Part 4 Chapter 21

***On building a boat***

***(or, learning how not to teach refugee law)***

**Martin Jones[[1]](#endnote-1)**

**Abstract:** The teaching of refugee law too often focuses excessively on the legal categories and rights set out by the international refugee regime rather than either the needs of the forcibly displaced or the norms, institutions and processes of the local legal systems within which their protection must be located. Drawing upon experiences from a range of jurisdictions on the frontier of the international refugee regime, I argue that the goal of teaching refugee law should be to equip law students, lawyers and allied non-lawyers (including the forcibly displaced themselves) with an understanding of the politics of the struggle for the rights of the forcibly displaced and the skill to pursue creative legal interventions that draw upon the particular features of the local legal environment. Examples from Hong Kong, Malaysia, Egypt and Aceh (Indonesia) establish the possibilities for such creative legal advocacy as well as the challenges in developing a pedagogy that better supports it.

**Biographical statement:** Martin Jones is a senior lecturer in international human rights law at the University of York, UK. He practiced as a refugee lawyer in Canada and has been heavily involved in the development of legal aid programs for refugees in the Global South. He has served as a consultant to UNHCR, UN OHCHR, the African Commission on Human and People’s Rights and a number of national governments on human rights and refugee law and policy. His research examines the role of the law (including the legal profession) in the protection of refugees on what has been described as ‘the frontier of the international refugee regime’, including in the MENA and Asia regions, and the effect of (and measures to counter) the shrinking of civic space for defenders of refugees and other people on the move.

“Créer le navire ce n’est point tisser les toiles, forger les clous, lire les astres, mais bien donner le goût de la mer qui est un, et à la lumière duquel il n’est plus rien qui soit contradictoire mais communauté dans l’amour.”[[2]](#endnote-2) (de Saint-Exupéry, 1948)

**Introduction**

I am not convinced that teaching law students or lawyers to practice refugee law is the best way for us to protect refugees. Or if we wish to insist that it is, I believe we need to come to a new understanding of what we mean by practicing refugee law (and, consequently, what and how we need to teach). This realisation has been hard learned from almost a decade of practicing a very old understanding of refugee law and almost two decades since trying to support law students and lawyers seeking to protect forcibly displaced persons. This realisation, more than any other, informs my approach to how we should teach – or rather how we should not teach – refugee law.

To be clear at the outset, I believe fervently that lawyers have an important role to play in the protection of the forcibly displaced[[3]](#endnote-3) and that the legal classroom is a vital forum for building the knowledge, skills, attributes and community required for that role. I situate myself and my teaching within the broader movement for greater legal engagement in response to forcible displacement; I consider myself an advocate and activist for the rights of forcibly displaced persons (Harrell-Bond, 2007; Rosenblum, 2002). However, like de St-Exupéry, I am neither convinced that the best way to accomplish something is to direct the specifics of how to do it nor that the directions provided in more traditional refugee law curricula are appropriate to follow in many cases. In fully honouring the scepticism of de St-Exupéry, I can hardly prescribe a definite set of directions about how teachers of refugee law should behave. Instead, I offer a series of reflections on how I have sought to awaken within the heart of others the call to protect the forcibly displaced through the law.

I have structured my reflections around my experiences in relation to three interconnected themes: politics, law and (non)lawyers. My experience teaching refugee law has led me to the view that we need to more fully recognise the challenging politics within which refugee law is situated and adopt a more creative, problem-centred approach to finding legal solutions. In short, we must provide our students with the understanding and skill that allows them to pursue innovative legal arguments drawing upon norms not usually associated with refugee law in partnership with their clients, communities of displaced persons, and a wide range of actors outside the legal profession and judicial institutions.

Although my pedagogy aligns with the poetic spirit of de Saint-Exupéry’s exorcation, the building of boats is not simply a metaphor for those concerned about people on the move. Around the world, forcibly displaced persons are being forced to build all too literal boats to travel to safety. So appropriately, I will close with a reflection on the use of legal advocacy to rescue boats in the current moment, drawing on my work with rescuers off the coast of Aceh, and what this too means for the teaching of refugee law.

