

“The Preparation of Living Corpses”

Immigration Detention and the Production of the Non-person

David Herd

Introduction

The premise of this chapter is twofold. First, it takes the view that the period through which we are living can be defined by the existence or, rather, the production of the non-person. Non-personhood, as will be explained, amounts to a legal category, or at least, a category that describes a person’s relation to the law. To understand non-personhood, the chapter contends, it is necessary to understand the spaces in which it is produced—the spaces in which non-persons are compelled to operate. Detention, and especially the alarmingly increased use of extrajudicial and extraterritorial indefinite detention, is key to understanding such spaces, critical as it is to the way non-personhood is made.

The fact that we are living through a period in which, as a matter of legal and political routine, people find themselves rendered non-persons through the process of detention indicates that something in our understanding, or our language, has been lost. We have lost sight of what it means to the individuals concerned, but also to the societies in which we operate, to permit the construction of spaces in which non-personhood is conventionally at stake. From which it follows; the chapter’s second working supposition contends that we need to recover the history of such spaces. In part, this is

because we need to understand the legal and political decision-making that has historically permitted the production of non-persons. Crucially however, we need to capture the arguments by which such decision-making has been challenged. What we currently lack, or have failed to reconstruct, is a language by which to gauge the meaning of contemporary modes of expulsion. The larger project of which this chapter is a fragment is an attempt to help address that deficit.¹

Starting with an account of the function of detention in the United Kingdom's "hostile environment" for people seeking asylum and comparing that use of detention to other practices in the Anglophone world, the chapter proceeds to address two historical junctures. The first is the moment, at the turn of the twentieth century, when emergent liberal democracies granted themselves the power to detain under immigration law. The second is the period from 1948 to 1958: a decade that can be said to have started with the promulgation of the *Universal Declaration of Human Rights* and to have ended with the publication of Hannah Arendt's *The Human Condition*, and through which one sees the emergence of geopolitical dynamics that continue to inform the politics of non-personhood in the present period. The basic processes of arbitrary detention, historical inquiry confirms, remain largely constant. What we must recover, as a matter of urgency, are discursive resources that can enable us to counter such detention and its devastating human and political costs.

Indefinite Detention and the Hostile Environment

In 2012 the British home secretary, and now former British prime minister, Theresa May announced her intention with forthcoming legislation (the immigration bills of 2014 and 2016) to produce "a really hostile environment for illegal migration." In itself this did not signify an exception. There are, of course, many national settings in which human movement is treated with hostility, just as the UK itself, under the previous New Labor administration, had increasingly demonstrated scant regard for migrant rights. What distinguished Theresa May's announcement was the deliberateness with which she both named and set out to shape an antimigration regime. I have written elsewhere about the scale and intensity of that regime, of the multiple ways in which it assaults personhood, and a full account of its procedures and effects is beyond the scope of this chapter.² It is crucial to register, however, that behind the aggressively delineated everyday spaces of the hostile environment, giving meaning and force to their negative architectonics, is the institutional fact and spatial reality of indefinite detention.

Such detention is, in theory, an administrative provision, reserved for people whose removal or deportation (either to a "first safe country" or

to their “country of origin”) is imminent, or at least pending. In practice, it is a deeply arbitrary and frequently protracted experience. Since 2007, one trigger for such detention has been sentencing.³ In the event that a non-citizen commits a crime—whether they are an asylum seeker, a failed asylum seeker, or a person with limited leave to remain—and where the crime attracts a sentence of twelve months or more, then they automatically become liable for deportation and are therefore detained the moment their sentence ends. There are many ways one might contextualize this practice, by observing, for instance, that the precarity of the asylum process tends to criminalize the individual, with typical offences being illegal working or the use of false papers. Either way, for the non-citizen caught in this context, the sentence served for an offence is not the end of the matter but a trigger for further, and this time indefinite, incarceration.

Equally likely, however, as Teresa Hayter observed in *Open Borders: The Case against Immigration Controls*, is that “people may be picked up in the street, on the underground or at work, or their houses may be raided in the early hours” (Hayter 2000: xvii). Such methods of detention have been documented by the Refugee Tales project, with numerous accounts confirming both the systemic nature of the practice, in that the patterns are clearly discernible, and also its arbitrariness, in that the individual is neither warned nor charged.⁴ Frequently, at the point of detention, the detained person will only be allowed to take with them the clothes they are wearing and not, for instance, any medication they might be using or any evidence that might help secure their release. More fundamentally, given that immigration detention is indefinite, they will not know when they will be released.

Periods of detention can be short, a matter of days or perhaps weeks, but equally a person can be detained for months and years. The longest period of indefinite immigration detention the Refugee Tales project is aware of is nine years, in the case of a Somali man “found” by Her Majesty’s Chief Inspector of Prisons, Nick Hardwick, in Lincoln Prison, having been abandoned to the paralegal processes of the asylum system.⁵ Of all of those detained, in a statistic that has remained stubbornly static over several years, 50 percent are released back into “the community.” What “the community” refers to, in this context, is a fundamentally negative spatial reality in which people are subjected to profound and protracted prohibition: unable to work, unable to circulate freely, permanently vulnerable to detention and re-detention. Even so, and the euphemism notwithstanding, the fact of their release plainly begs the question why such people were detained in the first place.

That detention constitutes a defining feature of the period through which we are living is, however, best indicated by the scale on which the practice is increasingly used. In 1973, 95 people were indefinitely detained under

immigration rules in the UK. By 1988, that number stood at 2,166. In June 2019, according to Home Office statistics, over 24,052 people were detained across a detention estate that includes 10 immigration removal centers and has recourse to various prisons. Shocking as this number is, it nonetheless represents a decrease since the historic high of 2015, when 32,053 people were indefinitely detained in the UK.⁶ That the number has begun to fall is unquestionably due to political pressure, and in particular due to the extra parliamentary campaigning of a range of antidetention groups. At the same time, since detention is arbitrary and re-detention is common, tens of thousands of people in the UK are currently, which is to say at any one moment, vulnerable to detention and re-detention.

