

REFUGEES AND THE (DIGITAL) GATEKEEPERS OF “FORTRESS EUROPE”

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Abstract: This contribution addresses an emergent research agenda for critical theory and research into state crime in the context of two domains in which state and non-state actors are reinventing their terms of engagement, roles and responsibilities under international law: (1) governments’ responses to the suffering of the thousands dying at sea on the doorstep of the EU and (2) the cyberspatial dimensions to border enforcement and related practices of surveillance and cybersecurity measures from the perspective of how human rights are rendered in digital, networked contexts. Drawing on reconsiderations of Foucault’s thought on the underlying schizoid tendencies of modern statecraft, I argue that identifying perpetrators of state crime and the related embedding of mass online surveillance lie at the epicentre of how critical scholars, activists, and judiciaries consider the ways that people use digital and networked devices and systems and how these can be used to undermine fundamental rights and freedoms, not only of millions of forcibly displaced persons but also those of all “netizens”. The article concludes by considering where openings for (digital) resistance lie in the face of these shifting constellations of state/non-state “collectives” as they patrol the online–offline nexus of contemporary borderzones.

Keywords: refugees; migration; human rights; cybersecurity; Internet; governmentality

Life and Death at the Border: “Access Denied”

In the lead-up to the 2016 national referendum in the UK, a campaign poster from the pro-Brexit, anti-immigration UK Independence Party (UKIP) caused a furor. It superimposed the slogan “Breaking Point: the EU has failed us all” over a photo of hundreds of (conspicuously non-White) people waiting in a queue somewhere at the Slovenian border. Mounted onto trucks and vans, this poster was being driven around the UK in the week that the anti-Brexit Labour MP, Jo Cox, was assassinated by a British nationalist. Timing aside, this image cleverly exploited deep divisions about the freedom-of-movement provisions of EU membership.¹ It made explicit sentiments about keeping the unwanted “Other” *out* – of the UK and, in turn, evoked the desire to get the UK *out* – of the EU (Stewart and Mason 2016; Lowe 2016; Rashid 2017). In so doing, it encapsulated the psycho-emotional, and with that the racial and religious dimensions to the

anti-immigration rhetoric, and anxieties about national identity and citizenship undergirding this referendum. The spectrum of responses to this image within the UK resonated with comparable debates elsewhere in the European Union.

Meanwhile thousands of people – mostly from the Global South – continue to flee their homes, seeking refuge from war and violent civil conflicts, if not from famine, endemic poverty and effects of climate change. These population movements are not emanating from within Europe, as was the case after the Second World War – events that led to several international conventions on human and refugee rights, or in the 1990s, during the civil war in the Balkans. Contemporary, post-9/11 policy politics around refugees and migration reveal how the EU as a whole and individual member states have been found wanting in their response to the humanitarian crisis currently unfolding on their doorstep (Muižnieks 2017; World Bank 2017).² EU member states – signatories to international treaties and conventions on the rights of refugees, the rights of migrants and concomitant human rights – are destinations of choice (required by law to honour these obligations), as well as of necessity (being the closest in that regard) at the end of a long road. Making it to a country that is a signatory to the 1951 Refugee Convention means passing through a number of gateways, obstacle courses that are at once physical, psychological, judicial and, as this article argues, increasingly digitized and globally networked. The net effect is that burgeoning trans-border cybersecurity apparatuses are able to locate and then track the refugee/migrant “Other” as a digitally verifiable miscreant, violent interloper in ways that escape public scrutiny, legal forms of redress or political accountability. The human suffering taking place in these maritime, air-patrolled, and land-based “biopolitical borderzones” (Topak 2014, 2017) underscores both a lack of political resolve and, in some cases, open hostility to accepting refugees from national legislatures and in Brussels. Evidence of human rights abuses over the last few years at the borders of Europe is, instead, being collected by NGOs, researchers, and activists to call to account not only individual states but also consortiums of private agents, and border-enforcement authorities operating transnationally under the aegis of the EU.

Aims and Organization

These life and death scenarios provide the critical point of entry for this contribution. Its main objective is to outline a research agenda that can take into account the emergence of these digitally adept and computer-networked gatekeepers – human and automated – now patrolling the inner and outer borderlands of the EU and “managing” the arrival of thousands of refugees. These gatekeepers are charged with enforcing policies of deterrence, search and rescue (SAR) operations and eventual processing, detention or deportation of these arrivals – those that

survive the journey. These actors take two forms. First are the private, military and/or security companies (PMSCs; Bures and Carrapico 2017) that work on behalf of state agencies under contract. G4S is one example, contracted in the UK and in Australia to run detention centres and deportations. Second are organizations established by EU regulations with a mandate to enforce EU-wide policy, controlling the Schengen border in this case. The recently re-established *European Border and Coast Guard Agency*, which still goes by its former name – *Frontex*, is the main EU agency in this regard. Its mission is ostensibly “to promote, coordinate and develop European border management *in line with the EU fundamental rights charter* and the concept of Integrated Border Management” (Frontex – European Border and Coast Guard Agency 2018, emphasis added).³ As its powers and budget steadily increase, this agency’s human rights track record has been the object of criticism by networks representing the rights of refugees since as far back as 2007 (ECRE 2007; International Commission of Jurists, ECRE and Amnesty International 2016). Nonetheless, in recognition of political pressure from within the EU to respond more “robustly” to the numbers of asylum seekers attempting to cross the Mediterranean, this two-pronged approach – the privatization and centralization of border control, detention and deportation activities – plays a central role in both EU and national policy agendas and public discourses, which effectively conflate the plight of refugees and right to asylum with broader political debates about immigration within the EU.

