

Threats, Monsters and the ‘Refugee Crisis’

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Abstract

Boaventura de Sousa Santos treated Tilburg University to a colorful and rich pallet of topics during his Montesquieu lecture that prompted self-reflection and critical review of the role of law in our western societies. He argued that the way the law functions today leads to the creation of an abyssal line that creates radical exclusions. Although critical of the role of law and the legal regime in western societies, he encourages us, lawyers of the 21st century, to reform and further develop the law in such a way that it is built on democratic pluralism, interculturality and dignity and as such contributes to a more inclusive society. In this short reflection on de Sousa Santos’ Lecture, I highlight some examples and situations that show how rules and procedures of Western societies can have detrimental effects on large groups of refugees and migrants.

Keywords

refugee crisis – European Union – montesquieu lecture

1 Introduction

Professor Boaventura de Sousa Santos treated Tilburg University to a colorful and rich pallet of topics during his Montesquieu lecture that prompted self-reflection and critical review of the role of law in our western societies. He argued that the way the law functions today leads to the creation of an abyssal line that creates radical exclusions.¹ According to Santos:

¹ Boaventura de Sousa Santos, ‘The Resilience of Abyssal Exclusions in our Societies: Toward a Post-Abyssal Law’ (2017) 22 *Tilburg Law Review* 1, 16.

The Abyssal line is the line that separates the metropolitan societies from colonized societies. The Western-centric conceptions focus exclusively on the metropolitan societies, the societies on this side of the line. The 'universal' idea of modern societies is therefore based on an abyssal exclusion of the societies on the other side of the line, societies to which such ideas, however supposedly universal, were not applicable.²

Although critical of the role of law and the legal regime in western societies, he encourages us, lawyers of the 21st century, to reform and further develop the law in such a way that it is built on democratic pluralism, interculturality and dignity and as such contributes to a more inclusive society.

The responses of the European Union to the so-called 'refugee crisis' reflect the institutional, moral and legal limitations of the EU and individual European States. They lead to the exclusion of those who are not recognized as refugees or rights holders by the regimes and are an example of what Santos calls 'abyssal exclusions'.³ In this response to his lecture, I will analyze how some of the threats and monsters he identified in his lecture play out in the 'refugee crisis.' I will do so by illustrating the effects of the EU policies on relocation and resettlement and discuss the emergence of a shadow society created by urban refugees.

2 The So-Called 'Refugee Crisis'

Santos' fourth monster is the concept of crisis and he argues that Europe is in a state of permanent crisis which is used as a justification for a broad range of measures.⁴ In relation to the 'refugee crisis,' the term 'crisis' is used to indicate the high numbers of refugees coming to Europe and the inability of Europe and the EU member states to manage this number of refugees. But is the use of the term crisis in this context justified?

Over the last two years, the number of asylum applications and first-time asylum applications has risen from 626,960 in 2014, to 1,322,825 in 2015 and 1,259,995 in 2016.⁵ An unknown number of refugees and migrants have crossed

2 Boaventura de Sousa Santos, 'Chapter 4' in Katy P Sian (eds), *Conversation in Postcolonial Thought* (Palgrave Macmillan 2014).

3 Santos (n 2) 1.

4 Santos (n 2) 14–15.

5 Eurostat, 'Asylum and first time asylum applicants – annual aggregated data (rounded)' <<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00191&plugin=1>> accessed 11 August 2016.

the borders irregularly and have not been registered as asylum seekers. Although the number of asylum applications has risen and might seem high, we have seen high influxes in the past. In 1992, approximately 672,000 applications were registered in the then 15 EU Member States when they received many asylum applicants from the former Yugoslavia.

In 2001, the number of applicants again peaked to approximately 424,000 applications in the 27 EU Member States.⁶ Although the numbers of registered applications in the last two years are higher than in the past, this does not necessarily qualify the situation as a 'refugee crisis.' Considering the current population of the EU (508 million inhabitants), 1,3 and 1,2 million asylum seekers cannot be considered as an overwhelming figure. The situation and responses to the newly arrived persons rather reflect another crisis, namely the incapability of the EU and EU Member States to design a joint, shared response in which all Member States take their share. Regardless of the relocation agreements (see below) and due to the Dublin regulation, Italy and Greece largely remain responsible for those arriving in the EU, including those who do not claim asylum and those who are unlikely to be granted asylum. Therefore, the refugee crisis is also referred to as a solidarity crisis.⁷

3 Institutionalized Exclusion

Based on the 1951 Refugee Convention worldwide there is a strong division between refugees who deserve protection and migrants who do not deserve such protection and are often referred to as economic migrants. Only those who serve the national interest with their work or knowledge are 'deserving' economic migrants. The legal definition of the refugee is exclusively reserved for those who fear persecution on one of the grounds listed in Article 1 of the Convention. The vast majority of those fleeing today are on the move because of armed conflict, war or natural disaster.