Such general growth in the detention population is mirrored elsewhere in the Anglophone world. In the United States, for example, as the Global Detention Project reports, "the number of people placed in detention annually increased from some 85,000 people in 1995 to a record 477,523 during fiscal year 2012" (Global Detention Project, n.d.). As in the UK, the US figure has fallen from that historic high, standing at 323,591 in 2017. One explanation for that decrease, as the Global Detention Project reports US officials as claiming, is the reduction in "unauthorized arrivals," a measure in itself of an increasingly aggressive border regime.⁷ A comparable graph can be drawn in the case of Australia, which, as has been well reported, externalizes the process by the practice of offshoring detention and where (unlike in the United States and United Kingdom) detention is mandatory for all non-citizens without a valid visa. It is partly, then, in the sheer scale of contemporary detention estates that the periodizing claim arises.

What is at issue also, however, is the definitive quality of the practice, the fact that, as I have indicated, indefinite detention produces, and stands behind the further production, of non-persons. Still the most concerted theoretical expression of such non-personhood is given by Giorgio Agamben in *State of Exception*. As Agamben observes, "The state of exception is not a special kind of law (like the law of war): rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept." It is a juridical zone, in other words, "in which application is suspended, but the law (*la legge*), as such, remains in force" (Agamben 2005: 4). The purpose of this chapter (and of the larger project of which it is a part) is to understand how such non-personhood is a function equally of how the individual perceives their spatial reality, how non-personhood is produced through the spaces in which non-persons are compelled to operate, and how, therefore, any attempt to address contemporary non-personhood must reckon with questions of space. Thus, for the person detained the space of detention (the Immigration Removal Centre in the UK) is determined by the fact that they do not know when they will be released. A corollary of such a loss of

basic recognition is that the institution itself comes invariably to dehumanize them, with the effect that violence against the detainee is a matter of common report. When, for instance, the BBC program *Panorama* reported on the Brook House Immigration Removal Centre in 2018 using undercover cameras, such violence was abundantly clear, the defining moment being when, having found a detainee after his failed self-strangulation, a detention center officer tried to complete the attempt.⁸ The space of the removal center, in other words, simultaneously defines and produces non-personhood.

So too, however, do institutionally adjacent spaces, notably the tribunals in which the individuals' appeals are heard. At the bail hearing, for instance, whereby an individual might be released from detention, the appellant is rarely present but is instead relayed by video link from the detention center. This has two effects: firstly, it makes the incarcerated individual seem, in their appearance, like a criminal; secondly, it displaces the quality of human presence that might otherwise bear on the proceedings of the court. More strikingly, the bail hearing itself is not a court of record. While the judge will issue a determination, in which some account of the proceedings is given, there is no full transcript, and therefore the words of the appellant are not on record. This is true also of the deportation appeal hearing, on which occasion the individual's future security is at stake. In such settings, in other words, the exclusion is linguistic; there is no account of the situation that registers the appellant's contribution to the proceedings. This should put us on notice, that the spatial production of non-personhood is intrinsically linguistic. A person's movement can be compromised or prevented because their access to the language is prevented, because their externality to the language makes it possible to dismiss them from space.

That detention informs and stands behind the negative spaces that constitute the non-person's environment flows directly from the fact that at any point the asylum seeker can be re-detained. At any point, in other words, and in any setting, the individual might be returned to that defining space of nonrecognition, where their vulnerability to the processes of the state is immediate and absolute. Hannah Arendt provides an account of such vulnerability when she observes that her concern is with "the arbitrariness by which victims are chosen, and for this it is decisive that they are objectively innocent, that they are chosen regardless of what they may or may not have done" (Arendt 1979: 6). At times, Arendt's value as a writer is to be found in the quality of her descriptive analysis rather than in her categorical structures, and what she is aiming to define, as she articulates the effect of arbitrariness, is terror. Which is not to argue, of course, that the UK is in any sense analogous to the regimes Arendt describes in *Origins of Totalitarianism*. It is to argue, however, that some people living here, in the present period, experience a kind and degree of anxiety that answers to Arendt's term.

The Entry Fiction

The history of the spaces in which non-personhood has been produced is not easy to tell, but one place we might start is the border. As we recognize it all too clearly today, with its brutally enforced regime of categorization, the border is a relatively recent invention. There has always been a border, as Thomas Nail eloquently lays out, but as a setting for the suspension of an individual’s personhood, the border is a late-nineteenth-century or early twentieth-century configuration.⁹ As Daniel Wilsher notes, prior to the latter part of the nineteenth century, migration, which chiefly meant “labor migration,” was embraced by the logic of free trade. There were many kinds of check, as Nail’s history of passport documentation records, but the border, broadly speaking, retained a permeability until that point. This is to present a historical reality, or rather, of course, multiple historical realities, in highly abstract terms. What justifies the level of abstraction is the fact that, with the turn of the twentieth century, the reality of the border was fundamentally altered. What resulted at that historical moment was a conceptual shift.

Where that shift occurred was in a series of acts of legislation, notably in the United States and the United Kingdom. In the American context the pivotal document was the Immigration Act of 1891, legislation that introduced a provision known as the “entry fiction.” According to the terms of this provision, an individual at the point of entry could be removed to shore for examination, subject as migrants were to rigorous health checks, but would not be “considered as landing during the period of examination” (Wilsher 2012: 13). To reinforce this provision, the 1891 Act was the first legislation in the American juridical tradition to mention “detention,” with the first “large-scale exclusion and detention” being directed at Chinese immigrants on the West Coast and including, as Wilsher points out, “many longstanding and lawful Chinese residents” (Wilsher 2012: 20). The first comparable UK legislation was the 1905 Immigration Act, which, following the recommendations of the 1903 Royal Commission on Immigration, enacted the power to inspect and exclude immigrants, authorizing also that, pending a hearing, “the immigrant may have been placed under suitable charge” (Wilsher 2012: 37). As Wilsher records it, this was “the first official mention of a system of administrative detention in UK law” (Wilsher 2012: 37).