The tools and – land, sea and aerial – systems that are being developed and deployed to monitor and confine the movement of incoming populations are dependent on Internet-based media and communications that include a range of military, policing and civil uses. In the second instance, they are inseparable from micro-level, bio-engineered and macro-level satellite-linked means for locating, scanning, classifying and patrolling an individual, group or space of interest, for example, by using GPS and geo-sensing techniques, military drones and other sorts of automated sensing devices to patrol, or target any given surface or vessel, and so make visible and digitally render human lives as data categories. In this regard, practices of border control and national security – deterrence, detention and processing – are more and more proximate to everyday policing as law enforcement and intelligence services become increasingly intertwined in the name of anti-terrorism measures for national/regional security priorities (Balleste 2015; Council of Europe 2014; Baumann et al. 2014; Necessary and Proportionate 2013).

The issues that this article addresses with respect to this current state of affairs fall under two rubrics.⁴ The first covers the role of digital/networked technologies in cases of violence, neglect or complicity that implicate individual state agencies, or EU agencies, that lead to the deaths of innocent people at any particular point along the routes they take to reach safe haven. The roll-out of punitive surveillance

programs dovetails the embedding of commercial and government-sponsored tools and systems for large-scale tracking, collecting and retention of the everyday communications of citizenries. Second, is how these top-down rationales and techniques of a burgeoning “internet governmentality complex” (Franklin 2013) operate with but also alongside digital devices with Internet connections and so access to web-based information and social networks. These services also provide a means of survival and enable support networks for those undertaking these journeys. These, in turn, can be repurposed for campaigning, mobilization against inhumane treatment and detention conditions on the ground, as well as deployed for conducting investigative research for legal action.⁵

The dual purposing that undergird these trends in how borders are perceived, policed and then crossed presents challenges for studying the *modus operandi* and locales in which cases of state crime may now be taking place. It means drawing together streams of research and activism that have proceeded along parallel trajectories to date, namely, inquiries into migration and asylum that re-deploy digital tools and imaging technologies to expose repressive and excessive recourses to “law and order”, those focusing on refugee/human rights mobilization on one hand and, on the other hand, on research and mobilization around human rights in Internet policymaking consultations that address design, access and use, and data-management issues. All these domains have a bearing on how state crime research may look to address where accountability lies for the inhumane treatment of displaced populations at any point along journeys that now unfold at the online–offline nexus. These streams are also converging at an historical juncture in the international state system that political theorists have dubbed as “post-national” in the European context (Habermas 2001) or “post-Westphalian” (Fraser 2007) in the broader sense. Within this longer-term dynamic, policy paralysis around a common EU immigration policy contrasts with burgeoning agreements over border and cybersecurity measures between some EU member states and those bordering the African continent’s shorelines of the Mediterranean.

If specific software applications, system architectures and personalized devices are now indispensable for the maintenance and extension of punitive forms of border security, then they need to be incorporated into debates around defining and pursuing cases of state crime on one hand and, on the other, human rights norms and jurisprudence (Pillay 2014; Ward and Green 2016; Vincent 2010). After providing an overview of the statistical and categorical dimensions to these population movements according to UN records, I consider the conceptual challenges of these politically and ethically controversial undertakings for the study of state crime in domains characterized by the embedding of computer-networked tools and procedures in the redesign of immigration and asylum policies across the EU. Developing previous work (Franklin 2013, 2015) and mindful of other contributions in this

series, this discussion considers recent re-engagements with Michel Foucault’s work in light of his thinking on modern statecraft as schizoid as one way of addressing these cross-cutting issues. These schizoid tendencies are encapsulated by the evolving armouries of public/private funded apparatuses of population control at home overlaid by measures that strive to keep other populations out. The first looks inwards (to citizens and residents); the second surveys outwards (to prospective residents and “newcomer” citizens). Both are being justified by discourses fuelling imaginaries of unease and anxiety towards the racially and religiously encoded stranger. Waves of orchestrated and “lone wolf” or “home-grown” terrorist attacks around Europe fuel these imaginaries and serve to bolster national (cyber)security procedures. This state of mind is underscored by ongoing squabbling at the EU level between member states over their roles and responsibilities under international human rights and humanitarian law; responsibilities that include ensuring that no one is “subjected to inhuman or degrading treatment”.⁶

Debates about challenges to the historical incumbency of states’ ability to exercise their sovereignty over citizenries are linked to the rise in economic reach and persuasive powers of this century’s global corporations that own and control the lion’s share of Internet goods and services, terms of access and use, and data management. Powerful Internet service providers, social media platforms as well as software developers and equipment manufacturers control the infrastructures that facilitate how borders are managed and how people make sense of their world and find their way as they traverse routes in and out of economic and national jurisdictions. The global market share and reach that these tech giants, or “economic sovereigns” as Rebecca McKinnon (2014) argues, have on everyday life for billions of their “netizens” arguably rival the ability of national and local authorities to influence and inform their citizenries and constituencies respectively.⁷ As definitions of state crime continue to be refined (Ross 2000; Ward and Green 2016),⁸ jurisprudence is still in its early stages with regard to successful prosecutions for digital or any other infractions by state and corporate actors with regard to recent recognition at the UN level that human rights exist online as they do, in principle and in law, offline (UN Human Rights Council (UNHRC) 2014; *Statewatch* 2013; Bowcott 2015).

