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Editorial

In his recent address to the United Nations Security Council António Guterres, the United Nations High Commissioner for Refugees, noted that, as a result of the current crisis in Syria, 'a quarter of the entire population of the country has been forced to leave their homes'.[1] Guterres described the 'impossible'[2] and 'unsustainable'[3] task of the UNHCR, its partner organisations and the bordering countries of Jordan and Lebanon to provide assistance to the ever increasing number of Syrian refugees. In his speech, he called for 'international solidarity' to assist these refugees and their hosts.[4] His choice of phrase reflects the preamble to the 1951 Convention Relating to the Status of Refugees which calls for 'international co-operation' in refugee protection.

The contributions to this latest edition of the *Oxford Monitor of Forced Migration* provide a timely reflection on the concepts of 'international solidarity' and 'international co-operation' in refugee protection. The articles included in this edition demonstrate that, in the face of global and national events such as conflict, discriminatory and persecutory practices and natural disasters, which often heighten the risk of forced displacement, the international response is rarely one of co-operation and solidarity. Instead, each article provides evidence of a fractured and diluted system of protection often more concerned with domestic concerns than national solidarity.

This edition opens with our *Field Monitor* in which Nele Weßels and Janna Weßels present the findings of their rich empirical study of asylum seekers in Greece. The authors' interviews with asylum seekers in Greece and Greek Border Police evidence the tensions that exist between international expectations and national capacity. Despite the country having no functional system for asylum claimants, the European Union nonetheless has continued to delegate responsibility for asylum processes to the national level. The lack of solidarity, co-operation and support at the European level is shown to clearly manifest itself in the lack of protection experienced by the asylum seekers interviewed in this piece, whom locate their existence as firmly 'trapped in Greece'.

The articles in this edition's *Policy Monitor* examine both new and pre-existing policies that seek to limit the protection provided to asylum seekers by governments in the developed world. Lane Krainyk evaluates a new Canadian policy that denies healthcare to asylum seekers from 'designated countries of origin'. It highlights how the restrictive measures constituted a governmental appeal to those sections of the Canadian populous who felt aggrieved by the supposed generosity of Canada's refugee protection policies. Krainyk, however, argues that such a policy is inconsistent with Canada's international obligations. Francesco Vecchio and Cosmo Beatson suggest a different, and more optimistic, state-society relationship in Hong Kong. They discuss the politics behind Hong Kong's enduring reticence to accede to the 1951 Convention Relating to the Status of Refugees, but also highlight the mounting local resistance to this lack of protection through an examination of a recent protest

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[1] **UN HIGH COMMISSIONER FOR REFUGEES** (2013) *Remarks to the United Nations Security Council António Guterres, United Nations High Commissioner for Refugees 18 April 2013.* Available from: <http://www.unhcr.org/517008e49.html> (accessed 13 May 2013) at 1.
[2] Ibid at 1.
[3] Ibid at 2.
[4] Ibid at 3.

march. Though a progressive step forward, these two articles nonetheless demonstrate the shortfalls exhibited in the protection standards provided by developed countries towards refugees, despite their playing host to a comparatively small number.

Sasan Panbehchi's contribution to *First Hand Monitor* provides a personal and very moving account of the impact of such policies. He provides an overview of a new policy introduced by the UK Government that treats asylum seekers who wish to enrol in a UK university as international students. Panbehchi's account of his struggle, to continue his medical degree while finding the necessary funds to pay upfront international student fees, is an acute example of the ways in which asylum seekers wishing to contribute to their new society face unanticipated challenges, imposed by the government, that often prevent them from doing so.

The theme that emerges from the contributions to *Law Monitor* is that, in an effort to achieve international solidarity in the area of refugee protection, there is not the need for 'more law' but rather augmented rigorous analyses and implementation of existing legal frameworks. Catherine Drummond provides a detailed examination of judicial interpretation and application of the exclusion clause in the 1951 Convention Relating to the Status of Refugees and argues that it has been misapplied, often to the disadvantage of those seeking asylum. Martha Marrazza discusses Kenya's new forced encampment policy and highlights the ways in which it places Kenya in breach of the 1951 Convention Relating to the Status of Refugees, the 1966 International Covenant on Economic, Social and Cultural Rights and Kenya's *non-refoulement* obligations. Johanna Gusman analyses a new refugee policy introduced in Ecuador that limits the definition of who is a 'refugee' enshrined in the 1984 Cartagena Declaration on Refugees, and highlights how this may escalate the sexual and gender-based violence experienced by women and girls seeking asylum in Ecuador.

Finally, our *Academic Articles* illustrate the fecundity of applying different academic disciplines to the study of Forced Migration. Daniel Murphy utilises a historical approach to suggest a series of factors which emerged and were institutionalised during the colonial era, but have played a major constitutive role in the contemporary situation of the Karen of eastern Burma. Murphy links these with a host of proximate causes to provide a narrative which skilfully links, geographically, historically and politically, current patterns of displacement with two hundred years' worth of colonial and neo-colonial intervention. Jonas Ecke then provides an empirically-driven piece to illustrate the enhancement to protection that a greater dialogue between anthropological methods and practice could engender. Through a case study of Buduburam Refugee Camp in Ghana, Ecke suggests that minor amendments to how information and knowledge is solicited within camp environments could produce huge dividends in terms of enhanced protective capacity.

Whilst discussing 'enhanced capacity', we, as Co-Editors-in-Chief, would like to convey our thanks to those individuals whom made this edition possible. Firstly, we would like to thank our team of editors who continue to volunteer their time to ensure OxMo comes to print. Secondly, we wish to thank the contributors to this issue for their fascinating articles and patient cooperation. Thirdly, our thanks must be conveyed to OxMo's board of senior editors whose commitment and enthusiasm for this publication and its goals has provided a source of ongoing inspiration. The precedent of high quality and richly diverse articles is now well-established for OxMo, and we hope that you find Volume 3 as a continuation of this tradition.

Kate Ogg and Georgia Cole
Oxford, May 2012

Field Monitor

Trapped in Greece: A Report about Experiences of Migrants, Asylum Seekers and Border Policemen during the Early Weeks of the Operation Xenios Zeus

By Nele Weßels and Janna Weßels

Abstract

The harbour city of Patras exemplifies the quintessential problematic of the current situation of asylum seekers and undocumented migrants in Greece. In daily confrontations, migrants and asylum seekers, who seek shelter in an abandoned factory that overlooks the port, try to find a way onto a ferry to leave for northern European countries. At the same time the task of the border police is to prevent them from doing so. This article attempts to capture this tension and the way it represents the current situation of asylum seekers and undocumented migrants in Greece, in particular under the impression of the newly launched operation *Xenios Zeus*, intended to 'crack down on illegal immigration'.

Introduction

The old factory Peiraiki Petraiki looks shabby and abandoned, and stands in stark contrast to the newly built, accurately enclosed harbour on the other side of the coastal road of Patras in Greece. One can easily see the factory from the street, its old towers and broken fences. It does not look like a place human beings would live in. Yet many undocumented migrants use it as quarters.

The old factory Peiraiki Petraiki in Patras, home for many undocumented migrants.

This article aims at giving an impression of the situation of asylum seekers and migrants in Greece during the early weeks of the operation '*Xenios Zeus*', an operation to crack down on illegal immigration. It takes into account the viewpoints on both sides of the coastal road in Patras, the ones of asylum seekers and migrants on the one hand, and the border police on the other. It is mainly based on interviews which the authors conducted in Berlin and Greece within the framework of a student project in September 2012.[5]

The project group conducted a number of unstructured interviews in Berlin in Germany, and in Athens, Patras and the Evros region in Greece between 30 August and 8 September 2012. [6] The group members visited the old factory Peiraiki Petraiki on 4 September 2012 and spoke with a total of 15 asylum seekers and undocumented migrants with different backgrounds. In addition, the project group visited the Fylakio Migrant Centre close to Orestiada on 7 September 2012 and the Temporary Migrant Centre in Komotini on 8 September 2012. Interviews were also conducted with Greek border police and Frontex officials. The interviews were conducted in English, French and Greek. The names of migrants and asylum seekers as well as the border policemen have been changed in order to protect the interviewees' anonymity.

The Port of Patras – A Front in the Middle of Europe

Fethi looks over the port of Patras, with a longing expression on his face. From the first storey of the old factory there is an excellent view of all the ferries that leave Greece towards Italy every day. Fethi and his friends know every

The view over the port of Patras from the first storey of Peiraiki Petraiki

Simplified visualization of the migrants' movements: after crossing the Greek-Turkish border they travel to the South of Greece

single one of them; they can list their names, their departure and arrival times. The ferries look very close, almost within reach. To the migrants, they represent the gate to central Europe, the gate to a better life, yet, as they explain – it is almost impossible for them to go aboard: the new port that was only recently opened in July 2011 is well-protected. Every car, every truck at the new port is searched for illegal passengers before it is given access to one

of the ferries. Nevertheless, several migrants try to find a way onto the ships

[6] In Germany, interviews were conducted with Matthias Monroy, Research Assistant of Andrej Hunko, MP of German Parliament; Isabelle Olma and Tobias Brenner, German Department for Foreign Affairs; Dr. Roland Bank, UNHCR Berlin and Nele Allenberg, EKD;
In Greece: Haralambos Pendelidis and Panagiotis Charelas, members of the Greek Border Police Union; Grigorios Apostolou, Head of Frontex Operational Office Piraeus, and Klaus Hudernigg, Head of Intelligence Component at Frontex Operational Office Piraeus; Alexander Roggenkamp, Director of German Academic Exchange Service Athens; Klemens Semtner, German Deputy Ambassador to Greece; Evie Trepa, Asylum Service Athens; Vassiliki Kanellopoulou, Social Worker, and Ioanna Alexia, Psychologist at Amygdaleza Migrant Detention Centre; Georgia Nikolaou-Mavranezouli, Prefect of Evros; Christos Katsioulis, Director of Friedrich Ebert Foundation Athens; .Stella Nanou, Deputy Director of Public Relations, and Daphne Kapetanaki, Protection Officer at UNHCR Greece; Alex Anastasiou, Director of Social Services, and Spyros Koulocheris, Director of Legal Unit at Greek Council for Refugees; Vassiliki Katrivanou, MP of Greek Parliament; Evangelos Maraslis, Vice Mayor of Orestiada,

every single day. Emad, for example, has been in Patras for three months. He knows all the tricks: where the truck drivers live in order to sneak onto their trucks at night time before they head off to the ferries, or where to jump into the ocean in order to swim to the ferries and avoid the strict controls on the trucks. Already twice he was able to get through the Greek controls unnoticed and to make it onto a ferry in a truck on a two-day ride without any food, water, or the possibility to move; only to be caught at the controls at the Italian border police in Venice and sent back to Greece. This account is representative of many other asylum seekers' experiences: a recent Human Rights Watch (2013) report harshly criticizes the Italian practice of sending migrants arriving from Greece back to Greece under Dublin II without the opportunity to talk to a lawyer or an NGO to explain their story and claim asylum.

The Dublin II Regulation,[7] adopted in 2003, is the key law of the European Union to determine the responsibility of the Member States for the examination of asylum claims in the EU. It provides that the EU Member State that admitted an asylum seeker or at least did not prevent his or her entry is responsible for examining the asylum claim of that individual (EU Publications Office 2003). Hence, other Member States can send all undocumented migrants who enter the Schengen zone via the Greek-Turkish border back to Greece. Greece, however, is unable to cope with the increasing number of migrants and the Greek asylum system has been openly and severely criticised for the violation of human rights. The case went before the European Court of Human Rights, which decided in January 2011 that returning asylum seekers to Greece violates the European Convention on Human Rights (*M.S.S. v. Belgium and Greece*). Since that decision, most European Member States – with a few exceptions, such as Italy – temporarily suspended transfers of asylum seekers under the Dublin II Regulation (EU Publications Office 2003).

At the same time, the EU enhances its efforts to ensure that migrants and asylum seekers remain in Greece: the EU border agency Frontex established an Operational Office in Piraeus, the port of Athens. This is meant as an act of solidarity and support, as Grigorios Apostolou, Head of Office, explained in an interview. The Greek border policeman Pantelidis, however, provides a different perspective: Instead of helping to 'protect' the border, and stopping migrants from entering Greece, Frontex acts as an 'observer'. In his view, the purpose of Frontex is merely the meticulous identification of migrants crossing the border so that Greece will be registered as their country of entry. This allows other European countries to return them under the Dublin II regulation. Thus, Frontex is not helping Greece. In effect, in the words of the Vice Mayor of the Evros border town Orestiada, it is 'contrary to the work of the Greek border police in every respect' (Int. Maraslis2012).[8] Eleni Baltatzi, a

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[7]Note that the Dublin II Regulation has been recast, though at the time of writing the revised regulation was not yet adopted. The recast Dublin regulation does not change the principles underlying the Dublin System such that the EU Member State of entry generally remains responsible for examining the asylum claim. The first recast proposal from 3 December 2008 included the possibility to temporarily suspend transfers where a Members State's asylum system faces particular pressures or based on concerns that a Member State provides a level of protection that falls below Community standards (Art. 31), but during the codecision procedure this was subsequently replaced by an Early Warning Mechanism provision. See: Council of the European Union (2012). See also: Peers (2012) and Pollet (2013)

[8]Note that former Civil Protection Minister Christos Papoutsis has accused the European Commission of being inconsistent by simultaneously refusing to revise the Dublin Regulation and threatening to punish Greece for not controlling its external borders, instead of supporting them in doing so (see Zoomnews 2012).

Greek student, states: 'It is extremely easy for immigrants to enter Greece, but extremely difficult to get out. I would say that nobody wants to stay in Greece, particularly now that we have got the crisis. But somehow migrants seem to be trapped once they entered Greece. I find this European regulation very unfair. What kind of united Europe is that?' (int. Baltatzi 2012).

> *'It is extremely easy for immigrants to enter Greece, but extremely difficult to get out',*
> *Eleni Baltatzi, Greek Student*

A clothes line in Peiraiki Petraiki. Migrants living under provisional conditions.

Xenios Zeus - The 'Hospitable Sweep Policy' and the Dublin II Regulation

Since early August 2012, the number of asylum seekers and migrants seeking shelter in the factory has decreased significantly (int. Papaleonidopoulos 2012). Interviews with the different stakeholders in Athens, Patras and the Evros region quickly reveal the reason: In the first week of August 2012, the Greek government has launched the operation '*Xenios Zeus*', sometimes also referred to as '*sweep policy*' (int. Katsiouli and Newsbomb 2012). This operation to crack down on illegal immigration is named after the Greek God of hospitality, which can only be understood as irony: the operation is, according to the Hellenic Police, aimed at sealing the borders, returning undocumented migrants to their countries of origin and 'reinstating the rule of law' in the centre of Athens (Elliniki Astyomia 2012). It is designed as a response to the 'immigration problem' which Public Order and Citizen Protection Minister Nikos Dendias deems to be 'maybe even bigger than the financial one' (Papachlimintzos 2012).

Initially envisaged as a temporary measure for the duration of two months, it continues to date in spite of being heavily criticised as discriminatory (for example see GCR 2012, ECRE August 2012; Amnesty International 2012; Human Rights Watch 2012). From one day to another, 4500 members of the Border Police were mobilised, most of whom patrol Athens and other cities to check anyone who looks like a migrant. By mid-January 2013, almost six months after the operation was launched, a total of 71,398 migrants had been briefly detained and questioned by police, while 4,335 had been arrested on charges of unlawful residence

(see Ekathimerini 2013a).[9] Several hundred officers were deployed as guards in newly created ad hoc detention centres that were 'maybe set up a bit quickly', as the President of the Border Police Union Haralambos Pantelidis explains (int. Pantelidis 2012). Up to 30 new detention centres are planned in the course of the operation (see ECRE March 2012),[10] four of which had already been installed in Northern Greece by mid-September 2012. The asylum seekers and migrants, most of whom are picked up in Athens, are sent to the detention centres to await repatriation to their countries of origin (see ECRE September 2012). The asylum seekers and migrants are returned to the North of the country, back to the border region where they usually cross the Greek-Turkish border in order to enter the European Schengen zone. '*Xenios Zeus* acts as an internal Dublin II regulation', noted the Vice Mayor Mr. Maraslis (int. Maraslis 2012) in Orestiada, a city in the Evros region that is directly affected by this operation. Indeed, the fact that the new detention centres are located in the North of the country was repeatedly criticised: repatriation is a complicated bureaucratic matter, and the centres are too far away from Athens with its embassies for this logistical challenge (int. Anastasiou and int. Koulocheris 2012).

The 'internal Dublin II regulation' also directly affects the migrants at the factory in Patras: Almost every day they are chased away from their quarters in the old factory, and sometimes they are transported to Athens by bus where they are left alone on Omonia Square and at risk of being rounded up and sent to a detention centre in the

Migrants in front of their 'kitchen' at the old factory of Peiraiki Petraiki.

north of the country. By foot they return the over 200 kilometres to Patras in order to continue trying to get out of Greece. Mohammed points at a wound on his shinbone: a police dog had attacked him a few days ago during a raid at the factory. According to the migrants, violence amongst border policemen towards migrants is normal. When asked what makes them keep going Mohammed says: the hope for a life with the rule of law.

> *"We don't give up hope to finally reach a country where we will be treated according to the rule of law" Mohammed, Immigrant at Peiraiki Petraiki*

'It's like gambling', Fethi says. 'It's a Russian roulette', border policeman Janis says. Janis stands on the other side of the coastal road, next to the steely gates and fences of the port. He is not allowed to speak about his work, but after a while he starts talking; he wants to make sure that the role of the policemen is understood correctly and one can feel his relief to share

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[9]This means that the other 67,063 (94%) brought in for questioning were in fact legal residents and had therefore been subjected to this treatment due to their perceived ethnicity only; see also ECRE Weekly Bulletin September 2012.

[10] Note that ECRE refers to various newspaper articles and numbers vary. Haralambos Pandelidis, the president of the border police union, mentioned a total of 20 new centers to be built (int. Pandelidis).

his burden. Almost every day Janis discovers migrants in cars, trucks and the ocean and brings them back beyond the front. Sometimes, he explains, they 'obviously' have to apply force in order to handle the situation. 'What would you do?', he asks us, shrugging his shoulders, 'I am only acting my part'. He looks defenceless at this moment, despite the big weapon around his shoulders. He has seen many of the migrants often, he recognises them, they greet each other, fear each other. He did not choose to be stuck there. Neither did the migrants.

It is an ironic front, being in the middle of Europe, and a desperate one: it is in Patras that the incongruities of the common European asylum system become painfully obvious. EU law, namely the Dublin II regulation makes Greece the responsible Member State for all migrants entering Europe at the Greek-Turkish border, which has recently been the most popular entry point to

A border policeman at the newly built port of Patras looking over to the old factory of Peiraiki Petraiki. Almost every day he discovers immigrants trying to leave Greece by ferry.

the Schengen zone for migrants, the vast majority of whom do not intend to remain in Greece. The presence of the EU agency Frontex as an 'observer' and a means to allow for Dublin II by registering migrants further augments the pressure on the Greek government.

Greece, however, does not have a functioning asylum system and international criticism of the Greek asylum system recently grew stronger. At the same time, Greece is fighting with the financial and economic crisis; more precisely a very high and increasing unemployment rate, an instable government, severe cost cuts, increasing xenophobia amongst the population and a growing popularity of the extremist right-wing parties. To establish a functioning asylum system under these conditions is a huge challenge for the Greek government.

In this impasse, instead of tackling the actual sources of the situation and contributing to a holistic solution, *Xenios Zeus* fights the symptoms. By rounding up migrants and transferring those who are unable to provide proof of legal residence to detention centres far away from Athens, the government can demonstrate force and public order. *Xenios Zeus* can thus be understood as a rashly conducted and desperate operation aiming mainly at showing the ability to take action.

In this sense, Patras represents the clash between a unified Europe and national interests, a clash that is played out 'on the back of 1500 Greek policemen' (int. Pantelidis 2012) who are

required to close ostensibly open borders, and asylum seekers and migrants fleeing persecution and seeking the rule of law: what the EU stands for is denied to them.

While there is no functioning asylum system that assures fair and efficient asylum procedures to all asylum seekers in Greece and provides for the regularisation of migrants in order to be able to be responsive to the migrants' personal needs, be it asylum, local integration or support for the voluntary return, at the same time the European Union refuses to acknowledge the migration issue in Greece and in other European border countries as a European issue rather than as a national problem by changing the European legal framework, first and foremost the Dublin II regulation (int. Kapetanaki, int. Nanou, int. Baltatzi, int. Koulocheris, int. Anastasiou and int. Pantelidis, all 2012). Meanwhile, migrants and border police are obliged to hold the 'front' in Patras as the Greek government continues with *Xenios Zeus*.[11]

Nele Weßels is a German national who holds a Masters in European Studies from Trinity College Dublin, where she concentrated on the utilisation of gender attitudes to other Islam in Europe. She is currently finishing her postgraduate studies in Psychology at the Technical University Dresden.

