FORCED MIGRATION review

Externalisation

With States increasingly taking action beyond their own borders to prevent the arrival of refugees and asylum seekers, we examine the consequences for protection.

Plus special feature on:
Mobility and agency in protracted displacement

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From the Editors

In recent years, some States have been pursuing increasingly restrictive policies and practices in order to deter refugees and asylum seekers from reaching their borders. Authors in this issue's main feature discuss the emergence of these policies of 'externalisation', reflect on the consequences for people's lives, and explore ways of challenging these developments, particularly where they result in human rights abuses.

In the second feature, authors examine the role of people's mobility and agency in protracted displacement. Researchers from the Transnational Figurations of Displacement (TRAFIG)* research project present case-studies from a range of countries to show how displaced persons' mobility and their translocal networks can provide important resources in their search for durable solutions.

We would like to thank Jeff Crisp for his assistance with the main feature, and colleagues at TRAFIG for their collaboration on the second feature. Thank you to all our donors, both those who have given financially towards this issue specifically and those who support FMR on an ongoing basis so that we can continue to make learning and information about forced migration accessible to all.

This magazine and the accompanying Editors' briefing are available online at www.fmreview.org/externalisation. A selection of articles from the issue will also be available in Arabic, French and Spanish online. Print copies will be available in English only.

Our March 2022 issue will focus on **Climate crisis: from commitment to action**. Our July 2022 issue on **Knowledge, voice and power** will explore how and where research, insights and experiences, particularly those developed in regions most affected by displacement, are communicated, heard and valued. Call for articles at www.fmreview.org/issue70. Deadline for submissions: 15 February.

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With best wishes

Alice Philip and Marion Couldrey
Editors, Forced Migration Review.

Front cover image:
The Greek border fence near the Kastanies/Pazarkule land border crossing between Turkey and Greece was reinforced and extended in 2021. Although large parts of the border remain unfenced, surveillance technology has been installed and deployed, making it almost impossible for people to reach Greek territory and apply for asylum. Photo credit: Josoor

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Externalisation of international protection: UNHCR's perspective

Madeline Garlick

In recent years, some States have pursued increasingly restrictive policies and practices in order to deter refugees and asylum seekers from reaching their borders. Such policies of 'externalisation' are manifestly inconsistent with the spirit of international cooperation embodied in the 1951 Refugee Convention.

International cooperation has always been indispensable to the effective functioning of the international regime for refugee protection. The drafters of the 1951 Convention Relating to the Status of Refugees (1951 Convention) explicitly acknowledged this, recognising that as the challenge of refugee protection is international in its "scope and nature", the solution "cannot therefore be achieved without international cooperation".[1]

There have been many positive examples of situations where States have shown their readiness to share responsibility and demonstrate international cooperation in practice. In addition, since 2018 the Global Compact on Refugees (GCR) has renewed the focus on responsibility sharing as a key element of global refugee protection. At the first Global Refugee Forum in 2019, UNHCR called for pledges to support development of the capacity of national asylum systems. As a result, support platforms were set up to assist States in identifying partners which could provide expertise and other resources to boost capacity. Among these, States participating in the Intergovernmental Authority on Development (IGAD) grouping in the East and Horn of Africa are working with the World Bank to strengthen regional efforts to promote return and integration, education, health and economic inclusion for refugees, including those from Somalia. A regional support platform in Latin America, known as MIRPS (the Spanish acronym for Comprehensive Refugee Response Framework), brings together eight States seeking to mobilise technical, financial and material support for refugee protection in the region, and promote the exchange of good

practices and lessons learned. In addition, the Asylum Capacity Support Group set up by States and UNHCR has provided a mechanism for matching support needs with offers. Such initiatives send positive signals regarding States' interest in upholding and strengthening protection standards.

Nonetheless, in recent years there have also been troubling instances where States have pursued restrictive policies or practices, seeking to deter arrivals through unilateral or collective measures. Some of these have aimed or served to shift responsibility for international protection elsewhere, in ways that have undermined access to protection and enjoyment of rights for asylum seekers and refugees. With the recent emergence of new proposals in this vein, in May 2021 UNHCR issued a note on the 'externalisation' of international protection, cautioning against measures which could deny refugees access to international protection and enjoyment of their rights, and underscoring the importance of positive engagement in lawful cooperative arrangements.[2] This sets out important parameters to help guide collaborative approaches to refugee protection in ways which respect international law and responsibility-sharing principles.

International cooperation and responsibility versus externalisation

UNHCR defines the externalisation of international protection as: "measures taken by States – unilaterally or in cooperation with other States – which are implemented or have effects outside their own territories, and which directly or indirectly prevent asylum-seekers and refugees from reaching a particular 'destination' country or region,

and/or from being able to claim or enjoy protection there. Such measures constitute externalization where they involve inadequate safeguards to guarantee international protection as well as shifting responsibility for identifying or meeting international protection needs to another State, or leaving such needs unmet; making such measures unlawful."[3]

Externalisation practices frequently result in people being transferred between countries without essential safeguards or appropriate standards of treatment. Externalisation may lead to long-term or indefinite 'warehousing' of asylum seekers in isolated locations, or expose them to indirect *refoulement* and other threats. Externalisation policies may also create or feed negative perceptions of asylum seekers and refugees. Such measures have the potential to undermine the international protection system and, if adopted by a significant number of States, could place many asylum seekers and refugees at risk of mistreatment, *refoulement* or legal limbo, without access to procedural or substantive rights. Several categories of externalisation practices are described below.

1. Extraterritorial processing
Some arrangements transfer a State's responsibility for determining claims for international protection to a third State. This may involve transferring responsibility for processing such claims under the laws either of the externalising State or the third State. Alternatively, it can involve refugee status determination being undertaken in the externalising State while asylum seekers are denied entry or removed from the territory to await the outcome of their claims.