Legal Statistical Narratives of Suffering

The current humanitarian crisis signalled by agencies such as the World Bank, the UN and human rights organizations is being conveyed through the web, reported and responded to along a variety of digital media axes, news and organizational channels. News outlets, international organizations charged with refugee and other humanitarian aid, national governments, the various organs of the European Commission and UN agencies refer to these forced movements of people as

refugees and/or asylum seekers, or migrants in often conflicting ways. These different terms of reference (Amit and Landau 2016; Braithwaite 2016; Guterres 2015) point to the underlying political implications of legal categories in the face of calls for individual governments, and the EU as a whole, to take concerted action to address the ensuing human suffering. Legal clarities belie, however, the opaqueness of application in practice. As Michael Møller, Director General of the United Nations Office at Geneva argues,

There should be no misunderstanding between refugees and economic migrants... [yet]...the terms refugee and migrant have been put into the same salad. To put it very bluntly, every refugee is a migrant. Not every migrant is a refugee. (Cited in Ridley 2016)

These statistics bear some mention at this point because they provide quantifiers of these categories which, in turn, underscore a host of political stress points about the socio-legal ramifications of this humanitarian crisis. Labels as well as statistics matter as they not only carry but also nuance the rhetoric of crisis, threat and security, providing signifiers of tolerable versus undesirable supplicants. First, according to the UN Refugee Agency, the United Nations High Commissioner for Refugees, the end of 2014 signalled a sharp jump in the number of people on the road after being forcibly displaced from their homes, from 52.2 to 59.5 million. In other words, one out of every 122 human beings at this time was either a refugee, internally displaced or seeking asylum (UN High Commissioner for Refugees (UNHCR) 2016), half of which were children. In the following year, largely due to ten major armed conflicts, the number of people forcibly displaced around the world had risen to over 65 million, equivalent to the total UK population (World Bank 2017). To put it another way, over the past 10 years, more people in the world have been displaced than at any other period in modern times, increasing fourfold, from about 11,000 a day in 2011 to 44,000 per day 4 years later.⁹ In the one month of October 2015, the number of refugees entering the EU by sea – media focus on the Italian islands such as Lampedusa having shifted to the Greek islands of Kos, Lesbos, amongst others – was equivalent to the total over the whole of 2014: 53 per cent of which were Syrian.

These numbers underscore the skewed geographies of asylum provisions. It is not the wealthier parts of the world that are confronted with the need for immediate and longer-term responses to the arrival of thousands of traumatized, exhausted people. Host states in the Global South carry the heaviest burden, registered at hosting 86 per cent of the world's refugees; across the Syrian border in Lebanon for instance, one in three or four people is a refugee. These hosts include a number of "Least Developed Countries" that are dealing with around 26 per cent of this

total (UNHCR 2015; Elliot 2016). This skewed geography is reflected within, and around the EU. In this case, in the arrival figures for those taking the sea and land routes to the borders of the larger European continent (stretching from Greece and Turkey into the Baltic States and onwards into Scandinavia), the burden of reception, lodging, legal processing and then management of the eventual transit of the thousands reaching these shorelines are borne by Greece and the southern member states of the EU; Italy, Hungary and the Balkan states in particular. Within the richer parts of Western Europe, Germany has accepted 60 per cent of the recorded applications for asylum (Eurostat 2017).

But it is the death toll, particularly at sea, over the last few years that signals the scale of magnitude at one end of the human spectrum and, at the other, national and intergovernmental conflicts over immigration further “up-stream”. Moreover, mass deaths by drowning, if not by dehydration and exhaustion, are being recorded live, or reconstructed, and uploaded onto dedicated websites, national news and commercial social media outlets. Images of capsized boats, unseaworthy and over-full vessels of all descriptions drifting in the Mediterranean and Aegean Seas, bodies washed up on the shore, exhausted and drenched passengers in flimsy, useless life-jackets being pulled on to coastguard boats, or taken on board by fisher folk and other private vessels defying their own national anti-human trafficking laws have been headline news.¹⁰ The controversial record of EU SAR missions in these cases have been termed a form of “death by rescue” by critical research into the processes by which refugee boats may be located but not intercepted (Heller and Pezzani 2014). Within current EU member states, and in Brussels, debates about whether SAR undertakings are in themselves encouraging more people to make these journeys permeate public and policy discourses.¹¹ The jurisdictional complexities, and with that the political tensions on the ground, pivot on who bears the responsibility of being the first point of entry for the thousands being washed up on the beaches of southern Europe’s holiday destinations. As these arguments grind on in national legislatures, at the European Commission in Brussels and European Parliament in Strasbourg, and also in High Courts around the region, they contribute to the increasingly inhumane waiting times and living conditions experienced by those hoping to continue onwards.

Multi-sited Gatekeeping Powers

Discussing the digital, predominantly though not necessarily networked tools and procedures that are now commonplace at the points of entry and exit along any national or regional (as is the case of the EU Schengen zone) border may appear far removed from the body count of drowned asylum seekers. These tools and everyday communications devices – the most important “non-food item” that

people take with them, may seem contingent upon, rather than determining aspects of the physical properties of the shorelines, maritime and airspaces that coastguard or land-based border authorities patrol. But in the context of ongoing policies of digitizing strategic infrastructures, security and government services, they play an under-theorized role in the cat-and-mouse game that characterizes how asylum seekers are received, processed and their personal data archived and considered by would-be host countries, humanitarian organizations, UN agencies, and courts of law (Aarstad 2017; Bosilica 2016; Boulanin 2013; Bowden 2013). In line with legal reconsiderations of how Internet infrastructure recalibrates state security measures and cross-border law enforcement, these computer-dependent powers have been challenging longstanding notions about national sovereignty and rule of law as these, in turn, have been reconsidered for forging international agreement over responsibility and accountability for combating climate change, and custodianship over outer space, the world's oceans and polar regions.