Janna Weßels, also a German national, is Quentin Bryce Doctoral Scholar at the Faculty of Law, University of Technology, Sydney. Her research focuses on the act/identity distinction in gender and sexuality based refugee status determinations. She holds a Masters in Forced Migration from the Refugee Studies Centre at the University of Oxford.

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[11]Just recently a major sweep operation was conducted at the factory of Peraiki Petraiki, detaining 'about 100 migrants as part of the ongoing *Xenios Zeus* operation' (see Ekathimerini 2013b).

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Photos

Photos 1-4 were provided by Lena Kampf, photo 5 was provided by Klaas Eller.

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Policy Monitor

Refugee Healthcare in Canada: Denying Access Based on Origin and Status

By Lane Krainyk

Abstract

In recent years, the Canadian Government has embarked on an aggressive agenda to change policies relating to refugees and asylum seekers in Canada. Most recently, access to healthcare has been denied to asylum seekers coming from 'Designated Countries of Origin'. In this article, I contend that Canada has acted against its international obligations by failing to provide basic healthcare and discriminating against asylum-seekers based on national origin. The troubling (and unlawful) consequence of these changes is that, in certain circumstances, healthcare for asylum seekers will be denied in emergency and life threatening situations unless there is a risk to public health and safety.

Refugee Healthcare in Canada: Denying Access Based on Origin and Status

This paper examines Canada's changing approach for providing refugees and asylum seekers access to healthcare. Refugees and asylum seekers often have difficulty gaining access to sufficient healthcare in their countries of asylum. In most cases, this is a result of insufficient resources to provide for the refugees' or asylum seekers' healthcare needs and/or an unwillingness on the part of the State to allocate sufficient resources to these needs. This unwillingness sometimes results from concerns, founded or unfounded, that some refugee claimants are engaging in healthcare tourism. In Canada, voices in government calling for reduced allocation of resources to refugee and asylum seeker healthcare on this basis have

grown louder, particularly since the Conservatives won a parliamentary majority in 2011 (see the photo, above, for an example). Conservative Members of Parliament have advocated for the end of 'unfair benefits' for refugees.

Recently, there have been significant cuts made to the Interim Federal Health Program (IFHP). The IFHP provides 'temporary coverage of health-care costs to protected persons [refugees and asylum seekers] who are not eligible for provincial or territorial health insurance plans' (Service Canada 2013). However, under the government's new approach, access to the IFHP has been denied to asylum seekers coming from 'Designated Countries of Origin' (DCOs). The DCO list contains a list of countries where the Canadian Government has determined that a person is 'less likely… to be persecuted compared to other areas.' (CIC 2013). These countries, the government suggests, 'respect human rights' and 'do not normally produce refugees' (CIC 2005). Notably, the Minister for Immigration, Jason Kenney, has the unilateral discretion to add countries to the list (Mehta 2012).

Claimants from DCO countries are subject to different rules than other claimants. They have access to fewer protections under domestic law and are deprived of many of the benefits that other claimants receive. The current list, effective 15 February 2013, includes 35 countries. Crucially, the implication of the introduction of the DCO list is that *all* funding for healthcare is denied to asylum seekers from DCOs (unless and until they are granted refugee status). The sole exception that has been carved out is for health situations that are deemed to threaten public health and safety (Mehta 2012). Asylum seekers from DCOs have no access to supplemental care (including drug coverage for necessary medications) and have even lost eligibility for basic and emergency healthcare (including maternal healthcare and life-threatening emergencies).

The government's new policies have had, and will continue to have, drastic implications for both asylum seekers and healthcare providers in Canada. There has been a strong reaction to these changes from the Canadian medical community. The organisation Canadian Doctors for Refugee Care (CDRC) has noted that, as a result of these changes to the IFHP, many 'will no longer be covered for necessary medications such as insulin, and some will be denied access to physicians unless their condition is deemed a threat to public health/safety' (CDRC 2013). The organization further notes that prenatal care for pregnant women and mental healthcare (particularly important for claimants who are survivors of violence or torture) are among the healthcare services cut under the new policies (CDRD 2013). On 20 January 2013, a group of doctors wrote an editorial in the Toronto Star arguing that the denial of basic healthcare to claimants based on their origin makes refugee healthcare in Canada more inaccessible than that in refugee camps (Lai, et. al. 2013). Further, on 25 February 2013, CDRC, the Canadian Association of Refugee Lawyers (CARL) and three individual patients filed a claim with the Canadian Federal Court, asking that the health care cuts be declared unlawful and unconstitutional (CARL 2013).[12]

Canada has a legal obligation to provide healthcare to refugees and asylum seekers. In 1976, Canada ratified the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 12 of the ICESCR stipulates that the 'right of everyone to the enjoyment of the highest attainable standard of health', shall be guaranteed to everyone and also calls for

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[12]   The case had not been heard at the time of publication.

the 'provision for the reduction of… infant mortality and for the healthy development of the child… the prevention, treatment and control of… disease; and the creation of conditions which could assure to all medical service and medical attention in the event of sickness' (*ICESCR* 1966). Article 12 represents what James Hathaway, a noted refugee scholar, describes as an 'affirmative entitlement' to access 'on a timely basis… a system of health protection which is both of good quality and respectful of cultural and individual concerns' (Hathaway 513 2005).

Further, Article 2(2) of the ICESCR requires State Parties to 'guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to… national or social origin… or other status'. At the 22nd session of the Committee on Economic, Social and Cultural Rights in 2000, General Comment 14 on Article 12 was adopted. The General Comment notes that States are under the obligation to respect Article 12 by 'refraining from denying or limiting equal access for all persons, including…asylum seekers and illegal immigrants, to preventative, curative and palliative health services' and 'abstaining from enforcing discriminatory practices as a State policy' (CESCR 2000: 34).

In addition, the Committee observed in an earlier General Comment on Article 2 of the Covenant that State parties have a 'minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [in the Covenant]' including access to 'primary health care'. Failing to do so demonstrates that the State party has failed to 'discharge its obligations under the Covenant' (CESCR 1991: 10).

Therefore, Canada's discriminatory treatment of refugee claimants is in violation of two of its obligations under the ICESCR. First, it violates Article 12 by not providing for healthcare services to all claimants, even in emergency situations. Second, it discriminates between claimants based on their national origin when determining whether or not to provide care at all. Provision of healthcare has been described as a 'core obligation' under international law and a State party cannot, 'under any circumstances, justify its non-compliance' with this 'non-derogable' right (Hathaway 2005: 513).

UNHCR has spoken specifically on the issue of healthcare provision as it relates to asylum seekers. In a discussion paper on the recommended reception standards for asylum seekers, UNHCR noted that while States have:

> [B]road discretion to choose what forms and kinds of support they will offer to asylum seekers, it is important that… at a minimum, the basic dignity and rights of asylum seekers are protected and that their situation is, in all the circumstances, adequate for the country in which they have sought asylum (UNHCR 2000).

Further, UNHCR goes on to note that there is a 'minimum core content of human rights which applies to everyone in all situations' and that this 'minimum core' includes Article 25 of the Universal Declaration of Human Rights. This recognises the 'right of everyone to a standard of living adequate for the health and well-being of himself or herself including... medical care.' Finally, UNHCR goes on to state that asylum seekers 'may suffer from health problems' that 'require prompt professional treatment' and that 'asylum seekers should receive free basic medical care, in case of need, both upon arrival and throughout the asylum procedure' (UNHCR 2000). While the literature does not present a defined scope of this

'minimum core', it can be inferred from this analysis that at least basic and primary medical care that would allow for an adequate standard of living would be required.

Wherever the threshold lies for this 'minimum core', it is clear that a blanket denial of healthcare to all asylum seekers from certain countries contravenes Canada's obligations. With respect to certain subsections of the refugee claimant population, the Canadian Government's actions are even more clearly contrary to its international obligations. Article 24(1) of the 1989 Convention on the Rights of the Child (CRC) states that State parties recognise 'the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'. It further obligates State parties to ensure that 'no child is deprived of his or her right of access to such health care services' as contained in the CRC or in another human rights instruments to which that State is party (*CRC* 1989). The Canadian Pediatric Society has noted that the Canadian Government's new policies would deprive children of any care, in certain instances, unless their situation is considered to be a risk to public health and safety (Samson and Hui 2012).

The Canadian Government has attempted to minimise the significance of these changes, suggesting that the extent of the losses is felt by a relatively small population. The government has argued that under the reformed IFHP there are only three exceptions to the continuation of previous coverage: refugee claimants who have been rejected, refugee claimants whose claims are suspended, and refugee claimants from DCOs (Mehta 2012). However, by making this admission, the government effectively concedes that it is violating its international legal obligations and discriminating against individuals based on status and origin.

The changes to the IFHP and the introduction of the DCO list treat refugee claimants as if they were tourists visiting Canada for the purpose of taking advantage of its generous social services. However, the Government of Canada has no way to substantiate this claim before processing asylum seekers and determining refugee status. For example, the government has claimed that asylum seekers from Mexico and Hungary often present 'bogus' claims and has, as a result, added these countries to the DCO list. Yet legitimate claims from these countries are far from rare. In fact, from 2008-2012 almost 1,500 asylum seekers from Hungary and almost 8,000 asylum seekers from Mexico were recognised as refugees in accordance with the Refugee Convention, the UNHCR statute, or as people granted 'refugee-like' humanitarian status (World Bank 2013). Accordingly, individuals coming from DCO countries *do*, in at least some cases, present credible refugee claims. These credible claims undermine the primary justification that the government has provided for the introduction of the DCO list.

The Canadian Government has tried to dismiss the significance of the changes it has imposed. Evidence shows, however, that many are already suffering from the effects of these policies. Minister Kenney has argued that his government is merely working to ensure that refugees and claimants do not access better care than Canadians. Yet, for many affected individuals, the government's policies take away *all* coverage. For many, no coverage remains for emergency care. No coverage remains for maternal care. As a result, the government has violated its international obligations and created a system that denies healthcare access to some of Canada's most vulnerable and marginalised populations. The government's narrative has been misleading. They are not denying refugee claimants access to 'unfair benefits', they are denying them the right to basic and emergency healthcare.

Lane Krainyk recently completed his Juris Doctor at the University of Toronto Faculty of Law. During the course of his legal studies, Lane has concentrated on international human rights issues, interning with the Burma Lawyers' Council, the Refugee Law Office and UNHCR. In addition, Lane is a former editor of Rights Review, the University of Toronto Faculty of Law's human rights publication.

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Resisting government labelling and engaging the community: The 'March For Protection' in Hong Kong

By Francesco Vecchio and Cosmo Beatson

This article intends to analyse an event that revealed new avenues for Hong Kong's civil society to counter the government's attempt to negate asylum seekers' individual agency and the government's opposition towards a comprehensive asylum policy. This article outlines the context which led to the organisation of the 'March For Protection' on 30 October 2012. In doing so, it aims to offer a starting point to explore and debate the march's rationale, attainments and, more generally, civil society's relationship with state power.

Asylum seekers in Hong Kong recently grabbed the headlines with a protest march in which they demanded fairer screening and rebuffed official and public views that generally depict them as bogus claimants. In the wake of the 'March For Protection' (MFP) and widespread English-language press coverage highlighting the difficulties asylum seekers face in the territory (for example Chiu 2012a; SCMP Editorial 2012; Kennedy 2013; Yeung 2013), civil society and UNHCR Hong Kong's head-of-office called forcefully for local authorities to accede to the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) (Chiu 2012b; Read 2013) and address current procedural shortcomings (Daly 2012; Vision First 2013a).

Hong Kong is a Special Administrative Region of the People's Republic of China. Under the 'one country, two systems' policy, it enjoys relatively broad administrative independence in immigration policy. While it is not our intention to delve into China/Hong Kong relations, we note that although the mainland signed the 1951 Refugee Convention and provisions for refugees were included in domestic law, Hong Kong has instead firmly resisted its extension to the territory (Loper 2010). Nonetheless, the city is a signatory to the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and a two-track asylum screening system is available to refugees. On the one hand, UNHCR performs refugee screening. On the other, the Hong Kong Government assesses claims under Article 3 of CAT, which prohibits the removal of a person to the country where s/he would face torture or other cruel treatment. In spite of its potential to minimise mistakes, this bifurcated asylum practice has been said to give rise to procedural confusion, delays and a wasteful duplication of resources. Refugees' concurrent or sequential reliance on both mechanisms affects the understandings of asylum seeking. Additionally, public policy is shaped by Hong Kong's memory of dramatic mainlander and Vietnamese refugee inflows in the past (Vecchio, forthcoming). The government has repeatedly asserted that were Hong Kong to accede to the 1951 Refugee Convention, the city would be flooded by waves of illegal migrants posing as asylum seekers to gain entrance and exploit local prosperity (see for example discussions in the Hong Kong Legislative Council, LG 2011).

There are indications that these, and other misconceptions, are widespread in the community. A typical statement in this direction was made by scholar Victor Fung (2012), who recently alerted the readers of China Daily that waves of 'economic migrants' would inundate the city, working illegally to support their families back home. In his reply to UNHCR's appeal, Fung warned that were Hong Kong to accede to the 1951 Refugee Convention, the territory would be doomed to 'sink' into the harbour and 'drown'. However, the reasons why such a

catastrophic scenario would inevitably unfold were not disclosed. As often happens (see Tao 2009), the rationale supporting official propaganda on the formation of the Refugee Convention/illegal migration nexus is rarely elucidated, giving us the impression that certain beliefs have become so profoundly ingrained in Hong Kong's mindset that they amount to tautological truths. While proponents offer no evidence to support the formulation of their views, any attempt to negate them is resisted no matter what evidence is presented to refute their validity.

In reality, Fung's comments are reflective of an old myth, namely, that Hong Kong should remain firm in erecting protective floodgates to control the desirable ebb and flow of people in times of neoliberal globalization. In the 1980s and 1990s, when Hong Kong changed from a manufacturing centre to a service economy, its labour needs shifted rapidly from requiring menial skills to valuing brain-power (Zhao *et al.* 2004). As a consequence, a low-skilled immigrant population was perceived as a burden, rather than an asset. As stressed by Law and Lee (2006: 235), 'the Hong Kong state has a long tradition of using economic conditions as the most important premise for policy-making, not merely in relation to immigration control, but to nearly all aspects of public policy-making'. While humanitarian values seldom occupy a significant role in Hong Kong government's policies, 'economic prosperity is regarded as the cornerstone of the state's legitimacy' (Law and Lee 2006: 235). For example, in January 1999, after the Hong Kong Court of Final Appeal declared unconstitutional the government's scheme to prevent 1.67 million mainland Chinese, related to Hong Kong residents, from acquiring the right of abode (according to Article 24 of the Basic Law, Hong Kong's mini-constitution), the government called on the Standing Committee of the National People's Congress in Beijing to reinterpret the article and restrict that right (Smart 2003). To justify this extreme measure, the authorities put forward the catastrophic scenario of a massive invasion of Chinese mainlanders flocking into tiny, over-populated Hong Kong and threatening its economic development (Ku 2001; Smart 2003). Similar fears had been raised when Vietnamese refugees landed in Hong Kong between the 1970s and 1990s. While at first their arrival did not raise particular concerns, after an increasingly fatigued international community retracted its resettlement support, the government branded those 'boat people' as illegal immigrants fleeing poverty, not persecution (Thomas 2000).

In the wake of this extraordinary experience – that is still etched seminally in the city's psyche – the government has continuously maintained a firm and intransigent policy of not granting asylum. Furthermore, the government has insisted upon its demand that the international community repay the money spent to shelter and care for the Vietnamese refugees. Thereafter, every attempt to legislate in favour of a more humane refugee policy, and the spontaneous arrival of underprivileged people, has been resisted as potentially cracking the dam and threatening Hong Kong's prosperity.[13] Additionally, extremely low recognition rates of torture claimants conveniently undergird the official standpoint that asylum seekers are bogus. In particular, since CAT screening commenced in 2004, a total of 11,900 claims have been lodged, and only one was substantiated in May 2008, following court intervention. This is tantamount to a recognition rate of zero per cent, which has been

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[13] In what sounds like a political statement, a 2011 Court judgment denied the right to work to a sample of UNHCR refugees and the single screened-in torture victim (*Ma v Director of Immigration*). The judge explicitly emphasised 'Hong Kong's small geographical size, huge population, substantial daily intake of immigrants from the Mainland, and relatively high per capita income and living standards.' With this position the court justified the adoption of 'very restrictive and tough immigration policies and practices' which would otherwise give a 'ray of hope' to illegal migrants posing as asylum seekers.

said to raise questions about the screening fairness and government willingness to protect torture victims (Vision First 2012).

On 30 October 2012, over 300 asylum seekers and their sympathisers took to the streets to protest against government policies and discourses of asylum aimed at categorising claimants as deviant economic migrants. In this demonstration, protesters marched in solidarity to demand fairer screening and to reject the government's 100 per cent rejection rate of torture claimants. Organisers argued that this is an impossible statistic, apparently maintained to support the accusation that asylum seekers are effectively economic migrants bent on abusing the system (Vision First 2012). The protesters drew a link between this homogenous categorisation and the government's attempt to hastily dismiss the 1951 Refugee Convention as a risky loophole that would inescapably endanger the city. In fact, painting every claimant with the same brush appears to conveniently exonerate the administration from implementing a comprehensive system for the contemporaneous assessment of both UNHCR refugees and CAT claimants. In the current system, claimants' credibility is undermined and a culture of suspicion has taken root in the presumption that asylum seekers are deviant abusers laying siege to Hong Kong for profit. To resist this characterisation, the MFP embodied a visible movement that finally countered such asylum policies and refugee politics. As one asylum seeker observantly stated, 'no matter what our stories are, whatever our individualities and dreams are, we are all illegal immigrants. They [government authorities] want us to be economic migrants. They make us live like this, but I'm not what they want us to be'.

The MFP was the first large, public demonstration in Hong Kong by asylum seekers who are not afforded regular immigration status. Predictably, it failed to achieve immediate policy changes, but it exposed what protesters perceive to be government malpractices. First, by objecting to bureaucratic constructs that homogenise their identities and reasons to travel to Hong Kong, asylum seekers united to make one voice of their many concerns. As protesters chanted slogans intended to push human rights into the political agenda, those previously believed to belong to reserved, fringe groups, came courageously together, and (paradoxically) transcended their individual, cultural and ethnic differences to claim their diverse individualities. As participant Beatson stressed in his closing argument during the march, 'People said we couldn't get organised. They said it was dangerous to take action…. They were wrong!' Second, the MFP raised public awareness by drawing increased media attention to refugees, as evidenced by a dozen articles, letters and editorials that appeared in the English-language press in late 2012. Conversely, the Chinese media mostly did not cover the demonstration. This possibly reflected the local population's attitude as seemingly still bruised by previous refugee ordeals. However, this sudden and unexpected exposure arguably compelled UNHCR to take a firmer public stand and openly demand that the government accede to the 1951 Refugee Convention. As head-of-office Karani (2012) stated, 'When it comes to expedient but fair due process, no one can compete with Hong Kong, and were the government to implement robust refugee-status determination procedures under the Refugee Convention, the effect would be that of a deterrent, not a magnet'. Third, a realistic advocacy strategy apparently emerged among similarly-minded individuals, legislators and NGOs (see Vision First 2013b). Yet the refugee non-profits have to demonstrate a stronger disposition to prioritize the refugee cause, and breach the bedrock of the predominantly adverse Chinese public opinion.

In conclusion, the MFP denounced practices of ordinary state violence on populations whose individualities and untenured legal status normally hinder their union. In what Green and Ward (2012) have argued to be a dialectical process between engagement and resistance, the

MFP identified and opposed government policy and practices that ostensibly violate social/legal norms relating to human rights. Further, it attempted to educate Hong Kong citizens and state actors about the consequences of denying asylum seekers their due agency. Importantly, the MFP demonstrated that new avenues are available for Hong Kong civil society to openly protest and engage the government's power to render asylum seekers 'bogus'. In so doing, it affirmed the civil society's duty and right to pinpoint government cruelty and shortcomings. Thus, it elevated a potent, symbolic mirror for the government to look at itself and question its work (cf. Cook 2011). Whether such effort is to result in positive outcomes is yet to be seen. The MPF will be staged again on 27 April 2013 with the aim of achieving greater vigour and broader participation from locals and those who were discouraged in October by fears of mass arrests and detention.