In neither context were the numbers of detentions high, and, given the relatively low initial impact of the change, a historian might choose to record these acts of legislation as simply formalizing administrative convenience. It is there, though, in the difference between administrative convenience and fundamental juridical change, that a principal question of the modern border opens up. As contemporary commentators recognized, such legislative authorization of detention constituted a breach of principle. As the constitutional theorist A. V. Dicey observed, it represented an “indifference to that respect for the personal freedom, even of the alien, which may be called

the natural individualism of the common law” (Wilsher 2012: 37). Winston Churchill was more direct, objecting that it made detention “a matter of administration and not justice” (Wilsher 2012: 39). For N. W. Sibley and A. Elias, on the other hand, writing in their 1906 study *The Aliens Act and the Right of Asylum*, the introduction of immigration detention clearly infringed “the principles of the common law and Magna Carta that a person could be liable to be sent to prison without committing a crime” (Wilsher 2012: 40). As Wilsher argues, what such infringements of the Magna Carta tradition flowed from was an elision, in the UK and US juridical contexts, of the power of expulsion and the power of detention. Detention, in other words, was allowed to fall under immigration policy, whereas in other jurisdictions, notably France, detention has historically been understood as a matter of policing. What is at issue, then, historically, is not a matter of administrative convenience but a conceptual consideration.

To detain in the manner described was to breach both Magna Carta and habeas corpus, where what both documents articulated was the imperative that incarceration could only legitimately follow what the Fifth Amendment of the American Constitution would term “due process.” As Chapter 39 of Magna Carta had it:

No free man is to be arrested, or imprisoned, or disseized, or outlawed, or exiled, or in any way destroyed, nor will we go against him, nor will we send against him, save by the lawful judgement of his peers or by the law of the land.

The purpose of this provision was to defend the individual against tyranny, or as it would imply in subsequent historical incarnations, against the unfettered authority of the state. To authorize detention in the name of immigration legislation was not, therefore, simply to adjust policy to changing reality; it was to alter the conception of the border such that an individual might no longer be deemed entitled to fundamental legal recognition. The implications of this were grave, as critics realized. The most immediate consequence, however, was the construction of an impossible kind of space. Thus, the person held in immigration detention was “deemed not to have been landed, even if conditionally disembarked” (Wilsher 2012: 42). Such are the contradictions by which the law enforces the juridical non-person’s experience of space.

Articulating the Non-place in the *Universal Declaration of Human Rights*

Insufficiently documented and difficult to record as it is, for certain reasons that will be immediately apparent and for others that will become clear, the history of the juridical non-place gained focus in the period following

World War II, a period during which both the non-spaces of detention and the non-persons those spaces were intended to produce became subject to extensive, cross-disciplinary commentary. One source of such commentary was the period's defining document, the *Universal Declaration of Human Rights*. Intended to articulate principles of juridical consistency in the face of the segregations of fascism, the declaration also outlined the non-place whose existence it was formulated to prevent. Insofar, that is, as the authors of the declaration collectively imagined a new kind of polity, so several of its articles combine to bring the dynamics of that non-place into view. Consider:

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6. Everyone has the right to recognition everywhere as a person before the law.

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

Article 12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 14. (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

Article 15. (1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

It could be argued that all the articles of the *Universal Declaration* contribute, in negative at least, to an outline of the juridical non-place. By describing rights, and therefore a preferred polity, the declaration's articles by definition articulate those elements the non-place lacks. Of the articles identified here, as speaking directly to the dynamics of the non-place itself, Article 6 is included because it specifies a defining absence: the absence of "recognition before the law." In all the other examples, what is specified is a concrete reality of the non-place, a defining element of its topography and fabric: torture, cruel, inhuman, or degrading treatment; arbitrary arrest, detention, or exile; arbitrary interference with privacy; persecution; arbitrary deprivation of nationality. What this list constitutes is the *Universal Declaration's* internal description of the non-place, a working sketch against which future political practice should be formed. To properly understand that description, however, and the values that underpin it, one needs to perform a kind of textual archeology, the aim being to draw out the discussions that informed key articles.

The discussions that informed the formulation of two articles, Articles 6 and 9, indicate the nature of the debates. What Article 6 means to establish is

what John P. Humphrey, the *Declaration's* principal early drafter, termed “legal personality,” the point being to assert that no person might at any point, in any context, fall outside of legal consideration. The force of this point was not immediately felt, with the United Kingdom, the United States, and India each at some point proposing to vote against the article on the grounds that the concept underpinning it was either too legally technical or too vague (Morsink 1999: 44). It was in the Third Committee that the underlying issue became apparent, when the Canadian delegate H. H. Carter drew on recent historical experience to clarify the issue. It was, he said, “important to keep in mind ... the possibility that certain persons might be deprived of their juridical personality by an arbitrary act of their government. Nazi Germany offered a recent example” (Morsink 1999: xx). To deprive a person or group of their juridical personality was, in effect, the necessary preliminary to the other mistreatments that shaped the non-place. Only after that deprivation had been affected could the state justify such actions to itself.

The discussions informing Article 9, framed to prevent “arbitrary arrest, detention or exile,” were less skeptical, since it was clearly understood that some such provision was necessary. The question, in this case, was how the right should be formulated. Early versions of the statement referred to the existing legal context as a guarantee against the kind of deprivation entailed. The limitation of any such formulation was pointed out by Dr. Franz Bienenfeld, representative of the World Jewish Congress. As he observed, “Under the Nazi regime thousands of people had been deprived of their liberty under laws which were perfectly valid” (Morsink 1999: 50). The question was, therefore, if, as recent history demonstrated, reference to the law did not, in and of itself, guarantee protection against the kind of deprivation of liberty envisaged, how was such a protection to be formulated? The term taken to catch that meaning was “arbitrary,” signaling that form of treatment that might, in extreme circumstances, be permissible within a given legal framework but which nonetheless fundamentally offended against the principles enshrined in a declaration of rights. As the Lebanese delegate, Charles Malik, observed, the word “arbitrary” carried a great deal of weight in the article, as elsewhere in the declaration, becoming, in fact, the document’s key qualifier. “Arbitrary” conduct, as in Articles 12 and 15, was taken to constitute the opposite of a practice that gave due recognition to rights.