Despite a number of UN Resolutions, multilateral expressions of human rights principle for “the online environment” (UNHRC 2014), the EU and its member states have been deepening and expanding the existing borders in two ways: (1) beyond conventional national territorial boundaries into others' jurisdictions by setting up processing/detention centres in places such as Libya (as is the case with Italy), or Turkey (with Germany), and entering into detention centre “sharing” arrangements with African Saharan states (as is the case with the UK) and (2) by the increasingly public relations dimensions to off-the-shelf and tailor-made procedures and equipment for digitally enhanced border controls and immigration, identity checks by state and outsourced border and detention agents. It is no longer sufficient for twenty-first-century statecraft just to patrol the gates and contingent interiors of borderzones. It is possible to push these out as well as drill down, deeper into the individual body, familial and community spaces that comprise both citizenries and undocumented, precarious populations waiting the outcome of lengthy application procedures. The computing and data-retention power is available to record, file and sift through the vast databases that ensue. Commercial and governmental forms of digitized identification, infrared and other forms of enhanced visioning technologies, authentication toolkits and computerized security and monitoring systems and machinery are all on the market; for large-scale (aerial) and hand-held (night-vision and body-heat sensors) situations.

The “big data” and artificial intelligence dimensions to the information that can be extrapolated from these tailor-made tools, as well as from ordinary – mobile phone and other computing – devices with inbuilt geo-tracking capabilities, are increasingly embedded in the practices of contemporary statecraft. Ascertaining the rights and privileges of citizenship and residency within national jurisdictions now dovetail with the policing of customs and “free movement” provisions, biometric

passports accompany digitalized library cards, online visa or welfare applications and other sorts of networked topologies of legitimation in schools, universities and health services (Bosilica 2016). This move to digitized surveillance-by-design connects the policing of the “inside” and “outside” spaces that constitute conventional legal understandings of landed and maritime border jurisdictions – “technologies of extraterritorialization” as Joseph Pugliese (2013) argues. These horizontal planetary surfaces are now interconnected vertically via satellite technologies and airborne, automated devices such as drones. The topographical intelligence and digital databases that ensue are made possible through emerging technologies of calculation that can scan, mine and increasingly connect once-separate databases together. These are now the object of computing R&D looking to refine techniques (using algorithms) for collating, sorting and monitoring where human beings are going, predict where they might go, what they might do next.

In this respect, the work of critical legal scholars on state crime in the Latin American region can be informative. Cruz (2016) for instance argues for the need to bring

the state back into the analysis of criminal violence by examining the many ways in which the state directly contributes to violence...[For example] by extending the legal limits of the use of legitimate force, by tolerating and supporting the employment of extra-legal approaches to deal with crime and disorder... while seeking legitimacy and constructing political authority. (Cruz 2016: 375)

The case extension and expansion of border controls hundreds of kilometres out from the putative borders of “Fortress Europe” underscore Cruz’s points as these functions are increasingly outsourced to private actors and automated processes. As another Latin American legal scholar observes, the privatization of gatekeeping at or within any putative borders also absolves said state actor from being directly involved in the deaths. In other words, the “State does not kill directly unwanted groups of individuals. Rather, the State lets them die” (França 2014, 2017; Bures and Carrapico 2017; Heller and Pezzani 2014).

Political, Legal, Conceptual Challenges

The above developments point to a triple problematic for critical theory and research into the state crime, refugee crisis and technology nexus of cause, effect and eventual accountability. Digital tools and computer-networked systems have a formative, indeed proactive and penetrative role to play in the embodied, physical and emotional toll of forced displacement. As noted earlier, they also have a role to play in how people survive against all odds and how support networks on the ground and online provide technical and other forms of support and sustenance

for those in need, as well as look to develop counter-narratives to compete for social and broadcast media headlines.¹²

The first of these challenges concerns shifts from physical to computer-generated and mediated geographies of direct and outsourced exercises of customary sovereign power and control over any population, underscored by techniques of revisualization recorded by drones, satellites and hand-held devices such as mobile phone video footage. These are redrawing the cartographies upon which Westphalian legal, political and economic idioms of national sovereignty over a geographically delimited jurisdiction rest. Hard and soft law, liberal Western jurisprudence and concomitant debates in social and political theory underscore the geopolitical and institutional histories that legitimize state agency as contingent upon physical territory. International jurisprudence that is premised on customary law is being confronted by the legal challenges that these digital, networked interfaces and online archives of evidence present to judiciaries as the outcome of law enforcement and intelligence gathering based on data “harvesting” and digitalized forms of knowledge exchange, or intelligence sharing. However, these same representatives of (inter-)governmental security measures take part in Internet policymaking agendas that have been under pressure to incorporate human rights standards in any future visions for how Internet technologies will be deployed for the purposes of state or regional security (Necessary and Proportionate 2013; La Rue 2011; Council of Europe 2014; Internet Rights and Principles Coalition 2018). In this regard, if the human rights of citizens are now recognized as having substantive meaning online and, thereby, with implications for future interpretations of existing international law, then it follows that so should the rights of displaced populations under international humanitarian law also be recognized as having an online – digital and networked – dimension.