Before beginning, I should note that my reflections are necessarily drawn from my own idiosyncratic experiences – and as declared in my opening, they are most frequently derived from my mistakes. These experiences have occurred within and outside the classroom, often in jurisdictions in which the law and lawyers are little engaged in refugee protection (a set of experiences obscured by my current UK academic position). I have watched and learned from a wide range of teachers of refugee law, as a student, a lawyer and later as a colleague; I have also learned and continue to learn from my own students.[[4]](#endnote-4) Without limiting the locations that have educated me, my long term experiences teaching refugee law in Hong Kong, Egypt, and Malaysia have most informed my reflections. These experiences (and my education) have occurred while too often wearing the privileged mantle of an outside ‘expert’ in international refugee law, a cloak which I hope this contribution will finally reveal as misallocated and largely irrelevant.

During law students’ formal legal education, we have an opportunity to inspire their professional imagination. But the bulk of any professional’s training over the course of their career happens far beyond the University classroom, in continuing professional development events and in meetings within their organisation and their local legal community. Thus these reflections on the (non)teaching of refugee law, seek to inform not simply our university curricula but the broader professional pedagogy of our community of practice.[[5]](#endnote-5)

**Recognising the politics of Refugee Law**

The practice of refugee law is defined, structured by, and conducted within the politics of the international refugee regime. The *Convention Relating to the Status of Refugees* (United Nations, 1951), the *Protocol Relating to the Status of Refugees* (United Nations, 1967), and the *Statute of the United Nations High Commissioner for Refugees* (United Nations, 1967) remain the cornerstones of the regime. At a regional level, these instruments have been supplemented by further treaties and commitments. National laws and regulations often (somewhat incompletely) receive these into domestic legal systems and develop national asylum processes for the protection of refugees and others entitled to protection. These instruments not only outline standards for the protection of refugees but also circumscribe the international community, institutions and processes of the broader refugee regime.

This last point is important as it reminds us of the international politics of the regime. Many curricula respond to this by discussing the often hostile popular and political discourses of refugee protection within their local jurisdiction. But while refugee protection always has a local political dimension, the regime is embedded within the deeper politics of international governance (Jones, 2013). This politics informs everything from how we define a “refugee” to which States have obligations towards them. Furthermore, the jurisprudence we teach is a curated (read deliberately biased) sample of the legal engagement that occurs globally. As scholars like Chimni have pointed out, “legal categories most often seek to ‘discipline’ life and knowledge to realize dominant interests in society” (Chimni, 2009). Just as we ask ourselves and our students to acknowledge and critique our and their own privilege, we must ask them to examine and understand the privileges embodied in the international refugee regime.

We must expose our students to broader critiques of the regime, for example along the lines advanced by TWAIL scholars (Gathii, 2019). It is particularly important to do so in locations at the neo-colonial cutting edge of the regime. In practical terms, this means that in teaching in Hong Kong it is important to not only remind students that the overwhelming majority of local residents have refugee histories but also the *Refugee Convention* has a genealogy that stretches back to the “unequal” Treaty of Nanking (Hathaway, 2005; Craven, 2005) – and, further, that during the territory’s deepest refugee crisis the international regime could summon no support (Peterson, 2008).

With this background in hand, the development of Hong Kong’s “unified screening mechanism” (a national asylum system) through a process of strategic litigation (Loper, 2013) is less a triumph of the international regime and more the result of creative lawyering and a deeper manifestation of Hong Kong’s underlying experiences and legal norms. Furthermore, by linking the litigation needed by refugees in Hong Kong to local debates about the rule of law and over the *Extradition Bill* (and the more recent national security legislation), we can create political resonances for students that can inform, inspire and strengthen their future legal advocacy for the forcibly displaced.

This is not merely a question of academic importance, but one that can affect our perceptions of our role lawyers. As a range of scholars have observed, the politics of being a refugee lawyer affects how we practice refugee law and our relationship to both our clients and the legal systems within which we operate (Appelqvist, 2000). Concretely, our politics affects the nature and resilience of our practice as advocates for displaced persons. Our clients are also acutely aware of the politics that intentionally leave them destitute and limit their capacity to find solutions to their predicaments. Whether expressed by our clients as naïve pleas for greater support from UNHCR or conscious acts of resistance to unjust asylum processes, our practice as refugee lawyers confronts politics at every turn.

Asking us to teach the politics of refugee law is not a new call. The politics of the regime is already intertwined with the learning and teaching of refugee law. This regime has endowed individuals and centres and has developed model curricula for the teaching of refugee law which largely presents us as living in a golden age of protection in which any protective gaps result from a lack of resources and localised errors in judgment or improper motivesrather than structural problems within the regime.