How we are to understand the term “arbitrary” as it appears in the context of the declaration is thus a matter of some importance, it being the term against which a contemporary articulation of rights was poised. What it specified in the moment of the declaration’s composition was a defining dynamic of fascism, whereby people rendered beyond juridical recognition were subject to treatment for which no account was deemed due. As a descriptor in a high-level legal-political document, the term “arbitrary” is at a considerable remove from historical reality, from the appalling brutality it

intends to reference but does not catch. Its value, at that remove, is partly that it places us on the alert, that at the point at which we discern the arbitrary in politics then at some level of administration a practice traceable to authoritarianism has started to emerge.

Picturing the Non-place in the Postwar World

The value of tracing the implications of detention and its production of non-personhood through intersecting postwar discourses is that we come to an understanding of what, politically and ethically, is at stake. And crucially the setting in which the structural circumstances of the non-place reemerged in the immediate aftermath of the war was the environment to which the obligations of human rights should most clearly have been extended. As Hannah Arendt observed of what she termed the "internment camp":

Human rights ... are enjoyed only by citizens of the most prosperous and civilized countries. ... The situation of the rightless themselves ... has deteriorated just as stubbornly, until the internment camp—prior to the Second World War the exception rather than the rule for the stateless—has become the routine solution for the problem of the "displaced persons." (Arendt 1979: 279)

Writing in 1957, with the "number of stateless people ... larger than ever" (with "one million 'recognized' stateless" and more than "ten million so-called 'de facto' stateless"), Arendt observed the paradox that "the moment human beings ... had to fall back upon their minimum rights, no authority was left to protect them and no institution willing to guarantee them" (Arendt 1979: 292). Abandoned to "the barbed-wire labyrinth into which events had driven them," what the postwar stateless demonstrated, in the non-places they were compelled to occupy, was that "no one seems able to define with any assurance what the general human rights, as distinguished from the rights of the citizen, really are" (Arendt 1979: 293).

Arendt's account of the pathology of the postwar internment environment remains critical to our understanding of the human reality of the non-place. Arendt, this is to say, understood as well as anybody what non-personhood entailed, and the degree to which the non-places that produced it were structural to the contemporary environment. Where she erred, I will come to suggest, is in the way she assessed the implications of human rights. Rather, arguably, than a lack of clarity on the question of general human rights, what the procedures governing the non-place demonstrate is a certainty about the principles and entitlements that are being breached. Where one finds this, immediately after the war, is in the way the question of rights was handled in a European context, or more precisely, the way Europe allowed itself to be defined by the stance it adopted on the question of the extension

of rights. One way to observe this, in the postwar environment, is in relation to two texts relating to the question of qualification, the first in the context of the displacement camp, the second bearing on the European colony.

The context in which the logic of the non-place most quickly became visible in the postwar environment was, as Arendt observed, the displaced persons camp. As Gerard Daniel Cohen has documented, the American term “displaced person” was applicable to great numbers of people across the globe in the immediate aftermath of the war: between twenty-four and forty million people in China could be said to be displaced; up to twelve million people in Japan (Cohen 2011: 14). What the term principally came to refer to, however, under the auspices of the United Nations, was those displaced in Europe, with approximately eight million so-called DPs occupying Germany at the end of the war. Of those, some six to seven million people were quickly repatriated, often, as Cohen reports, with tragic consequences. Where policy came to settle and develop was in relation to those still displaced at the beginning of 1946, the so-called “last million,” whose future was understood to predict the postwar international environment. As a *New York Times* editorial of 2 February 1946 put it, “The fate and status of hundreds of thousands of human beings” was “clearly an international issue,” a sense of obligation that triggered far-reaching pronouncements—witness Emanuel Mounier’s declaration that France was “a country where an exiled, desolate, and desperate man will always find a hand stretched out to him with no questions asked” (Cohen 2011: 14, 16). The hand stretched out was the rhetorical equivalent of the implied scope and extent of the *Universal Declaration*. In practice, the interrogation, and all the forms of suspension that followed, quickly became the norm of the displaced person’s environment.

Where the interrogation occurred was at the point of definition. The key task in the context of the DP camp, as an International Refugee Organization (IRO) handbook outlined, was to determine “who is a genuine, bona fide and deserving refugee” (Cohen 2011: 35). Inscribing administrative practice that would inform much subsequent policy toward human movement, the *Manual for Eligibility Officers* issued detailed advice to IRO staff on how to identify the nongenuine claimant. First published in 1948 and running to 160 pages, the manual constituted the formalization of a policy the IRO inherited from its predecessor organization the United Nations Relief and Rehabilitation Organization. As Cohen documents, under the auspices of the UNRRA, “Allied screenings” of displaced persons “borrowed from denazification proceedings” conducted under the auspices of the Nuremberg Trials. Thus:

Just as German citizens filled out much-despised questionnaires designed by Allied occupiers to uncover active supporters of Nazism, their DP neighbors

were handed "eligibility questionnaires" issued by UNRRA to verify nationalities, dates of displacement, and wartime personal histories. (Cohen 2011: 37)

The rationale for the guidelines set out in the IRO manual was that they would shield staff from "improvisation and arbitrariness," ensuring, so it was argued, "uniform jurisprudence" (Cohen 2011: 43).

