Refugee Law and the Decolonial Paradigm

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The *Research Handbook on International Refugee Law* is one of a select number of recent publications which highlight the need for refugee law scholarship and practice to anchor themselves to a new paradigm. Starting from Lehmann's observation that refugee law research "tends to be composed mainly of courts of industrialized countries that handle individual claims, [thereby] missing out on practice in the Global South" (Lehmann 2021: 12), this review draws on the various contributions to the volume in order to advance the argument that only a decolonial turn in refugee law scholarship and practice would be able to counteract the increasingly violent manifestations of the current human rights paradigm.

Refugee Law and the Human Rights Paradigm

There is no doubt that human rights principles have proved to be invaluable aids in interpreting key aspects of the 1951 Convention Relating to the Status of Refugees (Refugee Convention), which, itself, provides little guidance to States as to how its principles are to be applied. The most prominent example of how human rights have added flesh to the bones of the Refugee Convention relates to the nature and degree of harm to which a putative refugee must be exposed before they can be said to fall within the Convention's definition of refugee, which is contained in Article 1. A (2). The Convention categorizes the relevant harm as 'persecution', and it is now almost universally recognised across jurisdictions that the content of the persecution standard is determined by human rights norms.

In terms of the principle of *non-refoulement* - the main substantive obligation that the Refugee Convention places upon States who are thereby prohibited by virtue of Article 33 from returning a person deemed to be a Convention refugee to a place where they may directly or indirectly face persecution - human rights principles provide more extensive guarantees than does the Refugee Convention. Commenting on the circumstances in which, under the Refugee Convention, an individual may be excluded from protection, Singer notes that "exclusion from protection against

refoulement under refugee law does not also entail loss of protection against *refoulement* under human rights law, the latter being 'absolute' and permitting no security or criminality exceptions" (Singer 2021: 385; see also Rikhof 2021: 390-402). Indeed, as van Wijk and Bolhuis argue, the extended human rights notion of *non-refoulement* has presented a challenge to the international community to build a coordinated set of strategies to deal with those individuals who, for various reasons, cannot avail themselves of the protection of the Refugee Convention, but who cannot be returned to their country of origin or domicile and cannot be relocated to a third state (van Wijk and Bolhuis 2021: 403-416).

Arguably, the greatest contribution to the legal protection of refugees that human rights principles have made is in its incremental extension of the range of individuals who can potentially benefit from the Refugee Convention's protection regime. The text of the Convention limits protection to refugees persecuted on account of their 'race, religion, nationality, membership of a particular social group or political opinion'. Many categories by which individuals inhabit and assert an essential identity are not covered by the five grounds that the Refugee Convention enumerates; notably gender. This fact coupled with what many have argued are dominant androcentric approaches to the interpretation and application of the Refugee Convention has meant that human rights instruments, such as the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), have been instrumental in shaping more nuanced and gender sensitive interpretions of what constitutes 'membership of a particular social group' and 'political opinion'. It is this aspect of the Human Rights paradigm - the capacity of human rights principles to stretch the terms of the Refugee Convention - that, I suggest, has not entirely run its course.

Two of the chapters in the volume address how human rights discourses have enabled individual's fleeing persecution, including criminal prosecution, on account of their sexual orientation to fall, in principle, within the scope of the Refugee Convention (see Wessels 2021: 268-280; Khan 2021: 310-323). Whilst highlighting the gains to putative refugees of this class, the chapters also demonstrate that there is still much that human rights principles can do to steer domestic courts towards more critical engagements with the questions of whether "claimants could reasonably be required to behave discreetly upon return to their country of origin in order to avoid persecution" (Wessels 2021: 268 - discussed in the context of the UK Supreme Court decision in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31). They also reflect on whether the general requirement that criminal sanctions against same-sex activity must be proved to be actually enforced before the threshold persecution standard can be met simply fails to "understand the symbiotic relationship between a particular society and the legal framework governing it" (Khan 2021: 323). Many still hope that the human rights paradigm might eventually

