-present state of affairs that relates to the arc of US and European exploits since the colonisation of Africa and the Americas. She critiques, then, the temporality and singularity of the 'crisis.' Second, and supporting the idea that this is really a question of colonial domination, she explicitly describes this not as a crisis of humans fleeing the violence or destitution of their particular places, but as a crisis of capital that flows and demarcates the 'wreckage' left from colonial endeavours. These two interventions suggest that if we are to call anything a crisis, it should be the trans-historical system of military and economic conquest that has long underpinned the intense, urgent and often forced movement of people across borders, and in particular, across perilous waters. Sharpe inverts the idea of crisis through a radical connectedness across the histories and geographies of racial capital and the devastation of empire.

Dauvergne approaches the same set of issues from a legal realist perspective. She is centrally concerned with the ability for law to offer protection. Her argument, that the crisis model provides a sense of urgency and separate status indispensible for maintaining the reliability and strength of international refugee law is about the effectiveness of legal protection and is contextualised within contemporary debates as to whether international refugee law belongs in the field of immigration law or in human rights. Ultimately, Dauvergne becomes a reluctant advocate for instrumentalising the crisis model as a *modus operandi*, and with it, acknowledges that, in the broader context of structural violence, human rights law does not have the capacity to effectively protect vulnerable populations (2013: 30). Conversely, refugee law is available to only a privileged few who have the resources and good fortune to be able to cross borders. It is slightly more effective precisely due to narrow set of

exceptional circumstances (i.e., crisis as opposed to quotidian precarity) in which refugees are imagined to exist, and highlights only one part of what Sharpe might identify as a geopolitical, trans-historical crisis. In short, the use of crisis as an analytical lens, without Sharpe's radical inversion, keeps the position of the refugee, and the status of refugee law, in the realm of the exceptional (and thus, Dauvergne would argue, enforceable).

Of course, individual asylum claims are critically important for claimants, often meaning the difference between life and death. However, other claims that do not qualify as refugee claims, or even claims for humanitarian leave to remain or similar forms of residency allowance,[2] may be similarly urgent, and the situations underlying them related to global political and economic structures that span various times and places (Mezzadra and Neilson 2013). People are forced to move for many reasons, including the coupling of poor infrastructure and environmental disaster, consistent economic need, and social alienation, e.g., in the context of British colonial laws on same-sex sexual relations (Kirby, 2011). While legal pedagogy allows for these aspects to be considered within broader refugee law analysis, legal advocacy considerations of refugee law, and in particular arguments related to refugee status determination, leave little room for attempts to feature the colonial logics that undergird the need for protection (Bruce-Jones 2015).

There is a presumption that refugee law teachers ought to begin with the concept of persecution and work outwards. That is to say, they should begin like much legal teaching does: with the relevant source of law, or the legal instrument. Effectively, then, if there is an indictment here, it is not of refugee law teachers in

[2] E.g., subsidiary protection under Article 15(c), European Union Qualifications Directive. See J. McAdam (2007), *Complimentary Protection in International Refugee Law*. Oxford: Oxford University Press.

particular, but of legal pedagogy more generally. In this way, the Refugee Convention tends to occupy the central gravitational force in the teaching about refugee law. A typical refugee law syllabus commences with a discussion of how the Refugee Convention frames and defines the refugee, and it then examines the case law on refugee status determination and perhaps on other regulatory frameworks (e.g., reception conditions, human rights to freedom from torture and to family and private life). This structure is not without good reason. Taught courses can only ever be of limited scope, and lawyers and students aiming to be legal practitioners expect to (and need to) fully understand how the law works, in its own terms and within its own fora. However, it is worth troubling this conventional teaching structure, which allows the Refugee Convention to set the terms of conversations about violence faced by people on the move, particularly in the current state of the world, and more particularly in Europe.

A CURRICULUM BEYOND PERSECUTION: WHY NOW?

The way legal academics typically teach refugee law is to focus on what makes a good claim, as reflected in the jurisprudence of a particular jurisdiction or with a view towards regional or international trends. In a purely legal sense, this is simply the way law works—protection is defined around rule-based parameters. However, in a wider sense of understanding violence, subjectivity and broader relations of power, this approach to teaching misses the forest through the trees.[3]

[3] In this chapter, when I refer to violence, I do not mean persecution but, rather, broader forms of physical and epistemic harm that are inflicted on individuals and groups. As the decolonial approach I am using is most interested in harms attributed to the state and historical geo-political and economic power relations, which can be described as structural, I am less interested in interpersonal violence.