Francesco Vecchio holds a PhD in criminology from Monash University, Australia, where he researches asylum seeking in the global city. He collaborates with a number of organisations conducting research on refugee and migrant experiences of border crossing and serves as a board director of Vision First.

Cosmo Beatson is Vision First's co-founder and Executive Director. He left the business world, after twenty years in the China trade to pursue his ideals through founding Vision First.

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1951 Convention Relating to the Status of Refugees

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1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Firsthand Monitor

The Situation of Asylum Seekers in Higher Education in England

By Sasan Panbehchi, assisted by Roger Ellis

Abstract

Higher education in the UK is an extremely challenging place for asylum seekers who have not been granted refugee status or indefinite leave to remain. Asylum seekers are treated not as home students but as international students, unable to fund themselves like home students by loans, and expected to pay at the start of each term the much greater fees they are charged. This is the direct result of a government policy that has only recently (in 2012) come into force. The author offers his story as a specific example of the difficulties such students face.

Introduction

Readers of this journal will know well the difficulties faced by asylum seekers in this country, even those studying in UK universities. My story, as the son of an asylum seeker and a first-year medical student at Sheffield University, provides a pointed and painful instantiation of this phenomenon.

My father was a prosperous businessman in Iran. In 2006 he took part in a protest against public attacks on the Turkish language, which our family speaks. He was arrested, beaten up, and held incommunicado for ten days. On his release he was regularly called in for interrogation, and constantly spied on and harassed by the authorities. He decided, in the end, that he had no option but to flee the country with his family. Thus, in February 2007, carrying what we could and walking by night through the snow for two days, we made it over the mountains to Turkey, where my father had arranged transport in a truck with a hidden compartment. We travelled for ten days, not knowing where we were going, and hardly ever able to leave our cramped quarters. Eventually, we were dropped in an alley in a huge city. This turned out to be London. My father got to a police station to ask for help (at that time, none of us spoke English). We were handed over to the Borders Agency and moved, first to Leeds, and then to Sheffield, which is where we now live.

Since this is my story and not my father's, I do not need to linger on the difficulties of those first years for all of us, especially my parents. Refused permission to remain in the country, facing the rejection of every subsequent appeal he made, and unable to get work, my father suffered from constant depression. My mother kept the family together – at what personal cost you can readily imagine. I lost my childhood: once I had learned enough English at school, I regularly had to help out as interpreter for my father.

In 2012, at the best state secondary school in Sheffield, I gained 3 A-levels in Science subjects (A*, A, and B) and an A* in Iranian. For years I had wanted to study medicine. The

year before, I had applied to Sheffield's medical school. With my science results I was accepted, and started in October 2012.

But that is when my problems really started. New legislation affecting Universities in England had come into force in February 2012, and was to have a crippling effect on asylum-seeking students, me included. Thus, had I gone to Sheffield a year earlier my situation would have been very different, and much easier.

In July 2011 my family had been granted temporary leave to remain in the UK for three years, so my father was able to work from then on. In May 2012 he opened an Iranian restaurant that is now beginning to pay for itself, and is popular with local people. But our legal status was unchanged, and we will have to reapply in July 2014 for permission to remain for another three years.

As the son of an asylum seeker, I am treated as an international student, and expected to pay the much higher fees that international students must pay (c. £125,000 for medicine) in comparison to home students. This problem affects all students, even British-born students, who have not lived in this country continuously for three years before entering University. Additionally, once you have registered as an international student, you cannot change your status midway through your studies.

Not only that: the University stipulates that international students pay all fees for each academic year in advance, a term at a time. Otherwise they cannot progress to the next year of their studies, much less graduate at the end of the course.

I paid for my first term's fees with family savings and a grant I got from the University of York. The rest of this year is being paid for by a loan by English friends. Until that loan was offered I had the enormous uncertainty of my future to cope with on top of the pressures of my studies, and found it almost impossible to concentrate on my work. Now at least I am free, for the time being, of that worry. But, upon passing the year, I will then have to face the same problems again at the end of the summer. Should I be compelled to withdraw at the end of my first year while I wait for my father to be granted permanent right to remain in the UK, I will then have to start my studies all over again, since the Medical School has decided, from September 2013, to restructure its degree course.

My family do not have the money to pay for my course: most of what they had has gone into the family restaurant, which could never make enough profit to pay for my studies. The failing Iranian currency means that, month by month, the amount I could get from my family funds in Iran gets smaller and smaller.

A tiny hope remains. The University has declared itself a University of Sanctuary (Mayblin 2011). What this will mean in practice no-one seems to know. A new committee has been set up, however, and is due to meet at the start of May 2013 to consider the practical implications of this promising declaration. I have written to the University Registrar a letter of appeal,

with supporting letters from my local MP and other Sheffield professionals, which I hope will be forwarded to that committee. I have also enlisted support from student bodies, particularly the Students' Union, student representatives of STAR (Students Against Racism), and student representatives of the British Medical Association. I would value enormously any representations readers could make for me at this time to the University: or more widely. My situation is nearly, if not quite, unique. The University of Sheffield is unable to provide numbers of asylum-seekers studying for degrees at the University, and I know of only one other in Sheffield. It is horrible that individuals in my position should be deprived of their right to continue their studies and, in this example, be denied the opportunity to contribute to the welfare of their adopted country by practising medicine in the NHS.

If nothing comes of my appeal to the university, any information readers may have concerning people or organisations I could approach to help me raise the costs of continuing my studies would be hugely appreciated. A group of friends has already started to campaign on my behalf. Readers could contact them, or me, at any of the addresses below.

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Law Monitor

Different Sources of International Criminal Law and Exclusion: How the Federal Court of Australia in *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* Got It Wrong and Why It Matters

By Catherine Drummond

Abstract

At the heart of the intersection of international refugee law and international criminal law lie the international crimes which provide the basis for exclusion from refugee status pursuant to Article 1F(a) of the 1951 Convention Relating to the Status of Refugees. While it is clear that the alleged act in question must have constituted an international crime at the time of its commission, whether criminality is determined by customary international law or international instruments, what the relationship between the two is, and what role defences play are issues which Australian courts have failed to properly grasp and something which is the subject of assumption and conjecture in the literature. In the leading Australian case on Article 1F(a), *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs*, the Federal Court of Australia made a fundamental error in applying Article 1F(a) in a manner inconsistent with its interpretation. This paper aims to set the records straight and fills a gap in existing literature on the interpretation and application of Article 1F(a).

Introduction

At the heart of the intersection of international refugee law and international criminal law lie the international crimes which provide the basis for exclusion from refugee status pursuant to Article 1F(a) [14] of the 1951 Convention Relating to the Status of Refugees (hereinafter Refugee Convention). Article 1F(a) provides that there must be 'serious reasons for considering' that the alleged conduct must have constituted a crime against peace, a war crime or a crime against humanity at the time of its commission. However, whether criminality is determined by customary international law or international instruments, what the relationship between the two is, and what role defences play are issues which Australian courts have failed to properly grasp and something which is the subject of assumption and conjecture in the literature. This Article will focus on the leading Australian case on Article 1F(a), *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (hereinafter *SRYYY*). It will be argued that the Federal Court of Australia in *SRYYY* made a fundamental error. The Court affirmed the uncontroversial view that Article 1F(a) requires that the conduct justifying exclusion constitute an international crime at the time of its commission, which necessarily entails the absence of a defence absolving the person from criminal responsibility. However, in applying Article 1F(a) the Court failed (and at one point

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[14] Article 1F(a) will be referred to interchangeably as "Article 1F(a)" or "the exclusion clause."

of the judgment even refused) to ascertain whether the substantive basis for criminality was treaty or customary international law. The result was that the Court considered that the defence of superior orders in Article 33 of the Rome Statute must be applied, notwithstanding that it was not clear that it reflected custom applicable to the applicant (SRYYY) at the time the conduct was engaged in nor was the Rome Statute binding on SRYYY. The Court therefore departed from the requirement that there be a basis for the substantive criminality at the time the conduct occurred. The gravity of the error is more acute when the approach in other jurisdictions, such as the United Kingdom, is considered, suggesting that the error is not one limited to Australia.

This paper aims to set the record straight and to fill a gap in existing literature on the interpretation and application of Article 1F(a). It posits that alleged criminality justifying exclusion must be based on either customary international criminal law or international instruments in force in respect of the particular conduct in question. To this end, courts are obliged, contrary to the position of the Court in *SRYYY*, to determine whether the 'instrument' they are applying accurately reflects customary international law at the time of the alleged conduct or was itself in force as a substantive basis for criminal liability in respect of the alleged conduct. The paper proceeds in three parts: first, it examines the reasoning of the Federal Court of Australia in *SRYYY*; second, it assesses the implications of such an approach; and third, it makes recommendations required to correct the Court's error. It concludes that the proper interpretation and application of Article 1F(a) is fundamental to the integrity of the institution of asylum and to the protection of persons whose exclusion is not legally justified.

The Approach of the Federal Court of Australia in *SRYYY*

SRYYY was a decision of the Federal Court of Australia on appeal from the Administrative Appeals Tribunal (hereinafter AAT). The AAT affirmed a Ministerial delegate's refusal to grant a protection visa to the applicant, a former member of the Sri Lankan army, pursuant to Article 1F(a)[15] because there were serious reasons for considering that the applicant had committed war crimes or crimes against humanity by interrogating Tamil civilians (*SRYYY*: [3]-[4]). The Court held that the AAT committed a jurisdictional error for, *inter alia*, failing to consider the defence of superior orders as set out in Article 33 of the Rome Statute (*SRYYY*: [127]). Despite producing what is largely a well-researched[16] and reasoned judgement, the Court fell into error in its interpretation of the role of customary international law in Article 1F(a) which has, and will continue to have, serious implications for the institution of asylum and the rights of asylum applicants in Australia, and potentially, in other jurisdictions.[17]

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[15] See also Migration Act 1958 (Cth) s36(2)(a); Migration Regulations 1994 (Cth) Schedule 2, cl. 866.221.
[16] Which some have noted is unusual in curial opinion: Johnston & Harris 2007.

[17] *SRYYY* has been relied on by counsel in similar proceedings across various jurisdictions. See, for example, *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2011] 1 AC 184: 185, 219.

What the Court did correctly

The Court correctly interpreted Article 1F(a) insofar as it appreciated that there must be serious reasons for considering that the conduct justifying exclusion must have constituted a crime against peace,[18] a war crime or a crime against humanity at the time of its commission (the requirement of international criminality). Article 1F(a) provides that:

> [t]he provisions of [the Refugee Convention] shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> a. he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes…

It is well accepted, and *SRYYY* affirmed, that Article 1F(a) is to be interpreted in accordance with the customary rules of treaty interpretation, codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter Vienna Convention).[19] The ordinary meaning of the term 'committed a crime', in its context[20] and in light of the object and purpose of the Refugee Convention, requires that the conduct in question must have constituted an international crime at the time it was engaged in (*SRYYY*: [61]-[62]). This interpretation is consistent with the non-derogable international human rights norm of *nullum crimen sine lege*[21] which is relevant to the interpretation of Article 1F(a).[22] In addition, *SRYYY* recognised

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[18] The term 'crime against peace' is drawn from the London Charter of the International Military Tribunal, Article 6(a). The modern equivalent is the crime of aggression found in Article 8*bis* of the Rome Statute.

[19] Article 31 of the Vienna Convention provides that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.' Article 32 permits recourse to supplementary means of interpretation, including the *travaux preparatoires*, to confirm the meaning ascertained by the application of Article 31 or to determine the meaning where the meaning according to Article 31 is ambiguous or obscure, or leads to a manifestly absurd or unreasonable result. As to its application to Article 1F see, e.g., *SRYYY* [18]; *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173: 178-179. As to the application of the Vienna Convention to the Refugee Convention generally, see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225: 230-231 (Brennan J), 239-240 (Dawson J), 251-256 (McHugh J), 277 (Gummow J), 294 (Kirby J). Despite the Vienna Convention's prohibition on retroactive application in Article 4, Articles 31 and 32 are a codification of custom and therefore apply to treaties enacted prior to its coming into force, including the Refugee Convention. See *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53: [48]: 'Articles 31 and 32 of the VCLT…may in many respects be considered as a codification of the existing customary international law at the point.' See also *LaGrand (Germany v United States)* [2001] ICJ Rep 501: [99]; Rauschning and Wetzel (eds.) 1978; Koskenniemi 2006.

[20] The context of Article 1F(a) is drawn from its location in Article 1 and its intended operation in excluding persons for whom there are serious reasons to believe have committed international crimes such that they do not escape prosecution and abuse the institution of asylum: see e.g. UNHCR, *Guidelines on International Protection* 2003; UNHCR, *Background Note on the Application of Exclusion Clauses* 2003; Zimmerman and Wennholz 2011; Gilbert 2003; Department of Immigration and Multicultural and Indigenous Affairs 2002.

[21] *Nullum crimen sine lege* is the latin maxim for "no crime without law." It is enshrined in Article II(2) of the Universal Declaration on Human Rights, Article 15 of the International Covenant on Civil and Political Rights (and Article 4(2) provides that it is non-derogable), Article 7 of the European Convention on Human Rights; Article 7(2) of the African Charter on Human and Peoples' Rights and Article 9 of the American Convention on Human Rights. See generally, Joseph, Schultz & Castan 2004; Cassese 2003:.

that defences are relevant, as a person cannot have 'committed a crime' where a defence is available to absolve him or her of criminal responsibility.[23]

The Federal Court in *SRYYY* also appreciated the distinction between the two sources of substantive international criminal law when it held that that responsibility can arise either under custom or under treaty (*SRYYY*: [67]). Customary international law consists of unwritten and evolving rules, created by extensive and virtually uniform State practice and *opinio juris*,[24] which are binding on all States.[25] International treaty law, by contrast, consists of conventional rules set down in agreements between subjects of international law which are stagnant and which bind only those who are signatories to each international instrument.

However, the Court did not acknowledge that for treaties to be an actual *source* of international criminal law they must substantive rather than jurisdictional[26] in nature and must be unquestionably binding on individuals at the time the conduct was engaged in (*Prosecutor v Tadić* (ICTY) 1995: [94], [143]).[27] The Rome Statute is one such example of a substantive treaty which creates international crimes and defences (Milanović 2011; *Prosecutor v Lubanga* (ICC) 2007: [302]-[303]). Therefore, in order to determine whether the conduct of the applicant was an international 'crime' at the time of its commission, the 'instruments drawn up to make provision in respect of' the international crimes referred to in Article 1F(a) must be ones which either, on the one hand, codify customary international criminal law or, on the other hand, which create substantive international crimes or defences and are binding on the particular individual at the time the conduct justifying exclusion was engaged in. This accords with commentators' views that the intent of the drafters of Article

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While the Court does not expressly refer to *nullum crimen sine lege* as part of the context, its rejection of the Minister's argument at [61]-[62] suggests an approach consistent with this norm.

[22] Article 31(3)(c) of the Vienna Convention provides that 'any relevant rules of international law applicable in the relations between the parties' are to be taken into account together with the context when applying the general rule in Article 31(1). This subparagraph, also known as the principle of systemic integration, has as its object, the interpretation of treaties against the background of the existing rules of international law in which they are situated, such that they are interpreted as part of a coherent and meaningful system of international law as a whole. See, e.g., Koskenniemi 2006.

[23] Cassese 2002; Darcy 2011; *SRYYY*: [127].

[24] *Opinio juris* is the belief that States act in a certain way because they are legally obligated to do so. See: *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Merits)* [1969] ICJ Rep 3: [74]. Note a lower test (general and consistent State practice and *opinio juris*) for custom is often used for non-criminal matters: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14: [186].

[25] With the exception of persistent objectors.

[26] Treaties of a jurisdictional nature such as the Statutes of the ICTY, ICTR and the SCSL, only define when a tribunal or court can exercise jurisdiction over crimes that emanate from another source, such as customary international law crimes. With respect to the ICTR cf. *Prosecutor v Kanyabashi* (*Decision on the Defence Motion on Jurisdiction*) (International Criminal Tribunal for Rwanda, Case No ICTR-96-15-T, 18 June 1997) [35]. However, this is widely and persuasively criticised, see e.g., Parlett 2011.

[27] See also Article 28 of the Vienna Convention. Further, the customary principle of *pacta tertiis* in Articles 34-36 of the Vienna Convnetion precludes treaties from creating rights and obligations for non-States parties who do not consent. Although 'parties' in this context means States, where the treaty in question creates rights and obligations directed to individuals through prescriptive jurisdiction, the same principles apply. See Milanović 2011.

1F(a) was to allow for the evolution and development of international criminal law (Goodwin-Gill and McAdam 2007; *SRYYY*: [47]).

Where the Court fell into error

The Federal Court of Australia stated that because the status of customary law at any given time is a vexed and difficult question, which the drafters of the Refugee Convention could not have intended courts to answer, 'it is not for the courts or the decision-maker to enquire whether the Rome Statute [or other applicable instruments] accurately reflects the state of customary international law at the date of the alleged crime' (*SRYYY*: [47]).[28] The immediate consequence is that the Court could apply an instrument that is not reflective of customary law at the time the alleged act was committed and which was not binding on the individual in the particular case at the relevant time. The result would be that an applicant is excluded from refugee status for conduct which did not constitute an international 'crime' at the time of its commission. The outcome would be the direct opposite of what Article 1F(a) seeks to achieve. The same principle applies for defences; if the Court applied a defence which was not reflective of customary international law at the relevant time nor contained in an instrument binding the individual, it may wrongly find the applicant is not excluded by Article 1F(a) when they ought to be. Without realising the difficulty it would create, the Court in *SRYYY* explicitly stated that, while it is unclear as to whether Article 33 of the Rome Statute (which contains the defence of superior orders) is reflective of custom (*SRYYY*: [76]),[29] the AAT had fallen into jurisdictional error in failing to consider its application (*SRYYY*: [127]). It is also not the case that the Rome Statute was binding for SRYYY at the relevant time; Sri Lanka is not and was not at the relevant time a party to the Rome Statute. The Court's justification that any instrument drawn up which provides a definition of war crimes, crimes against humanity or a crime against peace is an 'instrument' for the purpose of Article 1F(a) (*SRYYY*: [67]) is inconsistent with the ordinary meaning of the term 'committed a crime.' The use of this term in Article 1F(a) requires that the conduct be criminalised at the time it was committed, to be adjudged by the standards of international criminal liability at that time.[30]

The conclusion, therefore, must be that the Federal Court of Australia erred. The Rome Statute was not binding on the individual at the time of the alleged commission of the crime and thus, should not have been applied. In addition, Article 33 was not reflective of customary international law on superior orders at the relevant time and therefore, Article 33

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[28] Despite this statement, the Court did find that the Rome Statute was a codification of custom with respect to the definition of war crimes and crimes against humanity, and examined the AAT's application of the Rome Statute as a codification of custom, rather than a substantive treaty. In explaining its reliance on the Rome Statute for the definition of war crimes and crimes against humanity at a time before the Rome Statute came into force, the Court explained that the source of the criminal responsibility arose under customary international law and gave a number of examples of instruments enacted after the commission of the crimes they were drawn up in respect of, all of which reflected customary international law. See *SRYYY*: 81.

[29] The debate on whether Article 33 is reflective of custom is outside the scope of this paper. See, e.g. Gaeta 1999; McCoubrey 2001.
[30] See the Court's rejection of the Minister's temporal argument to the contrary: *SRYYY*: [60]-[62].

should not have been considered. The Court's reasoning in this respect and application of Article 1F(a) undermines and contradicts its interpretation of Article 1F(a).

This error may be reflective of a broader misunderstanding of the interaction between international criminal law and international refugee law. Courts in other jurisdictions, including notably the United Kingdom, have fallen prey to the same error. In *R (JS (Sri Lanka)) v Secretary of State for the Home Department* (hereinafter *JS*), the Court held that '[t]he starting point for a decision-maker addressing the question whether there are serious reasons for considering that an asylum seekers has committed an international crime…should now be the Rome Statute' (*JS*: [115]). The approach was expressly affirmed on appeal (*JS*: [8], [47]). That case too involved a Sri Lankan national, thus the Rome Statute was not directly binding on the applicant at the relevant time. No explicit consideration was given to the question of whether the provisions of the Rome Statute relied upon were reflective of customary international law.