These developments – the first is now public record in UNHRC Resolutions, whilst the second remains moot, signal another challenge. Much of the theory and research literature still pivots on taking a normative position along an implicit, ontological hierarchy between “real life” offline versus online – *virtual* – social and economic relations. Meanwhile, at this online–offline nexus, an emerging politico-legal order is deploying digital, geolocational forms of population control and casual surveillance on a planetary scale linking national jurisdictional conventions with programs of co-operation over extraterritorial techniques of both population (*viz.* border) control and (cyber)security measures. These techniques link the audio-visual monitoring of public and private spaces (with CCTV for instance) to people’s personal data (at customs, at work, at school) to larger scale forms of pre-emptive surveillance (communications data retention as the rule rather than the exception). Legal scholars, human rights and digital privacy activists have been quick to signal the dangers of this mission creep in the last few years but have

yet to consciously link the ensuing erosion of fundamental rights and liberties for citizens to their blatant disregard in the case of displaced populations.

With respect to who or what sort of legal entity can or should carry liability in these scenarios, there also needs to be a reconceptualization of state agencies not only as representatives of singular sovereign state actors but also as “state-actor collectives” (Ward and Green 2016) that also include those “non-state/state actor collectives” that operate, through outsourcing contracts, as government agents in the increasingly militarized and inhumane characteristics of border enforcement and immigration control. As the case of the death of Jimmy Mubenga in 2012 shows (he died whilst being forcibly restrained on board a flight during his deportation from the UK), governments rely on such agents, private firms largely, to enforce increasingly punitive immigration policies. The global reach of G4S, the aforementioned company employed by the UK to carry out this deportation – and whose employees were found guilty of the unlawful killing of Mr Mubenga, underscores the human rights implications of delegating these operations to poorly trained personnel, exacerbated by inadequate judicial oversight or transparency.¹³

The EU, taken here as a “state-actor collective” could also be regarded as a *meta-state actor* given its unique status as an international body that requires its member states to submit to EU-level laws and policies and yet provides them with a venue in which they can assert national interests respectively. In either respect, within any sort of de facto or de jure “organizational” remit (Ross 2003: 2), these tactics of deterrence, containment and “repatriation” of effectively unwanted populations are thrown into relief as the EU effectively pays only lip service to its obligations under international law. Claims that there is some political support for a “cynical quid pro quo” (Howden and Fotiadis 2017) – by which the squalid conditions that characterize reception and processing of refugees are regarded as a form of deterrence – remain moot legally speaking. Meanwhile some governments rely on public support for taking a tougher, more inhospitable line towards displaced populations gathering at or around national borders; fire-hoses being turned on to prevent people crossing into southern Europe, the recent violent clearing and dismantlement of the camp called “the Jungle” in Calais at the UK–French border in 2016, and constant harassment of those sleeping rough in Europe’s capitals are cases in point.

If, following Ward and Green, the humanitarian crisis of these past years is unfolding in a “multileveled legal space” (2016: 229), this begs the question of how to ascertain new categories of “state-offenders” (Ross 2003) in an issue area that needs to be treated as a *multi-sided* one as well, given the role that social media outlets and other arbiters of “public opinion” now play in mitigating, or indeed in condoning anti-immigration measures that include the long-term incarceration, and violent deportation of out-processed asylum seekers. One line of thinking considers the role of the “wider body politic” (Ross 2003: 2; Ward and Green 2016)

in calling offenders to account through legal action or public debate. But such body politics can also condone aggressive, even violent forms of deterrence and treatment of those deemed “non-citizens”, or turn a blind eye to the disproportionate targeting of communities regarded as threats to cultural identity or groups seen to be threats to public order. The historical record is replete with these scenarios within living memory, in Europe particularly. Before proceeding, therefore, it behoves us to consider the following: What happens when said “wider body politic” does not recognize or remains impassive to evidence of “social harm, moral transgression, and/or civil or human rights violation” (Ross 2003: 2) as in the case of thousands dying at sea or in the appalling conditions of detention centres and camps dotted in and around the Schengen zone?

These conceptual and sociocultural conundrums are germane to any discussion of the digital/networked and, thereby, media dimensions to (1) possible abuses of the human rights of asylum seekers, refugees and immigrants at any point in their respective applications for asylum, residency or citizenship; (2) how evidence is gathered about any such case and terms of its access and use; and (3) where and how best to mobilize on behalf of those subjected to human rights abuses across the full spectrum at any point in their journeys. The rest of this discussion will now consider some of the conceptual moves that follow from incorporating digital tools and computer networks into critical analyses of EU immigration and refugee policy.

Reconceptualizing (Cyber)Security, (Unwanted) Populations, Territory

Unwanted populations arriving or moving en masse through traditional geographical territories are a visible and visceral challenge for authorities at any time. Theorists and philosophers have debated the legal and ethical limits to liberal democracies throughout the history of the modern nation state. The work of Michel Foucault continues to be influential in this regard. The multi-language publications of his collected works include all the lecture series he delivered at the Collège de France in the late 1970s and early 1980s. These have provided a wave of critical reconsiderations of his work on the shifting power dynamics of state–society relationships in the history of the (western European) nation state and concomitant lexicon: governmentality, biopolitics, discipline, surveillance and territory. These lectures, which can now be approached as a whole rather than in isolation, and how they feature in subsequent analyses in the secondary literature coincide with emerging debates in international law, political and social theory about the “cyber-spatial” dimensions to how liberal governments aim to govern but, as Foucault (1978/1991) notes, “not too much”.¹⁴ From the perspective of state crime in a digital context, the time is ripe for considering how his thinking across all these lecture series can apprehend the present history of the nation state and its relationships with non-state actors, intergovernmental and other multilateral institutions as

these acquire digital, networked and, thereby, planetary characteristics of *supraterritoriality*, *cyberspatiality* and *transnational* breadth and depth of form and substance (Scholte 2000; Deibert 2014; Franklin 2013).