The core of the teaching of refugee law is on the status determination aspect of the journey of the refugee—this includes the questions of who will be granted asylum and why, who will be refused, what constitutes the test for a successful claim in the relevant jurisdiction, and so forth. Given that focusing on the rules and doctrines governing status determination provides a relative wealth of case law material, this approach to teaching seems sensible if the goal is to teach how refugee laws are operationalised. However, if we fail to discuss the treatment of refugees in receiving states, including the interplay between criminal law, immigration law and public law in the context of broader social well-being of refugees, we may fail to see the ways in which their claims are instrumentalised and their stories are understood, legally and socially. Put another way, if Sharpe's analysis of the trans-historical structures of anti-Blackness are to be taken seriously, how might we interpret refugee law vis-à-vis 'the wake' (Sharpe 2016)? This is a question that even the most nuanced and hopeful readings of the protections offered by the Refugee Convention will not help answer. In addition, if we fail to teach about the context of the masses of people who might cross borders if they gain the opportunity, security or energy to do so, including the global and historical circumstances which may have catalysed such want or need for movement, we risk failing to understand the core of the violence that people on the move face and in which we, as a global community, are complicit.

Migration experts predict that even larger number of refugees will be crossing borders in the future due to environmental catastrophes and social instability owing to global disparities and economic downturn (Juss 2006; Betts 2013). While groups that migrate for these reasons are not currently entitled to refugee status as per contemporary interpretations of persecution under the Refugee Convention, the question of whether this will or should remain the case will become increasingly

urgent. There are already debates about whether the project of refugee law is irredeemably flawed, given its compromised position between human rights and immigration law (El-Enany 2017), and whether it will be even less fit for purpose in the near future (Juss 2006).

In the context of teaching and in determining border policies, we should be seriously considering a great deal more about other aspects of the refugee's journey, some of which would have been set into motion years or even generations before the personal stories of the respective applicants recognised their own need to flee.[4] Taking a wider view would not only offer a fuller sense of the applicants' circumstances, but it also might help explain how contemporary geopolitical arrangements, power relations, colonial legacies, regional economic stability, social attitudes and legal fixtures are part of an historical trajectory of international developments.

This context is, for an immigration judge determining the status of an asylum applicant, just that: merely context. However, the continuities between underlying power relations and of the resultant conditions that prompt people to flee their homes and regions, should not be taught with the same degree of erasure with which they are practiced if the teaching of refugee law is to take advantage of its ability to contest the deadening strictures of refugee law's narrowness. Considering Mignolo's assertions that one should begin thinking about decolonial approaches in spheres where there is a possibility to be effective and that epistemological change is an important element of decoloniality (Mignolo 2011, 17–19), the impact of this wider view is to create

[4] Here, I do not mean to suggest that we should engage in a broader conception of the refugee journey simply as a way to liberalise border policies, but I do acknowledge that, short of oversimplifying or ignoring the relationship between reform and transformative change, it may be that border policy can be reformed *en route* to more structural rethinking of borders in the future.

openings for decolonial analysis to play a greater role in educating future lawyers and academics. Law practitioners might, at least, become aware of the underpinning logics of refugee law and integrate ever-sharper systemic critiques into their praxis.

In order to trouble refugee law's narrowness in our curriculum, we could perhaps begin by locating refugee law within three broader, overlapping frames of analysis. First, we should think of the problems that arise in refugee law not only as stemming from a restrictive rather than expansive conception of the refugee, but as direct extensions of the problems of borders more generally. It is important, in the context of going beyond persecution, to understand refugee law not merely as a process by which the state grants humanitarian protection (only) to those in (particular) need—which can be regarded as a narrative of benevolence. Rather, we may conceive of it as a form of border regulation. In this view, the law acts a way for states to release the pressure at the margins by helping those who manage to cross borders to evade extreme forms of violence, much like a pressure cooker releases small amounts of steam in order to keep the vast majority of the steam inside the pot while avoiding an explosion. It is important to reject the benevolent narrative of refugee law because it positions the receiving states, and Western states in particular, as acting toward a net benefit of refugees without acknowledging the violence they cause refugees nor the instrumentalising function of refugees in securing the human rights authority of the state. It is worth thinking, instead, along quite a different axis—one that positions the receiving state as complicit in maintaining the pressure-cooker of border control and the use of borders as a global system of regulating movement and the global conditions of violence.