Extraterritorial processing can also take place outside State territory, including aboard vessels in international waters. UNHCR considers that processing on

UNHCR/Sufyan Said

132 refugees and migrants disembarking at Tripoli naval base, after their boat was intercepted by Libyan Coast Guards off the Libyan coast.

board maritime vessels is not appropriate, unless reception arrangements and eligibility screening processes meeting international standards can be guaranteed.[4]

In some cases, States seek to avoid legal responsibilities by processing asylum claims in special zones within State territory where a lower standard of rights apply. This may occur in transit or 'international' zones at airports or border areas, or in other areas of a State's territory, including territorial islands, that are declared to have some special 'extraterritorial' or 'excised' status. If processing and reception are subject to the same standards and safeguards as elsewhere on a State's territory, it does not constitute unlawful extraterritorial processing. If, however, rights and obligations are less extensive or do not apply in that zone, it represents an attempt to avoid responsibility – which is at odds with international law.

States cannot avoid their obligations under international refugee and human rights law by processing claims outside their territory. A State that receives an asylum claim, or exercises effective control or jurisdiction over an asylum seeker, retains joint responsibility for fair processing and treatment along with the State on whose territory the determination takes place. Both bear responsibility for ensuring a swift and legally sound assessment of the

applicant's protection needs, and provision of international protection where needed.

2. Unilateral measures to prevent arrivals

Measures taken by States to prevent asylum seekers from reaching their borders or entering their territory to seek asylum may also violate international standards. Such measures can include land, sea or air border control measures such as 'pushbacks', and maritime interceptions and return to third countries, including where disembarkation is refused or where supplies or boat repairs are offered in order to facilitate onward journeys.

Arrangements amounting to externalisation may also include physical or procedural obstacles to entering a territory, or procedures which deny effective access to asylum. 'Metering' of arrivals (that is, numerical caps or limits on admission), externalised waiting periods for decisions on claims filed in the territory, or extraterritorial pre-screening (for example, where asylum seekers are prohibited from applying in the territory and are instead required to apply at embassies abroad)[5] may all fall within this category. Such measures may breach the prohibition on collective expulsion, the principle of *non-refoulement*, and the right to seek and enjoy asylum. States are entitled to manage entry at their borders but border measures need to be consistent with refugee and human rights law. Border management must not prevent access to international protection for those who need it.

3. Cooperative measures to prevent arrivals

Collective measures by a group of States are sometimes taken to prevent asylum seekers from reaching a particular country's territory. These may include bilateral or multilateral cooperation on migration control (for example, through posting migration officers in the territory of other States); joint or proxy interception or surveillance arrangements; informal cooperation at borders; and funding or training for migration control. Such cooperation may be for lawful and positive purposes, such as increasing search-and-rescue capacity or law enforcement measures against trafficking in persons and

migrant smuggling. However, if designed or implemented without adequate safeguards, or in order to avoid or shift international protection responsibilities, such cooperative measures may constitute externalisation.

Cooperation without externalisation: lawful responses

UNHCR makes a clear distinction between externalisation measures and lawful arrangements for transfer of responsibility for international protection. These lawful 'transfer arrangements' are consistent with international standards, with safeguards ensuring refugees' access to international protection where needed. UNHCR has issued guidance on how such arrangements can be configured under bilateral or multilateral agreements among States; this guidance aims to provide clarity as to which State is responsible for processing claims and offering international protection where relevant.[6] States may also lawfully apply 'safe country' concepts,[7] as well as regional disembarkation mechanisms,[8] and emergency or humanitarian evacuations or transfers; these need to be regulated and implemented in the spirit of international cooperation with adequate guarantees of respect for rights. Protection and durable solutions for refugees may also be realised through resettlement, humanitarian admissions and other complementary and regular pathways or through protected entry schemes (involving admission for the purpose of claiming asylum) or embassy procedures. While these also entail a transfer of international protection responsibilities, they are distinct from externalization in that they feature important guarantees of procedural fairness and secure legal status if the people concerned are found to need international protection.

UNHCR has outlined the following set of principles to help States design arrangements which are consistent with international cooperation and responsibility sharing.

Primary responsibility for identifying and assessing international protection needs lies with the State in which an asylum seeker arrives and seeks that protection,

or under whose jurisdiction she or he falls. This responsibility extends also to ensuring adequate reception conditions and procedural standards during status determination, and providing international protection if required. States have a duty to make independent inquiries as to the need for international protection of persons seeking or likely to need asylum, and to provide them with access to fair and efficient asylum procedures.

States must fulfil their obligations under international refugee and human rights law in good faith. They must make every effort to ensure that any measures taken to manage displacement, migration or mixed movements, whether unilaterally or in cooperation with other States, are protection-sensitive: that is, that they differentiate between, and provide appropriate measures (based on international standards) to meet the needs of, all persons, including refugees, other people with international protection needs, and people with specific needs (such as unaccompanied or separated children, victims of trafficking or trauma, and migrants).

States cannot avoid their obligations under international refugee and human rights law by employing transfer or extraterritorial processing modalities. Both the State to which an asylum claim has been, or is intended to be, made and the State on whose territory the determination takes place retain joint responsibility for processing and reception (including for speedy and appropriate outcomes), consistent with their international obligations.

Wherever a State exercises effective control over persons or places on the territory of another State (or, for instance, in international waters), its obligations under international refugee and human rights law continue to apply.

International cooperation in sharing international protection responsibilities and ensuring access to international protection is a primary consideration of refugee law as affirmed in the Global Compact on Refugees of 2018. Practices that shift burdens, avoid responsibility or frustrate access to international protection are inconsistent with global solidarity and responsibility sharing.

Conclusion

In addition to being legally flawed, practices which effectively deny or shift responsibility from the responsible State are likely to prove ineffective and unsustainable. Refugees who are denied access to the means to seek and enjoy protection will not find solutions, and may be compelled to resort to irregular movement at the hands of unscrupulous smugglers or be exposed to trafficking, hardship and denial of their rights.

The COVID-19 pandemic has reminded us in stark terms that global challenges require global solutions. States need to work together towards clear and principled common goals, and to seek to support each other, rather than adopting narrow, inward-looking strategies which may be driven by short-term political expediency. Avoiding the pitfalls of externalisation is in the interests not only of asylum seekers and refugees but also of States themselves. 2021 marks the 70th anniversary of the 1951 Convention; ensuring the right to seek asylum and expanding international cooperation would be a fitting tribute to this resilient and enduring legal instrument.