This did not obscure the fact that the purpose of such "uniform jurisprudence" was to determine the question of jurisdiction itself, to establish who, having been genuinely displaced, was permitted then to be relocated—genuine displacement during the war entailing the obligation to ensure that the person in question was granted a new home. It was here, in the face of this obligation, that the questions were put. To answer satisfactorily was to be granted juridical standing, recognition somewhere before the law. Not to answer satisfactorily was to have such recognition thrown into doubt, to be held in the suspense of what Arendt termed "internment," in the quasi-judicial process determining jurisdiction. What this meant in reality was prolonged deprivation, not least because residency in the camps invariably entailed the incapacity to work. Reporting on the situation of the DP camps in 1953, the Council of Europe confirmed Arendt's view:

The conscience of the peoples of Europe should revolt at the fact that among them are living millions of persons bearing the label of "surplus." ... What of the mental outlook of these beings cast out by society? What of the young people, whose earliest impressions are of the wretchedness of refugee camps or of permanent unemployment? (Cohen 2011: 123)

The fact that such institutionally sponsored suspension of personhood—"wretchedness" as the Council of Europe termed it—occurred at the point at which the obligations entailed by rights ought to have properly been invoked is what prompted Arendt to diagnose an indefinability at the heart of the discourse. In fact, what institutional practice demonstrated was something like the reverse, the process of interrogation regarding eligibility disclosing a sure understanding of the entitlements and commitments the recognition of rights entailed. The state's task, or the task of their international representatives, was to limit such eligibility as far as they could, hence the proliferation of questions and guidelines concerning the individual's claim. As the British-based Refugee Defence Committee report (titled *Is It Nothing to You?*) put it 1949, "It does not need a complicated system of legal jurisdiction such as that set up by IRO to discover the fact that a person is a Refugee" (Cohen 2011: 41).

What the processes of sifting and interrogation that shaped the postwar environment of the displaced person can be taken to demonstrate is not the weakness and incoherence but instead the substance of the concept of general rights. Such was the force of the implied claim that a whole new juris-

prudence had to be created, the express purpose of which was to establish that a recognizable entitlement did not apply. To observe the non-place at work, this is to suggest, is to register a setting generated by an identifiable act of institutional denial. Where this was writ largest in the postwar moment, as Marie-Benedicte Dembour has brilliantly documented, was in the institution of Europe itself, which is to say in the formulation of the European Convention of Human Rights.

Drafted in the two years following the *Universal Declaration* and adopted in 1950, the ECHR, as Dembour describes, was intended

to defend citizens—not any human being—against arbitrariness by the state. The hope was that the revolutionary mechanism put in place, with complaints by mere individuals allowed for the first time in history to be adjudicated by an international court, would make it possible to avoid another European descent into anything resembling Nazism or Fascism ... (Dembour 2015: 1)

Where the convention differed from the *Universal Declaration* was in its intended usability, the purpose of the document being to effect protection rather than simply outline what such protection should consist of. From which it followed that the question of scope and of extent was more sharply drawn, focusing in particular on whether the articulation of rights inscribed by the document carried as far as the colonial setting.

Dembour describes in detail the arguments that shaped the drafting process, noting that in its first iteration the understanding was that a convention that did not apply in the colonies was “politically unfeasible” (Cohen 2011: 71). For the Belgians, who held to this basic view, the object with respect to the overseas territories was to secure an acknowledgment of what was termed “local needs and the standards of civilization of the native population” (Dembour 2015: 67–68). For the British, repeating arguments they had made during the drafting of the *Universal Declaration*, what was required was an acknowledgment of the “autonomy which its dependent territories constitutionally enjoyed,” and therefore the inapplicability, via British endorsement of the final document, of the extension of rights to its colonial regimes (Dembour 2015: 68). What resulted, despite arguments to the contrary that clearly spelled out the contradictions, was a clause (Article 63) that accommodated the colonial position. Thus:

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. [Provides for a one-month delay before this declaration comes into force.]

3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organizations or groups of individuals as provided by Article 56 (now 34) of the Convention.

Clause 1 and Clause 4 entitle the signatory power, should it so wish, to extend the convention to territories for which it is "responsible," not declaring explicitly, because the document doesn't like to, that such an extension need not apply. Clause 3, on the other hand, allows for "due regard ... to local requirements," a phrase that cuts irremediably across the spatial consistency to which the *Universal Declaration* aspired. What Article 63 enters is a qualification, just as the IRO handbook sought a qualification, generating a circumstance, a non-place, in which the protections entailed by a general concept of rights do not apply. The document, in other words, and the institution for which it stands, is compelled to enter into a contradiction, producing a non-place, a space in which the principles in question are suspended, at precisely the juncture at which the extension of rights ought properly to obtain.

What needs to be pictured, of course, is what in reality the qualifications of Article 63 referred to, what really were the local requirements that a curtailment of the convention's geographical extent was intended to meet. To which end one might consider a footnote in *The Wretched of the Earth*, in which the non-place delineated by the qualifying article is shown to be brutally maintained. As Fanon (1965) puts it, quoting his own article in *Résistance Algérienne* 4, dated 28 March 1957:

It was then agreed (in the Assembly) that savage and iniquitous repression verging on genocide ought at all costs to be opposed by the authorities: but Lacoste replies, "Let us systematize the repression and organize the Algerian man-hunt." And, symbolically, he entrusts the military with civil powers, and gives military powers to civilians. The ring is closed. In the middle, the Algerian, disarmed, famished, tracked down, jostled, struck, lynched, will soon be slaughtered as a suspect. Today, in Algeria, there is not a single Frenchman who is not authorized and even invited to use his weapons. There is not a single Frenchman, in Algeria, one month after the appeal for calm by the UNO, who is not permitted, and obliged to search out, investigate and pursue suspects.

One month after the vote on the final motion of the General Assembly of the United Nations, there is not a European in Algeria who is not party to the most frightful work of extermination of modern times. A democratic solution?

Right, Lacoste concedes; let's begin by exterminating the Algerians, and to do that, let's arm the civilians and give them *carte blanche*. The Paris Press, on the whole, has welcomed the creation of these armed groups with reserve. Fascist militias, they've been called. Yes; but on the individual level, on the plane of human rights, what is fascism if not colonialism when rooted in a traditionally colonialist country? (Fanon 1965: 71)

Fanon's footnote draws *The Wretched of the Earth* into deep connection with the discourse of the non-place outlined in this chapter. In the image of the ring closed around the Algerian resistance, in flagrant breach of the United Nations' assertion of minimal human rights, Fanon identifies an inevitable concentration of the colonial topography the basic contours of which he delineates in the introduction to his text. "The colonial world," as he puts it, outlining the basis of all subsequent actions, "is a world cut in two. The dividing line, the frontiers are shown by barracks and police stations" (Fanon 1965: 29). What the line divides are different juridical zones, the settler zone where the law applies and the native zone where it is arbitrarily enforced. Thus:

All that the native has seen in his country is that they can freely arrest him, beat him, starve him: and no professor of ethics, no priest has ever come to be beaten in his place. (Fanon 1965: 34)

Recovering a Language for the Meaning of Non-personhood

The purpose of this chapter has been, in part, to show how the juridical non-place effected by detention has been historically constructed. Crucially also, however, its aim is to outline how such arbitrary situations have been understood to affect persons themselves. The importance of the former is that it allows us to discern the outline of the non-place as it comes into view, and therefore to recognize that structures underpinning forms of fascism are being revisited. The importance of the latter, of assessing how the realities of the non-place have affected persons, is that in the present moment we find ourselves devoid of a language for what non-personhood entails.