Second, we should present refugee law, and immigration law more generally, within the broader context of global power relations in order to properly identify its

limits, if we are indeed concerned with the transformative potential that decolonial thinking promises. We should do this in a way that takes historical developments into account, including and indeed especially racialised colonial relations. We should be able to confront the use of nationality as a proxy for racial and other types of difference in the regulation of borders, demonstrated for example in the negotiations of the 1962 and 1968 Commonwealth Immigration Acts in the UK.[5] The promulgation of fears of 'cultural swamping' (Sky News 2014; Ricci 2016) and a loss of national identity, common mantras of the proponents of strict immigration regulation, are racial as much as they are cultural. More broadly, global power relations, including the UK's role in exploitative economic relations with countries in the global south, are part of the engine of economically and politically motivated migration to the north. Frances Webber, an immigration barrister with over two decades of experience in the field, writes,

> 'Justice Collins recognised that 'the so-called economic migrants are frequently trying to escape conditions which one in this country would regard as tolerable'. What does that have to do with us? Sivanandan memorably said, 'We are here because you are there.' One way or another most of those who come to these shores without official permission are refugees from globalisation, from a poor world getting poorer as it is shaped to serve the interests, appetites and whims of the rich world, a world where our astonishing standard of living, our freedoms, the absurd array of consumer novelties,

[5] The 1962 and 1968 Commonwealth Immigration Acts served to restrict immigration of British colonial subjects largely along colour lines. The effects of these Acts were admonished in a 1973 report adopted by the European Commission, in response to applications brought on behalf of East African Asians against the United Kingdom, where it declared the UK immigration laws to be in violation of Article 14 ECHR (on the grounds of racial discrimination) in conjunction with Articles 3, 5, and 8. See European Commission (14th December 1973), *East African Asians v. United Kingdom*.

> fashions and foods available to us, and thrown away by us, are bought at the cost of health, freedoms and lives of others. This cost is felt in the terms of trade and intellectual property agreements, in the imposition on poor countries by global economic police of policies that remove food self-sufficiency and drive small producers off the land, in the substitution by agribusiness of biofuels for food production in the vast tracts of Africa and Asia bought up by corporations for profit, in the soaring food prices in the poor world which sparked riots in Egypt and Tunisia.' (Webber 2012, 4).

Here, Webber points to the inability to separate the specific conditions that force refugees and other migrants to emigrate from the larger global economic and political relations that create these conditions. An example of this is LGBTI refugees, who are questioned on whether they are 'really' gay and sometimes made to feel as though they must expose their physiognomy, desires and sexual practices, as distinguished from economic factors that might also compel their movement, as though the legal regulation of sexuality and gender norms or the economic plight of many migrants are completely unrelated to colonialism or global inequality (Bruce-Jones, 2015). Popular discussions, like legal ones, tend to portray the persecution of refugees as a function of local or regional circumstances, rather than embedded within global historical structures—of course, this is by design, as refugee law was never meant to address the root causes of global material inequality, war and devastation represented by those who cross borders in search of peace, health and safety.

This brings us to a third frame—the location of violence. To understand the complex engine behind the movement of people across borders, we must resist oversimplifying how and where violence impacts the lives of refugees. Just as we

discuss violence in the states of origin in an effort to establish the legal efficacy of asylum status claims, we should teach about and understand state violence in the receiving state as central to the stories of refugees. Rather than reinforce the notion that violence is located only in refugees' respective countries of origin, it is important to recognise the material deprivation, social marginalisation and precarity that refugees face in the countries that receive them (United 2015). It surfaces in religious animosities and fears (Wike, Stokes and Simmons 2016; Burnett 2016) and it reveals itself, for example, in a disbelief in refugees' stories (Webber 2012). It is evidenced in the systemic ways in which refugees may be forced to navigate physical spaces of potential danger, such as that described with the Grenfell Tower disaster in the introduction. So, while many refugees flee from dire situations, they do not find themselves, by and large, free from precarity when they enter, for example, the United Kingdom. However, the idea that refugees do not have an easy road in the UK does little to undermine the legitimising function of the refugee category for the UK in the international arena, so far as its human rights record is concerned, as other states in Europe have been considered worse in one way or another.[6] Furthermore, it is generally taken for granted that the often harsh and isolating conditions in Europe are, with some minor exceptions, acceptable because they are assumed better than persecution.