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Conceptualising externalisation: still fit for purpose?

Nikolas Feith Tan

Given the proliferation of externalisation policies in recent years, there needs to be greater clarity around the term 'externalisation': what it means, what it comprises, and implications under international law.

Since its emergence in the early 2000s, the term 'externalisation' seems to have developed into an umbrella concept encompassing any migration control measure affecting refugees undertaken either unilaterally or multilaterally, either extraterritorially or with extraterritorial effects. Despite its ubiquitous use, however, the term has rarely been defined, and related and often overlapping concepts have emerged.

Externalisation is linked to concepts of remote control, non-entrée, deterrence, offshoring, extraterritorialisation and protection elsewhere. Moreover, externalisation and these related terms all place States in the Global North at the centre, notwithstanding the frequent involvement of other States. This has the effect of sidelining the significant role, responsibility and accountability structures of 'external' States, who are increasingly taking on migration controls at the behest of destination States.

Definition and scope

Confusion as to the definition of the term externalisation centres on a number of questions relating to its scope:

First, the geographic scope of externalisation practices is not always clear. For example, is externalisation limited to a State's conduct beyond its borders? A narrow geographic scope focuses on **extraterritorial** migration control, such as pushbacks and extraterritorial asylum processing. Crisp has recently defined externalisation as "measures taken by states in locations beyond their territorial borders to obstruct, deter or otherwise avert the arrival of refugees".[1] However, a broader definition could include practices implemented after an asylum seeker's arrival in the destination State that have the **effect** of externalising protection, thus including

primarily territorial mechanisms such as the 'safe third country' and 'first country of asylum' concepts. Indeed, in its recent *Note on the "Externalization" of International Protection*, UNHCR defined externalisation as "measures preventing asylum-seekers from entering safe territory and claiming international protection, or transfers of asylum-seekers and refugees to other countries without sufficient safeguards".[2]

Second, the practical scope of externalisation is necessarily broad to accommodate the wide spectrum of State policies and practices deterring and diverting asylum seekers. These include boat pull and pushbacks, extraterritorial processing and protection, visa controls, carrier sanctions, the posting of immigration officers internationally, and the funding, equipping and training of migration management in third countries. However, some practices sit at the conceptual edges. For instance, do extraterritorial procedures for resettlement and 'complementary pathways' fall under the concept of externalisation? They are, after all, asylum and refugee policy measures taken outside a State's borders. While resettlement procedures are not expressly aimed at deterring asylum seekers, they are at the least highly selective in determining who receives protection and who does not. Resettlement allows destination States to maintain a commitment to the international refugee regime while restricting access to territorial asylum. For example, the EU–Turkey Statement of 2016 includes a built-in resettlement element, with one Syrian refugee resettled for every one returned, while Australia's externalisation efforts are often justified in terms of a relatively generous resettlement programme. Most recently, the temporary hosting of Afghan refugees in third States, at the request of

the US, raises questions of whether we are seeing a new form of externalisation.[3]

Finally, on a related point, there is the question of the extent to which externalisation is a normative term. Do externalisation practices by definition undermine the spirit of destination States' obligations under international human rights and refugee law or do they in fact violate these obligations outright? In many cases, externalisation practices are the result of governments' strategic avoidance of their obligations under the 1951 Refugee Convention or other international or regional human rights instruments. On the other hand, do some externalisation practices that are compliant with international law have the potential to protect refugee rights – and could be termed 'rights-based' externalisation? Notably, UNHCR has specifically defined the concept as unlawful, contrasting externalisation with "lawful practices involving the transfer of the responsibility for international protection, undertaken in accordance with international standards".[4]

Still fit for purpose?

Recent years have seen the emergence of what I have termed 'complex externalisation', or the embedding of certain protective practices in a broader externalisation or containment agenda. This has also recently been referred to as 'contained mobility'.[5] For example, while the EU's role in supporting the Libyan Coast Guard in preventing departures for Europe is a classic example of externalisation, related mobility practices have emerged. The EU is the primary funder of UNHCR's Emergency Transit Mechanism, which evacuates highly vulnerable asylum seekers and refugees from Libya – where they have been detained as a direct result of EU-supported pullback practices by the Libyan Coast Guard – to Niger and Rwanda. In turn, France, for example, is currently engaged in extraterritorial asylum processing in Niger for the express purpose of resettlement.

Given how embedded some policies of externalisation have become in the Global North, a clear-eyed concept of which practices

Asylum seekers brought from Libya to Niger, where their asylum applications will be processed, pass the time playing board games.

fall under this label is vital, for at least three reasons. First, as the term 'externalisation' does not appear in international law, clarity is needed as to which externalisation practices are in compliance with or violate international law. Second, definitional clarity matters because including or excluding certain practices from the broader concept of externalisation has an impact on how we measure the effects of such policies. Third, the emergence of 'complex externalisation' calls for caution in further stretching the conceptual boundaries of externalisation and instead invites an analysis of both the intention of States and the impacts on refugees themselves. To remain categorically useful, future work on externalisation will need to grapple with these definitional questions.

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Why resettlement quotas cannot replace asylum systems

Bernd Parusel

Resettlement is an important element of refugee protection worldwide. However, it is fundamentally different from territorial asylum systems. Resettlement should complement the reception of asylum seekers but should never replace it.

Time and again, ideas to phase out the right to asylum in its current form circulate among politicians, experts and even academics in a number of European countries. Some believe that the 1951 Refugee Convention is outdated and that the right of individuals to seek asylum within the territory of a receiving ('destination') country (or at the border) should be abandoned. Instead, they propose new systems of resettlement-like admissions of refugees directly from third countries. This would mean that European countries themselves would choose which and how many refugees they receive, and from where, rather than having to receive those who make their way to Europe on their own. This in essence would be a form of 'externalisation', whereby people are deterred from seeking asylum within a destination State's borders.