Implications

The implications of the approach by *SRYYY* are fourfold. First, the application of the definitions of crimes or defences in the Rome Statute which do not reflect custom or which are not directly binding of the individual at the relevant time contradicts the requirement of Article 1F(a) that the alleged conduct in question constitute a 'crime' at the time of its commission. This has the potential to lead to unjustified inclusions or exclusions, depending on whether the Rome Statute is narrower or broader than custom. This is demonstrated by the inability of the applicant in *SRYYY* to avail himself of a potentially broader defence of superior orders at custom and his subsequent exclusion.[31] Moreover, in light of the fact that some of the countries from which Australia receives many asylum seekers are not parties to the Rome Statute, including notably Sri Lanka, the risk for error will be high unless decision-makers are cautious with the application of definitions of crimes and defences therein which are not reflective of custom.

Second, unjustified exclusions weaken the institution of asylum, which directly undermines the core purpose of the exclusion clause. Article 1F(a) seeks to protect and strengthen the institution of asylum by ensuring that protection is granted only to those who deserve it. An incorrect application of Article 1F(a) which results in unjustified exclusions damages the entire rationale and operation of the international system of refugee protection.

Third, if Australia is not correctly interpreting and applying the Refugee Convention, it may very well be in breach of its international obligations to interpret treaties in good faith (Vienna Convention Article 31(1)). International law envisages a role to play for courts in providing a subsidiary means for the determination of rules of law (Statute of the

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[31] The applicant in *SRYYY* attempted to do so in the later case of *SZITR v Minister for Immigration and Multicultural Affairs* [2006] FCA1759 but was the matter was not determined because the applicant had not first raised it before the AAT and therefore, there was no jurisdictional error for the Federal Court to review.

International Court of Justice Article 38(1)(d)) by interpreting and applying international law. Thus Australian courts should not eschew their role in determining whether a treaty is reflective of custom merely because the question is a 'vexed' one on which views may differ (*SRYYY*: [47]).

Finally, the incorrect application of international criminal law principles relevant to Article 1F(a), such as the requirement that conduct be criminalised at the time it is engaged in order to constitute a 'crime' at international law, has the potential to fragment and undermine systemic coherence in international law as a whole (Koskenniemi 2006).

Recommendations

Courts and policymakers must immediately recognise the importance of ensuring that Article 1F(a) is applied in a manner consistent with its proper interpretation and direct decision-makers and administrative tribunals accordingly. A three step approach should be followed: first, determine whether the alleged act constituted a crime at the time of commission; second, determine whether the source of substantive criminality or any available defences is custom or treaty; and third, apply that source (or an instrument codifying custom, if the former) of international criminal law norms to identify the elements of the crime or defence by which to judge whether there are serious reasons for considering whether that crime has been committed, thereby justifying exclusion of the applicant.

Further, while it would be unduly burdensome to expect Ministerial delegates to continually ascertain the status of custom at various points in time while processing applications for protection visas, it would not be unreasonable to require the Department of Immigration and Citizenship to commission legal advisers to investigate the issue and provide amended advice to decision-makers through the Refugee Guidelines in Procedures and Advice Manual.[32]

Conclusion

This paper has criticised the approach of the Federal Court of Australia in *SRYYY* for applying Article 1F(a) of the Refugee Convention in a manner inconsistent with its proper meaning. Such an approach has serious implications for the integrity of the institution of asylum and the protection of persons whose exclusion is not legally justified. It also may have adverse consequences for Australia's compliance with its international obligations and for the systemic coherence of international law. In essence, this paper is a plea for accuracy in establishing the basis for legally justified exclusions under Article 1F(a).

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[32] The most recent edition of the Refugee Guidelines in PAM3 was updated in March 2010: Department of Immigration and Citizenship, *Refugee Law Guidelines* (March 2010, issued as part of Procedures and Advice Manual 3).

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A Critical Analysis of Kenya's Forced Encampment Policy for Urban Refugees

By Martha Marrazza

Abstract:

The Government of Kenya recently announced a forced encampment policy for urban refugees. The policy and proposed implementation plan has three main components: the forced eviction of refugees from urban areas; the forced encampment of refugees in Kenya; and the eventual return of refugees to their home countries. This article will argue that the government directive and proposed implementation plan is in breach of Kenya's international human rights obligations because it is overtly discriminatory; violates Article 3 and 26 of the 1951 Convention Relating to the Status of Refugees and Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights; and potentially violates Kenya's *non-refoulement* obligations.

Introduction

In December 2012, Kenya's Department of Refugee Affairs (DRA) announced a forced encampment policy for urban refugees. While Kenya hosts over 450,000 refugees in Dadaab Refugee Camp and over 101,000 refugees in Kakuma Refugee Camp, there are approximately 56,000 refugees residing in urban areas in Kenya (UNHCR-Kenya 2013; Fleming 2013). The Government of Kenya's recent forced encampment policy targets such urban refugees, citing security concerns as a motive for the policy.

Although the Government of Kenya has had a *de facto* encampment policy for refugees since the early 1990s, the encampment of refugees has never been fully enshrined in law (Campbell et. al 2011). While the movement of refugees in the camps in Dadaab and Kakuma has been restricted, the restrictions have proved less rigorous than they appear (Campbell et. al 2011). In fact, according to a 2011 paper produced by UNHCR's Policy Development and Evaluation Service (PDES), 'In practice, refugees in Nairobi are not at risk of compulsory relocation to the camps' (Campbell et. al 2011).

However, the December 2012 forced encampment policy articulated by the DRA states that all Somali asylum seekers and refugees in urban areas must move to Dadaab Refugee Camp and that all other asylum seekers and refugees in urban areas must relocate to Kakuma Refugee Camp. Additionally, the forced encampment policy orders that the registration of asylum seekers and refugees in urban areas be halted and that all urban registration centres be closed.[33] Finally, regarding service provision for urban refugees, the policy states that

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[33] According to UNHCR's website, refugee registration refers to 'the recording, verifying, and updating of information on people of concern to UNHCR so they can be protected and UNHCR can ultimately find durable solutions' (UNHCR 2013). Registration provides refugees with an official record of their status, which helps

'UNHCR and other agencies serving asylum seekers and refugees stop providing all direct services to refugees with immediate effect' (Department of Refugee Affairs 2012).

After providing background on the Government of Kenya's directive and elaborating on the current refugee situation in Kenya, this article will offer a brief critique of the directive and proposed implementation plan on legal grounds. The directive and proposed implementation plan has three main components: 1) the forced eviction[34] of refugees from urban areas; 2) the forced encampment of refugees in Kenya; and 3) the eventual return of refugees to their home countries. This article will argue that the government directive and proposed implementation plan is in breach of Kenya's international human rights obligations because it is overtly discriminatory; potentially violates Articles 3 and 26 of the 1951 Convention Relating to the Status of Refugees (hereinafter Refugee Convention) and Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (CESCR); and potentially violates Kenya's *non-refoulement* obligations as well.

Contextualising the Government of Kenya's forced encampment policy for refugees

The refugee situation in Kenya and recent government directive is informed by regional security dynamics in the Horn of Africa. In neighbouring Somalia, famine and protracted conflict perpetrated by groups like Al Shabaab, an Islamist insurgent group with ties to Al Qaeda, has resulted in massive displacement (Ploch 2010). In fact, over 900,000 Somalis currently live as refugees in Kenya, Ethiopia, Djibouti, and Yemen alone (European Commission 2011). Given the emergence of Al Shabaab in East Africa, coupled with the large-scale displacement of Somalis into Kenya, the Government of Kenya is concerned about 'possible terrorist movement across Kenya's porous border with Somalia' (Ploch 2010). Al Shabaab also recruits among members of the Somali diaspora (Ploch 2010), which has further increased suspicion of Somali refugees in Kenya.

Kenyan government officials and the media often assert that violence in the refugee camps and in Eastleigh, a Somali-dominated neighbourhood of Nairobi, can be attributed to the high populations of Somali refugees living in camps and urban settings in Kenya. After a series of grenade attacks in Eastleigh in recent months, the Government of Kenya attributed the attacks to Al Shabaab and used the attacks to justify the December 2012 forced encampment policy for refugees. According to the DRA's press statement, the policy directly resulted from the 'rampant insecurity in the refugee camps and urban areas' (Department of Refugee Affairs 2012).

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protect refugees against *refoulement* and arbitrary detentions. Registration also gives refugees access to certain services and assistance, and it is essential for determining which durable solution is most appropriate for refugees (UNHCR 2013).

[34] The term 'forced eviction' is used to describe the Government of Kenya's plan to relocate urban refugees from cities to camp settings because it accurately describes the policy, and because there is a legal framework surrounding forced evictions. According to the Office of the High Commissioner for Human Rights, the practice of forced evictions is defined as 'the removal of individuals, families or communities from their homes, land or neighbourhoods, against their will, directly or indirectly attributable to the State' (OHCHR 1993).

Furthermore, in the weeks following the directive, a 16 January 2013 letter from the Ministry of Provincial Administration and Internal Security regarding the government's plan for implementing the policy was leaked to the press (Iringo 2013). According to the letter, the government planned on ultimately returning refugees to their home countries after sending them to Dadaab or Kakuma. The letter states:

> The Government intends to move all the refugees residing in Urban areas to the Dadaab and Kakuma Refugee Camps and ultimately, to their home countries after the necessary arrangements have been put in place. The first phase which is targeting 18000 persons will commence on 21st January, 2013. (Iringo 2013).

Predictably, UNHCR and other refugee-serving organisations in Kenya have swiftly and forcefully criticised the Government of Kenya's new forced encampment policy and proposed implementation plan. In a briefing on 25 January 2013, UNHCR spokesperson Melissa Fleming stated that UNHCR had serious concerns with the policy 'from the protection, human rights and humanitarian point of view' (Fleming 2013). Other organisations, such as Human Rights Watch, Amnesty International, and Refugees International, have condemned the policy as discriminatory and unlawful (Achilles 2012; Human Rights Watch 2013; Teff and Yarnell 2013).

In response to the directive, the legal aid non-governmental organisation Kituo cha Sheria filed a case opposing the government's policy. Judge David Majanja of the Kenyan High Court, issued a conservatory order on 4 February 2013 to temporarily prevent state actors from implementing the directive. A follow-up hearing was scheduled for 19 February 2013, and UNHCR and the Katiba Institute have been added to the case as *amici curiae*.

Critique of the Government of Kenya's forced encampment policy and proposed implementation plan

Kenya's forced encampment policy is discriminatory

Most basically, the Government of Kenya's directive is overtly discriminatory.[35] According to the International Convention on the Elimination of All Forms of Racial Discrimination (1966), discrimination is defined as:

> …Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The directive is discriminatory on two levels: first, it targets refugees (specifically urban

refugees), and secondly, it differentiates between refugees from Somalia and refugees from other countries.

The forced eviction component of the policy explicitly discriminates against refugees, specifically urban refugees. In contrast to some forced eviction policies that are applied to all inhabitants of a certain area regardless of their immigration status, the Government of Kenya's policy would target urban refugees if implemented. While forced evictions may be legal in certain circumstances,[36] commentary on Article 11 of CESCR states, 'where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved' (OHCHR 1997). Since the Government's forced eviction policy would only be applied to refugees rather than to all inhabitants of a certain neighbourhood or district, the policy involves a form of discrimination.

Furthermore, the Government of Kenya's forced encampment policy is potentially in violation of Article 3 of the Refugee Convention, which states that 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'. By differentiating between Somali refugees and refugees from other countries, the Government of Kenya is effectively discriminating against refugees on the basis of their country of origin.

The discriminatory nature of the Government of Kenya's forced encampment policy, both against urban refugees in general and against Somali refugees in particular, is therefore problematic and potentially in violation of the Refugee Convention and of CESCR.

Secondly, the forced eviction provision of the directive is potentially in violation of standards for adequate housing recognised by international human rights law. Forced evictions violate the right to adequate housing outlined in Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (CESCR). While some may argue that transferring refugees to alternative housing in a camp setting does not violate the right to adequate housing outlined in Article 11(1), UN Guidance on the Basic Principles and Guidelines on Development-Based Evictions and Displacement states that all persons have the right of resettlement to alternative land 'of better or equal quality' (OHCHR 1997b). In Kenya the refugee camps are so crowded and insecure that a forced encampment policy would result in a severe loss of services for most urban refugees (Human Rights Watch 2013; Therkelsen 2012; Teff et. al 2013).

Kenya's forced encampment policy potentially violates the freedom of movement rights of

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[36] According to the Office of the High Commissioner for Human Rights, forced evictions can be consistent with international human rights standards in certain exceptional circumstances, including but not limited to: '(a) racist or other discriminatory statements, attacks or treatment by one tenant or resident against a neighbouring tenant; (b) unjustifiable destruction of rented property; (c) the persistent non-payment of rent despite a proven ability to pay, and in the absence of unfulfilled duties of the landlord to ensure dwelling habitability; (d) persistent antisocial behaviour which threatens, harasses or intimidates neighbours, or persistent behaviour which threatens public health or safety ...', etc. (OHCHR 1993).

refugees

Next, the forced encampment provision of the directive potentially violates the freedom of movement rights of refugees outlined in Article 26 of the Refugee Convention. According to Article 26, states should allow refugees lawfully within their territory the right to choose their place of residence and move freely within their territory. Domestic refugee legislation in Kenya similarly fails to provide legal justification for the encampment of refugees. Although refugee camps are mentioned in Kenya's Refugees Act (2006) (hereafter the Act), the Act does not provide an official encampment policy and fails to designate which categories of refugees should reside in camps (Elhawary et. al 2010). Therefore, the Government of Kenya does not have a legal basis for its forced encampment policy under domestic and international law.

Kenya's forced encampment policy and proposed implementation plan potentially violates Kenya's non-refoulement *obligations*

Third, the government's stated intention to return refugees to their country of origin potentially violates the *non-refoulement* principle enshrined in the Refugee Convention and customary international law. According to Article 33 of the Convention, states cannot expel or return ('*refouler*') refugees to countries or territories where they would face persecution. *Non-refoulement* is an essential and foundational principle of refugee protection, one that has been incorporated into Kenya's domestic refugee legislation. Thus, Permanent Secretary Iringo's letter stating that the Government of Kenya intends to return all urban refugees to their home countries without individual assessments as to whether there is a risk of persecution undermines Kenya's role as a country of asylum.

If implemented as planned, the Government of Kenya's forced encampment policy and push to return refugees to their country of origin would violate Kenya's *non-refoulement* obligations as a signatory of the Refugee Convention.

Conclusion

Overall, the Government of Kenya's security concerns do not justify the December 2012 forced encampment policy, which is discriminatory, illegal, and would displace tens of thousands of urban refugees, jeopardising their human rights, livelihoods, and access to critical services in the process. This article has argued that the directive and proposed implementation plan is in breach of Kenya's international human rights obligations. If carried out, the policy would forcibly evict urban refugees in a discriminatory manner; curb the freedom of movement rights of refugees; and potentially result in the illegal return of refugees to their country of origin. The High Court's preliminary ruling and the opposition from UNHCR and civil society organisations is promising. The Government of Kenya should heed the initial responses to the policy and withdraw the directive if they are committed to the human rights and protection of refugees.

Martha Marrazza is an American national who holds a BA in Religion and Political Science from Swarthmore College and an MSc in Forced Migration from the Refugee Studies Centre at Oxford University, where she concentrated on the US Refugee Admissions Program, specifically focusing on groups of special concern to the US. Since graduating she has been based in Nairobi, Kenya, first as a Project Developer for the International Organization for Migration (IOM), and currently as a Caseworker for the US Refugee Admissions Program.

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Recognising the Feminisation of Displacement: The Gendered Impact of Ecuador's New Refugee Decree

By Johanna L. Gusman

Abstract

Recent shifts in Ecuador's refugee policy, in particular its newest Refugee Decree 1182, are making South America's once most generous haven for asylum seekers considerably more restrictive. These changes have significant consequences for Ecuador's refugee population, the overwhelming majority of which is comprised of women and children. This article discusses the gendered impact of these policy changes in light of the feminisation of displacement, the growing phenomenon in which women represent a disproportionate percentage of displaced populations worldwide. By eliminating the 1984 Cartagena definition of 'refugee' and imposing barriers to asylum, the Decree exposes women and girls seeking protection to increased risk of sexual and gender-based violence. It will be argued that unless Ecuador recognises these acute consequences of its refugee policy, the rates of sexual and gender-based violence against those seeking protection in Ecuador will increase.

Introduction

The feminisation of displacement refers to the phenomenon in which women constitute a disproportionate percentage of displaced persons worldwide (Hadjdukowski-Ahmed 2008).[37] South America's displacement crisis serves as an especially pronounced example of this growing problem. Currently, Ecuador is home to the largest number of refugees in South America; of that population, 88% are women and their dependents[38] (UNHCR 2011a). Despite these compelling demographics, gender issues and recognition of the overwhelming number of women and children asylum seekers are rarely discussed in policy formation or law reform. Recent shifts in Ecuador's refugee policy, in particular its newest Refugee Decree 1182 (hereinafter Decree), are jeopardising the country's favourable protection environment by decreasing access to asylum procedures and lifting protections against *refoulement*.[39] This in turn increases the risk of exposure to sexual and gender-based violence

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[37] Awareness of the strikingly high percentage of women in the refugee population first began with the United Nations High Commissioner for Refugees (UNHCR) report at the World Conference for the Decade on Women in Copenhagen (UNHCR 1980) when, to the surprise of many, the report revealed that 80% of the refugees under the protection of UNHCR were women and their dependents. While this figure will vary according to particular refugee flow situations, it is still quoted to this day (see Haidukowski-Ahmed 2008).

[38] The figure of 88% is comprised of 48% refugee women and 40% refugee children.

[39] The principle of *non-refoulement* is the cornerstone of asylum and of international refugee law. Following from the right to seek and to enjoy asylum from persecution in other countries, as set forth in Article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other

(SGBV) in its already susceptible, largely female refugee population.[40] This article will discuss this link in detail and raise awareness about the precarious situation for Ecuador's refugee and asylum seeking populations. After providing the background of the displacement crisis in the region, it will discuss Ecuador's evolving refugee protection environment, including the political atmosphere that led to the adoption of the Decree. It will then elaborate on the often overlooked gendered impact of this law and argue for increased legal protections against SGBV for Ecuador's refugee and asylum seeking population.

Background

Decades of armed conflict related to the drug war in Colombia have displaced millions of people, both internally and externally. The situation in Colombia has become so severe that the country has been grouped with the Democratic Republic of Congo, Iraq, Somalia, and Sudan as having more than a million people identified as internally displaced at the end of 2010 (UNHCR 2011b). In fact, the conflict has been catalogued as the worst humanitarian crisis in the Western Hemisphere in recent times (Ministry of Foreign Affairs, Trade and Integration 2009). Illegal armed groups have increased violence in the region and the presence of illicit economies has created an environment of exploitation, the combination of which continues to drive high levels of displacement (International Crisis Group Report 2011).

The international consequences of Columbia's conflict have been extreme, particularly in relation to neighbouring Ecuador. According to the United Nations High Commissioner for Refugees (hereinafter UNHCR), there are between 135,000 to 160,000 individuals in need of international protection in Ecuador, with the number of displaced Colombians seeking refugee status climbing annually. As of 31 January 2012, there were 55,330 registered refugees in Ecuador, of whom 98.4% were Colombian nationals (UNHCR 2011a). In an

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rights are threatened when a refugee is returned to persecution or danger, thus procedures or arrangements for identifying refugees provide protection against *refoulement* by ensuring that persons who are entitled to protection do in fact receive it. Ecuador's Constitution of 2008 establishes the right of asylum and refuge and introduces key principles in the protection of asylum seekers and refugees, such as: (1) the principle of *non-refoulement*; (2) the principle of non-punishment of irregular entry or stay in the country; (3) the provision of humanitarian assistance; and (4) the possibility of granting refugee status to an entire group under certain circumstances.

[40] Sexual and gender-based violence (SGBV) refers to any harmful act that is perpetrated against one person's will and that is based on socially ascribed gender differences. SGBV involves widespread violations of human rights and is often linked to unequal gender relations within communities as well as the abuse of power both by individuals and other systems. It can take the form of sexual violence or persecution, or it can be the result of discrimination embedded in legislation or prevailing social norms and practices. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, whether occurring in public or private life. Displacement, whether internal or international, weakens existing community and family protection mechanisms, and exposes refugee and internally displaced women and girls to a wide range of human rights violations, including SGBV, abuse and exploitation. During the displacement cycle, SGBV can occur during conflict, prior to flight, during flight, in the country of asylum, during repatriation, and during reintegration (see UNHCR-DIP 2011).

effort to control the Colombian conflict's spillover, the Ecuadorian government has sent thousands of troops to the border since 2008. This mobilisation has greatly complicated the humanitarian crisis in the region by creating a situation in which multiple armed actors vie for community resources and control, with women caught in the crossfire (International Crisis Group Report 2011). Xenophobia and discrimination against Columbian migrants has also caused the political support for refugees to deteriorate. It is against this background that Ecuador adopted a more restrictive refugee policy.