In my experience, the leaders of most law schools are too enamoured with “transnational” or “international” partnerships with UNHCR and too many students approach the study of refugee law with the idea that working for the World’s Refugee Agency is the apotheosis of refugee law. The international refugee regime has shaped our curricular tools and affected when, where and how we teach refugee law. These tools have been developed as much for the strengthening of the regime as the protection of refugees (these are two distinct and sometimes competing goals). That when we teach law, we teach politics is a given; the question is only which politics do we teach when we teach refugee law? The politics we teach within our curricula must challenge these beliefs and provide pathways for students to think critically and provide a foundation for a reimagining of “refugee law” – treating migration and protection as more than narrow exceptions to fixity and citizenship.[[6]](#endnote-6)

Failing to prepare our students for these challenges has personal and collective risks: our students may burnout and our movement could fail to identify the real obstacles to its success. Understanding the project of engaging the law in the protection of the forcibly displaced as fundamentally political also positions our work within broader social movements. Such a positioning not only reinforces a sense of greater identity and community by students and practitioners but also provides solidarity in times of difficulty and helps identify larger obstacles that must be overcome.

**Broadening the scope of Refugee Law**

One immediate consequence of recognising the politics of refugee law is realising that its limits are arbitrary. What we traditionally teach as refugee law is set by the regime not the needs of the forcibly displaced. Consequently, our curricula are often limited by the *Refugee Convention* and its inventory of the ‘rights of refugees’. We may contrast this inventory with regional instruments or national systems, but these ‘international’ rights too often structure our teaching. Not only does this approach fail to properly acknowledge the arbitrariness of our framework (its politics), but it also results in a curriculum that fails to speak to the future experiences of many of our students, particularly those who will practice in the more than four dozen jurisdictions that have failed to become party to the *Refugee Convention* (or other international instruments on refugee protection)[[7]](#endnote-7) or the countless remaining jurisdictions where the obligations of the *Refugee Convention* have not been fully received into domestic law. Most importantly, it fails to recognise that the needs of people on the move inevitably extend far beyond the negotiated frameworks of international refugee law.

I have written elsewhere that lawyers should reject refugee law in favour of a broader ‘law of asylum’ based upon a jurisdiction-specific assemblage of international, national and local norms. (Jones, 2016; Jones, 2017). While there may still be gaps, this approach highlights the role of local argument and decision-making in the development of any legal system. It also emphasises the importance of procedural protections, about which the *Refugee Convention* says very little. This approach should be extended to the classroom. Local legal frameworks, arguments and jurisprudence and a focus of legal processes should form the foundation and framework of our lessons on refugee protection. While such an approach is easiest to prescribe for teaching in places on the frontiers of the international refugee regime, I would insist that such an approach is relevant in all jurisdictions.[[8]](#endnote-8)

For example, in Malaysia, which is not party to the *Refugee Convention*, it makes more sense to teach how local legal norms, actors and systems might respond to the particular predicament of refugees in that country rather than to try to teach a very hypothetical interpretation and application of particular articles in the *Refugee Convention*. More specifically, this means that more time needs to be spent taking account of local rules around criminal sentencing that affect the (non) punishment of refugees for immigration offences than the interpretation of Article 31 of the *Refugee Convention*. In Malaysia, it also means teaching about the sub-national religious laws and processes that govern Muslim refugees’ personal status. It means teaching refugee law from below: rebalancing the curriculum so that international categories and criteria supplement the core analysis of the local situation and legal norms rather than the other way around.

When situated within a discussion of the local predicament of the forcibly displaced (and the politics that perpetuate it), such an approach prepares students for the type of creative lawyering that is necessary in many jurisdictions, particularly those without much existing legal engagement on refugee protection. It requires that students actively problem-solve, applying their knowledge about their own legal system to the situation of the forcibly displaced. It also places a huge (and immensely difficult) responsibility on teachers to ground their teaching in the local context.

**(Non-)Lawyers and Protection**

None of the foregoing is to assert that the legal profession should be the only audience for our teaching. Some of my most impactful experiences in teaching have been directed at non-lawyers: with State officials in Hong Kong sceptical of refugee protection, paralegals in Egypt seeking to expand access to justice by forcibly displaced persons, and displaced persons themselves trying to navigate their new situation and advocate for themselves and their communities. Refugee protection is provided and supported by a range of actors and it is important that we make refugee law accessible and relevant to all those involved in refugee protection. As a practical matter, I welcome students from outside my discipline, faculty, department and centre into my classroom (though University structures and rules sometimes make this surprisingly difficult).