Critics of the current asylum system have a point when they argue that the European Union's common asylum system and the way it is implemented across the bloc's Member States and other European countries has serious shortcomings. Because of visa requirements, carrier sanctions, various types of deterrence strategies and even physical barriers and pushbacks, it has become almost impossible for people in need of protection to reach the territory of the EU Member States in safe, legal and orderly ways. Many have to rely on human smugglers, often risking their lives on dangerous journeys. Depending on where in Europe they arrive, they then face huge variations in protection prospects, types of asylum procedures and reception conditions. A further problem, mainly from governments' perspectives, is that although many asylum seekers do not qualify for protection in accordance with the Refugee

Convention or supplementary national asylum laws, enforcement agencies find it hard to return them to their countries of origin. Last but not least, responsibility sharing in receiving asylum seekers and processing their protection claims is highly inequitable, with some countries undertaking a much larger share than others, making this a topic that causes political divisions between different EU Member States.[1]

It is as a result of these problems and the deep political frustration they have caused that various radical ideas have gained traction in the asylum and migration debate. In the United Kingdom, Denmark, Sweden and other countries, some politicians, experts and scholars propose that the right to seek asylum inside the EU should be abolished entirely, and that asylum should only be sought from outside the EU. (In Denmark, a certain version of this idea is already official government policy and has prompted strong criticism.[2]) Those who are found to be in need of protection, or at least some of them, might then be offered a transfer to Europe by means of resettlement or similar arrangements. It is often argued that this would prevent irregular journeys and make it possible for European countries to focus on the most vulnerable individuals. A further argument is that receiving societies in Europe might be more willing to offer refugees protection if they were able to choose the beneficiaries.

Examining the arguments

Resettlement and similar humanitarian admission schemes are well-established and crucial elements of refugee protection worldwide, including in Europe.[3] Yet they are fundamentally different from

territorial asylum systems based on the Refugee Convention. For various reasons examined below, the one system therefore cannot replace the other.

Firstly, from a political perspective, there are few indications to suggest that resettling more refugees means there will be fewer asylum seekers or that the political appetite for resettlement grows when the number of asylum seekers decreases. Since the migration 'crisis' of 2015–16, the number of new asylum seekers in Europe has decreased drastically – not least because of harsher deterrence measures at the EU's external borders, migration deals with neighbouring countries (such as Turkey or Libya) and, perhaps, more hostile policies within Member States. According to the logic of those who argue for a different refugee protection system, reduced numbers of asylum applicants would mean that more refugees could be accepted via resettlement. In reality, however, this has not happened. We see that even if some EU countries have recently increased their quotas, the number of resettled refugees they are accepting falls far short of the number of people requesting asylum within Europe or at the EU's external borders. In 2019, for example, approximately 21,300 individuals were resettled to Member States of the EU, while 206,000 received a positive decision at the first stage of their application for asylum. Including statuses granted in appeal procedures, the number of positive asylum decisions is likely to be even higher. Thus, only one in ten individuals, probably fewer, receive protection in the EU via resettlement, and asylum remains by far the primary protection system.[4] (The year 2020 should not be used for comparisons because the COVID-19 pandemic made resettlements more difficult or impossible because of travel bans and closures of migration offices.)

Eurostat data also show that there is no clear pattern over time. After 2016, some countries such as Sweden, Germany and France raised their resettlement quotas for 2017–19. Others like Austria, Belgium and the Baltic States also increased their pledges or introduced new resettlement initiatives, only to reduce or abandon them

later. Denmark, which used to regularly resettle refugees, suspended refugee resettlement in 2017, 2018 and 2019.

This shows that, notwithstanding commitments made by some countries to increase their resettlement efforts, the system is unstable as governments are free to step up and scale down these programmes as they please. Such choices often do not correlate with the evolution of the asylum situation or the global need for resettlement. Even in a country like Sweden, there is no guarantee that politicians will continue to uphold the current level of resettlement admissions, which is relatively high. As public opinion changes, so can government preferences, and so can resettlement commitments. Consequently, quota systems are dependent on political will rather than any objective need to provide long-term solutions for refugees. By contrast, the right to asylum has no quantitative limits or quotas.

Secondly, the idea that public support for refugees would increase if national governments could select which individuals, and how many, they want to accept is presumptuous and paternalistic. Who has the knowledge and right to decide which are the most serious refugee situations or which individuals have the greatest need to be offered a safe future in Europe? Also, some conflict areas with acute refugee crises can be too dangerous for officials to access in order to carry out their resettlement missions, and it is highly uncertain that they would find those individuals who face the most serious threats. Furthermore, asylum is not only for people fleeing from armed conflicts or other situations that are visible and reported on in the media; refugee status is primarily intended for individuals facing political persecution, and where and how this happens is often hidden from our eyes.

Politicians also sometimes complain that most asylum seekers who arrive in Europe are (young) men and that we need a new system that focuses on women, children and particularly vulnerable groups. However, the unbalanced gender distribution among asylum seekers in Europe is not a result of the Refugee Convention but of attempts to evade

it by deterring asylum seekers and making Europe inaccessible. If available pathways were safer and/or if there were opportunities to apply for protection or humanitarian visas from abroad, the proportion of women, children or elderly people would almost certainly increase. If we were serious about the gender balance, we would also offer wider possibilities for family reunification in the EU. Resettlement is an important tool in this sense as well, precisely because it is serves as a complementary pathway. It is a selection system where receiving countries for example can accept entire families. But we cannot base the entire global protection system on which individuals are pitied most by residents of receiving countries.

Thirdly, it is not clear why abandoning the right to asylum in Europe would stop dangerous irregular crossings and deaths at sea. Europe struggles to return rejected asylum applicants and other people with no legal right to stay in the EU to their countries of origin. This means that even if people who arrive on irregular routes would have no right to apply for, or receive, asylum, European countries might still not be able to remove them. As long as there is still a chance, however small, to remain in Europe, with or without access to asylum or permits to stay, some people might still risk their lives to get there.