Stuart Elden, a geographer, who focuses his reflections on the series delivered in 1977–1978 entitled *Sécurité, Territoire, Population* (Foucault 2004c) goes some way in considering how these more recent dynamics can be read back into Foucault’s ideas by asking, “what happens to territory?” (Elden 2007: 563). Taking these lectures as consecutive lines of thought, Elden argues that Foucault was losing sight of how disciplining powers as they refine their rationales and tools for targeting their respective populations necessarily aim to “securitize” and enclose space as “territory”. His claim is that Foucault puts aside his emphasis on geographical *territory* (how sovereign powers manage, discipline and so control populations within delimited physical space) to focus on how the agencies of sovereign power look to manage, and so control *populations* (Elden 2007: 563, note 2). Elden is concerned to retain the central notion that territory is

more than merely land, but a rendering of the emergent concept of “space” as a political category: owned, distributed, mapped, calculated, bordered, and controlled. Foucault’s notion of the politics of calculation is therefore crucial, but not as something which only manifests itself in population, but, rather, in territory too. (2007: 578)

He concludes that the “same kinds of mechanisms that Foucault looks at in relation to population are used to understand and control territory...[and]...in an era of security both territory and population are understood in a transformed sense” (Elden 2007: 578). If this counts for physical territories – political categories of space – then it can also count for those that are under formation, traversed in the online environment. To put it another way, the digital ability to patrol and so circumvent the inner and outer limits of any said physical territory (state borders, maritime borders, shorelines) implies an additional genus of politics, digitized operations that reconfigure existing jurisdictional “politics of calculation” (Elden 2007: 578) and, with that, cyberspatiality as a digitally rendered political category of space in which differently constituted “populations” become evident.

These concepts and the power “dispositifs” and “calculs” they engender, in which locales and in which forms, are also pertinent to questions about whether the plight of 65 million displaced persons can be considered under the rubric of state crime, namely through interrogations of military and commercialized deployments of digital and networked technologies of population control that rely on (online) surveillance. Refugees, “economic migrants”, and asylum seekers are also *populations*, citizens of somewhere if not unwanted arrivals

elsewhere. Their movements through and across any number of territorial jurisdictions – cyberspatial, landed or maritime – are in this respect the object of existing forms of state actions, as well as leading to all manner of intergovernmental undertakings to facilitate “innovations”. They also provide motivation for various countermanding practices: humanitarian actions and activist campaigns. *Space* is the operative word here, a term that has a long and rich literature of its own addressing Foucault’s work and the thought of his contemporaries. As one of these contemporaries noted, in a much-cited phrase, “space is practised place” (De Certeau 1984: 117). The implications of regarding territorial jurisdiction as more than the sum of landed parameters and concomitant spaces with a pre-given physical essence allows for a conceptual bridge between the ontological hierarchy of value often attributed to “offlineness” as superior to “onlineness”. It allows for thinking to move past the convention of treating territory as a fixed “political category of space”, with populations as *a priori* subjects thereof, all of which must be defined by their physical/embodied properties alone.

Within these reconsiderations of cyberspace as digitally and networked practices of place, we can consider Foucault’s insights into what he argues are two, contradictory dynamics at work: Those *disciplining* functions of sociocultural, political and economic institutions and second, the effects of *security* imperatives that patrol, co-construct the relationship between interior (domestic) and exterior (foreign) realms. For political representatives, intelligence agencies and law enforcement, the threat of attack from within, by globally networked aggressors, justifies programs that extend rather than restrict invasions into people’s private lives and public interactions online and offline. As Elden notes, following Foucault, this dual mechanism is a constituent of how the modern nation state is interrelated with the history of capitalist economies, and liberal notions of subjectivity and individual rights. It is in these, now published, lectures that Foucault makes much more explicit the schizoid manifestations of these procedures not only to track, contain and curtail but also to push outwards in the quest for certainty. Elden notes, “Discipline is centripetal, while security is centrifugal: discipline seeks to regulate everything while security seeks to regulate as little as possible...; discipline is isolating, working on measures of segmentation, while security seeks to incorporate, and to distribute more widely” (Elden, citing Foucault, 2007: 565, see also Foucault 2004a, 2004b, 2004c).

Whilst at present there is only circumstantial evidence to suggest that this double movement is being coordinated in the sense of an ideological program (Topak 2014; Pugliese 2013), its contradictory consequences are being thrown into relief at EU borderzones. This is where citizens coming and going, as well as refugee populations coming and going confront the forces of national security (intelligence and data mining, meta-data gathering and predictive programs for anti-terrorism

programs) as they work with those of national sovereignty (customs officers, border guards, immigration detention centres, public service record-keeping). The point that bears repeating is the prevalence for outsourcing of these “services” to private firms. The EU Border Agency, Frontex, whilst answerable to the European Council, can be supported (as is currently the case) or called to account by the European Parliament.