However, it is debatable whether or not these refugees fall under the protection of the Refugee Convention. Alexander Betts introduced the term 'survival migration' to refer to people who leave to survive an existing threat against

6 Eurostat, 'Asylum Statistics' <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> 24 April 2017.

7 Lillian M Langford, 'The Other Euro Crisis: Rights Violations under the Common European Asylum System and the Unraveling of EU Solidarity' (2013), 26 *Harvard Human Rights Journal* 26, 217.

which their own country fails to protect them and who should qualify for protection or asylum.⁸ Consequently, the group of recipients of protection becomes much larger. The difficulty with a narrow and strict understanding of who is a refugee and who is not is that it creates the risk of distinguishing between a small group of 'deserving refugees' (those who fulfil the convention definition) and 'undeserving refugees or migrants' (those who do not), or to use Santos' words: it draws the abyssal line. Thus, the legal framework and determining whether or not a person fulfils the conditions to fall within the framework is important for the level of protection, as will be illustrated below.⁹

3.1 *Europe's Relocation Schemes*

In June and again in September 2015 the EU Member States agreed to relocate 160,000 refugees from Greece and Italy to other EU Member States following a key for division based on the population size, GDP, number of spontaneous asylum applications and unemployment rates and with compulsory participation. On 4th of May 2017, 18,059 people were relocated to the other EU Member States.¹⁰ Although the relocation takes place following the established key, Member States are allowed to indicate their preferences. This has led to the exclusion of some countries of certain nationals (e.g. Eritreans) or certain groups (single men) or only allowing persons listed by a specific NGO.¹¹ This has led to new forms of exclusion that have been condemned by the European Commission since it is the sole responsibility of Greece and Italy to take the decision on relocation.

In September 2016, the initial target was reduced with 54,000 places for resettlement to 106,000 (see below). With reference to the Commission's press release accompanying the eleventh report, some organizations indicated that the Commission is considering to drop, again, the number of refugees to be

8 Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Cornell University Press 2013) 361; Others plea for a more conservative interpretation: GS Goodwin-Gill, *The International Law of Refugee Protection* (Oxford University 2014) 36.

9 Bridget Anderson, 'Migration, immigration controls and the fashioning of precarious workers' (2010), 24 *Work, Employment and Society* 2, 300.

10 European Union, 'Member States' Support to Emergency Relocation Mechanism' <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf> accessed 23 May 2017.

11 Commission Report to the European Parliament, the European Council and the Council on Relocation and Resettlement, COM (2017), 5–6.

relocated to only 33,000 refugees.¹² In its press release, the Commission indicates that there remain some 14,000 refugees eligible for relocation in Greece and some 3,500 in Italy.¹³ If it is true that only these refugees will be relocated then, in the end, a total number of only 33,840 refugees will be relocated instead of the 160,000 initially agreed.

The revision of the targets shows the malleability of policies in an effort to conceal reality which is political unwillingness to comply. This unwillingness follows from the strict eligibility criteria for relocation creating low numbers of people that qualify for relocation. Relocation is limited to applicants who are in clear need of international protection and are a national or stateless resident of those countries for which the EU-wide average recognition rate is more than 75 percent. The majority of beneficiaries so far are from Syria, followed by Eritreans and Iraqis. Since June 2016, Iraqis are not eligible anymore because recognition rates dropped below 75%. Despite the ongoing conflict in Afghanistan causing a high number of refugees, Afghans are not eligible for relocation.

These differences between nationalities create tensions between groups of refugees and migrants and feelings of discrimination. Other difficulties in the relocation process are the lack of pledges from the Member States, the practical and procedural difficulties in applying the eligibility criteria and the indication of restrictive preferences by receiving member states. This has caused long procedures, lasting uncertainty and a lack of registrations by those who might have qualified. Thus, although the idea to alleviate the pressure on Greece and Italy by relocating 160,000 refugees was initially to be applauded, the way in which it is implemented is disappointing both from the side of the EU Member States and the European Commission.

Imposing formal criteria such as the 75% recognition rate furthermore, shows the arbitrariness of the system. Refugees coming from countries that meet these criteria are not necessarily those who are most in need of international protection. Additionally, it creates a system in which Greece and Italy are left with those refugees who are less likely to receive refugee status and whom, as is well known, it is often difficult to return to their home country. It

12 European Council on Refugees and Exiles, 'Commission Report Reveals Downscaled Ambition on Relocation', <<https://www.ecre.org/commission-report-reveals-downscaled-ambition-on-relocation/>> accessed 14 April 2017; See also Nikolaj Nielsen, 'Fewer Refugees to be Relocated as EU Revises Targets' (EU Observer, 12 April 2017), <<https://euobserver.com/migration/137582>> accessed 14 April 2017.