Last but not least, abandoning territorial asylum systems based on the Refugee Convention would set a dangerous precedent and could trigger a chain reaction that ultimately risks damaging the global refugee protection system. Current externalisation efforts in the EU are already having this effect on countries bordering Europe. If rich European countries think they can evade the Refugee Convention and only resettle some individuals according to their shifting preferences, why should poorer frontline countries in other parts of the world not do the same? The more countries that follow such a path, the more the responsibility to admit and process asylum seekers would increase for those countries who remain committed to offering asylum and to keeping their borders open to those who flee. We

could even end up with a situation where all countries only want to admit resettled refugees – and no asylum seekers. However, in such a situation, resettlement would become impossible as well, because the concept of resettlement is based on refugees being selected in countries where they have fled to, not in their countries of origin.

Conclusion

If we want a workable protection system for refugees, we have no choice but to defend the current basis of refugee protection and to work on innovative ways to improve it, for example by offering safe and legal pathways through humanitarian visas or complementary pathways. Resettlement is an extremely useful and valuable protection tool as well, not least in the context of global responsibility sharing. Existing resettlement programmes and related humanitarian admission or private/ community sponsorship systems should therefore be improved and expanded, and new ones be introduced to open up more alternatives to risky irregular journeys. But resettlement programmes cannot be used as a justification of abandoning the right to apply for, and receive, asylum in destination countries. Resettlement is a complementary system, not a substitute for territorial asylum.

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This article is written in a personal capacity.

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Pushbacks on the Balkan route: a hallmark of EU border externalisation

Gigi Aulsebrook, Natalie Gruber and Melissa Pawson

Illegal pushbacks – and the use of violence – on Europe's borders have increased to unprecedented levels, raising the alarm about abuses of fundamental human rights.

As practitioners working for Josoor, the only organisation focused on supporting survivors of pushbacks from Greece and Bulgaria based in Turkey, we systematically document testimonies of survivors and other evidence of human rights violations from the European border regime. Together with our partners from the Border Violence Monitoring Network (BVMN), we monitor pushbacks across the so-called Balkan route. In 2020, we saw this practice reach unprecedented levels in terms of numbers, regularity and scale of coordination, as well as brutality. It is also spreading deeper into EU territory. Despite being an unofficial and illegal practice, pushbacks are now a hallmark of the externalisation policy employed by the EU.

The term 'pushback' describes the unregulated cross-border expulsion of people on the move to another country. Conducted without due process and outside any legal framework, pushbacks violate national, EU and international law, most notably the prohibition of collective expulsions (European Convention on Human Rights), the principle of *non-refoulement* and the right to apply for asylum (1951 Refugee Convention). In addition, the measures employed to carry out pushbacks, such as arbitrary detention and extreme violence (often amounting to inhuman and degrading treatment, and torture), violate many other laws and leave survivors with lasting physical and psychological trauma.

Changes in pushbacks at the EU–Turkey border

The first reports of pushbacks emerged from the militarised land border area in Greece in the 1990s. Following the so-called closure of the Balkan route in 2016, these ad hoc policies and practices have greatly increased,

becoming a core practice of the European border regime.[1] In the case of pushbacks from Greece, the authorities have made use of (and continue to make use of) arbitrary detention and violence amounting to torture in multiple police stations and detention sites from the borderlands to deep inside the mainland, as well as on board vessels belonging to the Hellenic Coastguard and Frontex, the EU's Border and Coastguard Agency.

In response to and under the pretext of the failure of the 2016 EU–Turkey Agreement, the Greek government accelerated the systematisation of pushbacks in 2020, illegally suspending asylum applications for one month and deploying additional forces at the land border with Turkey. This has seen the average number of groups pushed back over the Greece–Turkey border more than double from 2019 to mid-2021. Eighty-nine percent of pushbacks from Greece recorded by BVMN in 2020 contained one or more forms of violence and abuse such as beatings, forced undressings and the use of firearms.[2]

On the mainland, pushbacks no longer only occur in the immediate border area: in the last year, the practice has expanded to locations deep inside Greek territory, including pushbacks from refugee camps. For example, people have been apprehended in Igoumenitsa, a city 773km from Edirne, the nearest Turkish city to the Greece-Turkey border; there have also been multiple instances of groups of up to 110 asylum seekers being taken by Greek officers from Diavata camp, located over 400km from Edirne, before being detained and then pushed back across the land border to Turkey.[3]

One such case occurred in Diavata camp in September 2020. The person who shared his story with us was without shoes and only dressed in a t-shirt and shorts when he was

An inflatable boat left behind on the Turkish shore of the Evros/Meriç river, either after crossing or after a pushback.

forced inside a van by police. "They didn't explain […] They pushed us inside the vans and they kicked us," he told us. People who refused to enter the vans were beaten by the police. The group consisted of people from Syria, Afghanistan, Algeria, Morocco and Tunisia. The testimony respondent also reportedly witnessed police "throw away" the identification papers of one person. This accords with multiple reports collected by BVMN in which police destroyed legal documents of people on the move.

2020 has also seen the Hellenic Coast Guard (HCG) employ new tactics in their pushbacks in the Aegean Sea. Until 2017, the HCG was conducting rescues at sea rather than pushbacks. However, in the years leading up to 2020, the HCG began intercepting small boats in Greek territorial waters in order to disable or remove their engines, before using Coastguard ships to make waves to push the dinghies towards Turkish waters. Since 2020, the HCG additionally began taking people from such boats aboard their ships, driving towards Turkish waters and then forcing the migrants onto unmanoeuvrable inflatable life rafts that quickly deflate, and abandoning them at sea.

There is also a worrying and unprecedented trend in which people are being apprehended on land on the Aegean islands, usually at night and with no registration and identification procedure followed, before being taken back to sea and abandoned on life rafts. Hundreds of these cases have been recorded from at least six different Greek islands, indicating the coordinated nature of this practice. In one incident in July 2020, a group containing children and other vulnerable people was detained after arriving in Rhodes and then forced back onto life rafts:

The whole group of people were put onto a boat. There were 25 people, 15 of them children. One 11-year-old boy was blind. After three and a half hours, the group was transferred onto a floating platform. The blind child almost fell into the water … but luckily one man managed to get hold of him, preventing him from falling into the sea. None of the officers reacted. [The mother of the blind 11-year-old said:] "My son yelled at the Greek soldiers, begging them for mercy and humanity, convinced we would die in that moment." After the group had been transferred onto the platform, they were abandoned at sea. They were drifting for five hours until 4am. Water was coming in and they had to constantly bail it out with their hands in high seas.