This third frame, then, suggests that we should be teaching refugee law from a perspective that critically examines the violence imparted by the receiving state. Rather than set the bar low and focus solely on minimum standards of protection

[6] See e.g., *M.S.S. v. Belgium and Greece* (no. 30696/09), where it was held that returning an asylum applicant from Belgium to Greece under the EU Dublin Regulation II was a violation of Article 3 ECHR, given the deficiencies in asylum procedures in Greece as well as the poor living conditions to which asylum applicants were subjected.

legally permissible under regional and national human rights laws, this perspective asks whether we can imagine treating refugees as human-rights-bearing citizens, bearing in mind, of course, that their precarity as non-citizens exacerbates those aspects of state violence that they face which already imperil citizens and other residents who face racial, sexual and religious discrimination and violence are (Dembour and Kelly 2011). To extend this decolonial thinking into the realms of practice and policy, it may prove useful to consider the exacerbation of the violence against refugees to be an inexcusable extension of colonial conditions. Is it imaginable that we treat refugees as citizens with the full rights of citizenship as soon as they apply for status as a matter of (decolonial) principle? Furthermore, can such a principle really be considered decolonial if the machinery and logics of refugee law are left largely intact?

IMAGINING VIOLENCE, CREATING REFUGEES

Violence and persecution are legally different in the context of refugee law. While violence is a generalised concept of harm, persecution is a very specific type of harm in refugee law. Persecution generally amounts to extreme forms of violence or social exclusion, including, for example, torture or the withdrawal of fundamental rights protection (Goodwin-Gill and McAdam 2007). Persecution does not enjoy a precise definition under the Refugee Convention and can be considered to lack determinacy for this reason (Maiani 2008); however, Member States tend to interpret the bar on the level of violence or social exclusion to be quite high (Goodwin-Gill and McAdam 2007). Other forms of violence, which do not meet the threshold that states

understand as constitutive of persecution, are not considered when refugee status is being determined.[7]

In addition to the high bar on the violence constitutive of persecution, there must also be specific reasons for such persecution in order to claim refugee status. Under the Refugee Convention, a refugee is defined as a person who,

> 'owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.' (Refugee Convention, Article 1(2), 1951)

The grounds enumerated in the Refugee Convention specify the reasons for persecution recognised in advancing individual asylum claims. However, there are other groups of migrants that cross borders for other reasons, including to escape physical and psychological harm, economic despair, and environmental catastrophe.

In the UK, public discussions of the 'refugee crisis' have taken on a specific tone, scrutinising refugees as a class. Mainstream UK newspapers have been the most polarised across Europe, with the politically right-of-centre press (which occupies a prominent media platform in the UK) having regularly featured interviews with 'citizen voices who were overwhelmingly hostile to asylum and immigration' (Berry

[7] It may be considered in other contexts, such as determining other forms of humanitarian protection or residency permission.

et. al., 2015, 32). A comparative report on media coverage of the refugee situation in 2015 mentioned that, in the context of *The Sun* and *The Daily Mail*, 'although some refugee voices in the right-wing press sometimes did feature accounts of suffering they were more likely to merely state that they were determined to get to the UK because they would be safe, or provided for by the British state' (ibid). This fits with the rhetoric of the 'bogus' asylum seeker discussed by Francis Webber in *Borderline Justice*, a retrospective account of British asylum law since the late 1980s (Webber 2012). Prakash Shah illustrates, in his account of refugees and racism in public reactions to refugee populations in the United Kingdom at the turn of the century, that there was public backlash, in particular, against African and Asian refugees (Shah, 2000) and Monish Bhatia suggests that the racialisation and criminalisation of asylum seekers continues (Bhatia 2014, 2015).