Summing up, apparatuses of border/national/cybersecurity push outwards in a series of *centrifugal effects* as they refine a matrix of physical and digitally encoded forms of deterrence and containment. To this end, the externalization of bordering, by setting up detention centres in other jurisdictions (from Libya to the Pacific island of Nauru), and systems of *extra-terrestrialization* (satellite technologies) become “standard operating procedure” rather than techno-legal exceptions. Agreements to exchange knowledge via databases that are made up of people’s personal communications and other indicators of identity (e.g. as is the case in a series of undertakings with Interpol and Europol) are becoming par-for-the-course, *despite* the comprehensive regulations around data retention at the EU level encapsulated in the General Data Protection Regulation (GDPR) that came into force in May 2018. As is the case with any schizoid state, the opposing effects can be seen in these scenarios through the deployment of existing and cutting-edge strategies of mass online surveillance that reinforce digitalized, networked operations of pursuit and prosecution. These operations also target citizenries, now under 24/7 surveillance, online and on the street, as well as those arriving at or having crossed the border without the prerequisite forms of legitimacy. These *centripetal* effects corral and monitor people at home and people on the move whilst pushing the terms of engagement outwards – *centrifugally*.

The deployment of tailor-made tools, along with commandeering the databases accruing to commercial operators, to track and restrain any targeted population as they move, in whatever incarnation, thereby places ordinary citizenries and these unwanted others alongside each other. And it puts them in close proximity when it comes to the letter of existing human rights law. Debates on the conceptual and legal status of cyberspace notwithstanding (Tsagourias 2015; Deibert 2014; Fidler 2015: 94), the way in which governments, businesses, and ordinary people access and enter these (cyber)spaces through Internet-embedded goods and services has implications for how human rights and humanitarian law will be interpreted in future jurisprudence around asylum and ruling on how fundamental rights and freedoms should be protected in online domains.

Resistance at the Online–Offline Nexus

Does this, however, mean that there is no possibility to resist, to fight back and change the terms of debate if not rules of the current game on the ground (e.g. in

detention centres, camps or at borders where physical violence is being perpetrated if not condoned) or online (where detainees are refused adequate Internet access or access to digital services that can support their applications)? If so, what is the future in digital settings of “methods that citizens and public and private organizations [might use] to control domestic and international state crime, caused by individual countries and their respective crime-producing agencies” (Ross 2000: 2)? For understanding and devising programs of resistance that include online articulations that deploy digital tools and web services (e.g. smartphones to blogs or social media platforms), one task is to ascertain at which point these schizoid, characteristics become dysfunctional. Resistance, therefore, cannot be undertaken or analysed in simple binaries, for example, online versus on-the-ground actions. There are many examples of individual or community organization supporting refugees to show solidarity in acts of kindness or breaking the law by helping refugees even if the general media and political tenor of late has been one of unmitigated hostility. So, here, as I noted above, it is not sufficient to evoke reasonable publics, as a self-evident moderating force. Mobilization and awareness campaigns against the political crimes that are being perpetrated in the Aegean, the Mediterranean and on the land routes that cross the internal European borders have yet to gain traction or emerge as a transnational countermanding voice within the EU at least. That said, and because mobilization often starts in small ways and at different levels of analysis and intervention, it is possible to consider how resistance in a digitally embedded context can take place in a myriad of ways and by any means available; from providing guerrilla-like WiFi connections at the border, or phone batteries and chargers, to fighting disproportionate forms of cybersecurity and surveillance legislation in national and international courts, to developing cross-border and cross-sector education and organizational strategies to change public and political opinion.

This potential can be overlooked when focusing on the increasingly hi-tech, “smart” bordering practices of border gatekeeping. For example, stretching back to the early years of Internet media and communications last century, the record shows how alternative, independent media outlets report incidents, call perpetrators of violence and other abuses to account by bearing witness online, by deploying and repurposing commercial platforms or open-source tools, or occupying spaces on the web to organize and express localized and international condemnation of how border agencies abuse the human rights of those stuck at the border. If deaths at the border, at sea and within detention centres can be seen as an international crime and agencies contracted by state signatories to international human rights conventions considered as accomplices, then resistance can take place in the courts as well as on the streets, or through social media. For organizing resistance, within and across physical and digitally encoded borders, as well as in specific locales where local groups can interact with those populations needing assistance, the

offline–online nexus needs addressing in a strategic way. The digitization of Fortress Europe needs its riposte in technologically and media-savvy responses to human rights abuses in order to generate the sort of critical mass that can support activist and scholarly approaches to tackling the intersection of state crime, humanitarian crises and their digital, networked manifestations, approaches that can work within the paradigm of “dialectical legal pluralism” (Ward and Green 2016).

In Conclusion

To conclude, let me recapitulate the key themes of this reflection on state crime and digital resistance from the perspective of the 65 million people who are forcibly displaced around the world. First, if the statistics of death and suffering around the ever-expanding juridical borders of Fortress Europe can be apprehended as playing out in both multi-sited and multilayered techno-legal domains, then state culpability needs to be regarded also in terms of collectives given the links between government outsourcing and abuses of fundamental rights and freedoms by these state proxies. This entails including the actions of private, for-profit concerns that are answerable to governmental and intergovernmental agencies. This working reality thereby implies a need to develop conceptual frameworks that can consider abuses of international law in ways that include states but do not exclude their accomplices on a legal technicality. Second, it is time to reconsider bordered territories in ways that do not denote necessarily physical landmasses; maritime borders and airspace matter in this context as do the geopolitical standoffs unfolding at present with regard to ownership and control of cyberspace as governments both vie and collaborate with corporate powerbrokers of Internet access, terms of use and services. The historical and digitally reconfigured (cyber)borders of Europe are zones of violence that witness daily the abrogation of human rights offline but also online. Politicized justifications for psychological and physical violence underscore the push-and-pull of centripetal discipline and centrifugal security imperatives. This both exacerbates and enhances the underlying schizoid tendencies of the Westphalian state system in the face of intractable human suffering.