result in legal recognition of so-called climate refugees. However, Scott's chapter (2021: 343-356) intimates that a human rights approach is unlikely to extend the notion of persecution so far as to encompass harm caused by a non-human agent (Scott 2021: 348), and further suggests that the Refugee Convention's requirement that an individual must be outside their country of origin or domicile might actually undermine the protection needs of those displaced through climate emergences - because "[e]mpirical research on contemporary patterns of displacement in the context of environmental pressures suggested that most people who move in this connection do so over short distances, temporarily and generally within the boundaries of their own countries" (Scott 2021: 344). Finally on this point, Moffatt's chapter (2021: 417-428) on the appropriate standard of review in asylum cases identifies another area in which human rights standards, as represented by the jurisprudence of the European Court of Human Rights, still need to mature. Arguing that the Court should unequivocally mandate that a refugee should be entitled to a full review on the merits of a first decision on their asylum claim, Moffatt notes that the *Vilvarajah* decision, which determined that the UK judicial review form of review - which is a review of the legality of a decision, not its merits, and does not allow the reviewer to substitute their view on the case for the original decision - is still good law (Moffatt 2021: 423). More fundamentally, Moffatt criticizes the ECHR's rulings which have meant that "migration status decision-making, including asylum decision-making, has consistently been excluded from the application of article 6" (Moffatt 2021: 422).

These advances and opportunities notwithstanding, critics of the human rights paradigm have long warned of its capacity to do violence to the refugee cause - not least my seeking to go beyond its original purpose of providing an evolutionary approach to the interpretation of the Refugee Convention. In 2020, Romit Bhandari published a book, titled *Human Rights and the Revision of Refugee Law* (Routledge), which unapologetically attributes to the human rights turn in refugee law scholarship and practice what has come to be known as the 'international deterrence' or 'cooperative deterrence' strategies that now contain the majority of refugees in states where they are exposed to human rights abuses. It is notable in this regard that in the last twenty years during which the human rights paradigm has been most dominant the number of refugees residing in states within the Global South rose from seventy per cent to eighty-four per cent (Feith Tan 2021: 177). Overall, the *Research Handbook on International Refugee Law* provides ample evidence in the form of the practices of states to suggest that, put at its mildest, the violence of the human rights paradigm is beginning to far outweigh its emancipatory potential.

Human Rights and International/Cooperative Deterrence Strategies

As previously stated, the main substantive obligation which the Refugee Convention places on States is expressed within the Article 33 principle of *non-refoulement*. Although the human rights paradigm has further entrenched this principle for those individuals who are able to establish the precondition for refugee status - viz - that they are outside their country of origin or domicile - it has also allowed States to utilize other human rights based arguments to limit the capacity of individuals to leave their country. For example, "efforts to combat human trafficking and human smuggling might exacerbate the plight of refugees who do not have safe and regular pathways to international protection. In addition, countries of origin are under pressure to control the irregular movement of their own nationals. More specifically, it has been reported that countries of origin and transit use anti-trafficking as a pretext to hamper departure and onward travel of individuals" (Stoyanova 2021: 339). Other practices include the creation of zones of safety, based on guarantees that injurious activity will not intrude in a particular part of a country of origin. As Ghrainne notes, such zones have an uncertain history as regards their efficacy in terms of refugee protection; specifically "[t]the existence of a 'safe' zone in Kosovo was used by European states to justify the rejection of asylum applications, even though it subsequently became clear that such zones were anything but safe" (Ghrainne 2021: 36-37). Higgins also identifies "in-country programs, which enable people in refugee-like-situations - but who have not yet fled across an international border - to be processed within their countries of origin and then settled abroad" (Higgins 2021: 44) as ostensibly meeting humanitarian objectives, but, in practice, supporting increasingly restrictive border control measures (Higgins 2021: 51).

The most worrying practices of deterrence, which the EU, Australia and the US have been at the forefront of, attempt to shift the legal obligations contained in the Refugee Convention from states in the Global North wholly onto states in the Global South. In Giuffre and Moreno-Lax's words, States in the Global South "are being financed for 'pull-backs', detention camps, and pre-emptive rescue at sea, which transform (pre)-entry controls (by destination countries) into exit vetting (by countries of departure) that negates the right to leave and forecloses *refoulement* responsibilities" (Giuffre and Moreno-Lax 2021: 84). As a consequence of these measures of 'contactless control', Southern States are "being impelled to deal not only with 'their own refugees', but with those unwanted by the North as well" (Giuffre and Moreno-Lax 2021: 84). The idea that black and brown bodies must be subject to the rigours of Western conceived legal norms - for their own good and salvation - is a legacy of colonialism that lives on today and is exemplified in the practices relating to refugees. For this reason, I leave deferred discussion of those measures to the next

section. However, one manifestation of these measures is directly facilitated by the human rights paradigm that this section aims to critique. This involves arrangements - often in 'partnership' with States in the Global South - to patrol sea borders and intercept vessels carrying refugees. The practice is justified by the EU, Australian and US authorities that have led their deployment on the seemingly laudable grounds of saving human life. However, as Feith Tan notes, patrol and interception measures proceed from the basis of a very low assessment of *non-refoulement* obligations: "put simply, a refugee generally cannot be *refouled* if they never arrive" (Feith Tan 2021: 170). Simeon comments on the practice further, stating that "the EU, US and Australia have clearly gone the furthest in limiting the geographic boundaries of *non-refoulement*. By interdicting asylum-seekers and preventing people from landing on EU, US or Australian soil and, in some instances, even towing these vessels to their countries of departure, they are preventing asylum-seekers from making a claim for Convention refugee status" (Simeon 2021: 205).