People of a wide variety of nationalities, including Turkish citizens fleeing persecution, are pushed back to Turkey. Fifty-two percent of groups subjected to torture or inhuman and degrading treatment by Greek authorities in the pushbacks recorded by BVMN contained children and minors. Dozens of cases included registered asylum seekers with valid residence permits in Greece. Several cases also included people with refugee status with valid residence permits and travel documents from other EU countries, who were in Greece to visit relatives or search for missing loved ones.[4]

Pushbacks as a pillar of the EU's border regime

Pushbacks are not confined to Greece. They occur in many EU Member States and frequently across several countries in

succession, in what is known as a 'chain pushback'. In 2020, we recorded the cases of over 400 people, between the ages of one and 50, who were pushed back from Bulgaria via Greece to Turkey, back from Turkey to Greece and then back again to Turkey.

The systematic nature of pushbacks as an integral part of the EU border regime, encompassing many different Member States, is evidenced in the *Black Book of Pushbacks*, released by BVMN in December 2020.[5] The book presents 892 testimonies detailing the experiences of 12,654 people pushed back at the EU's borders, including from Austria, Italy, Slovenia, Croatia, Hungary, Greece and Bulgaria. All across the region, we have seen increases in the violence used in pushbacks. Ninety percent of all these testimonies referenced one or more forms of violence, 44% included forced undressings, 15% referenced the use of firearms in some capacity, and 10% included the use of electric discharge weapons. Particularly grave incidents include police spray-painting people's heads with crosses, police dogs ordered to attack people who have been apprehended, and Muslims being forced to burn the Qu'ran during their ordeal.

After four years of BVMN partners documenting border violence along the Balkan route, the lessons learned are grim. While some investigations into Frontex[6] have been started, there have been absolutely no consequences for EU Member States and their agencies. In the meantime, the EU continues to fund securitisation operations and the military equipment used in pushbacks, even using the EU–Turkey border area to test unpiloted military devices. The EU's deep involvement with illegal pushback practices appears to demonstrate a tacit approval and even encouragement of fundamental rights violations against people seeking protection and a safe place to live.

There has been a recent change in the way that Frontex and Member State governments defend themselves when confronted with evidence of pushbacks; while they have previously denied all allegations, they are now shifting to justifying their actions on questionable legal grounds. This development is frightening given the fear among human rights defenders that the EU will move towards legalising the practice of pushbacks, particularly since a European Court of Human Rights ruling in early 2020 which stated that, under specific circumstances, Spain had the right to push back two claimants.

Working as we do in a network of organisations across the Balkan route, we have seen that the EU is far from learning the lesson that externalisation simply does not work. We have seen first-hand that repressive policies do not stop people from attempting to reach Europe; such policies only force people to use more dangerous routes. And organisations such as ours can only do so much to support the colossal human suffering this creates. The only humane solution in accordance with international law and the EU's own founding principles is to rescue those in distress at sea, and to provide safe and legal passage to people seeking protection.

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www.borderviolence.eu/category/monthly-report/.
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6. Frontex is the EU's agency tasked with managing the EU's external borders, with a main part of its mandate to secure fundamental rights.

Frontex cooperation with third countries: examining the human rights implications

Mariana Gkliati and Jane Kilpatrick

While Frontex is currently under unprecedented examination for human rights violations at the EU's borders, its work beyond EU borders remains barely scrutinised.

Since its establishment in 2004, Frontex (the European Border and Coast Guard – EBCG – Agency) has become an important vehicle for implementing the EU's externalisation policies. Its arrangements with States of origin and transit are designed to prevent onwards movement towards the EU, and facilitate return and readmission. Using case-studies from Albania and Niger, we explore the different human rights risks, and draw out lessons relevant for protection-oriented practitioners and policymakers interested in the EU's adherence to the rule of law.[1]

Frontex in the Balkans

Following growing numbers of arrivals in 2015, and pressure to 'close' the Balkan route, the Western Balkans has been a priority region for Frontex. The EU has concluded five Status Agreements with Albania, Bosnia-Herzegovina, Montenegro, North Macedonia and Serbia, allowing Frontex to carry out joint surveillance operations or rapid border interventions on their territories. (A Frontex operation in Albania in 2019 was the first to be hosted outside EU borders.)

In the case of Albania, regrettably, the Status Agreement does not provide the necessary human rights safeguards, and migrants have reported routine abuse by law enforcement officials, including violent pushbacks.[2] Firstly, it does not oblige Frontex or Albania to suspend or terminate an operation if there are fundamental rights violations. Secondly, although it requires both parties to have a mechanism to deal with complaints of fundamental rights violations by staff during operations, it is not clear if the mechanism covers complaints about any stage of the process or only appeals concerning unsuccessful applications; furthermore, the complaints mechanism lacks accessibility, effectiveness and independence. It is not often used and to date has not responded with tangible results to any complaints. The mechanism is now subject to an inquiry by the EU Ombudsman. Thirdly, the Status Agreement gives Frontex staff executive powers, including the use of force and weapons, while awarding them immunity from civil and criminal prosecution. And, finally, there is a lack of transparency surrounding Frontex's operational plans with non-EU States, leaving few opportunities for scrutiny of the agency's actions or of its investigations into complaints.