Ecuador's Evolving Refugee Protection Environment

On 30 May 2012, just over a week after receiving international praise regarding Ecuador's refugee policy at the country's Universal Period Review under the Human Rights Council, President Rafael Correa Delgado issued the Decree. The new law severely limits the country's previously favourable protection policies (Saavedra 2012). This strong-armed effort to deal with a growing refugee population, presumably in response to the increasing resentment of Ecuadorians towards displaced Colombians, comes at a high cost for those seeking asylum in Ecuador. The Decree includes two major reforms that have potentially serious consequences for asylum seekers in Ecuador, particularly the women seeking protection from the violence that abounds in Colombia's armed conflict.

First, the Decree eliminates the broad definition of refugee in the Cartagena Declaration on Refugees (hereinafter Cartagena Declaration), thus severely restricting the grounds for protection available for asylum seekers. The foundational definition of refugee was set out in the 1951 Convention Relating to the Status of Refugees (hereinafter 1951 Convention). A 'refugee' is defined in Article 1A(2) of the 1951 Convention as amended by its 1967 Protocol[41] as any person:

> with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion who is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.

However, this definition proved insufficient for providing protection in the Latin American experience of displacement in comparison to the Eurocentric context upon which the 1951 Convention's definition of refugee is based. Therefore, in response to the growing refugee crisis following, *inter alia*, Cuban displacement and various civil wars in Central America, a group of government representatives, academics, and lawyers met in Cartagena, Colombia in 1984 and adopted the Cartagena Declaration. The Cartagena Declaration is a non-binding agreement that is applicable to individual claims for refugee status determination as well as to situations of mass influx (Silva 2012). The Cartagena Declaration broadens the definition of a

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[41] The Protocol relating to the Status of Refugees 1967 606 U.N.T.S 267 (which entered into force 4 October 1967) lifted the geographical and chronological limitations of the 1951 Convention relating to the Status of Refugees to areas beyond Europe as well as to situations past the European displacement caused by World War II, respectively.

'refugee' outlined in the 1951 Convention to include those who flee their countries because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have seriously disturbed public order. It is under this definition that many Colombians have been able to gain asylum in Ecuador due to their displacement by generalised violence in their home country—a provision that is not found in the 1951 definition.

The application of the refugee definition contained in the Cartagena Declaration is considered to be the most innovative protection tool in the region and a landmark contribution to the protection of refugees (UNHCR 2011a). However, the Decree's elimination of this definition means that displaced persons can no longer invoke the Cartagena Declaration's broad terms and can only apply using traditional justifications, such as the individual grounds of protection established by the 1951 Convention (Saavedra 2012). Most of the women seeking protection in Ecuador would satisfy the definition of a 'refugee' in the Cartagena Declaration because their lives, safety or freedom are threatened by the generalised violence in Columbia. However, many may not qualify as refugees pursuant to the 1951 Convention because they may not be able to satisfy the much higher threshold of a well-founded fear of persecution for reason of their race, religion, nationality, membership of a particular social group or political opinion. Not only does this policy shift signify a step backwards in Ecuador's highly praised refugee policy, but the Decree is also a reversal of certain principles enshrined in the Ecuadorian Constitution.[42]

Second, the Decree introduces accelerated procedures for asylum applications. Under this new law, asylum seekers will now have only 15 business days to apply for status in Ecuador after entering the country as compared to the 30 days they had under the previous law.[43] If asylum seekers are denied refugee status, they now have only five business days to appeal the decision as compared to the 30 business days they had prior to the Decree. Furthermore, applications for asylum are frequently arbitrarily rejected and the new Decree also has a

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[42] In 2008, Ecuador integrated a chapter on human mobility into its Constitution in response to intensive political lobbying by organisations working on immigration and refugee issues. Furthermore, it incorporated the principle of 'universal citizenship' where no one could be considered illegal due to an irregular migratory status. Based on this constitutional principle, the Government eliminated visa requirements for those entering Ecuador and began registering thousands of Colombians, especially at the northern border, who did not have a regularised immigration status. Article 11, subparagraph 8 of the Constitution reads, 'Any regressive action or omission that unjustifiably diminishes, is detrimental to, or annuls the exercise of the rights will be unconstitutional'. As it stands, human rights activists as well as refugee organisations are preparing to challenge the constitutionality of the Decree (see Saavedra 2012).

[43] According to correspondence with UNHCR's Field Protection Officer in Ecuador, Ernesto Avila, the time to seek refuge used to be 30 days after entering Ecuador, with some variations. However, the Refugee Directorate had considerable flexibility in this regard. For example, if a person could justify why he or she had not applied for asylum in the required time, for any reason, he or she could still be registered. Under the Decree, the new time restriction is what is 'causing the biggest problem for people in need of international protection, as they cannot [sic] access the refugee status determination [RSD] procedure'.

provision for the exclusion of *ilegitimas*, or illegitimate applications, such as asylum seekers that have committed minor offenses in Ecuadorian territory (Appelbaum 2012).[44]

This strict timeline is very unforgiving for the tens of thousands of asylum seekers within Ecuador's borders who already face serious challenges in accessing the asylum system without such time constraints.[45] Prior to the law in 2008, Ecuador was a leader in refugee policy, enacting progressive programs like the Enhanced Registration Project (ERP). The ERP registered, documented, and provided refugee status to about 27,740 refugees within one year, and has been dubbed one of the most generous contributions to the protection of refugees in Latin America (UNHCR 2011a: 2). However, following the ERP's implementation, UNHCR noticed a change within the Ecuadorian government that led to the addition of administrative barriers that complicated the already existing difficulties in accessing asylum. Such difficulties for refugees include, *inter alia*, their location in remote areas physically difficult to reach, a fear of coming forward leading to chronic under-registration, an ignorance of the right to make asylum claims, and a lack of money to reach registration offices, let alone pay for asylum procedures (Verney 2010).[46]

Subsequently, the situation in Ecuador is reaching a critical point. While the violence spills through Colombia's porous borders into Ecuador, there has been a tightening in Ecuador's otherwise generous refugee policies. This is largely due to the fact that general security apprehensions have trumped human rights considerations as well as refugee protection concerns, as evidenced by Ecuador's change in rhetoric towards refugees. In early 2011, President Correa linked the tightening of eligibility requirements to the reduction of crime. In the past, Colombian refugees were portrayed as victims of a humanitarian crisis; now they are seen as a national security concern (Leutert 2011). Inevitably, this subordination of human rights to principles of national sovereignty has far reaching effects beyond simple shifts in legal definitions or administrative tweaks in timing. Each of these changes also has specific gendered consequences that often go unnoticed at the policy-level. The remainder of this article will discuss such consequences.

The Gendered Impact of Ecuador's Decree

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[44] Although Article 1F of the 1951 Convention denies refugee status to those who have committed serious crimes, denying refugee status to those who have committed only minor offenses is in breach of both the 1951 Convention and the Cartagena Declaration.

[45] For example, UNHCR's efforts regarding the Enhanced Registration Project (ERP) for the determination of refugee status—a component of the refugee policy adopted in September 2008 that aimed at increasing the registration of the 'invisible population' of persons in need of international protection—has seen major setbacks. According to UNHCR's submission to Office of the High Commissioner for Human Rights for Ecuador's latest Universal Periodic Review, the situation is gaining increased resemblance to the situation Colombians faced before the ERP was carried out.

[46] The General Office for Refugees (DGR) of the Foreign Ministry as well as the Commission of Eligibility are located in Quito, far from the Northern Border where the displacement crisis is concentrated. With the exception of the registration brigades under the ERP in the provinces of the border region, all refugee applicants have to go to the DGR in Quito to obtain a refugee card.

In light of the two reforms introduced by the new Decree, the phenomenon of the feminisation of displacement reveals several gendered impacts for the refugee and asylum seeking populations in Ecuador that must be considered. The restriction of the refugee definition as well as the introduction of accelerated asylum procedures will prevent many women seeking protection in Ecuador from obtaining legal status. While all forcibly displaced persons face protection concerns (including men), women and girls are often exposed to particular protection problems related to their gender,[47] their cultural and socio-economic position, and – most significantly linked to the recent policy changes – their lack of regularised legal status (UNHCR 2006). Foremost among such protection concerns is the risk of SGBV, the prevention of which is an urgent, core protection issue for the refugee population in Ecuador as identified by UNHCR (DIP 2011). This section will elaborate on how the Decree's restriction of the provision of legal status to women is directly associated to increased risk of SGBV, paying special attention to the issues of gender discrimination and the inaccessibility of protection procedures.

The first gendered impact of the new law highlights the issue of gender discrimination as it relates to the restricted refugee definition and the elimination of the Cartagena Declaration's grounds for asylum. Restricting the refugee definition is significant because gender is not explicitly referenced as a ground of persecution in the 1951 Convention; rather, it must be argued that gender constitutes a 'particular social group'. Thus, the refugee definition must be interpreted to include gender-related claims by, for example, giving due consideration to how gender can impact the type of persecution suffered (Edwards 2009), which places many women at the mercy of the State to ensure this happens. Displaced Colombian women in Ecuador must then establish a well-founded fear of persecution as a particular social group instead of more simply claiming asylum under the Cartagena terms of generalised violence.

This is distressing considering that whether it is economic deprivation, displacement, poverty or gender-based violence, the costs of modern conflicts are often disproportionately borne by women and their children (Schirch and Sewak 2005). It is in response to the increased targeting of civilians and non-combatants in armed conflicts that the Cartagena Declaration broadened the definition of a refugee (CRR 2001) in the first place. This shift in the nature of conflict accounts in part for the megatrend of the feminisation of displacement that is certainly apparent in Ecuador, especially at the northern border with Colombia (Gusman 2013). In fact, there are four times as many refugee women as there are refugee men in Ecuador.

It is also important to note that gender discrimination is often the root cause of SGBV (DIP 2011). The combined effects of gender and displacement often heighten women's risk of human rights violations. They may be subjected to discrimination, not only *vis-à-vis* men, but

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[47] It is important to distinguish between the terms 'gender' and 'sex'. Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, statuses, roles or responsibilities that are assigned to one sex or another. In contrast, sex is purely the biological determination while gender acquires socially and culturally constructed meaning overtime (see UNHCR 2002).

also in relation to local women in host communities due to being foreigners and/or their lack of legal status (Joint CEDAW and UNHCR Seminar 2009). Without regularised legal status, women are especially at risk of sexual exploitation and abuse. Lack of documentation restricts access to state services, which exposes women, girls, and boys with limited resources to higher risks of SGBV and other forms of abuse, as they must look for alternative ways to obtain accommodation and food (UNHCR 2006). By restricting the definition by which many women and children can receive regularised status, Ecuador's policy effectively increases their risk of and exposure to SGBV.

Unfortunately, this predicted rise in SGBV is evidenced in the statistics. There has been a downward trend in recognition rates seen in practice, particularly as the conflict worsens. For example, the recognition rate for asylum seekers in Ecuador decreased from 74% in 2009 to 53% in 2010, and to an average of 24% in September 2011 (UNHCR 2011). Issuance of the Decree will likely continue to decrease these already dismal recognition rates. An even more distressing trend is the increase in SGBV rates among the Northern Border provinces. At the border areas, armed actors, including the military, regularly sexually abuse women (International Crisis Group Report 2011). A recent study from the Women's Federation of Sucumbíos, a border region in Ecuador, found that an overwhelming majority of the female population report experiencing SGBV (McGrath 2011). This supports a recent UNHCR study that revealed 94.5% of the 700 refugee women surveyed in the Lago Agrio, a town within Sucumbíos, have experienced SGBV in their lifetime (McGrath 2011). Additionally, according to UNHCR, over 50% of women refugees in Ecuador are between 18 and 35 years of age, a population that is particularly susceptible to SGBV (DIP 2011). On account that the Decree significantly restricts the definition of 'refugee', thus eliminating the ability to gain legal status for many women in Ecuador, there has been corresponding increase in rates of SGBV that must be addressed at the policy level.

Another gendered impact of the new law relates to the lack of legal status arising from the inaccessibility of asylum due to the implementation of accelerated procedures. Without the ability to access asylum and receive a legal status many women find themselves in situations where they must resort to informal routes of economic support. 'Survival sex' is commonplace among refugee and displaced women in Ecuador due to a lack of economic resources in their country of asylum. With no other options to escape their poverty, one of the most accessible sources of income for Colombian refugees in Ecuador is sex work (Brown 2009). As a matter of fact, survival sex is frequently a direct consequence of family separations, gaps in assistance or failures of registration systems (DIP 2011). Considering that access to registration is significantly limited under the new Decree and that documentation is required for formal work in Ecuador, it is likely that survival sex will continue to be the main source of income for displaced and refugee women unable to gain access to registration systems.

Again, this prediction is reinforced by statistics. Colombian women often report being forced into survival sex and prostitution in order to survive their forced displacement to Ecuador. In fact, the majority of sex workers in Ecuador are Colombian women, many of whom were not

in that business in their home country (Refugee Council USA 2011). Indeed, studies conducted by several United Nations agencies, non-governmental organisations and the Ecuadorean Ministry of Health indicate that nearly half of the Colombian refugee women who are part of the industry at the northern border were not in the business back in their homeland (Durango 2011). As a result, UNHCR's Global Appeal 2012-2013 states that the organisation will step up its efforts to prevent women from becoming involved in survival sex in Ecuador as well as strengthen local support networks and organisations related to this effort (UNHCR 2012). Considering that Ecuador's new Decree will likely increase the involvement of marginalized women in survival sex due its accelerated procedures that decrease access for those women to register, policymakers should work closely with UNHCR to not only make sure local support networks are strengthened, but also that prevention of this phenomenon exists within the relevant laws.

Conclusion

This article has outlined why it is crucial for Ecuador to recognise the feminisation of displacement taking place within its borders when it is developing law and policy. This article has also demonstrated how Ecuador's restriction of the refugee definition and access to asylum via accelerated procedures, as promulgated by the new Decree, has a gendered dimension, namely the rise in rates of SGBV. The displacement crisis and its close association to SGBV highlights the need for policymakers to respond, especially considering that the borders of Ecuador have increasingly assumed the characteristics of the Colombian humanitarian crisis. In order to prevent a bad situation from getting worse, policy must be directed towards curbing these outcomes and increasing the protection and support of displaced women in Ecuador.

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A British Legacy? Forced Migration, Displacement and Conflict in Eastern Burma

By Daniel Murphy

Abstract

Colonial-era migratory movements were profoundly transformational. This article, however, examines an instance of contemporary, conflict-induced forced migration - that of the Karen in eastern Burma – situating it within the context of Burma's colonial past. It argues that the British imposition of notions of territorial sovereignty, the importation of a politics of ethnicity and religiosity and the decolonisation process were ultimate causative factors in the emergence of conflict, and hence forced migration, in Eastern Burma. Structural conditions by which post-independence displacement has been reproduced as an experience of Karen communities are situated within a historicised political economy of narco-trafficking and transnational engagement. In doing so, this article references current crises in Kachin and Rakhine states and calls for an intensification of international pressure to resolve Burma's on-going human rights abuses and provide support to those affected by displacement.

Introduction

On January 12th 2012, leaders from the Karen National Union (KNU) met with representatives of the Burmese government to sign a ceasefire agreement, bringing the world's longest running civil war to a close. This historic agreement, which remains stable excluding minor breaches, could result in the return of thousands of Karen refugees from Thailand. The number of Karen in Burma remains difficult to estimate due to unreliable census data. At anything from 7 to12% of the total population, they are second only to the Shan as the most sizeable minority group amongst an ethnic Burman majority, whilst in Thailand they constitute the principal ethnic minority, numbering around 400,000 (BRU 2009). Figure 1 (see appendix) situates the largest and most widely dispersed Karen sub-group - the S'Gaw.

Out of an estimated 1,400,000 legal and illegal Burmese migrants in Thailand, an unknown but significant proportion is ethnically Karen. The Karen constitute the majority of Thailand's 160,000 refugees residing in nine United Nations High Commission for Refugees' (UNHCR) camps hugging the Thai-Burmese border while an estimated 500,000 have been displaced within Burma. The categorical blurring between forced and economic migrants in the Burmese case is significant (Bosson 2007), suggesting the number of forcibly displaced is much higher than those receiving UNHCR assistance.

Research overwhelmingly shows that the Karen migrate to escape conflict and human rights abuses including forced labour, use of child soldiers, torture, extortion, human minesweeping, sexual violence and razing of villages (see Cusano 2001; HRW 2005). Accounting fully for Karen forced migration, however, necessitates an anatomy of the 63 year long KNU and Tatmadaw (Burmese armed forces) conflict. The following is thus a substantiation of the hypothesis that colonial-era factors stand as ultimate causes in relation to the emergence of post-independence conflict and, *ipso facto*, forced migration in Eastern Burma.

Sovereignty and Suzerainty

Notions of nation-state are assumed throughout modern societies. 'Nation-ness', however, takes as its referent a constructed and artificial geo-political entity - one determined by the historical evolution of cultural ideologies and economic modes of production, reinforced by institutions of dominion (Anderson 1983). Winichakul (1994) suggests that within all modern geo-political bodies remain groups of distinct ethnicities that differ not only in the shape and extension of their geographical dispersion but also in their historical understandings of sovereignty and geographical space.

Discussing British confoundedness at the Siamese court's lack of concern regarding fixed demarcations of its western frontier (much of which now constitutes Kayin state's eastern border), Winichakul details the characteristics of Siamese conceptions of non-boundedness and concludes that Siam's boundaries were a 'discontinuous, patchy arrangement of power units where different people of different overlords mingled together' (Winichakul 1994: 74-9). Regular concession of territory was accepted practice within this dynamic ecosystem of power-relations, serving to fulfil the only practical imperative: preservation of the centre of political authority.

Similarly, pre-colonial Burmese geographies did not associate political authority with fixed territorial limits (South 2008). To appreciate the context of the Karen in Southeast Asia we must turn from geographic concepts of fixity, line and internal homogeneity towards an analysis mapped by hierarchical power relations, spheres of influence and fluidity (Kang, 2010) - which scholars have described as *mandala*. Only then do the political contours of pre-colonial East Asia make sense. In 1823, just before the first British incursion into Burma, the Karen straddled the Chakri Siam and Konbaung (Upper Burma) *mandala*. They may well have been *de facto* vassals of Shan and Mon princelings and possibly had tributary relations with Qing China.

Chief S'gaw Saw Ku's surrender of the Salween Karen after the First Anglo-Burmese war constituted incorporation into the British *mandala* - it did not involve a shifting of lines in Karen geographical space. It was via colonial impositions of territorial limit, sovereignty and boundedness that the indigenous Karen perspectives of space were challenged and displaced[48]. The subsuming of Karen geographies into broader territorial sovereignties was rendered pseudo-existent within colonial cartographies and affirmed by military dominance. The historical demise of 'laissez-faire suzerainty' is crystallised in the formation of the modern Thai-Burma border, which was established by a series of agreements - spanning over

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[48] Indigenous geographies may problematise the application of certain categories of forced migration. Keely (1996) situates the production of refugee flows as endemic to an international system premised on multinational nation states. The fluid suzerainties of *mandala*, however, claim no such basis and, furthermore, scholars risk underestimating the agency of persons who pre-empt disorder by moving into new spheres of influence as an adaptive strategy. If dreams of a Karen homeland faded post-independence with the KNU's loss of territory and latent *mandala* organisations of geographic space underwent resurgence as I believe some scholars (e.g. Horstmann, 2011; South, 2011: 26-7) suggest, then externally-imposed characterisations of Karen 'refugee-ness' are perhaps questionable. From the Karen perspective, does the crossing of an unrecognised line to avail themselves of a new suzerain, whether Thai Karen, an international NGO or UNHCR, constitute, in all cases, a flow of refugees? Such questions are nevertheless beyond the scope of this paper.

a century - between British and French colonial administrations and the Siamese (MENAS, 2009). The British, aided by five Karen elders, surveyed and marked much of the northern portion of the border themselves due to the indifference shown by the kings of Bangkok and Chiangmai.

The geo-body Burma was able to claim a land and a people that had never historically defined themselves as belonging to it. In so doing, this affected a post-colonial Karen response framed within the new vocabulary of modern geographies - nationalism, independence, sectarianism and federalism - and operationalised as a protracted conflict with Yangon. It was the colonial project, however, and its obsession with essentialising the diverse peoples of the Empire under ethnic categories, which was to have more significant impact on the large-scale displacement of the Karen.