As Briddick's chapter makes clear, these practices of "[l]egal re-bordering [involving] the removal of lawful immigration opportunities in combination with the strengthening and deepening of the territorial border through enhanced immigration controls" (Briddick 2021: 283) are likely to undermine the gains to women asylum-seekers that the early deployment of the human rights paradigm achieved. Arguing that "a consideration of gender has been notably absent from debates on Europe's re-bordering" (Biddick 2021: 284), Briddick draws attention to the disproportionate impact of containment policies on women, thus "[w]hilst men face a higher risk of death at internal border sites (such as in detention) a greater proportion of women than men die at frontiers. Drowning is the leading cause of border-related death and women are more likely than men to drown/die at sea. Being pregnant is particularly associated with drowning and with dying at a frontier" (Biddick 2021: 284).

Measures such as those referenced above are known as international or cooperative deterrence strategies because they are prevalent practices among states in the Global North - often initiated by Australia (Taylor 2021: 251). As a recent member state of the European Union, the UK cannot be isolated from the EU's general policies in this regard. In addition, major tenets of its internal policy towards refugees draws on a number of these deterrence strategies. A few examples will suffice. Schultz's and Juss's and Mitchell's chapters explore how the UK asylum process applies what has come to be known as the 'internal flight alternative' or 'internal protection alternative' to "deny refugee status to persons whose risk of persecution is present in only part of a country" (Schultz 2021: 126). The strategy which began to emerge in the 1990s is now a major prong of UK policy. Indeed, as Schultz notes, most states that assess refugee status on an individual basis consider an IFA/IPA. This includes jurisdictions in Europe, Australia, New Zealand, Canada, USA, Mexico, Japan and South Africa" (Schultz 2021: 128-129). The policy places an enormous, and many would argue legally unreasonable, burden on refugees to prove that, in essence, the entire area of their

country of origin or domicile is unsafe - given their protection needs. Further, it appears to operate without any, or adequate, consideration of whether the individual has family or other ties in the place that is deemed to be an IFA/IPA. As far as the UK is concerned, the policy suffers also through flawed information relating to countries of origin. I will return to this point later in the review when I specifically address the need for refugee scholarship and practice to embrace a decolonial paradigm. For now, it remains to be said that Juss and Mitchell have argued that the policy turns refugees into displaced persons and, among other things, their chapter explores potential legal sanctions for those States, like the UK, whose "asylum policies [are] contributing to forced displacement" (Juss and Mitchell 2021: 158).

Other deterrent measures in UK asylum practice include the increasing use of the Article 1F exclusion clause as "language explicitly connecting refugees with the threat posed by international terrorism really began to take shape during the end of the 20th Century…[and] became more forceful and entrenched following the 9/11 terrorist attacks in the US" (Singer 2021: 374-375). Deterrence also takes the form of convicting asylum seekers of "offences of unlawful entry and presence without any or inadequate reference to article 31(1)" (Holiday 2021: 233) - which prohibits the penalisation of refugees for illegal entry - provided that their journey to the destination country is not unduly circuitous and that they do not unduly delay attempts to regularise their status. Mathew's chapter offers the intriguing possibility that the article 33 *non-refoulement* principle might be breached when the state makes life so difficult for a refugee or asylum-seeker that he or she 'decides' to return home" (Mathew 2021: 207). Her notion of 'constructive *refoulement*' could well be engaged in cases where the criminal arm of the state is unfairly leveled at the asylum seeker, or, where, as is too frequently the case, restrictive social assistance policies leave asylum-seekers with little more than the most basic levels of subsistence