Frontex in West Africa

The West African route through the Sahel region, a historical transit zone, is another main priority for Frontex, whose presence in the region was strengthened in 2010 with the launching of the Africa-Frontex Intelligence Community (AFIC). AFIC – a framework for cooperation with 31 African States – aims to enhance the effectiveness of border management by establishing and improving information sharing and communication channels, and by improving the operational capabilities of the beneficiary African States and their capacity to share strategic and operational risk analyses on migration flows, border security and cross-border criminality. In one such case within the framework of AFIC, Frontex cooperates with Niger by sharing information regarding border management, providing training and capacity building, and setting up integrated border management systems, including ensuring the interoperability of West-African databases and their accessibility by EU authorities.[3]

Migrants travelling through West Africa risk racketeering, arbitrary arrest and detention, deportation, and torture by State

and non-State actors. Many of them die or are abandoned in Niger's desert region. The situation in Niger has worsened in the wake of structural changes in national legislation made in the name of EU cooperation. In particular, Niger, a traditional transit country, was the first sub-Saharan country to amend its national legislation to criminalise smuggling in 2015 and has adopted repressive measures of containment of migrants. Criminalisation of migration and closing of borders have led to an increase in smugglers' fees, and enhanced risks to individuals' safety as many are forced to take more dangerous 'underground' routes.[4]

A look into the future

Frontex occupies a central place in implementing the EU's externalisation policies and we can expect to see further expansion of the territorial scope of its activities in the Balkan and West African regions, including through joint operations. In addition, the new EU Pact on Migration and Asylum calls for further engagement with third countries to achieve their cooperation regarding readmissions. It envisages a much deeper involvement of Frontex in forming and supporting new partnerships with third countries.

A specific challenge we have identified in the course of our research is the lack of transparency regarding the work of the agency on the ground. The concealment of operational plans, combined with the narrow right of access to information in third countries, poses a considerable challenge; this challenge is even more acute in West Africa where the presence and activities of Frontex are barely known. This prevents local civil society from monitoring the agency, with the consequence that they cannot advocate effectively in favour of human rights and the interests of local economies and communities.

The cooperation of Frontex with third countries is tailored to the region. For Balkan countries, the road towards their accession to the EU is inextricably linked to cooperation in preventing migrant movements. This incentive makes them particularly receptive

to EU securitisation concerns, and is likely to encourage more direct operational cooperation as their geographical location allows reduced operational costs for Frontex.

In contrast, the agency's cooperation with West African countries is more indirect and practical. It focuses on capacity building, information sharing, and cooperation regarding the readmission into the country of those denied asylum in the EU. It is, nevertheless, of vital importance for the realisation of the EU's objective of deterring entry to EU States. This cooperation is extremely sensitive politically as it tends to go against the national interests of West African countries, which is why the EU employs visa liberalisation and development aid as incentives.

It is important to realise that different regional characteristics lead to different externalisation strategies and different forms of cooperation. Therefore, our policy, legal and advocacy solutions cannot be one-size-fits-all: they need to be region-specific.

Call for robust safeguards

In outsourcing border control, the EU aims also to outsource its responsibilities vis-à-vis refugee law and human rights protection. However, we can identify two types of risks in this approach. Firstly, there is the risk of violation of the civil-political and socio-economic rights of vulnerable people on the move and residents of third States. Secondly, the EU risks being held liable for rights violations, attributed to Frontex either directly or indirectly for its complicity in violations committed by third States. Therefore, any cooperation should be conditional upon an assessment of the human rights situation on the ground. This requires clear situational awareness and continuous monitoring and reporting. Here, the role of the European Parliament in the oversight and approval of such cooperation should be central. Finally, status and working agreements should be underpinned by the necessary human rights safeguards in ways that can be enforced and reviewed by the competent authorities, including courts, and by civil society in the EU and third countries.

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1. Our research is partially supported by the Transnational Institute and Statewatch, and includes interviews with national authorities, civil society and Western missions in Mali and Niger.

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Extraterritorial asylum processing: the Libya-Niger Emergency Transit Mechanism

Laura Lambert

The Libya-Niger Emergency Transit Mechanism launched in 2017 successfully evacuated a large number of asylum seekers detained in Libya. However, the outcomes for many of the asylum seekers, and indeed for the three main partners (UNHCR, the EU and Niger), were far from what they had hoped for.

In late 2017, UNHCR, the European Union (EU) and Niger attracted international attention by presenting the Emergency Transit Mechanism (ETM) as a humanitarian solution to the well-documented torture and exploitation of asylum seekers and refugees in Libya. Implemented with funding from the EU Trust Fund for Africa, this programme proposed flying 3,800 vulnerable people from Libyan detention centres to Niger, Libya's southern neighbour. In Niger, their asylum claims would be determined before refugees could access resettlement or complementary pathways to Europe and North America. However, a significant number of evacuees received negative asylum decisions in Niger, which undermined the initial depiction of Niger as a space of 'transit'.

Rejections represent a core issue of the ETM and extraterritorial asylum processing at large, though it has not been widely discussed. Although Niger was declared a transit state, its role in filtering evacuees before their arrival in the Global North and the conflicting selection criteria between evacuation, refugee status determination and resettlement made rejections likely. Nigerien officials and ETM asylum seekers opposed to Niger's role as a holding country have called

on UNHCR and resettlement countries to live up to their international responsibilities.[1]

A buffer state between Libya and Europe

The creation of the ETM was integral to European attempts to keep refugees and migrants at bay in Libya. With European funding and support, the Libyan coast guard intercepted refugees and migrants and detained them. UNHCR had partial access to the detention centres but its refugee protection and resettlement procedures were constrained by the civil war and limitations imposed by the government. The central idea of the ETM was thus to 'deterritorialise' these procedures – that is, to move them to a third State – in order to provide immediate protection and to select asylum seekers before their physical arrival in Europe or North America. In this sense, Niger also played the role of a buffer state that allowed for a selection process before migrants arrived at Europe's borders.

At the same time, the ETM made access to asylum for refugees in Libya partially possible. It was partial because only a certain proportion of those in detention and among the 50,000 registered with UNHCR in Libya were offered evacuation. Many

more were only given the option to accept voluntary return to their countries of origin.[2] The plan involved high political stakes for UNHCR, the EU and Niger. It introduced a protection factor in EU externalisation policies which were often criticised for being security- and exclusion-focused and enhanced the reputation of Niger, currently the largest refugee host country in West Africa, as a country of hospitality.