The most obvious group of non-lawyers that should be brought into our practice of refugee law are our clients: displaced persons and the communities which they form. We should teach our students to “share and aim to share with her client responsibility for the ends she is promoting in her representation” (Luban, 1988). It is too easy to say that we have not been successful in refugee participation or to point to the challenges (Jones, 2015). Instead, we should point our students to the many lessons to be drawn from a mixture of success and failure.

In Egypt, these include the mixed (but hopeful) history of involving refugees as paralegals, particularly in UNHCR’s refugee status determination processes and client-centred lawyering practices. However, refugee ‘voice’ and participation in legal engagement need not only take place within ‘our’ (host) legal systems. Also in Egypt, a community of Syrian lawyers regularly provides support to the Syrian refugee community, resolving disputes within the community according to prevailing foreign (Syrian) legal norms and maintaining their professional identity in exile.

Despite these promising initiatives, we must continue to give prominence to the importance of refugee voice within our legal activities as well as more frankly and concretely evaluating the outcomes of our efforts. As a purely practical matter, our legal advocacy is most successful when it is grounded in the complexity and plurality of refugee experience and recognises them as “more than ‘innocent victims’” (Bhabha, 2002; Sigona, 2014). Even when litigation is successful in establishing the rights of displaced persons, their lives may become no less or even more difficult.[[9]](#endnote-9)

We must also reach local audiences beyond our clients, their communities and our profession and to do so we must make refugee law relevant to their experience and practice. Refugee law should provide a useful way for students to organise and respond to their experiences. This emphasises again the importance of understanding the local situation and also the operation of local policies and the legal system itself. Even more so than practicing lawyers, non-lawyers are often concerned about the practical aspects of refugee law: What is the legal justification for the arrest of a refugee? How long can a refugee be detained? What is the process for getting released? Who is allowed to visit?

These practical aspects are often the most difficult to teach as they are subject to change and often difficult to discern and interpret. As someone teaching in range of locations, I have found team teaching with and inviting guest lectures from individuals involved in refugee protection often provides an enjoyable short-cut. However, more importantly, the classroom should be a forum for students involved in refugee protection to discuss, organise and interrogate their experiences, equipping them with the questions to ask that will help them gather, analyse and apply information in the future.

Inevitably, bringing refugee law to a more diverse cohort of students means dealing with a wider range of perceptions of refugees, protection and the law. Students may also arrive with only caricatures of the situation or of the relevant legal norms, institutions and processes. We may be forced to provide background for these students on how the international and local legal systems work and connect their work and experiences with these systems. Non-lawyer students can be a difficult audience; the law is often seen as too complicated, alien and unintelligible. We must work to ensure that our students do not ever see the problems of refugees as someone else’s problem, in particular something that can only be solved by someone else, for example more lawyers, courts or norms (even if these may be elements of a solution).

In keeping with the aforementioned politics of teaching refugee law, we must actively confront and dispel popular myths about refugees, the international refugee regime, and (the lack of) refugee law. We must recognise the fundamental agency of displaced persons within our legal advocacy. No law (or legal argument) can ever solely rely upon the legal profession and the courts for its enforcement: we must build a base of support for refugee law in the broader community of those involved in refugee protection. Even if they never step inside a courtroom, these individuals will shape the experiences of refugees, the development of new approaches to protection that can be supported by legal advocacy, and the opinions of others.

**Conclusion: building (and protecting) real boats**

We must remind our students that if law is to play a meaningful role in the protection of displaced persons then it must inform argument and govern behaviour far beyond the traditional fora of international refugee law or even those of our judicial systems. By the time a refugee seeking protection finds herself before UNHCR or a court, his/her enjoyment of his/her rights has already been denied, delayed or obstructed. We must develop strategies of legal advocacy that directly impact and control the behaviour of State officials and individuals. This is a difficult goal for us to set for ourselves and we can only succeed if we adopt an approach that recognises the politics of refugee law, its broad scope and the agency in legal protection of more than the legal profession.

In recent years, hundreds of thousands of Rohingya refugees have been displaced by ethnic cleansing and genocide originating in Myanmar. They have fled to neighbouring states like Bangladesh where they have received an uneven welcome. As a result, many Rohingya refugees have sought to flee further afield and have taken to the high seas to evade borders that are otherwise closed to them. Tens of thousands of Rohingya refugees have travelled in this manner to Malaysia. However, their voyage further afield is not without peril. Thousands of Rohingya refugees have found themselves stranded in deteriorating conditions due to bad weather, inadequate boats, naval interdiction efforts, and extortion by smugglers.