The current social and political climate in the UK has produced an ever more restrictive environment for migrants, generally. The UK's Institute of Race Relations has examined how the new Immigration and Housing laws will functionally incresase poverty, homelessness and destitution among migrant and black and minority communities in Britian (Burnett 2016). There has been a tightening of state control on the lives of migrants in the domestic sphere which, in the lead-up to the 2014 Immigration Bill, was described by the then Home Secretary Theresa May as an attempt to create an hostile environment for illegal migrants (ibid; The Guardian 2013). Under Part 3, Chapter 1 of the Immigration Act, tenancy agreements are restricted to those without leave to remain, and landlords are fined if they fail to carry out proper checks or knowingly rent to someone without leave to remain (*Immigration Act 2014*). There have also been drastic cuts to legal aid for immigration matters (Peck 2016). The proliferation of policing mechanisms on immigrants to a

variety of institutions is not limited to the contemporary political moment, and indeed some scholars acknowledge that there is a systemic alienation of migrants from human rights protection. (Dembour and Kelly 2011, 9–11; Webber 2012, 119–131). However, the current moment in Europe, marked by a shift to right-wing populism and increased social restrictions for migrants in countries like the UK, underscores the need to urgently look beyond the question of status determination and towards the violence meted out by the receiving state when analysing the situation of refugees.

The criminalisation of refugees

In the UK, immigration detention is prevalently used more than in other European Union countries to house asylum applicants (Silverman 2016) including those whose claims have been rejected (Bosworth 2014). Despite the 2015 decision by the High Court of Appeal to stop the use of the detention fast track (DFT) appeals process that disadvantaged refugees by detaining them for the duration of an expedited asylum application process (Detention Action v. First Tier Tribunal, Second Tier Tribunal and Lord Chancellor, [2015]), detention is still used in the UK in some circumstances. It is well established that detention has significant deleterious effects on the health and well-being of refugees and asylum seekers (Bosworth 2016). Such matters are compounded for those who have experienced torture and other types of trauma, as detention frustrates their recovery and even exacerbates people's conditions (Shaw 2016; Robant, Hassan and Katona 2009). The continued use of detention in the UK as standard practice, then, indicates a number of things. It demonstrates that we systemically prolong the experience of violence that refugees encounter during their journey, by keeping them in a state of sometimes extreme physical and mental precarity. It also serves to normalise the carceral logic of linking criminal justice

issues with migration policy. The fact that immigration detention resembles prison, and immigration removal centres like the Verne in Dorset are actually re-purposed prisons, sends a particular message to the general population about the position that migrants, and refugees in particular, occupy in society. According to a briefing of the Migration Observatory at Oxford, which analyses UK Home Office statistics, in 2015 45% of all people admitted into immigration detention in the UK had at some point made an asylum application (Silverman 2016).

The discursive criminalisation of refugees was echoed in the 2013 'Go Home' Home Office campaign. The Home Office commissioned vans to circulate around six boroughs of London with a particular message, meant for particular migrant communities.[8] Each of the vans carried a large billboard that read 'In the UK illegally?' The secondary caption below this read, 'Go home or face arrest. Text home to 78070'. Slightly askew, stamp-like, in its own corner of the poster was the statement '106 arrests last week in your area'. These texts were laid over the image of an officer's dark jacket, bearing the Home Office emblem, his light-coloured hand holding out a metal handcuff. Offering it? Promising it? Threatening with its application?

These messages were directed at those living in the UK without proper documentation, including those who had overstayed their visas. This includes refugees whose applications had been denied.[9] However, the messages also spoke to the majority society, underlining the public service of effective policing, by

[8] In its response to complaints about the discriminatory and misleading nature of the van campaign, the Home Office stated that the vans 'covered specific, targeted areas and were designed to improve awareness of local immigration enforcement activity so that those with no legal right to be in UK were made aware that there was a real and present risk of being arrested.' See Advertising Standards Association Adjudication of the Home Office (9th October 2013).