Divide and Rule

As noted, pre-colonial Burma exhibited a mode of political organisation which confounded contemporary European powers. Social categories of identity throughout Burma were similarly unfamiliar, determined more by position in *mandala*-hierarchies, class and place of residence than ethnicity or language (South 2008). Ethno-linguistic identity did not necessarily preclude participation in multiple socio-political systems however (Scott 2009) and ethnicity, when expressed, would be sensitive to specific political contexts. The British impact on inter-ethnic relations nonetheless generated xenophobic undertones within Burman politics in two interlocking ways: first, the reification of ethnic categories shaped political thought and behaviour and second, clashes between British and Burman cosmologies subsequently politicised religion.

British colonial administrations' strategic operationalisation of 'divide and rule' is well accounted for within the historical literature (see Christopher 1988) as are the adverse legacies of ethnically partisan policies (see Cole 2009). In the Burmese case, South (2008: 8-12) carefully argues for the British introduction of a politics of ethnicity predicated on the 'rationalisation of the state'. He suggests that the conceptual-mode by which Burma was apprehended by the British essentialised ethnic-categories within particular social, political and cultural models, as evidenced by ethnographic censuses of the era (DCD 2006). These were then transmitted to colonial Burmese political elites. As noted by Gravers (1999: 7), this was JS Furnivall's 'plural society' wherein 'racial, ethnic, religious, social and economic differences and contradictions were allowed to develop…and the unity in this world was found in the Empire and its global market'.

This ethnogenesis was complicated by profound economic transformations throughout Burma Proper – the British administered lowland core. Massive migrant influxes from Europe, India and China accompanied widespread structural change. Skilled Indians were imported to serve as administrators and civil servants whilst unskilled Indian coolies worked on huge infrastructure projects. The last British census of 1931 records 7% of the Burmese population were of Indian descent (DCD 2006). Post-independence, anti-Indian sentiments culminated in the junta's[49] forced expulsions of Indians and the wholesale expropriation of their businesses, resulting in the emigration of over 300,000 Indians during the 1960s. These events suggest the incubation of strong xenophobia under British rule, which likely served the function of providing alternative foci for anti-colonial sentiments.

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[49] This refers to SLORC/SPDC Burma between 1962 and 2011

Development in Burma Proper integrated lowland Burman society into a homogenised core. This was evidenced by the rapid erosion of Mon identity, culture and language in Southern Burma under direct British rule. In contrast, the Frontier Areas were indirectly administered by the British in ways which ossified pre-colonial socio-political structures where power was retained by chieftains and social participation confined to specific ethno-linguistic locales (South 2008). Thant (2001) notes how old court notions of a *mandala*-periphery fused with European linguistics to ensure that, as South (2008: 10) also concludes: 'the separate identities of *Bama* [Burman] and non-Burmans were reinforced by the colonial experience'.

Blood and God

The ossification of the Frontier Areas into heterogeneous ethno-linguistic blocs highlights the ongoing significance of shared historical memory in the manufacture of ethno-nationalist identity. The Frontier Areas during the colonial era would serve as incubators for a pan-Karen identity constructed in opposition to the Burman core and, partially, by appeal to the oral histories of the Karen people. Hill-tribes on the periphery of pre-colonial lowland *mandala* centres of power had been marginalised and exploited: animist Karen song-poems, *hta*, reference forced labour and massacre at the hands of Buddhist Burman overlords (Min 2000) and, earlier in history, violent expulsion from the Irrawaddy delta (San 1928). The Frontier Areas' isolation from Burma's modernising, 'cosmopolitan' core certainly contributed to the emergence of a shared history amongst the Karen. But it was the Burman association of the Karen with both imperialism and Christianity that would see the re-emergence and reinforcing of the inter-ethnic tensions precipitating Karen displacement.

After 1828, the growth of Christianity amongst a fraction of S'Gaw Karen contributed to the perception that the Karen as a whole were committed to the destruction of Buddhist-Burman civilisation. In reality, various Karen sub-groups had previously engaged in both anti-colonialist and pro-British armed struggle (South 2008). Upon complete annexation in 1886, the British actively recruited Burma's ethnic minorities into its armies. In 1925, they adopted an exclusively non-Burman recruitment policy in which Karen were particularly favoured; by 1937 they made up 25% of the Burma Military Police, half of the Burma Rifles and outnumbered Burmans three to one in the British India Army. This bolstered Burman perceptions of Karen as colonial proxies, particularly when, as in the Saya San rebellion of 1930 to 1931, Karen troops were used to crush Burman resistance.

For Burma, colonial rule was traumatic. Upon completion of the British conquest in 1885, the political and cultural nexus of the Burman people, Mandalay Palace, was desecrated and their conceptual system - based largely on the harmony between religious and political authority underlying Buddhist cosmology - was shattered (Gravers 1999). Further erasure of the Brahmanic political culture met fierce and popular resistance leading to two years of British counter-insurgency (Thant 2001). Burmans viewed Christianity as a pernicious fundamentalism determined to uproot the cosmological and ontological foundations of a *dhamma* ordered universe. Elements of religious war emerged as Christian Karen were pitted against Buddhist Burman during colonisation (Gravers 1993). This recurred during WWII under respective British and Japanese alliances. Many disenfranchised S'gaw Karen, meanwhile, perceived the British as liberators. Positive relations with the Empire were lubricated by a growing number of American Baptist Karen elites who established the Karen National Association: which was the precursor of the KNU. Thus, from the outset, a brand of Christianity was critical in the establishment of an ethno-nationalist, *modern* sense of 'pan-

Karenism' (Cady 1958) despite Christians, today, numbering just 20% of the Karen population.

South (2008: 18) believes that this had an enduring significance for the Karen post-independence. Firstly an overwhelmingly Christian KNU leadership alienated other Karen and secondly, the junta mobilised a Burman hyper-nationalism which painted Karen ethno-nationalism as 'inherently foreign, and dominated by "neo-colonial" interests'. In both senses, South is correct. Nationalist rhetoric and censorship have been core tools of the dictatorship since inception. Today, the Tatmadaw operates a paternalistic Buddhist ethic; linking battalions in patronage systems with monasteries by area, and inhibiting the rise of non-Buddhists through the ranks (Maung 2009). In 1994, a KNU battalion mutinied, formed the Democratic Karen Buddhist Army (DKBA) and aligned itself with the junta, from which it receives financial and military aid. This was disastrous for the KNU, which never recovered from losing their Manerplaw headquarters to a joint DKBA and Tatmadaw offensive in 1995. The KNU's General Bo Mya purportedly claimed that U Thuzana, a militant Buddhist monk and founder of DKBA, was an agent of the junta. In fact, it is more likely that the 'colonisation' of highland, Buddhist Karen communities by lowland, Christian S'Gaw elites, instituting corrupt and authoritarian regimes, generated considerable, and mutinous, resentment (South 2007). The eventual displacement of Karen post-independence, however, would be indiscriminate *vis-à-vis* religious belief. Consequently, the final factor completing the alignment of ultimate causes of Karen forced migration is explored with reference to the decolonisation process itself.

Loyalty and Betrayal

In a 1998 House of Lords debate, Lord Weatherill acknowledged a 'debt of honour' to the Karen. It was made in reference to the widespread expectation that a sovereign Karen homeland would arise from decolonisation. The vague promises of self-determination made to anti-Japanese Karen militias after the loss of British Burma (Smith 1999) seem, perhaps, justified given that they had remained steadfast allies of the British for more than a century. In fact, a British discourse around Karen self-determination was evident long before 1948 and independence (San 1928).

In 1946, the Karen sent a Goodwill Mission to London and, at the first Panglong conference, reacted warmly to a proposed 'United Frontier Union' to replace the Frontier Areas. A 1945 British White Paper on Burma, meanwhile, stated that self-determination of Burma's ethnic minorities would not be compromised and that British governance would be extended until all were comfortable with joining a unified Burma (Walton 2008). Nationalist-organised strikes, British *realpolitik*[50] and Burma's marginal strategic importance in comparison to Europe, India and Palestine soon saw the White Paper revoked and power hastily handed to Aung San; a political moderate, leader of the Burma Nationalist Army and head of a shaky coalition of various political actors: the Anti-Fascist People's Freedom League (AFPFL).

In 1947, Aung San agreed to the phased-autonomy of the Shan, Kachin and Chin peoples at the historic Panglong Agreement. The Karen, politically divided on constitutional issues, were noticeably absent and the KNU rose up in rebellion the following year. As Cusano (2001) notes, British-educated civilian and military Karen elites were instrumental in

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[50] Attlee's government eventually disregarded the advice of their own Frontier Areas Commission Enquiry and refused to entertain the pleas of Burma's ethnic minorities (CHRC 2010)

manufacturing a revolutionary apparatus. Many of them would remain as leaders of the KNU for the next four decades. Harriden (2002) has meticulously demonstrated the artificiality of the KNU's revolutionary ethno-nationalist identity and, in particular, highlighted divergent opinions amongst the Karen. Aung San's positive attitude towards ethnic minorities and his vision of a *federated* Burma was largely supported by Buddhist Karen (Gravers 1993), but the movement lost momentum following his assassination soon after Panglong and was further crippled by the outbreak of civil war.

KNU gains during the initial phase of the war were significant; much of northern and lowland Burma came under rebel control. The AFPFL coalition installed Ne Win as head of the Tatmadaw to replace Smith Dun, an ethnic Karen, and to spearhead the counter-insurgency campaign. In the same month that the KNU declared Kayin state independent, Ne Win petitioned Attlee's Labour government for assistance, receiving 10,000 rifles and a Commonwealth loan of 350,000,000 rupees (worth some US $3,600,000,000[51] in 2010 value) to aid Burma in the fight against its insurgents. As Tatmadaw commander, coup-leader and then dictator, Ne Win would spend the next 39 years prosecuting wars against armed ethnic minority groups in Kachin, Rakhine, Kayah, Shan and Kayin states.

A recurrent narrative throughout KNU propaganda, alluded to by Lord Weatherill, is the British betrayal of the Karen. If the British betrayed anyone, in fact, they had betrayed only a small cadre of elite Karen loyalists manufactured, cultured and equipped for sectarian violence by a colonial administration that they referred to as 'Father' (San 1928: 58). Saw Ba U Gyi, Prime Minister of the independent KNU state briefly established during the civil war, hence popularised his Four Principles, which still constitute the ideological foundation of the KNU today:

> *There shall be no surrender*
>
> *The recognition of the Karen state must be complete*
>
> *We shall retain our arms*
>
> *We shall decide our own political destiny* (KNU, 2012)

These words, insofar as they were uttered by a Cambridge educated barrister, failed to embody the diverse religious, political, social and cultural identities of the Karen whom they were supposed to represent. Even now they confront only cautious criticism (see Naw 2007). The British 'betrayal' of an elite S'Gaw minority was indeed the proximate cause of the KNU uprising and the ensuing six decades of conflict and displacement - the ultimate cause, however, lies in the grafting of ethno-nationalism onto Karen political culture and the fracturing of Burma's internal relations along ethnic and religious fault-lines.

Conflict and Displacement

This concludes an exploration of colonial-era factors related to the emergence of conflict in Eastern Burma. The British introduction of territorial sovereignty necessitated the KNU's framing of its identity struggle in the vocabularies of ethno-nationalism. A pan-Karen

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[51] Economy cost valuation at 1950 exchange rate of 4.79 rupees/1 dollar.

ideology was thus fatefully bound up with territorial claims and inevitably sectarian in nature. The importation of a politics of ethnicity and religiosity, meanwhile, had profoundly adverse implications for Burman-Karen relations. Finally, as noted above, decolonisation and unfulfilled S'Gaw expectations completed the alignment of ultimate conditions which generated conflict in Eastern Burma. But how is conflict situated in relation to Karen forced migration? Conflicts of the globalised-era are internal; connected with identity struggles, resource disputes and ethnicity (David 1997). The Tatmadaw-KNU conflict can likewise be seen as a protracted process of state formation. Many highland cultures of Southeast Asia historically resisted hegemonic incorporation into lowland states (Scott 2009). Zolberg (1983) draws explicit links between colonial-era heterogenisation of subject-societies, decolonisation, the targeted persecution of minorities and their subsequent forced migration. Arendt (1966: 273) wrote that the ultimate consequence of nation-building for minorities was 'assimilation or liquidation'; the Tatmadaw's use of exemplary violence, their militarisation of space and the displacement of Karen communities can be understood strategically, as a systematic means of gaining control not over territory - but over a population. For the Tatmadaw, inducing displacement serves as a functional method of nation-building. In this sense, displaced Karen have fallen victims to the consequences of two nation building projects: the failed claims of the KNU and the painful, protracted process of state formation favoured by the junta.

In discussing patterns of Karen forced migration, it is important to distinguish between two types. Sudden movements of large populations, such as whole communities, in response to intensifications of conflict are distinct from the slow erosion of human security (*vis-à-vis* military appropriations of land, forced porterage, arbitrary taxation, etc.) which leads to low volume, yet more or less constant movements of individuals and families.

South (2007) characterises the bulk of Karen forced migration as 'armed conflict-induced'. The KNU, however, no longer presents a significant military threat to the Tatmadaw. Instead, the last few decades have seen the emergence of a highly asymmetrical warfare, engendering the KNU's adoption of guerrilla tactics. In response, the junta's 'Four Cuts' counter-insurgency programme, introduced by Ne Win in the 1960s, has sought to strangle flows of food, funds, intelligence and recruits to rebel groups by targeting civilian populations, often involving the forced relocation of whole villages[52]. The KNU, unable to protect communities from such retaliation, often 'evacuate' (relocate) them in advance of Tatmadaw campaigns and serial displacement is common – South (2007) records a group of 36 Karen having undergone over 1,000 instances of forced migration.

In contrast, Heppner (2005: 19-21) emphasises 'unintentional displacement' or the culmination of numerous, repeated human rights abuses 'in the *absence* of direct fighting' [emphasis in original]. Multiple abuses, such as extortion and forced labour, act in concert to erode the economic security of communities. At first, the most economically vulnerable are displaced and then richer villagers follow; as assets are sold, vulnerability increases and the Tatmadaw's demands focus on incrementally fewer people. Heppner (2005) cites studies demonstrating higher than average rates of displacement in areas relatively secure from fighting to propose that few Karen are displaced by actual conflict and argues that the militarisation of indigenous locales serves to exert control over minority populations, as noted above.

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[52] The Burma Library provides a long catalogue of such events: http://burmalibrary.org/show.php?cat=342

For the purposes of this article, both South's and Heppner's characterisations of Karen forced migration are located in the wider context of the emergence of conflict post-independence. Nevertheless, this analysis is incomplete without addressing the means by which violence and conflict are reproduced as proximal causes of Karen displacement– this article thus delineates the British legacies which have structurally impacted upon these mechanisms. The particular case of Burma leads us to a historicised political economy of conflict, narco-trafficking and transnational engagement. Analysing the functions and beneficiaries of violence sheds light upon prevailing economic and political power relations (Keen 1997).

Drugs and Guns

Burma is a resource-rich country with a dismal economy. It is estimated that for decades the junta spent 25 to 40% of the national budget on the Tatmadaw - this year, expenditure stands at 14.4%, a 60% real increase on 2011 to 2012 (McCartan 2012). At its zenith, the Tatmadaw may have been the 12th largest military in the world. This juxtaposes with Burma's expenditure on health (as a percentage of GDP) and under-five mortality rate which are 90% and 40% lower/higher, respectively, than LDC averages.[53]

Expansive militarisation of the state as a response to ethnic division and strife is underscored by the fact that Burma has faced no external threat to its sovereignty since independence. In contrast to analyses which draw on 'resource curses' (see ERI 2007) to account for Burma's internal discord, I contend that narco-trafficking, a colonial-era legacy, has significantly enabled the Tatmadaw's build-up of arms and, hence, the reproduction and deepening of conditions generating displacement.

In 1836, the British shipped 2,000 tonnes of Indian opium to China. By the century's end the trade constituted the largest in any commodity internationally. Chinese opium smokers increased almost five fold over 80 years and domestic production skyrocketed to 85% of global total by 1906. The creation of a huge market for opiates in China corresponded with the British introduction of large-scale opium cultivation and use in Siam (Lintner 2000) and Burma (Wright 2008). The indirect administration of Burma's Frontier Areas empowered indigenous princes, as noted, who raised revenues from poppy cultivation which were subsequently taxed by the British - as in India where they provided one fifth of total revenue.

Wartime decimation of Burma's economy rendered the British Treasury willing to cede independence. Heavily indebted, wracked by banditry and with over half of rice production wiped out, modern Burma was born into a climate of fiscal crisis, weak state institutions and endemic dissent within which the British rapidly allowed existing defence obligations to atrophy (Morris, 2008). Post-independence, exiled-Kuomintang, ethnic-insurgents and the Communist Party of Burma all took to intensive poppy cultivation to fund operations. The KNU, however, fund themselves through taxing cross-border smuggling and natural resource extraction, whilst consistently scorning the junta's and DKBA's complicity in the narcotics trade. Brown (1999) and Lintner (2000) provide damning accounts of the junta's involvement in the international opium, heroin and methamphetamine markets *vis-à-vis* money laundering 'investment schemes', high level corruption, patronage/strategic alliances with producers, Tatmadaw trafficking networks and direct government revenue raising. Large discrepancies in Burma's 1995 to 1996 foreign exchange accounts place unaccounted for narcoticsearnings at some US $600,000,000 (USDS 1997: 73).

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[53] 2009 figures from http://hdrstats.undp.org/en/tables/

The British impacted upon the reproduction of violence through influencing both the supply of and demand for opiates. The fomenting of massive, persisting globalised markets for opiates heralded an opportunity for the junta, isolated from international trade, to earn foreign exchange on narcotics, thence used to expand military capacity. Arms oriented capital accumulation shifted the balance of power enormously in the Tatmadaw's favour and the KNU's subsequent adoption of guerrilla tactics created protracted, low intensity conflicts where, as noted in the above analysis, civilian populations are routinely targeted by counter-insurgency campaigns and forcibly relocated by both belligerents.

Atmospheres of perpetual conflict, however, have become instrumental in screening rents. Narcotics producing frontier regions become 'inaccessible' in the junta's disingenuous 'war-on-drugs' rhetoric, as does the major transnational narcotics conduit which the Karen straddle: the Thai-Burma border. Powerful government actors are invested in reproducing insecurity whilst phantasmagoric images of violence feed back into public narratives of national security, legitimising further militarisation and, hence, a deepening of the very structures enabling narco-accumulation and the reproduction of conflict. What constitutes this structure is the complex web of interactions between multiple perceived and manufactured insecurities; a 'crisis' necessitating a permanent state of exception not dissimilar, in form, to Agamben's (2005: 2) treatment of Nazi Germany as 'a legal civil war that allows for the physical elimination…of entire categories of citizens who for some reason cannot be integrated into the political system'.

It is to another mainstay of this military dominated economy, natural resource extraction, and its transnational linkages to the disjunctive imperatives of British foreign and economic policy, that this article now turns. It will argue that the prioritisation of British economic interests, absent constructive engagement with the regime, has reproduced violence as part of the lived experience of Karen communities and as a proximate factor compelling displacement. This has primarily been through the reinforcement of uneven power relations but has also involved an indirect sanctioning of forced migration; in the form of development induced displacement.

Investment and non-engagement

British foreign policy towards post-independence Burma receives little attention. No doubt, this is partly a result of its relative unimportance: wartime devastation of Burma's infrastructure was harshened by industrial decline. The AFPFL's rejection of Commonwealth membership and its restrictions on foreign investment withered British interest, which disappeared entirely by the 1960s and Ne Win's imposed isolation from the world.

The Foreign Office viewed Ne Win's Burma as 'a relatively benign form of dictatorship' (FCO 1974) and, up until the brutal suppression of pro-democracy protests in 1988, seemingly allowed stable, autocratic government to trump any preferences for democracy and rule of law (Foley 2007). Indeed, after reforms which opened the country up to foreign investment post 1988, a new British foreign policy regime of isolation and containment – predicated on human rights and a demand for democratisation – clashed with its reluctance to curtail the commercial activity of its firms (Bray 1992). Following is a brief overview of one UK firm's involvement in one instance of Karen forced displacement and an analysis of how it is situated in a wider context.