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The *Research Handbook on International Refugee Law* contains three chapters which, in different ways, comment on the legality of the international/cooperative deterrence strategies that are defining this century's approach to the problematic of refugee protection by States in the Global North (see Giuffre and Moreno-Lax 2021: 82-108; Feith Tan 2021: 170-181 and Taylor 2021: 238-251). These chapters lend support to the argument pursued here that, not content with exporting a Eurocentric standard of refugee protection to States in the Global South, States in the Global North now seek to make Southern States solely accountable for any breach of the terms of the Refugee Convention. One of the most brutal ideologies that fuelled the colonial era was that the colonized were without their own laws, and needed these to be imposed by the colonial state. In the contemporary practices of States in the Global North is seen an extension, not a mere

repetition, of this trope. As far as the Refugee Convention is concerned, these States seek to free themselves of all legal restraint - presumably on the basis that the work toward legal compliance is yet another task of endurance that the formerly colonized should carry. As Giuffre and Moreno-Lax argue, from the perspective of EU practices, "[b]y transferring the coercive management of exiles to third countries, [they aim] to eliminate any physical contact, direct or indirect, between refugees and the authorities of would-be destination States. The ultimate goal is thus to sever any jurisdictional link with EU countries, in an attempt to elude any concomitant responsibility" (Giuffre and Moreno-Lax 2021: 85). Taylor puts the point with equal force, stating that "the next best way of overcoming the obstacle of the Refugee Convention is to implement policies which take advantage of grey areas of law and/or can be implemented without external scrutiny or accountability. Such policies enable plausible denial of allegations that Refugee Convention obligations have been breached" (Taylor 2021: 242-243). Feith Tan sees these practices as putting in question the "survival of access to asylum in the developed world" (Feith Tan 2021: 180).

This, I turn to the point with which this review began: refugee scholarship and practice is in dire need of a new paradigm. As Juss and Mitchell intimate, the seeds of a decolonial paradigm have long existed in the regions of Africa and Latin America. For them, "the question is whether and how these normative frameworks can become more influential in the UK and the EU more broadly" (Juss and Mitchell 2021: 168). Without wishing to downplay the undeniable fact that regional Conventions, such as the ones that govern the protection of refugees in Africa (OAU Convention, 1969) and Latin America (Cartagena Declaration, 1984) have influenced states in deciding on the proper recipients of temporary protection measures in situations where war or other catastrophic disturbances have generated large-scale movement of refugees (see for further discussion, Ineli-Ciger 2021: 57-69), the rights associated with temporary protection fall far below those accrued from the Refugee Convention - only affording "its beneficiaries protection from *refoulement* and basic minimum treatment until durable solutions are available. This basic minimum treatment usually consists of shelter, food, emergency medical care and means of subsistence" (Ineli-Ciger 2021: 63).

In a highly instructive chapter, Wood (2021: 16-30) identifies several reasons why the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa has failed to influence the shape of refugee protection, globally. All point to the need for decolonial scholarly and practice-oriented approaches. In terms of legal practice, Wood points to "the limited amount of

available case law or guidance on the 1969 Convention's terms [which] has hampered understandings of its application both in theory and in practice" (Wood 2021:18). In terms of refugee law scholarship, she bemoans the fact that "[s]cholarly analyses of the 1969 African Refugee Convention are rare, particularly when compared with the 1951 Refugee Convention. Most major works on international refugee law only briefly mention the instrument" (Wood 2021: 18). Furthermore, "[a] lack of detailed empirical research on the implementation of refugee law in Africa means that an understanding of how the 1969 Convention operates in practice is virtually non-existent" (Wood 2021: 18).

There is no reason to doubt that, with proper attention to its jurisprudence, the African Convention could contribute as effectively as the Human Rights paradigm in opening out the international protection regime to a greater number of individuals. For example, by extending the definition of refugee to individuals who are outside their country as a result of, inter alia, events seriously disturbing public order, it is suggested that the "1969 Convention's potential role in protecting people displaced in the contexts of disasters and the impacts of climate change" (Wood 2021: 28) would increase exponentially. Of more immediate potential significance is the suggestion made by Bruce-Jones that a decolonial paradigm that is spurred by the African Convention would instill in States in the Global North that what they currently refer to as 'burden-sharing' of refugees is no more than "the moral and financial debt (obligation) we have to remedy the historical, geopolitical violence of colonialism and global capitalism" (Bruce-Jone 2021: 77). Over-preoccupied with the question of how to "[share] the short term financial costs" (Bruce-Jones 2021: 77) that refugees are seen to bring, States in the Global North fail to appreciate that "[t]he burden, to the extent that we can speak of burdens, is not the people who move, nor is it the cost incurred for their provisions. The burden is the border itself, which assaults the material, social and political interconnectedness of human beings" (Bruce- Jones 2021: 77).