[9] I still refer to people on-the-move as refugees because they are fleeing from some circumstance, even if their claims may not meet the standard of 'refugee' defined under the Refugee Convention. See discussion of 'de facto refugees' in P. Tuitt (1996), *False Images: The Law's Construction of the Refugee*.

enumerating the numbers of people arrested in the local area for violating immigration laws. This campaign, and its construction of who makes up *the public*, or the community, was not a singular misjudgement of Home Office campaigning, but rather a coordinated set of policies that work to saturate domestic life with aspects of border control. Through messaging, material restrictions and systems co-ordination, non-citizens have been made to confront derivative border policies in their everyday lives. These policies re-instantiate the border everywhere—in our daily interactions and within the fabric of the domestic (Balibar 2001). As Mezzadra and Neilson argue, there has been a proliferation of borders and, with it, 'mutations of labour, space, time, law, power and citizenship' that is about constant regulation rather than merely exclusion (Mezzadra and Neilson 2013, 7). In their work, *Border as Method*, Mezzadra and Neilson argue that borders are a way of thinking, a way of framing social life, and that the distinguishing between physical borders and border thinking is becoming a difficult and perhaps even misguided endeavour (ibid, 8-9).

Brexit and counterterrorism

In the United Kingdom, for some time leading up to the 23 June 2016 Referendum on membership of the European Union, there was a resurgence of popular nationalist discourse in mainstream politics in the form of the rise of the UK Independence Party, or UKIP (Berry et. al. 2015, 34–40). Its leadership argued in favour of drastically reducing immigration and withdrawing the UK from the European Union in an effort to establish independent self-governance, to 'take back control' of Britain (Stewart and Mason 2016). The campaign for leaving the European Union capitalised on fears that were already present in British society about immigration and the supposed inability of the United Kingdom to absorb large numbers of refugees. Nigel Farage,

the former leader of UKIP, in the last days before the referendum, stood in front of a large campaign billboard that showed a queue of refugees crossing the border from Croatia into Slovenia in 2015, with a large text overlay that read 'Breaking Point' and a small caption reading 'We must break free of the EU and take back control.' The use of this poster in the campaign was lambasted in the press as 'a blatant attempt to incite racial hatred' and was likened to Nazi propaganda (ibid). Indeed, instances of racial violence increased dramatically leading up to and following the Brexit referendum (Burnett 2016a).

The Brexit (or Leave) campaign was run with a clear mandate to reduce immigration from Europe.[10] This anti-immigration stance was reinforced by right-wing media outlets through harsh rhetoric and suggestive images (PRI 2016) benefiting also from the pre-existing discursive loop between governmental counter-terrorism initiatives, racial stereotypes, and discourse on immigration. For instance, the 2015 Prevent Duty (Counter Terrorism and Security Act, 2015) requires public service providers and educational institutions to refer people to the police in an effort to counter 'radicalisation', but problematically relies on social ideas about how to recognise signs of radicalisation (Bowcott and Adams 2016).

When I arrived home a few weeks before the Brexit Referendum, I found a leaflet on the kitchen table. Its author: the Vote Leave campaign. The leaflet, 'The European Union and Your Family: The Facts,' had a map on its back cover with the title 'Countries set to join the EU'. The only countries labelled within their own territorial borders on the map were the UK, Syria and Iraq. The only other countries besides these that are not in colour were Turkey, Serbia, Montenegro, Macedonia and

[10] It has also been argued that immigration issues were more important to voters than economic issues. See A. Khan, 'Four ways the anti-immigration vote won the referendum for Brexit', *The New Statesman* (7th July 2016).

Albania. One quickly sees the orchestrated confusion in this design and the associations that are implied. The map has been sharply criticised as scaremongering and 'fanning the flames of division.' It is more than that. It capitalises on fear, Islamophobia, racism and promotes a thorough misunderstanding of EU politics, in the middle of a humanitarian catastrophe for Syrian people. Turkey is not close to joining the EU at present, but that possibility is portrayed as a future threat—a bridge between the EU and regions that instil fear and promise migration.

The fact that the EU was faded into the background of the map was also revealing. These particular scare tactics were not about the EU at all, really. Rather, they relied on nativist, xenophobic and highly racialised ideas about the position of the UK in the world, including who gets to come to the UK. They advance a logic that would sooner see the moat get bigger than smaller, see the UK as a sovereign fortress floating in the sky, out of reach. This map was meant to indulge the nativism of the mind, and if the success of the campaign in winning a majority vote in the referendum and the rise in violence against non-white people and continental Europeans are any indication (Burnett 2016b), this and other such media messages, such as Farage's billboard campaign, are effective.