Echoing the conclusions of Ward and Green (2016) in their rethinking of state crime as a multiplex category and domain, critical scholarship that hopes to influence policymakers and judiciaries needs to take the lead in several respects. First, to develop robust modes of analysis that can *shift the political payoff of binaries* that feed xenophobic and racist public discourses on one hand and, on the other, dismiss human rights activism at the online–offline nexus as irrelevant (Franklin 2018). Next, there needs to be not just theoretical but also ongoing activist and political work to change the social meaning of various forms of protest against human rights abuses, wherever they occur, in ways that can *fully include* the digital. Whilst bodies remain the target of privatized as well as officially condoned violence, administrative

negligence and public indifference to the plight of thousands currently stuck in refugee camps, held indefinitely in detention centres or those sleeping rough along the EU's now infamous refugee highways, the digital ramifications need considering also as a "multileveled *legal space*" (Ward and Green 2016: 229, emphasis added). State crime theory and research can then develop ways of analysing emerging case law to *multiply singular notions of liability* past state-centric legalities and so start to incorporate the online–offline dimensions of gathering evidence on any criminal acts by (regulatory and private) perpetrators or their accomplices.

As judiciaries might take on board these considerations as they interpret international human rights and humanitarian law, the other side of the coin is that thinking "past the state" in this regard can support social media and other campaigns on behalf of those who have died or suffer "living-death" conditions in detention or bureaucratic limbo.¹⁵ These insights can also support the funding and dissemination of the outcome of investigative journalism and provide resources for local, community education where asylum seekers and detention camps or centres are located. Only then, can substantive and legally authoritative alternatives gather critical mass to counter the toxicity of political and *public discourses* that construct (the right to) asylum, migration and multicultural expressions of citizenship as a *security or cultural threat*. This means theorizing and researching as well along *multi-dimensional axes of analysis and response* – scholarly, legal, advocacy and policy-based. It means accepting the interplay between the *digital and the networked as integral* to the power dialectics of future human rights jurisprudence in the post-Westphalian *cyberscapes* of this century.

Notes

1. The Schengen Agreement, "Europe's borderlands club" as Howden and Fotiadis (2017) put it.
2. In 2015, the UN Refugee Agency (the UNHCR) pronounced the situation as critical (Howden and Fotiadis 2017). That said, use of the term "refugee crisis" has its critics (Møller, in Ridley 2016).
3. From "Mission and Tasks" at <https://frontex.europa.eu/about-frontex/mission-tasks/> (emphasis added). More details on the legal status of Frontex is at <https://frontex.europa.eu/about-frontex/legal-basis/>.
4. This article draws on digital storytelling work for the international research project, *Deathscapes: Mapping Race and Violence in Settler Societies* (<https://www.deathscapes.org/>). Thanks to Raed Yacoub for the research support and Saeb Kasm for the constructive feedback.
5. The work of the Forensic Architecture research group, open-source journalism from the Bellingcat online collective and the Centre of Investigative Journalism are three cases in point.
6. Articles 18 and 19 of the *Charter of Fundamental Rights of the European Union* (2016/C 202/02) articulate obligations to respect the rights of refugees under other international conventions, including *non-refoulement*, that is, not sending people back to places that cannot guarantee their safety. Article 4 states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

7. Google, for instance, processes the personal data of a billion people per day. And like Google with its search engine and web services, Facebook still can claim that two billion, two in seven people on the planet, are registered as a member of its global “community” of “netizens”.
8. This literature on state crime addresses the ethnocentric dimensions to liberal, Western traditions of international law to consider the notion of “rule of law” as more than the sum of litigation, legal compliance or policing. Its inclusion of non-Western understandings of justice allows for considerations of collective responsibility, prosecutions, presentation of evidence based on, not just written documentation or compliance with the strict letter of the law, assessing the effects of inaction as well as actions.
9. Ewan McLeod, Head of Policy Development at the UNHCR public lecture, Goldsmiths University of London, 25 November 2015.
10. The case of toddler Alan Kurdi, whose family were fleeing the civil war in Syria, is the most high-profile example to date. A photo of his body washed up on a Greek beach took on a life of its own by becoming a social media “meme” in an emerging online iconography of death and survival at sea. For more details, see *Alan Kurdi and the Boat* on the *Deathscapes* website; <https://www.deathscapes.org/case-studies/alan-kurdi-and-the-boat>.
11. Here a grey area in the wording of the 1951 Refugee Convention, about how the circumstances that lead to geographical unevenness can be alleviated, accompanies an ongoing lack of clarity on the legal parameters of search and rescue. This makes it difficult to ascertain responsibility under law, to call any one state to account for not fulfilling their humanitarian obligations as these shift along the maritime borders that delineate national from international waters (Heller and Pezzani 2015; Den Hertog 2012).
12. One example is *Qisetna: Talking Syria*, <http://talkingsyria.com/>; another is the Euro-Mediterranean Resources Network, <http://euromernet.org/>. The UN Migration Agency, the International Organization for Migration (IOM) and their awareness-raising campaigns on social media outlets like Twitter, @UNmigration, for another modality. See Topak (2017) and other contributions to this Special Issue.
13. A reconstruction of the death of Jimmy Mubenga, and the role of G4S, is available on the *Deathscapes* website; *Jimmy Mubenga and the Plane*, <https://www.deathscapes.org/case-studies/jimmy-mubenga-case-study/>.
14. The literature on the phenomenological dimensions to the embedding of digital technologies and computer networking in everyday life, business and politics is longstanding and multidisciplinary. I discuss these debates in Franklin (2013).
15. Thanks to Raed Yacoub for bringing this point to my attention.

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