There are many texts in which one might find versions of such a language, but it is Arendt who gives the overview, who made it her intention to articulate what might be called the phenomenology of the non-person. Her work in this area dates principally to the mid-1950s, to the additional material included in the revised edition of *Origins of Totalitarianism* and to *Human Condition*. Writing about the origins, the effects, but also the legacy (in internment and statelessness) of totalitarianism, Arendt identifies as her object of study "groups of people to whom suddenly the rules of the world

around them had ceased to apply" (Arendt 1979: 267). Her intention in considering such status is to diagnose what in practice it means, how it feels, in reality, for humans to be held outside.

In arriving at such a diagnosis, Arendt identifies a series of effects and symptoms that bear directly on our contemporary situation. Significant among these is criminalization, Arendt's straightforward observation being that to hold a person outside the law is, in effect, to compel them toward illegality, if not, simply, to render them illegal. Thus: "The stateless person, without right to residence and without the right to work, had of course consistently to transgress the law" (Arendt 1979: 269). For Arendt, there was to be no ambiguity: to render a person rightless and therefore outside the law was to cause them to transgress it. This practical reality had two very significant aspects. The first, perversely, was that criminality afforded a degree of protection. Thus:

The same man who was in jail yesterday because of his mere presence in the world, who had no rights whatever and lived under threat of deportation, or who was dispatched without sentence and without trial to some kind of internment because he had tried to work and make a living, may become almost a full-fledged citizen because of a little theft. (Arendt 1979: 286)

Such an improvement of circumstance should not be overstated, not least since the commitment of a crime, for all that it invokes certain due processes, frequently results, in the present moment at least, in the penalty of deportation. The juridical personhood afforded by criminality, in other words, is short-lived.

The second consequence of compelling people to live outside the rules that apply to the world around them is the power it accords those who enforce the law. Again, Arendt is unambiguous: "This was the first time the police in Western Europe had received authority to act on its own, to rule directly over people" (Arendt 1979: 287). From which it followed that "the greater the ratio of statelessness ... the greater the danger of a gradual transformation into a police state" (Arendt 1979: 287–88). Extending the argument to the European colony, Fanon makes the same point:

In the colonies it is the policeman and the soldier who are the official, instituted go-betweens, the spokesmen of the settler and his rule of oppression. ... In the capitalist countries a multitude of moral teachers, counselors and "bewilders" separate the exploited from those in power. In the colonial countries, on the contrary, the policeman and the soldier, by their immediate presence and their frequent and direct action maintain contact with the native and advise him by means of rifle-buts and napalm not to budge. The intermediary does not lighten the oppression, nor seek to hide the domination ... he is the bringer of violence into the home and into the mind of the native. (Fanon 1965: 29)

It can be argued of Arendt's discussion of non-personhood in *Origins of Totalitarianism* that at times she shifts between categories, conflating circumstances of different degrees and intensity. Similarly, it could be argued here that to shift from Arendt to Fanon, and therefore from statelessness to colonization, is to equate situations whose differences are critical. Arendt's point, however, like mine, is to draw out the structural qualities of juridical non-personhood. What one sees here, then, in the combined commentaries, is a form of mutual re-enforcement. To set a person outside the law, to designate them as illegal, is both to render them permanently vulnerable to the intrusions of the police and, at the same time, to greatly enhance police power. What that leads to is increasing levels of violence against the individual—witness such treatment as *Panorama* reported of detainees in the detention system in the United Kingdom. Such are the consequences, as Arendt anticipated, of a “greater ... extension of rule by police decree” (Arendt 1979: 290).

It is not sufficient, however, as both Arendt and Fanon observe, to describe the structural effects of juridical non-personhood. What has to be understood also is the pathology of such a circumstance, the way it feels to the individual whose status is in suspense. What has to be grasped accordingly is that the segregated space takes its character from the fact that legality is not consequential on action but on status. Thus, as opposed to a framework “where one is judged by one's actions and opinions,” the juridical non-place entails

the loss of the relevance of speech (and man, since Aristotle, has been defined as a being commanding the power of speech and thought) and the loss of all human relationship (and man, again since Aristotle has been thought of as the “political animal,” that is one who by definition lives in a community), the loss, in other words, of some of the most essential characteristics of human life. (Arendt 1979: 297)

That such essential characteristics are lost is due to the fact that the individual's status is unrelated to their actions. Nothing they have done or said, nor anything they can do or say, determines their situation.

It is a situation that has its reverse in what Arendt calls “the space of appearance”—her account of a polis, in *Human Condition*, grounded in her determination to outline a situation in which non-personhood would not apply. There again, as she describes what is at stake, what she points to is the absence of consequence. Thus: “A life without speech and without action ... is literally dead to the world; it has ceased to be a human life because it is no longer lived among men” (Arendt 1958: 176). What a life lived among men amounts to, as Arendt details at length, is the occupation of what she terms the “space of appearance,” to be deprived of which, as she observes, is to be “deprived of reality” (Arendt 1958: 199).

The point here, to repeat, is that we find in Arendt a language for the meaning of non-personhood that either we have forgotten or we are choosing not to recollect. Such deprivations are entirely characteristic of the person who occupies the contemporary non-place, the person who is either detained or detainable, the person whose capacity to act is profoundly inhibited by restrictions on movement and on work, and in which the capacity to speak meaningfully is fundamentally impeded by official processes in which the default setting is one of disbelief. The value of Arendt, then, is partly that she gives us a way of understanding what such a fundamental assault on personhood entails for the individual, “a life without speech and without action” being “literally dead to the world.”