The criminalisation of refugees in the UK and the discursive connections with counter-terrorism, racism, and anti-immigration logics demonstrate how government policies meant to address social problems (resource scarcity, terrorism and criminality) focus on refugees in various ways. This includes aspects of the UK Immigration Act 2016, which includes the categorisation of undocumented work as a criminal offence and 'extension of "deport first, appeal later" provisions' (Burnett 2016b). This foregrounds the welfare of refugees with security rationales, displacing refugees from their positions of vulnerability and forcing them to inhabit a position of

the ever possible threat. Given the well-rehearsed social anxieties about the of growing numbers of refugees arriving in Europe from Syria (Chan and Bluth 2017) and the racist stereotypes about Muslims and people from the Middle East and Muslim countries being terrorists, migrants of colour in particular have been assigned an added dimension of stigma. As a result, migration across borders, even when the purpose is to escape hardship, is met with fears that refugees are masquerading under the guise of vulnerability—faking it (Webber 2012).

The figure of the refugee, then, is rendered as both in need of assistance and as a potential threat, an indecipherable figure of both victim and perpetrator who is viewed, by default, as suspect. This is contextualised within a very narrow idea of what constitutes violence—so that the violence in the receiving state of the UK is not as an object of scrutiny, and it is justified or at least calibrated against the horrors in the state of origin and the potential for violence attributed to the refugee herself.

TOWARDS A DECOLONIAL SET OF COMMITMENTS

> 'On May 18, 2015, the European Union (EU) voted to replace humanitarian patrols of the Mediterranean with military ones. Under this new plan, and with Libyan cooperation that is "complicated by the fact that there is not just one government in Libya, the boats of the smugglers will be intercepted and then destroyed." The EU says that their "aim is to disrupt the business model that makes people-smuggling across the Mediterranean such a lucrative trade." But the EU has no intention of disrupting the other business models, profitable to multinational corporations, that set those people flowing.' (Sharpe 2016, 59).

The questions produced in this chapter are: can we be concerned with status determination without being concerned about the totality of violence faced by refugees? Can we ask about the legal technical aspects of refugee law without also being deeply concerned with the project itself, including the global historical conditions that still prompt movement, such as the ones Sharpe discusses? The way we teach refugee law demonstrates that we try to isolate these issues from one another, but perhaps we should teach toward their entanglement instead.

There is a conventional view of refugee law, that the processes of determining persecution and, thus, relief are fit for purpose. In this view, the function of refugee law is not to reckon with history, but rather to assist those people who are most in need.[11] However, in teaching refugee law, in context, we must reconfigure the margins and the centre of the discourse on violence. While active state violence and failure to prevent third-party violence from persecuting individuals for convention reasons is at the heart of the Refugee Convention's scrutiny, forms of state inaction or callousness outside of this evaluative framework and the resulting human suffering are not addressed as a core feature of refugee law teaching. This is no surprise, as the purpose of the Refugee Convention was never to mitigate *all* types of violence, even if extreme. However, our mission as educators, particularly if we are to grapple with colonial structures of racism, must go beyond the Refugee Convention's formal protections and examine the place of refugee law more holistically in our social

[11] This is a controversial point, as asylum seekers, as opposed to refugees being resettled, must have crossed a border physically into the place where they wish to apply for asylum, which suggests that only those with the means or ability to make a physical journey of this kind will have access to the protection of the Geneva Convention. In other words, there is a question as to whether refugee law does, in fact, help those in most need, or whether it is primarily a way to balance humanitarian protection and immigration regulation in the receiving states.

world. This means, at the very least, examining the complicity of refugee law's provisions and assumptions in extending such colonial structures.

The way we conceptualise refugee law in our teaching, research and, to some extent, our practice of it must go beyond the highly-specific focus on persecution in order to grasp the reality of global inequality and properly capture the co-ordination of state processes, borders, and overlapping forms of exclusion (see also Chacon, this volume). The teaching of asylum and refugee law must confront not only the violence of persecution as defined by the Refugee Convention and interpreted by states party, but it must reckon with the forms of violence faced by refugees and asylum seekers that do not formally constitute persecution, but are nevertheless pervasive aspects of the experiences of these people in their countries of origin, on the journey to new lands, and in receiving states. This is important if decolonial modes of analysis are to allow us the space to be visionary about anti-racism and the politics of borders, and there is no time like the present to focus this needed attention on the way we teach refugee law.

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