Towards the end of the Cold War, British foreign policy essentially mirrored American foreign policy. Following the neoliberal economic *zeitgeist* emanating from Washington, the UK Department of Trade and Industry's South East-Asian Trade Advisory Group (SEATAG) orchestrated a new surge of British commercial interest in Burma - another potential 'Asian Tiger' (Taylor 2007). In 1990, a British company, Premier Oil, signed an exploration agreement with the junta and in 1992 identified viable gas reserves in the Andaman - the Yetagun offshore gas field. Over the next decade, Premier Oil extracted significant profits from Yetagun, using pipeline infrastructure constructed by UNOCAL and Total.

The construction of the pipeline was a human rights disaster. Forced relocation and forced labour were widespread amongst Karen villages in twenty mile radiuses of pipeline routes (which run to Ratchaburi, Thailand) and forced porterage was employed to serve the Tatmadaw's 'Total Battalions', contracted by Western firms to provide security (ERI 2006). In 2007, Yetagun's sister field, Yadana, generated US $1,100,000,000 of which approximately 75% went directly to the junta (ERI, 2009). The IMF acknowledges that gas exports constitute Burma's major source of foreign exchange yet only 1% of the fiscal budget - a huge surplus being deposited in overseas banks (IMF 2009), serving to insulate the junta from economic sanctions. Monopolistic state owned and military managed enterprises, particularly the Union of Myanmar Economic Holding Limited, channel these undisclosed natural resource revenues into purchases of arms. The first Yadana payment of US $100,000,000, for example, was rapidly followed by a US $130,000,000 purchase of twelve MiG-29 aircraft (AOW 2012). Ethical concerns encouraged the UK government to eventually offer weak condemnation of Premier Oil's involvement in Burmese gas (BBC 2000) and, two years later, they withdrew from the Yetagun project. The UK's public condemnation, however, has to be seen in its proper context.

Foreign policy, as Boswell (2007) describes for immigration policy, is located between the conflicting tides of state imperatives: in this case, facilitating capital accumulation whilst upholding normative institutional legitimacy. The dominant process by which the latter is judged, public discourse, operates linearly at the domestic scale whilst economic interfacing is multi-scalar and indirect. Thus emerges the overall approach to Burma which Charoenmuang (1996: 61) caricatures as 'double standard bearing'; whereby the UK publicly denounces the military regime yet permits or facilitates private sector engagement.

In the six years from 1990 to 96, investment in Burma comprised some 0.1% of total UK foreign direct investment (FDI) outflows.[54] By 1997, the UK was the largest foreign investor in Burma (Ruland 2001). A Labour party election promise of a unilateral investment ban that same year was reneged upon and, ten years later, the UK was named as the second largest investor;[55] much of the FDI outflow being channelled indirectly via subsidiaries in British dependent territories (BBC 2007). The Burma Campaign UK's regular publication of 'dirty lists' exposing such British companies had far more significant impacts on UK-Burma investment than government policy.

The core proposal here then, is that indirect economic interfacing, which evaded widespread public scrutiny in Britain, has been complicit in the forced relocation and displacement of Karen in areas containing valuable natural resources and, as with narco-trafficking, deepening the uneven economic and political power relations which perpetuate Tatmadaw-

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[54] US$157.7 million (USDS, 1997: 137) against a total of US$153.9 billion.
[55] 1988 to 2004.

KNU conflict. Such economic interfacing may well, in some cases, render British legacies both ultimate *and* proximate causes of Karen forced migration.

Conclusion

This article has presented several interconnected, colonial-era factors as ultimate causes of post-independence KNU-Tatmadaw conflict and, subsequently, Karen forced migration: the displacement of indigenous geographies by concepts of territorial sovereignty, the introduction of a politics premised on religious and ethnic fault-lines and the withdrawal of support for the self-determination of a Christian, S'Gaw Karen elite. Additionally, it has argued that, post-independence, the reproduction of violence was partly manifest, structurally, as an indirect consequence of the British pursuit of economic imperatives (in the form of the narcotics trade and foreign investment).

Today, Burma stands at the threshold of a new era. Moderate political reform and a new constitution have seen the culmination of a strategic logic first heralded by the junta's courting of Thai and Chinese foreign capital in the late 1980s. This logic has aimed at implementing limited access orders (North *et al* 2009): opening up resource-rich frontier areas by enticing rebel elites into ceasefires premised on promises of lucrative personal gain. Conflict and human rights abuses, however, remain endemic as ongoing events in Rakhine and Kachin states show.

As with the Karen, the two conflicts are deeply historicised. Broad parallels exist between the Karen and Kachin contexts with regards to the structural causal factors implicated in the emergence of post-independence conflict and displacement.[56] For the 'Rohingya', rendered stateless under a series of citizenship laws, the situation is different. The Muslim Rohingya are a mixture of indigenous Arakanese and Chittagonian Bengali immigrants imported en masse by the British to cultivate sparsely populated land. Enormous increases in the Muslim population under British rule and the arming of Bengali guerrillas during the Japanese occupation heralded decades of internecine strife between the Muslim and the Buddhist ethnic Rakhine population (Chan 2005). Persecution, sanctioned by the junta, has culminated in over 250,000 Rohingya refugees languishing in unwelcoming Bangladesh (UNHCR 2011) and an explosion of ethnic violence last year leading to the further displacement of approximately 136,000 (Brinham 2012).

The UK has forsaken its colonial legacies. By predicating engagement on the 'democratisation demand', long-term goals of peace-building and inclusive socio-economic development have been displaced. Burma's marginalisation has nurtured a siege mentality amongst the junta and, coupled with international sanctions, forced cut backs in health and education spending; effectively penalising Burma's poor. Instead, Britain should seek critical and conditional constructive engagement. Institutional capacity building, particularly the cultivation of reform minded officers within the Tatmadaw, could support the emergence of civil society and the cadre of competent bureaucrats Burma sorely needs. Bilateral economic relations could be directed at addressing basic needs, expanding infrastructure at Burma's frontiers, enhancing indigenous ownership of natural resources and curtailing the exploitative effects of mining, logging, hydro- and agri-business. If made conditional, recent substantial increases in overseas development assistance (DVB 2011) could incentivise reforms

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[56] Including: indirect administration as a Frontier Area, the spread of Christianity, British inculcation of ethno-nationalism and the displacement of indigenous geographies.

countering cronyism and protecting the political and cultural rights of minorities. Similarly, the UK pushing for the suspension of multilateral import, export and investment bans to remain subject to annual review might further encourage progress.

Finally, Britain and the international community would do well to recognise that Burma's democratisation is impossible without equitable solutions to its endemic internal conflicts: persistent insecurity gives the Tatmadaw pretext to retain its undemocratic stranglehold over 25% of Burma's parliament. For decades, the junta benefited from a xenophobic rhetoric which painted foreign intervention in internal affairs as a neo-colonial threat to national security. Burma's willingness to open itself up to international trade has rendered this discourse void and makes it vulnerable to multilateral diplomatic pressure. Because of, not despite, its colonial past in Burma, the UK should lobby aggressively through the European Union, the UN Security Council and international financial institutions (IFIs) to ensure that Naypyidaw is held to account for its continuing human rights abuses whilst ensuring that enhanced engagement does not serve to further marginalise and displace vulnerable ethnic minorities at Burma's frontiers.

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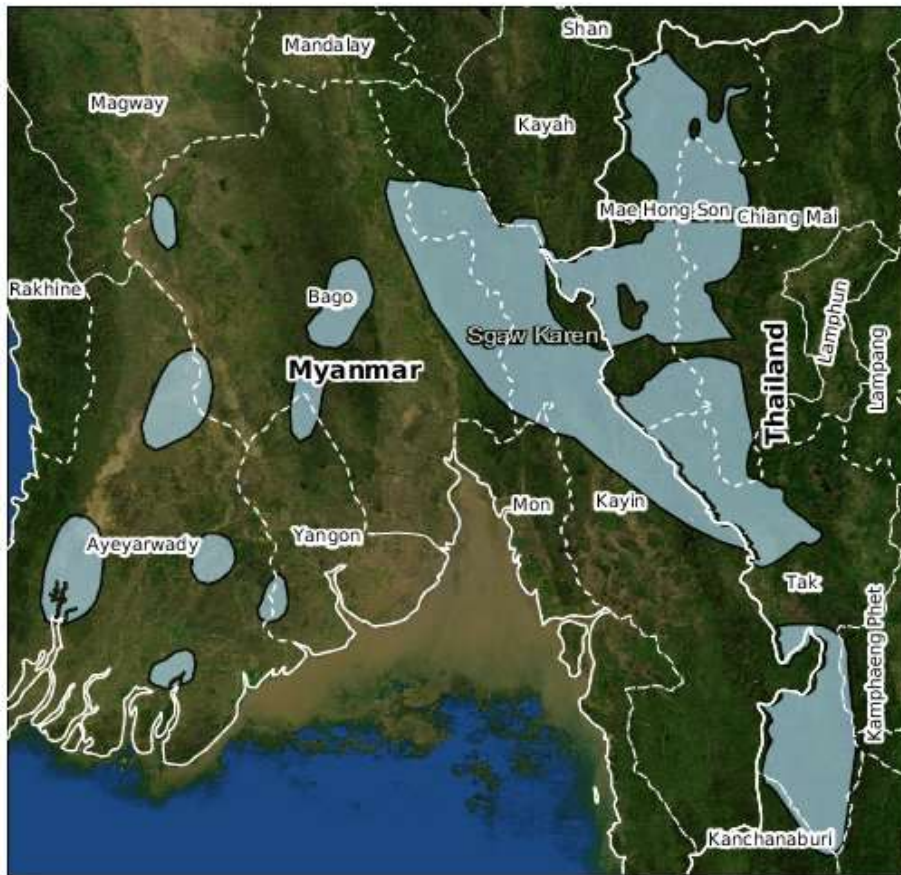
Appendix

Figure 1 - Map showing the distribution of Karen S'Gaw speakers in Burma and Thailand (GMI 2010).

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Anthropology's Relevance to Policies on Forced Migration

By Jonas Ecke

Abstract

This article argues that the application of anthropological methods could help policy makers and practitioners to adapt policies to the local needs of refugees. Drawing from his own research in a Liberian refugee camp in Ghana, the author discusses the potential roles of biographical-narrative and mapping interviews in improving the communication between refugee camp administrators, and refugees, as well as for informing refugee repatriation efforts.

Introduction

This article will cite examples from my research in the Buduburam refugee camp in Ghana to explain how anthropological methods could be helpful in improving policies to assist refugees. First, this article will introduce cultural anthropology. Second, it will introduce the reader to the situation in the Buduburam refugee camp. Third, some general considerations of the utility of anthropological methods for policy makers will be discussed. To demonstrate this utility, I will explain two methods, biographical-narrative and mapping interviews, as well as the possible contributions of anthropology for two problems in policy. These problems are the miscommunication between refugees and camp administrators, and the neglect of the societal dynamics of repatriation. Finally, I will address a few of the criticisms directed at the relationship between anthropological engagement and policy makers.

Background: The Cultural Anthropological Approach

Definitions of culture vary widely within cultural anthropology, and are heavily contested. This contestation has often focused on the discipline's neglect of the fluidity and interconnectedness of culture. Recent critics suggested that well respected definitions of culture, for example it being 'the customary ways that a particular population or society thinks and behaves' (Ember and Ember 2011:6), seem to suggest that cultures exist as distinct and discrete entities. As Gupta and Ferguson (1997: 34) state, anthropology has historically 'assumed isomorphism of space, place, and culture'. The global interconnectedness and mobility that define this contemporary age of 'globalisation' has thus compelled many anthropologists to argue that cultures no longer exist as bounded and territory based entities (for example, see Appadurai 1996; Hastrup and Olweg 1997).

Many anthropologists are therefore committed to what they call a 'holistic approach' (Ember and Ember 2011: 4), which conceives of cultures as interconnected systems, at both macro and micro scales. At the micro scale, while these researchers may focus on one aspect of a culture, such as religion, they also incorporate various other aspects of social life into their

analysis, for example gender roles and age-structures. In my view, cultural anthropology is thus characterised by tensions, as well as synergistic effects, between an emic and etic methodology. The emic perspective seeks to understand a culture from the ground up, based on definitions and points of view that are derived from the cultures that anthropologists work with. The etic approach necessitates collecting data based on a predetermined set of anthropological categories (Ember and Ember 2011). It is thus a question of balancing the attentiveness to the theoretical supposition that culture is not bounded, but rather only observable over diverse temporal and geographical scales, and remaining true to the empirical observations available within the societies in which anthropologists find themselves.

This more diffuse notion of culture does not, therefore, negate the utility of carrying out fieldwork, nor the difficulties associated with this. Rather than studying cultures from a distance, anthropologists participate in the rites and daily activities of the culture that they study to experience it in its immediacy (Russell 1995). This wish for intimacy must nonetheless be balanced with the need to maintain some distance from the cultures they study to enable empirical accuracy and to not too heavily distort the behaviour they wish to observe. Thus, anthropologists were historically compelled to refrain from 'going native', which would have indicated the surpassing of disciplinary boundaries of objectivity (Tresch 2011: 303). Most anthropologists have therefore historically based their analysis on qualitative methods. Even so, it is one of the strengths of anthropology that it can incorporate diverse methods, including quantitative ones (Russell 1995).

Buduburam Refugee Camp

Liberians arrived in Ghana when they fled the two Liberian civil wars, which ravaged their country from 1989 to 1996 and 1999 to 2003, respectively. In 1990, the Ghanaian government opened the camp in the Gomoa Buduburam area in order to accommodate the massive influx of refugees. In 1992 it was estimated that 8,000 refugees needed to be accommodated in the camp. In 2008, an estimated 45,000 refugees lived in basically the same area of property (Boamah-Gyau 2008).

In 2003, the United Nations High Commission for Refugees (hereinafter UNHCR) ceased distributing refugee ID cards to Liberians. According to UNHCR, the ceasefire in Liberia and the subsequent departure of Charles Taylor indicated that a 'well-founded fear of persecution' no longer existed in Liberia, and thus refugee status could no longer be granted to incoming Liberians in accordance with the 1951 Convention Relating to the Status of Refugees (hereinafter Refugee Convention) (Omata 2001: 14).

Although UNHCR withdrew most of its services following the registration session in 2003, it took until 2012 to invoke the cessation clause. This officially terminates protection by the agency according to Article 1C(5) of the Refugee Convention. Its invocation means that by 30 June 2012, those refugees with an ID card were supposed to have returned to Liberia, locally integrated into Ghanaian society, or applied for exemption from this process based on

a continuing fear of persecution. If refugees opt for integration into Ghanaian society, they are officially entitled to all services that Ghanaian citizens receive. Those who return to Liberia receive a grant of $300 for each adult and $200 for each child. The maximum allowance for luggage for each refugee traveling to Liberia is 30 kilograms. Those without refugee identification cards are permitted to stay in the country for 90 days according to Economic Community of West Africa guidelines (UNHCR Ghana 2012).

Discussion: Anthropology and Forced Displacement

The situation in Buduburam is emblematic of a global problem. Worldwide approximately 42.5 million people have been forcibly displaced, both within and outside of their national borders (UNHCR 2011). Many of the policies that address forced migration are, however, formulated in terms of a global reach. Unfortunately, aid for refugees is therefore currently distributed without much regard for the cultures of the local beneficiaries (Cuny *et al*. 1992; Hammond 2004; Mackenzie *et al*. 2007; Voutira and Giorgia 2007). This section will provide some brief examples of research that demonstrates the intertwined nature of culture and processes of displacement, and subsequently how this inevitably affects policy.

The input of anthropologists would be helpful in efforts to improve policies and services in refugee camps globally. All too often popular and political discourses conceptualise refugee camps as transitory phenomena. Arguably, the perception of displacement as a fleeting phenomenon is reflected in 'temporary protection' programs that have been adopted by Western countries of asylum (Voutira and Giorgia 2007: 216). In reality, however, many situations of forced displacement are protracted. According to UNHCR, 'protracted refugee situations' exist when refugees have been trapped in a situation of exile for at least five years following their displacement (UNHCR EXCOM Conclusion 2009). Buduburam refugee camp, for instance, has existed for twenty two years. Despite such realities, images of the 'tent city' that are depicted in popular reporting on humanitarian catastrophes seem to shape public conceptions of forced displacement.

Displaced populations are therefore often compelled to adapt to new cultural contexts. This process of adaptation is, however, iterative. Not only do refugees adapt to their new surroundings, but they also impact on these contexts in a way that can be profoundly transformative in the other direction. For many displaced peoples, engaging with the culture of the host country and institutional policies of relief agencies challenges the utility of their cosmologies, exchange systems, and cultural values, leading to new cultural innovations, and changes to long held traditions (see Daley 2001; Hendrie 1992). For example, Ugandans from the North West of the country used to organise farming in reciprocal work groups. In their exile in Southern Sudan, they began organising farming in familial collectives. This shift reflected the general inability of refugees to re-establish commonly accepted moral codes and communal order in the new context of the refugee settlement (Allen 1996).

Knowledge of such changing cultural and societal dynamics is vital for policy- makers, as unintended consequences of policies for displaced populations exemplify. UNHCR mostly

operates its relief efforts based on norms of equality by giving the same services to all refugees, regardless of their position in societal hierarchies in their societies of origins, for example in regards to age and class. In some instances, it provides special assistance to women, for example to female headed households. Sometimes these policies achieve the intended outcomes, notably female empowerment. Southern Ethiopian refugee women who returned from exile in a refugee camp were, for example, more likely to participate in public debates than those who did not flee. They challenged the customs of widow inheritance and arranged marriages and became involved in commercial activities (Getachew 1996).

UNHCR's policy emphasis on gender equality can, however, have paradoxical effects, as exemplified by gender relations among Burundian refugees in Tanzania (Turner 1999). Refugee men believed that refugee women considered UNHCR to be akin to a better husband (Turner 1999:2). It was UNHCR, after all, which provided for schooling, feeding, and other services. Not being able to provide for their families humiliated the men. In theory, UNHCR's equality-focused policy-approach should have created more equal relationships between men and women in the refugee camp. In practice, however, men began feeling that their masculinity was threatened and thus started looking for alternative ways to assert their authority. They sought meaning by running for the public office of street leader, for example, whilst women were afforded few opportunities to do so. The avenues men pursued to reassert authority may therefore have had a negative impact back upon women.

In sum, not knowing about the cultures of displaced populations may adversely affect policy outcomes. As this paper argues, anthropological methods are ideally suited for generating valid data on the changing cultural contexts of displacement. In the following, I will discuss two of these methods: biographical-mapping and narrative interviews.

Methods: Biographical-Narrative and Mapping Interviews

One of the weaknesses of formalised interviews is that there is often an asymmetrical power relationship between the 'interviewer,' who determines the course of a conversation, and the 'interviewee', who dutifully responds to questions formulated by the interviewer (Flick *et al*. 2004: 205). Biographical-narrative interviews are designed to reduce these power asymmetries by giving the interviewee the autonomy to narrate her own life history rather than responding to a predetermined set of questions. Of course, even though biographical-narrative interviews can reduce power asymmetries, they do not nullify them; they are inevitably going to exist to some extent between a researcher from the global North, who may be white, affluent and Western educated, and a refugee in a developing country. In addition, there will be some degree of confusion over the aims of interviews as well as uncertainties surrounding to what ends the information they disclose might be used, with implications for what refugees may choose to divulge.

It is additionally difficult for short term researchers to learn about the genuine perspectives of refugees, regardless of the methodology. For example, when the Ghana Refugee Board interviewers were conducting exemption procedures in the country following the invocation

of the cessation clause, these interviews had an estimated maximum duration of 1.5 to 2 hours to elicit a huge breadth of information from interviewees.[57]   Moreover, many organisations rely on formalised interviews, even though refugees are apprehensive about such a process. Some of the most difficult experiences in the lives of refugees have happened in settings in which they were asked questions against the backdrop of highly unequal power asymmetries (Pernice 1994). In the past they may have been questioned by combatants who persecuted them and by investigators in hearings that determined whether they would receive international assistance or asylum. Thus, research has shown that some refugees may adopt particular strategic narratives as they respond to questions in highly formalised interview situations (Eastmond 2007). In part because of the strategic use of information by refugees, asylum interviewers exhibit a 'culture of distrust' in regards to the accounts of asylum seekers.

Anthropologists therefore aim to supplement formalised interviews by developing knowledge from living and interacting with refugees on a day to day basis. In this process of 'participatory observation,' they hope to gain a nuanced and practical understanding of the complexities of refugees' living conditions. When anthropologists do conduct interviews, they often do so in a semi-structured or unstructured fashion, as the example of biographical-interviews exemplifies. Despite such approaches, there are still power asymmetries between researchers in professional capacities and refugees. The impact of these power-asymmetries on the data that is generated must be acknowledged.