We have to hear this for what it is, for what it means in the present of an individual’s existence, for the degree of abjection that lived juridical non-personhood entails. As Arendt wants to observe also, however, we must understand what such civic death can become preparatory to, or at least has historically prepared for, by way of political action. Thus, as she goes on to observe in her consideration of what she terms “Total Domination”:

In comparison with the insane end-result–concentration camp society—the process by which men are prepared for this end, and the methods by which individuals are adapted to these conditions, are transparent and logical. The insane mass manufacture of corpses is preceded by the historically and politically intelligible preparation of living corpses. (Arendt 1979: 447)

Or as she puts it in terms of the law, and in terms the law can understand, “The first essential step on the road to total domination is to kill the juridical person in man” (Arendt 1979: 447).

Twenty-First-Century Detention

To view the present political moment through the optic of detention is to find ourselves precariously poised. Where we are, in fact, is where Agamben warned us we were in 2005 when he investigated what he termed the “state of exception.” “From this perspective,” as he wrote, “the state of exception appears as a threshold of indeterminacy between democracy and absolutism” (Agamben 2005: 3). The principal form of that threshold, as he explained, was “indefinite detention,” a practice conspicuously reinstated in the US context in the form of the Patriot Act that followed the 11 September 2001 attack on the World Trade Center. As Agamben put it:

The immediately biopolitical significance of the state of exception as the original structure in which law encompasses living beings by means of its own suspension emerges clearly in the “military order” issued by the president

of the United States on November 13, 2001, which authorized the “indefinite detention” and trial by “military commissions” (not to be confused with the military tribunals provided for by the law of war) of noncitizens suspected of involvement in terrorist activities. (Agamben 2005: 3)

There had already been a Patriot Act in response to 9/11, “issued by the U.S. Senate on October 26, 2001” (Agamben 2005: 3). What was new about President Bush’s order was that “it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being” (Agamben 2005: 3).

As this chapter has documented, and as Agamben understood when he wrote *State of Exception*, the US executive’s response to 9/11 did not inaugurate such a “legally unnamable and unclassifiable being.” The history of such a non-person can be traced to the turn of the twentieth century, and their full emergence as a figure in modern geopolitics can be located in the decade that followed World War II. From this point of view, 9/11 was not so much a turning point as an intensification of existing legal and political procedures. By invoking “indefinite detention,” the US administration re-instituted a procedure that has since become integral to the apparatus by which various governments have also responded to crises of forced displacement, some of which have followed the wars that the United States and Britain prosecuted under the pretext of the 9/11 attacks. The 2001 Patriot Act, in other words, did not initiate arbitrary detention but made it once again politically normal. From which, broadly speaking, it has followed, as Agamben warned it would, that we have slipped into an age of detention; an age in which detaining people arbitrarily and for indefinite periods has become acceptable as a response to various forms of geopolitical pressure, including to the requests for asylum of unprecedented numbers of refugees.

Moral and political outrage has been slow to catch up, but the fact that the campaign to end indefinite detention in the United Kingdom is now politically mature, that it has gained strength and profile over the past decade, is positive. This ongoing call for a change of law recently culminated in the formulation of an amendment to the proposed 2019 immigration bill. Through the hard work of numerous NGOs and pressure groups, that amendment secured the support of MPs across all parties, including sufficient government MPs that, had the amendment come to a vote, a change of law would very likely have resulted. In the event, the immigration bill was suspended, in part, no doubt, because of this cross-party support, and will now be redrafted and represented in the new parliament. A great deal has been achieved, and it is very possible that campaigning progress can be built on, but, with a new parliamentary arithmetic, the battle for a change of law starts again.

At the same time, as the campaign to end indefinite detention in the United Kingdom teeters on the brink, so detention practices in the United States intensify and harden. Following the caging of people seeking asylum at the US-Mexico border, and the separation across the detention estate of children and families, a new rule introduced by the Trump administration replaces the Flores settlement—which previously placed a limit on detention—thus allowing for children and adults to be indefinitely detained. What this regressive rule change reminds us, as all such changes should always remind us, is that it is through the practice of detention that the incipient authoritarian state defines its power. Whenever we discern an increase in the use of detention, in other words, we are observing an authoritarian logic at work, one that must be identified, called out, and opposed as such.

How to do this, how to oppose the use of arbitrary immigration detention, is both an urgent and, given the power dynamics at work, a most demanding political question. The argument here is that for such opposition to be effectively staged, it is necessary to recover and reconstruct existing discursive resources. To revisit such resources, in particular those developed in the immediate aftermath of World War II, is to achieve three interconnected objectives. In the first place, it is to recover a language that allows us to understand what is at stake in detention, the degree to which it damages both individuals and the polity at large. In the second place, it is to better understand what detention implies as practice, how it revives and replicates earlier forms of institutionalized racism, most notably, in the UK context, the practices of colonialism. Finally, what the recovery of existing resources clarifies is the force, in all situations of detention, of the language of human rights. This is both an obvious fact and one to which it is necessary to draw constant attention given the lengths to which the state and its apparatuses will go to prevent that fact coming to the fore. What one sees as one investigates the intersecting postwar discourses of detention and non-personhood is a constant effort to limit the extension of the framework of human rights. To which one could respond, as Arendt appeared to, by calling the validity of that framework into doubt. But Arendt was wrong on this, or at least she came to the wrong conclusion. The right conclusion, as Jacques Rancière has argued, is to observe in the state's challenge to the language of rights the enduring force of that language disclosed.