13 Commission Press Release, 1P/17/908, <http://europa.eu/rapid/press-release_IP-17-908_en.htm> accessed 12 April 2017.

creates a divide between those who are protected and those who are not. In Santos' words, it creates abyssal exclusions.¹⁴

On a more legal and institutional note, some Member States simply refuse to comply with their obligations to accept refugees from Italy and Greece, and there are still two cases pending before the Court of Justice of the EU, in which the legality of the relocation decisions is challenged. Slovakia had initiated annulment procedures against the decision of compulsory migration quotas on 2 December 2015.¹⁵ In short, it argues the Council of Ministers exceeded its mandate because it introduced quotas and involuntary redistribution, whereas the European Council had promised a policy with no quotas and voluntary redistribution. It furthermore challenged the legal basis of Article 78(3) Treaty on the Functioning of the EU and the qualified majority voting. Hungary also initiated annulment procedures against compulsory migration quotas on 3 December 2015.¹⁶ It also challenges the legal basis and argues that the principle of subsidiarity is not complied with and that the role of the national parliaments is disregarded. Since an annulment action does not have suspensive effect, Hungary and Slovakia remain bound by the Council Decision that is challenged. The hearing of the cases before the Court of Justice of the European Union took place on 10 May 2017.

3.2 *Europe's Resettlement Policy*

As agreed in the EU-Turkey Statement, Council Decision (EU) 2016/1754 of 29 September 2016 created the option for EU Member States to resettle Syrian refugees in need of international protection directly from Turkey and made 54,000 places available for this purpose. This number was reduced from the 160,000 relocation places agreed previously. Earlier on it was agreed that 22,504 Syrian refugees were to be resettled from Jordan, Lebanon, and Turkey to alleviate the burden in these countries.¹⁷

Although much can be said about the EU-Turkey Statement, I want to focus on the aspect of resettlement here. The Commission, which monitors this resettlement scheme, indicated in its eleventh report that on 10 April 2017, 15,492 Syrian refugees had been resettled from Turkey, Jordan, and Lebanon, including 4,618 refugees from Turkey under the EU-Turkey Statement. Surprisingly some 11% of those who have been eligible for resettlement from Turkey

¹⁴ Santos (n 2) 16.

¹⁵ Case C-643/15 *Slovakia v. Council* [2015].

¹⁶ Case C-647/15 *Hungary v. Council* [2015].

¹⁷ Commission Report to the European Parliament, the European Council and the Council on Relocation and Resettlement, COM (2017), 74.

to one of the EU Member States decided to stay in Turkey instead. Again, some ten member states so far have refused to undertake any action to resettle from Turkey. And again, the legal basis of the resettlement agreement, namely, the EU-Turkey Statement, was challenged before the Court of Justice of the EU:¹⁸

Three asylum seekers who claimed asylum in Greece after 20th of March 2016 stated that the European Council as an institution concluded the agreement with Turkey and that it was not allowed to do so. The General Court of the EU concluded that it lacked jurisdiction to decide on the legality of the EU-Turkey statement because, given the content and the circumstances and despite the press release stating that it was an agreement between the European Council and Turkey, the statement cannot be considered as an act of the European Council but rather as an act between the Heads of State or Government and the Turkish Prime Minister.

The fact that the President of the European Council was the spokesperson leading the negotiations and the President of the European Commission were present at the meeting cannot change this conclusion. It follows from the Court's decision that there is a very thin line between Heads of State or Government acting as representatives of a State and them acting as members of the European Council.¹⁹ One has to be very well informed not to be confused by such practices especially if afterwards the agreement is presented as an EU-Turkey statement. This is what Santos would call his second monster, namely institutions operating extra-institutionally.²⁰

3.3 *Urban Refugees: Living in a Shadow Society*

Santos' sixth threat is the recolonisation of difference.²¹ He sees the so-called 'refugee crisis' as a result of unsolved colonial questions of Europe fuelled by racism and xenophobia. Exclusion of newcomers and especially those who are from different cultures or who have a different belief is the result thereof. As stated above, legal frameworks, policies, and practices divide between deserving and non-deserving refugees and migrants. Those who do not fulfill the requirements (economic migrants not serving a national interest, refugees not qualifying for relocation, refugees arriving on the Greek islands after 20th of March 2016, refugees and migrants entangled in slow, unpredictable and

18 Case T-192/16 *NF v. Council* [2017], ECLI:EU:T:2017:128; Case T-193/16 *NG v. Council* [2017] ECLI:EU:T:2017:129; Case T-257/16 *NM v Council* [2017] ECLI:EU:T:2017:130.