Biographical-narrative interviews are more like conversations. During my previous research in the Buduburam camp in Ghana in the winter of 2010 and the summer of 2011, I found that Liberian refugees openly talked about their displacement history. I was, for example, particularly interested in the sizable number of Pentecostal churches in the camp, and what had attracted many displaced Liberians to join a Pentecostal makeshift church. The most illuminating observations concerning this topic in retrospect stemmed from biographical-narrative interviews.

Like biographical-narrative interviews, mapping interviews seek to reduce the power asymmetry between the interviewer and interviewee. With this method, anthropologists map the physical environments of the people whose lives they explore. In so doing, anthropologists try to learn from the interviewees about how they conceptualise their environment and how this relates to their biographies, social relationships, subsistence patterns, cosmologies, and indigenous knowledge (Chapin *et al*. 2001). In some instances, facilitating opportunities that enable indigenous groups to map what they perceive as their territories enables them to challenge externally imposed boundaries (D'Antona *et al*. 2008).

In my case, applying such methods meant walking with the refugees through environments that are important in their life histories or current circumstances, and asking them to point out how pivotal places are embedded in their life histories. I conducted such interviews with my research assistant; we walked through the camp and conversed about its institutions and norms. In the process, I gained some of my most valuable insights into social life in the camp,

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[57] This estimate is drawn from a personal conversation in 2013 with an intern from UNHCR Ghana.

for example in regards to the relationship between the Ghanaian camp administrators and refugees.

It would, of course, be unfeasible to fly in anthropologists, who would mostly be trained in Western countries, any time aid workers are confronted with problems. Nonetheless, it is worth noting that aid workers could be trained in applying anthropological methods. In a similar vein, it may not be feasible for refugee aid administrators to give up on standardised interviews. Perhaps it would be more possible to complement standardised interviews with anthropological methods. In the following, I will discuss how doing so may improve policy responses in two ways: to alleviate some of the miscommunication between refugees and camp administrators; and to better inform repatriation efforts.

Domains of Application: Communication in the Camp

Applying anthropological methods could help to minimise communicative dilemmas that exist between refugees and those tasked with assisting refugees. Anthropological, qualitative methods, such as biographical-narrative interviews, can be facilitators of constructive communication. Anthropology has a long history of participatory research projects that facilitate conversations that enable managers of aid projects to learn about the perspectives of the stakeholders (Ervin 2005).

Buduburam's recent history, for example, is mired in miscommunication and hostility between the camp administrators and refugees. In many ways, a sign that reads 'Refugee Camp' epitomises these tensions (see below).[58] First, the Liberian organisation Joint Liberian Refugee Committees in Ghana (hereinafter JOLRECG) put up the sign. JOLRECG has allegedly been behind refugee protests for more comprehensive resettlement packages, even though many Liberians reportedly disagree with the organisation's strategies (Shout Africa 2011). After JOLRECG put up the sign, the camp management took it down again. Then, JOLRECG put it back up. It was apparently taken down again. The mostly Ghanaian camp management preferred to refer simply to Buduburam and omit the term 'camp.' The Liberian refugees insisted on calling the locality a 'refugee camp'. The Ghanaian authorities were hesitant to use the terminology 'refugee camp' because a 'refugee camp' compels humanitarian aid and resettlement. This vignette of the sign does not only illustrate the relationship between the camp management and the refugees, it also demonstrates how actors involved in local power struggles appropriate terminologies from international discourses.

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[58] Elizabeth Hauser made me aware of the sign in a personal conversation in July 2010. Subsequently, I conducted interviews with refugees about it. Divergent terminologies for Buduburam are also mentioned in Holzer 2012:276.

Image 1: Sign 'Liberian Refugee Camp,' which prompted a local power struggle

Hauser (2012) identifies insufficient communication mechanisms as a main factor for tensions between refugees and camp administrators in Buduburam. One of the reasons for refugee protests in 2008 was that UNHCR maintained communication with representatives according to demographic markers (for example gender and age) instead of political positions that were relevant for refugees. More specifically, Hauser asserts that UNHCR had a 'lack of adequate channels of communication' (Hauser 2012: 274). Information was mostly communicated via public bulletin boards, writings from embassies, and stories that were told in the population of the camp. For these reasons, UNHCR falsely accepted the pretences of more conservative refugees, according to whom the protests were not representative of the majority of the population in the settlement, thus occluding the voices of all those without direct pathways of communication with UNHCR (Hauser 2012: 272).

Of course, anthropological methods would not have solved all the communicative impasses between refugees and administrators. In the final analysis, much of the strife is a consequence of UNHCR not having sufficient resources to resettle, adequately integrate or repatriate refugees. Nonetheless, application of anthropological methods might have bolstered the capabilities of authorities to resolve conflicts through an appreciation of the complexities on the ground, for instance of the significance of political cleavages among refugees.

Domains of Application: Repatriation Policies

As the UN High Commissioner for Refugees António Guterres (2009: [6]) reminds the

refugee aid community, movements of repatriated refugees:

> represent both a developmental opportunity and a developmental risk. If addressed appropriately, in a coherent and comprehensive manner, large-scale repatriation movements provide national and international actors with an important opportunity to establish new livelihoods, reconstruct shattered infrastructure and improve social relations amongst different groups of citizens which at the same time helps consolidate peace and strengthen the foundation for democratic government.

On the other hand, returnees do not always constructively contribute to the rebuilding of the nation of origin. Instead, they may spur instability, as in the cases of the Khmer Rouge returnees from Thailand (Rogge 1992), and the Nicaraguan Contras in the Central American region (Basok 1990). After all, refugee movements, whether to host countries or back to countries of origin, may lead to a 'regionalization of conflicts' (Milner 2008: 12), even though little ethnographic (or other) data is available to evaluate when conditions in exile may lead to such a dynamic. UNHCR announced that repatriation is the 'most desirable' outcome of a refugee crisis. United Nations resolutions thus repeatedly call for repatriations. Allen and Turton (1996) argue that the history of European nationalism informs perceptions according to which the complex emergency of prolonged displacement is resolved once refugees returned into their nation of origin. As a consequence of this bias, insufficient attention and resources are directed towards the complex dynamics that transpire once refugees have been repatriated. UNHCR delegates responsibility to the country of origin's government and the International Organisation for Migration to facilitate individual returns.

Cultural factors during repatriation and in exile are intertwined, which means return programmes must take the cultures in exile into account to understand the cultural context of repatriation. While an emic approach is prioritised for understanding displacement, exile, and repatriation from the perspective of refugees, the etic approach is instructive for guiding the researcher towards putting empirical phenomena into a conversation with emergent cultural anthropological theories that problematise the nexus between the local and the global.

In regards to cultural change among refugees, it is important to note that forced displacement represents an experience of rupture in their lives. In a sense, many '[r]efugees are in the midst of the story they are telling, and uncertainty and liminality, rather than progression and conclusion, are the order of the day' (Eastmond 2007: 251).[59]

My biographical-narrative and mapping research suggests that Pentecostal churches, which convert numerous refugees in Buduburam, have become very popular in large part because they help individuals cope with the rupture that is caused by the experience of displacement. Pentecostals in the camp (as elsewhere) attempt to make 'a break with the past' (Meyer

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[59] It should be noted that this point should not be over-determined. Some refugees, such as Mozambicans in South Africa, find opportunities in displacement and migration, for example in the establishment of businesses and romantic relationships in countries of asylum (Lubkeman 2002).

1998:316). In doing so, they repudiate certain traditional Liberian practices, which they blame for the atrocities of the Liberian civil wars. In this way, they construct a narrative that assigns meaning to their pasts. From the perspective of Pentecostal converts in the refugee camp, their experiences of the Liberian Civil Wars can be explained by reference to collective deviations from Christian values and practices.

Thus Pentecostalism helps many believers to come to terms with their past. Furthermore, Pentecostalism enables many refugees to manage expectations for the future and cope with their harsh everyday lives. Instead of a syncretic belief system that blends Christianity with traditionalism, it became apparent during research that many Liberian converts embrace an ideology of transnationalism and connect to global, Evangelical networks. This is partly in an effort to overcome their marginal status, which is marked by a lack of mobility and political and economic rights.

The Pentecostal culture in the camp affects its ethnic relations. I did not openly ask about the ethnic affiliations of my interviewees until the end of my research stage. It appeared that different ethnic groups were present in Buduburam refugee camp. According to my interviews, there is an absence of ethnic violence in the refugee camp, even though ethnic animosities precipitated the Liberian civil wars (Boamah-Gyau 2008). When I did not ask, respondents mostly did not mention the topic of ethnicity in the interviews. When the topic of ethnicity came up in conversations, respondents' answers seemed to generally indicate that ethnicity was no longer an important topic in the camp. Refugees mentioned that ethnicity partly became a less salient societal force because of the presence of the churches in the camp. In the words of a believer in the camp, '[a]nother good aspect of the church is that it breaks the spirit of tribalism. I may not know your tribe, but I come to church and serve God with you'. According to some respondents, the work of churches has been an important source of reconciliation between different ethnic groups that live in the camp. As a pastor told me:

> "[a]nd lastly, once we ask for reconciliation…we should learn to reconcile our differences and live as one people. Once that is done and we shift our position back to God, he can restore our nation. Because he said in his word, "Out of the arches of violence, I will restore a nation. And that nation could be our nation. Can you give us a better future and hope for our nation."'

Overall, the themes of faith based forgiveness and reconciliation were prominent in my interviews and discussions. Knowledge of ethnic dynamics and reconciliation of refugees in exile could prove vital for societies such as Liberia, which struggle to rebuild themselves after interethnic wars and yet are attempting to consolidate ethnic reconciliation against the backdrop of the influx of 'returnees'. Situations of exile do not automatically lead to a reduction of ethnic affiliations, as Malkki's (1995) ethnography of the Hutu 'mythico-nationalism' of Burundian refugees in Tanzania exemplifies.

There are, however, no reports that Liberian returnees upset the process of ethnic

reconciliation in Liberia. Nonetheless, data drawn from anthropological research could help when making predictions about the effects of a large influx of returnees on the country of origin, particularly in regards to ethnic reconciliation. By drawing from ethnographic research conducted in situations of asylum (see Allen and Turton 1996, Kibreab 1996), the 'development risks' of repatriation, to which the current UN High Commissioner for Refugees refers, may be predicted and perhaps even mitigated.

Because of the historical bias that takes as axiomatic that refugee crises are resolved once refugees have been returned into their nation of origin, there is 'a scarcity of academic research into the long-term process of post-return integration' (Hammond 2004: 207). The absence of academic research is mirrored in the lack of resources and policies that address post return integration. Such policies would have to integrate research in settings of exile, for example refugee camps, and in societies in which returnees would be reintegrated.

Insights into dynamics that lead to repatriation could help international agencies in constructively responding to large scale repatriation movements. Communication patterns within refugee communities about conditions in the country of origin compared to those encountered in exile are complex long term processes. How information is promulgated and the nature of knowledge, and how people use it once they obtain it, is necessarily idiosyncratic and highly context specific. It is, therefore, very difficult to adequately capture the knowledge that flows in the process of repatriation. Even so, compared to highly standardised interviews, qualitative methods such as participatory observation and unstandardised or semi-standardised interviews can be helpful for understanding how the knowledge in repatriation processes is constituted and used to some, although perhaps modest, extent.

According to Cuny *et al.*'s (1992: 21) model, refugees in exile send 'scouts' into countries of origin to determine whether the economic, political and military situation has improved. Refugees in Buduburam also waited for the reports of such 'scouts' to conclude whether repatriation would enhance their livelihoods, but they did not have a formalised organisational structure to organise the repatriation. In contrast, Ethiopian Tigrayan refugees in Sudan organised repatriations through the grassroots Relief Society of Tigray (hereinafter REST) (Hendrie 1992). Many refugees expressed wishes to return when there were reports of a rainy season in Ethiopia, even though hostilities had not ended. When it became clear that most international agencies would actively discourage the repatriation, REST changed its strategy – only heads of households were encouraged to repatriate. They would prepare domestic farm economies so that the rest of the household could follow. Aid workers knew little about these self-support networks and economic resilience strategies. Knowledge of relief operations is hierarchised and, unfortunately, the knowledge of refugees themselves seems to oftentimes be grossly undervalued. In the words of an aid worker, who was involved in the Tigray operation:

> It was an amazing time. Here are a people who have lived in that part of the
> world for centuries. They make a decision to go home, and we say, "Hey,

maybe you better think about that." It reflects a real shortcoming of how we
think about refugee situations, if we are in control. In fact, people will do what
they do, and we really have very little to say about it (Hendrie 1992: 366).

Since a refugee crisis is not resolved once refugees have returned to their country of origin,
but rather when the protective relationship between state and citizen is effectively re-
established, research should also address post repatriation. Following calls for more
investigations of post repatriation integration (Hammond 2004), my future research will
investigate whether Liberian refugee returnees, who spent time in exile in Ghana, obtain
'territory-anchored rights' assigned on criterion of membership in a group that belongs to a
territory (Kibreabb 1999: 187). In my past research, I realised that for refugees, achieving
basic political and economic rights and territoriality are inextricably linked. Liberian refugees
in Ghana do not enjoy 'territorially-anchored rights'. They were neither part of a Ghanaian
ethnic group, and therefore under protection and patronage of one of the country's chiefs, nor
citizens of the Ghanaian state. The inhabitants of Buduburam could not vote in elections.
They claimed that they were discriminated in the provision of public services such as primary
school education, sanitation, and healthcare. They asserted that the Ghanaian police
mistreated them. At the same time, they lacked efficient means for redress in cases of
maltreatment and discrimination.

In significant ways, the extent to which these returnees reassert their 'territory- anchored
rights' will depend on their ability to reintegrate into Liberian society. In this respect, their
Pentecostal religiosity, to which they converted in exile in Ghana, plays a pivotal role. Many
born again Christians in Buduburam sought for discontinuity and repudiation in regards to
unchristian and occult aspects of their cultural pasts. From the perspective of converts in the
camp, adherence to what is occult invariably leads to societal disintegration. The bloodshed
of the civil wars seems to have been an example of such disintegration.

In the beginning of my research, I assumed that the respondents either had no religion or
were animists in their pre-conversion life as they narrated religious and spiritual changes in
their lives and told me that they had not been Christian before becoming born again. In time,
though, I learned that they meant to express that they were, indeed, Christian, for example
Baptist, before coming to Ghana, but that their Christian faith had lacked commitment before
it was tested in Buduburam and that they became born again as the result of the challenges
respondents experienced in exile. A focus of Christianity as it was practiced in Buduburam
was that it officially did not tolerate the syncretism between Christian and non-Christian
beliefs that was allegedly permissible in much of Liberian history.

Some of my informants considered Ghanaians as more complicit with traditional, non-
Christian and occult practices. It is possible that the Liberian returnees will be confronted
with belief systems that they once repudiated upon their return to Liberia. On the one hand,
reintegrating into familial networks may require re-identifying with belief systems that were
once rejected. On the other hand, the religious revival that transpired in Buduburam did not
happen in a vacuum, but is in some respect epitomic for larger trends in religiosity in the

West African region. In my future research, I will explore how religious experiences and cosmologies in Liberia compare to those that I observed in Buduburam. In so doing, I hope to identify what threats or opportunities arise to the sustainability and efficacy of the return as a consequence of Liberians having become born again.

Against the backdrop of these challenges, it is important to remain mindful of Allen's (1996: 260) contention that:

> [a]nother reason why research is so important, particularly in relief work, is that viable community life cannot be assumed. Returnees may be coming home, but they may have little previous contact with people they find to be neighbours. In social upheaval, local-level mutuality is something grappled with, sometimes violently. Relief workers need to know who the losers are in order to provide assistance effectively, and development projects which call for community participation are unlikely to succeed unless considerable efforts are made to establish community which might participate.

Frequently who these 'losers' turn out to be is foreshadowed in exile. As other anthropologists (Hampshire *et al*. 2008) have noted, changing age relations produced winners and losers in Buduburam. The elderly were venerated in Liberia. In the refugee camp, on the other hand, the elderly have few opportunities to make their voices heard. Marginalisation of the elderly is a consequence of both the mobilisation of youth in the Liberian civil wars as well as the elderly's inability to generate income. Perhaps the main source of income is remittances from relatives that have been settled into the United States. To receive remittances, Liberians who stayed in Ghana need to cultivate contact and negotiations with relatives who have been resettled abroad. Doing so is a task for younger refugees since the elderly do not know how to work with computers and the Internet.

What I would add to previous research on age relationships in Buduburam is that the elderly may use churches to regain some influence. Some Pentecostal churches have official positions for church elders. A young informant informed me that learning from the wisdom of the elders is one of the advantages of attending church. In his words, '[t]he elderly encourage us young ones to deal with our problems out there. Some of my friends are smoking because of the stress…They receive no good advice. There are good elders we have in church, so we don't go wayward'. Overall, most of the churches seem to still be dominated by attendees and volunteers of younger generations, though my findings on the nexus between age and church participation remain preliminary and tentative. As mentioned in the theoretical section above, it is, however, important to analyse the intersection between different cultural facets, such as age, gender and religion, to more fully understand the impact of these dynamics on the processes of forced displacement and return that I have referred to.

If the elderly turn out to be losers as a consequence of repatriation, then assistance providers must make special provisions for this demographic. Anthropological methods are useful for identifying exactly how elderly people experience 'vulnerability' to certain factors, and how

they seek to overcome these in the camp and during the repatriation process. In my research, I used biographical-narrative interviews as well as focus groups to discuss age relations. Even though I did not address age relations in the context of biographical-mapping interviews, they could also capture age relations. Age relations in the camp have spatial dimensions. Some of the areas in the camp, for example, were dominated by the youth.

Limits to the Potentials of Anthropological Engagement

At first sight, the ways through which anthropological researchers and policy practitioners attain information appear to be polar opposites. Anthropologists seek to provide holistic and 'thick descriptions' of a social context (Geertz 1973:3:30). For this reason, they make notes of a vast array of information in order to provide a holistic depiction of the communities that they study. In contrast, practitioners need concise information, which they can operationalise for policies. Opinions on whether scholars should become engaged with policy, for instance for development organisations that aim to relieve poverty, differ within anthropology. Scholars and practitioners such as Nolan (2001) have long argued that anthropology and development policies must become more mutually relevant to become more efficient. To make this happen, anthropologists need to convey their findings in a way that is accessible to policy makers.

Contrary to such views, Escobar (1991) cautions against anthropological engagement with development policies. Following Escobar's line of argument, development organisations' focus on poverty alleviation implicitly serves the purpose of diffusing societal and political conflicts that would undermine current societal arrangements that are inimical to the poor. Consequently, anthropologists' uncritical acceptance of 'development' paradigms makes them part of the problem, rather than the solution. Instead of working within the development framework, anthropologists should focus on grassroots generated and realistic alternatives. Similarly, anthropologist Ferguson (1994) asserts that the World Bank's policies towards Lesotho were based on analysis that did not reflect social reality but rather innate bureaucratic logics, which, in the final analysis, de-politicise the process of 'development'.

Similar debates are held in the interdisciplinary field of 'refugee studies'. Many refugee scholars profess that their research should have policy relevance (for example see, Hugman *et al*. 2011; Mackenzie *et al*. 2007; Limbu 2009). On the other hand, Bakewell (2008) cautions against exclusively applying categories that are intelligible for policy makers. By focusing on policy relevant questions and terminologies, researchers may ignore wider societal dynamics that are not affected by aid programmes. Paradoxically, research that may be more helpful for policies that could improve the lives of those forcefully displaced may emerge from research that does not profess to be policy relevant, such as in depth anthropological studies. For instance, if researchers only focus on officially designated refugees, as determined by the Refugee Convention, they may ignore the huge number of self-settled and unassisted refugees, whom provide clues as to the most sustainable and relevant durable solutions for refugees themselves.

Conclusion

Anthropological methods cannot solve all the conundrums practitioners in refugee assistance face on a daily basis. They also do not absolve anthropologists and other social scientists from ethical conundrums associated with engaging with institutions that are embedded in the problematic ideologies that Ferguson and Escobar rightly point out. Nonetheless, as I have hoped to demonstrate, the application of anthropological methods such as biographical-narrative interviews and biographical-mapping methods may help policy makers in appreciating the complexity of contexts of forced displacement. This will invariably affect policies that change the lives of refugees, for better or worse, for example in regards to communication between administrators and refugees and the effects of religion and age relations on repatriation processes.

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Legal instruments

1951 Convention relating to the Status of Refugees.

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