Where Rancière is in dispute with Arendt is on the question of how individuals or groups relate to human rights. Thus, whereas Arendt finds the *Universal Declaration* to be fundamentally flawed in its seeming implication that rights are inherent, or intrinsic, or otherwise automatically guaranteed, Rancière understands rights much more actively as that which must be fought for, claimed, or won. As he puts it in his decisive contribution to the discourse, "Who Is the Subject of the Rights of Man?":

The strength of these rights lies in the back-and-forth movement between the first inscription of the right and the dissensual stage on which it is put to test. ... This is ... why today the citizens of states ruled by religious law or by the mere arbitrariness of their governments, and even the clandestine immigrants in the zones of our countries or the populations in the camps of refugees, can invoke them. These rights are theirs when they can do something with them to construct a dissensus against the denial of rights they suffer. And there are always people among them who do it. It is only if you presuppose that the rights *belong* to definite or permanent subjects that you must state, as Arendt did, that the only real rights are the rights given to the citizens of a nation by their belonging to that nation, and guaranteed by the protection of their state. If you do this, of course, you must deny the reality of the struggles led outside of the frame of the national constitutional state and assume that the situation of the “merely” human person deprived of national rights is the implementation of the abstractedness of those rights. (Rancière 2004: 305–6)

Rancière construes rights as a site of permanent struggle in which the motivating claim is permanently underwritten by the universality in whose name it is made. They exist as that which whose denial is the basis of the claim they give rise to, the act of dissensus through which the struggle of greater universality is achieved. Fundamental to any such expression of rights is the statement given by Article 9 of the *Universal Declaration* that “no one shall be subjected to arbitrary arrest, detention or exile.” The urgent task of anybody seeking to oppose immigration detention and the escalation of such detention is to animate the right articulated in Article 9. It is to help forge the conditions in which those rendered detainable can resist such a status, conditions in which their rights are established through being won. To say so is not to suppose, for one moment, that any such progress is easily achieved. It is to contend that the nature of our polity tilts on the question of detention, that now, more than ever, we must understand that question as central to our political definition.

David Herd is a co-organizer of the project Refugee Tales and professor of modern literature at the University of Kent. His collections of poetry include *All Just* (Carcenet, 2012), *Outwith* (Bookthug, 2012), *Through* (Carcenet, 2016), and *Walk Song* (Equipage, 2018). He has given readings and lectures in many countries, and his poems, essays, and reviews have been widely published. As a critic, he is the author of *John Ashbery and American Poetry* (2000), *Enthusiast! Essays on Modern American Literature* (2007), and the editor of *Contemporary Olson* (2015). His writings on the politics of human movement have appeared in *Detention Unlocked*, *Los Angeles Review of Books*, *Parallax*, and the *TLS*, and he is currently completing a book titled *Making Space for the Human: Writing against Expulsion in the Postwar World*.

Notes

1. For a more comprehensive consideration of the questions raised by this chapter, see my forthcoming monograph *Making Space for the Human: Persons, Non-persons, Movement in the Postwar World*.
2. See, for instance, the “Afterwords” to *Refugee Tales*, *Refugee Tales II*, and *Refugee Tales III*, published by Comma Press in 2016, 2017, and 2019.
3. See UK Borders Act 2007, Section 32, retrieved 3 May 2018 from <https://www.legislation.gov.uk/ukpga/2007/30/section/32>.
4. Founded in 2014 by Gatwick Detainees Welfare Group, Refugee Tales is a civil society project that calls attention to the fact that the United Kingdom is the only country in Europe that detains people indefinitely under immigration rules; as such, the project calls for that policy to end. The way the project makes its call is by sharing the stories of people who have experienced detention, and the way it shares those stories is in the context of a public walk. For more information about the project, see www.refugeetales.org
5. In August 2012, “prisons inspector Nick Hardwick discovered a Somali man in Lincoln prison who had been in immigration detention for nine years beyond the end of his sentence, because he had been ‘forgotten.’” See Webber (2012).
6. For UK immigration detention statistics up to June 2017, see UK Government 2017.
7. For an overview of US immigration detention statistics, see Global Detention Project (n.d.).
8. For the full broadcast of the *Panorama* program “Undercover—Britain’s Immigration Secrets” see https://www.youtube.com/watch?v=_fp0QLDKgME (retrieved 10 October 2021).
9. For Thomas Nail’s account of the history of border formation, see his interconnecting texts (Nail 2016, 2015).

References

- Agamben, Giorgio. 2005. *State of Exception*. Translated by Kevin Attell. Chicago: University of Chicago Press.
- Arendt, Hannah. 1958. *The Human Condition*. Chicago: The University of Chicago Press.
- . 1979. *Origins of Totalitarianism*. 1st edn., 1950. New York: Harcourt Brace Jovanovich Publishers.
- Cohen, Gerard Daniel. 2011. *In War’s Wake: Europe’s Displaced Persons in the Postwar Order*. Oxford: Oxford University Press.
- Dembour, Marie-Benedicte. 2015. *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*. Oxford: Oxford University Press.
- Fanon, Frantz. 1965. *The Wretched of the Earth*. Translated by Constance Farrington. London: Penguin Books.

- Global Detention Project. n.d. 'United States'. Retrieved 10 October 2021. <https://www.globaldetentionproject.org/countries/americas/united-states>.
- Hayter, Theresa. 2000. *Open Borders: The Case against Immigration Controls*. London: Pluto Press.
- Morsink, Johannes. 1999. *The Universal Declaration of Human Rights: Origins, Drafting and Intent*. Philadelphia: University of Pennsylvania Press.
- Nail, Thomas. 2015. *The Figure of the Migrant*. Stanford, CA: Stanford University Press.
- . 2016. *Theory of the Border*. Oxford: Oxford University Press.
- Rancière, Jacques. 2004. "Who Is the Subject of the Rights of Man?" *South Atlantic Quarterly* 103 (Spring/Summer): 297–310.
- UK Government. 2017. "National statistics: How Many People Are Detained or Returned?" 24 August. Retrieved 2 January 2020 from <https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2017/how-many-people-are-detained-or-returned>.
- Webber, Frances. 2012. "Revealing the Impact of Immigration Detention." Institute of Race Relations, 21 December. Retrieved 2 January 2020 from <http://www.irr.org.uk/news/revealing-the-impact-of-immigration-detention/>.
- Wilsher, Daniel. 2012. *Immigration Detention: Law, History, Politics*. Cambridge: Cambridge University Press.