Barichello's chapter (2021: 109-125) demonstrates how what she refers to as the 'spirit of Catagena' might, along with other regional instruments, offer a new refugee rights paradigm. She states that "in Latin America…[l]iberalism rather than restrictionism has been the norm over the past three decades. Latin America actually resists the global trend toward increased restrictiveness in the access to asylum" (Barichello 2021: 110-111). Echoing Bruce-Jones's concerns over the approach by Northern States to the so-called costs of refugees, Barichello emphasises that States in Latin America "have been influenced by the concepts of responsibility-sharing and the 'idea of solidarity'...[t]he use of the term 'responsibility' instead of 'burden' embodies much more than a

simple altering of terminology, but rather it is a complete change in the way refugees and refugee protection are viewed...it focuses on the individual and collective State responsibility for protecting [refugees] from violations of human rights" (Barichello 2021: 115). Noting that the Cartagena Declaration "draws heavily on the text of Article 1(2) of the 1969 Convention" (Wood 2021: 20), Wood provides some insight into why many States outside of the industrialised North are comfortable with the notion of responsibility-sharing. For Wood, the fact that, whereas the Refugee Convention only "espouses the principle of international cooperation in its preamble, the 1969 Convention goes further, including it within the substantive provisions" (Wood 2021: 23) is highly significant because the African Convention "moves the concept of responsibility-sharing from a mere recommendation to a binding obligation" (Wood 2021: 24).

Conclusion

It would be naive to suppose that a broader acceptance by states of the tenets of the OAU Convention and/or the Cartagena Declaration would, without more, shift the paradigm within which refugee protection needs are addressed from a human rights one to a decolonial one. Equally, it would be intellectually suspect to suggest that the current Refugee Convention regime is intractably opposed to a decolonial paradigm. There are many ways in which the academy, the courts and the legal practitioners concerned with refugee matters can, even now, work towards shifting the paradigm. As I hope this review has made clear, the contributors to the *Research HandBook on International Refugee Law* have already played their small part. It remains for me to summarise, drawing again from the volume, two specific ways in which scholars and practitioners can pave the way towards this new paradigm. First, a greater willingness to bear the costs of translating non-English academic, case law and policy sources is essential. Juss and Mitchell note the paucity of decision-making in the UK in relation to internal flight/protection alternatives and attributes this, in part, to the fact that the UK Home Office's Country Policy and Information Team " does not routinely engage with non-English sources (due to translation costs)" (Juss and Mitchell 2021: 142). As Honkala's chapter makes clear, improving the quality of country of origin (COI) reports will reduce the chances of negative decisions based on reports that "[contain] basic inaccuracies, [are] partisan, [are] out of date and [are] insufficiently sensitive to gender issues" (Honkala 2021: 304). Focusing on the position of asylum-seeking women, Honkala notes that "[t]he lack of COI on the specific status and treatment of women and the different types of

persecution they may face creates difficulties for many women to evidence their claim and may mean a negative decision on their credibility" (Honkala 2021: 307-308). Honkola is not the only contributor to the volume who points to the impact on women's rights of the failure to establish a decolonial approach in refugee scholarship and practice. In her analysis of the circumstances in which Palastinian refugees can avail themselves of the protection of the Refugee Convention - despite their prima facie exclusion from its ambit by virtue of Article 1 D - Ogg argues that judicial approaches in EU countries - exemplified by decisions of the Court of Justice of the European Union - "favours those who have heroic or intrepid narratives and this can serve to disadvantage Palestinian wimen and girls" (Ogg 2021: 358. See generally, Ogg 2021: 358-373).

Second, refugee scholars should continue to challenge interpretations of Refugee Convention rights which privilege the cultural practices of States in the Global North. Writing of the right to family reunion, Darling observes that decision-makers invariably work from the lens of "the family unit as the traditional "Western concept of a nuclear family" (Darling 2021: 263)) - despite the fact that UNHCR has urged states to adopt broader, more culturally sensitive approaches (Darling 2021: 263). The impact of this approach on the emotional health and well-being of refugees is profound, because "[t]he Western idea of the nuclear family, or 'immediate family' as it is often referred to in the immigration context, usually only includes a husband, wife and dependent minor children. The definition does not extend to cover adult siblings or elderly parents. Relatives considered more distant under the Western nuclear family definition, such as grandparents, aunts and uncles or cousins, will rarely be eligible for family reunion" (Darling 2021: 263). Here also we see an example of where a decolonial approach would advance the position of women, who "continue to make up the majority of family reunion beneficiaries" (Briddick 2021: 288).