19 Case T-192/16, note 15, paras 67–68; Case T-193/16, note 15, paras 68–69; Case T-257/16, note 15, paras 66–67.

20 Santos (2) 13.

21 Santos (2) 10.

demanding asylum procedures) have to find a way to survive. They prefer to settle in urban areas rather than in refugee camps.²² Although they are a mixed and diverse group, these people are generally referred to as urban refugees. The United Nations High Commissioner for Refugees (the UNHCR) estimates that globally more than 10 million refugees and 27 million IDPs (internally displaced persons) live in urban areas, which is more than half of the refugee populations. In 2009, the UNHCR defined urban refugees as refugees living in “a built-up area that accommodates large numbers of people living in close proximity to each other, and where the majority of people sustain themselves by means of formal and informal employment and the provision of goods and services.”²³

Many refugees and migrants avoid or leave the traditional refugee camps because of the poor living and security conditions and the lack of prospects for the future. Although most camps are supposed to be temporal, refugees are often trapped for years and in some cases decades in these camps, putting their lives and the lives of their children on hold. For those reasons, some refugees prefer to live in urban settings, hoping it will give them the opportunity to retain self-sufficiency, earn an income, and better living conditions and dignity. However, there is also a flipside to these practices. Urban refugees often remain unregistered which is generally a condition for assistance, services, and goods from the international and national organizations. Without access to basic needs such as schooling and health services and living invisible lives, they often face grave rights violations and extreme levels of poverty, which is reinforced when they are undocumented or without legal residence status.²⁴ Regardless of these conditions refugees and migrants not formally recognized manage to live their lives outside the formal structures. Many refugees in Greece do not want to register, for instance, because they do not want to remain in Greece and as the application procedure takes too long. But even if they are registered their application is not processed and many migrants do not have access to

22 Koichi Koizumi and Gerhard Hoffstaedter (eds), *Urban Refugees: Challenges in Protection, Services, and Policy* (Routledge, 2015) Abingdon: Routledge, 2015; UN High Commissioner for Refugees (UNHCR), ‘UNHCR Policy on Alternatives to Camps’, UNHCR/HCP/2014/9, <<http://www.refworld.org/docid/5423ded84.html>> accessed 22 July 2014.

23 UN High Commissioner for Refugees, UNHCR Policy on Refugee Protection and Solutions in UNHCR, ‘UNHCR Policy on Refugee Protection and Solutions in Urban Areas’, available at: <<http://www.refworld.org/docid/4ab8e7f72.html>> accessed 1 September 2009.

24 Gregor Noll, ‘Why Human Rights Fail to Protect Undocumented Migrants’ (2010), 12 *European Journal of Migration and Law* 2, 241; CARE, *Five Years into Exile. The challenges faced by Syrian refugees outside camps in Jordan and how they and their host communities are coping*, Amman, June 30, (2015).

basic needs.²⁵ In Athens, in some area's so-called squats are created to try to provide these basic needs. These are managed by the volunteer or anarchist groups who are skeptical of the involvement of formal structures and the UN, IGO and NGO activities, making it difficult to access these urban refugees.²⁶ Therefore, there are also concerns about the wellbeing of refugees living in squats. As such shadow societies emerge in parallel to the formal economies and societies. Santos' post-abysal ideas of the plurinational and intercultural law might further enhance these economies and societies in a way it does not harm refugees or the local communities and might create new forms of a state organization.²⁷

4 Conclusion

The threats and monsters identified by prof. Santos are omnipresent in Europe's response to the refugee crisis. In this short reflection on his Montesquieu Lecture, only a few have been highlighted, but the examples and situations described above show how rules and procedures of Western societies can have detrimental effects on large groups of refugees and migrants. The EU-Turkey Statement causing a decrease in new arrivals is claimed to be a success notwithstanding the numerous refugees stuck on the Greek islands in deplorable circumstances. Uncooperative Member States find ways to boycott agreements made at EU level by imposing additional rules and procedures on the relocation scheme or simply by not complying with their obligations. The EU response is characterized by a lack of solidarity and fairness. According to Santos the development of a post-abysal law, that comes from the bottom up and that brings together scientific and non-academic knowledge, can remedy the abyssal exclusions in our societies. Given the rise of nationalist parties, resistance against a more liberal asylum policy, and increased segregation it would be interesting to research Santos' ideas of a post-abysal law in the context of the EU's migration policy.

25 Alice Bloch and Sonia McKay, *Living on the Margins: Undocumented Migrants in a Global City Policy* (University of Bristol Press 2016).

26 About squats in Athens see Squat!net, 'Athens: Trial against activists who re-occupied Villa Amalias begins' <<https://en.squat.net/tag/athens/>> accessed 27 March 2017.

27 Santos (n 2) 23.