Since 2009, thousands of Rohingya have been rescued by local fisherman and brought ashore into Aceh, Indonesia’s northern most province. While these rescues have been presented as acts of (limited) hospitality (McNevin and Missbach, 2018), a closer inspection reveals the role of the law. Local fishermen and sub-national government officials have explained their actions as obliged by local customary law, both the local customary law of the sea (*hokum adat laot*) and religious law (*sharia*). The discourse of these local norms is ensconced in the Achenese sense of identity and their lengthy struggle to maintain it against the Indonesian national project.

Although these obligations were not litigated in courtrooms, they nonetheless were prominent in public and political discourses that allowed the rescues to continue despite national opposition. In the face of this, the national government of Indonesia withdrew its objections to the rescues and introduced (after many years of delay) its own competing national refugee protection framework. As I write, hundreds of new Rohingya refugees have recently been welcomed ashore in Aceh during the current pandemic. Even amidst the heightened xenophobia and closed borders of the current moment, the Rohingya are being welcomed because of legal norms and arguments far older and beyond those within the *Refugee Convention*. Conversations with the fishermen reveal sophisticated understandings of their pluralist legal environment and commitment to the norms of a very local and complicated refugee law (Fitria, 2020).

In Aceh, the rescues were not only supported by multiple norms within well-developed and locally respected legal systems but were recognised by their supporters as political acts, against the Indonesian State and, at times, even against the international refugee regime. In localising and politicising refugee protection it also became linked to the broader struggles of local communities. While no teacher of refugee law can take credit for what is happening in Aceh, we must all teach in a way that allows our students to recognise, support and sometimes lead such efforts during their studies and future practice. In teaching refugee law in a way that supports such legal advocacy, we are educating our students that refugee protection is part of the larger unfinished human rights project that seeks to protect the fundamental dignity of all human beings. We must awaken and cultivate amongst our students both a yearning for a vast and endless sea of dignity for displaced persons and an equally strong yearning for them to use their knowledge, skills and values to further this objective; the legal understanding and skills our teaching seeks to develop aim to provide boats on which future refugees may journey to safety.

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2. “To create the ship is not to weave the webs, to forge the nails, to read the stars, but to give a taste of the sea which is, and in the light of which there is nothing but, a shared love.” (translation by author). This quote is often simplified by self-help books into the more prosaic: “When you want to build a ship, do not begin by gathering wood, cutting boards, and distributing work, but awaken within the heart of man the desire for the vast and endless sea" [↑](#endnote-ref-2)
3. While I am reluctant to be overly semantic, I prefer to describe the focus of my concern as ‘forcibly displaced persons’ rather than as ‘refugees’, especially given my argument below about adopting a broad understanding of the scope of refugee law and who it aims to protect. [↑](#endnote-ref-3)
4. I owe particular debts of gratitude (and friendship) to Sharry Aiken, who provided me with my first opportunities to teach refugee law at Queen’s University in Canada and later at the American University of Cairo, and James Hathaway, who connected me with the then nascent community of practitioners of refugee legal aid in the Global South. [↑](#endnote-ref-4)
5. I do not dismiss the various other elements of a broad-based legal education but rather focus here on the narrower, practical issue of how best to train law students and lawyers to protect forcibly displaced persons using the law. [↑](#endnote-ref-5)
6. For an elaboration of this point (albeit in relation to politics rather than law) see Nail, 2015. [↑](#endnote-ref-6)
7. A near continguous group of more than forty States stretching from the eastern Mediterranean to the Pacific have not become party to the *Refugee Convention*, the *Refugee Protocol* or any regional treaties protecting refugees. These States constitute a majority of states in the Middle East and North Africa, South Asia and South East Asia regions and are home to around half the world’s refugees. [↑](#endnote-ref-7)
8. I have a nagging worry that the development of many of our vaunted national asylum systems are less intertwined with the *Refugee Convention* than our conventional legal histories suggest. The mythologising of the *Refugee Convention* in our narrative strikes me as akin to the stories told about international human rights law before the recent work of scholars such as Samuel Moyn and the broader turn to history in international legal studies prompted by scholars such as Antony Anghie and Martti Koskenniemi. [↑](#endnote-ref-8)
9. Strategic litigation in Hong Kong forced the government to introduce a national asylum system (“unified screening mechanism”) but resulted in recognition rates dropping to below 1%. For a first-hand account of the litigation, see Daly, 2014. [↑](#endnote-ref-9)