In numerous reports, the EU, UNHCR and Nigerien officials alike depicted Niger as a transit country, and this was also reflected in the 2017 Memorandum of Understanding between UNHCR and the Nigerien Interior Minister. Procedurally, however, the MoU also included provisions for the remainder of evacuees excluded from resettlement in Niger. Although UNHCR prepared asylum files and issued recommendations, the final (negative) asylum decision rested with Niger.[3] This allowed the State to take responsibility for implementing subsequent immigration decisions such as deportation and legalisation.

Conflicting selection criteria

There were conflicting selection procedures throughout the process. Due to constraints on its operation in Libya, UNHCR only undertook a simplified screening procedure for selecting candidates for evacuation to Niger. In contrast to earlier emergency evacuation schemes, detainees were screened according to their vulnerability and only undertook asylum procedures once in Niger.[4] As a result, a large number of people were evacuated to Niger who would later not be eligible for refugee status.

In addition, the situation in Libya did not allow for orderly selection procedures. UNHCR staff in Niger confirmed that the screening was "not done on everyone" initially and not done well due to the lack of rule of law. Apart from allegations of corruption against Libyan officials, detainees also changed their biodata in order to increase their evacuation chances.[5] The pervasiveness of these different informal practices in Libya raised the likelihood of rejections in Niger.

Furthermore, resettlement countries applied their own criteria in Niger when processing resettlement applications and rejected certain profiles based on their countries' interests and capacities. Germany rejected an Ethiopian woman in order to avoid a precedence for Ethiopian refugee recognition in Germany. The Netherlands precluded refugees with more serious medical conditions due to their cost. France refused unaccompanied minors who did not already have family members in the country, because of the complexities involved in their integration and to prevent subsequent family reunifications. Several European countries made decisions against candidates based on security reasons. Although UNHCR resubmitted cases to other resettlement countries and sought complementary pathways, the interests of resettlement countries risked further refugees remaining in Niger. Complementary pathways were also severely restrained

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Police registration of Emergency Transit Mechanism asylum seekers, Niamey, Niger, 2019.

by the highly selective visa policies of Global North consulates in Niger.

Responsibility and burden sharing

As a result of conflicting selection criteria, a number of evacuees in Niger had issues with their cases. In 2018, the Nigerien asylum authorities took decisions on 415 ETM files and rejected 85 out of them in the first instance. In August 2019, a UNHCR official interviewed in the course of this research reported that he considered about 100 applicants to be "complex cases", which required detailed credibility assessments. Also, there were about 20 "potentially dangerous profiles in international criminal networks" who had reportedly been involved in migrant smuggling and trafficking or crimes against humanity. These exclusion cases took UNHCR by surprise.

After the final appeal process, Niger would be responsible for immigration decisions. As deportations to Libya and resettlement were ruled out for these cases, rejected claimants would probably have to stay in Niger. Confronted with multiple security issues in managing the ETM, Nigerien officials and government representatives were often reluctant to assume responsibility for rejections, and strongly criticised UNHCR and the resettlement countries for leaving Niger to carry the burden.

Those asylum seekers who received negative first-instance decisions felt stuck in limbo after waiting for more than a year since their evacuation, and blamed UNHCR. One of them said: "UNHCR brought us here. UNHCR is playing with us. We can't do anything." They saw UNHCR as responsible for their future because it was UNHCR that had relocated them to Niger, a country they had not sought to go to.

Some asylum seekers with negative first-instance decisions considered returning to Libya via the Sahara, despite the violence they had suffered in Libya. They did not see Niger, which ranks last globally in the Human Development Index, as offering them the potential of a decent life. These asylum seekers had spent thousands of dollars and faced high personal risk to migrate to Europe via Libya in order to pursue their dream of a better life. They had not planned for a life of precarity in Niger.

Conclusion

The implementation of the ETM in Niger underlines the unresolved issue of rejections in third-country asylum processing. From a humanitarian perspective, the ETM has surely saved and improved the lives of many refugees. Nevertheless, a core problem at the outset was the disconnect between evacuation, refugee status determination and resettlement with respect to their selection criteria and decision-makers. While the humanitarian evacuation centred on vulnerability and was the responsibility of UNHCR, the asylum adjudication relied on a perceived fear of return to the country of origin and was ultimately Niger's responsibility. Resettlement offers, on the other hand, were decided by resettlement countries based on their own interests and capacities. With these conflicting logics of evacuation, refugee status determination and resettlement, exclusions were inevitable. As these cases were more numerous and complex than initially expected, the search for solutions exposed conflicting interests between African actors (both Nigerien officials and ETM asylum seekers), UNHCR and the EU. Asylum seekers and Nigerien officials believed that a decent life lay outside Niger (in the Global North), while Nigerien officials and politicians refused, for security issues, to allow Niger to become a holding country. These conflicts of interest manifested themselves against a backdrop of strong asymmetries of power. These structural tensions challenge the viability of these forms of extraterritorial asylum processing.

Those introducing an ETM in Rwanda in 2019 appeared to have learned from experiences in Niger and as a result included alternative solutions in the initial agreement, namely local integration in Rwanda and voluntary return to countries of origin.[6] However, although the process is more transparent, it shifts the burden to asylum seekers in difficult situations

in Libya for accepting an evacuation to Rwanda despite the risk of an unwanted solution (local integration in Rwanda or voluntary return), and it does not solve the structural tensions that are inherent in the Emergency Transit Mechanism.

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1. My analysis is based on fieldwork undertaken in Niger in 2018-19 and interviews conducted remotely in January 2021.

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From complementary to 'primary' pathways to asylum: a word on the 'right to flee'

Violeta Moreno-Lax

The international community needs to move away from the prevailing discretion-based model for pathways to asylum. The 'right to flee' must be taken seriously.

Containment, externalisation and the 'irregularisation' of mobility are some of the strategies used by States to impede or deter asylum seekers' entry into their territories so as to avoid protection-related responsibilities.[1] Despite their incompatibility with global solidarity and responsibility sharing, they have become a standard means of migration management.[2]

To reach a (potential) country of asylum, few alternatives exist to so-called spontaneous arrivals, that is, arrivals usually through dangerous and irregular means. The alternatives are collectively referred to as 'complementary pathways', which may include resettlement, private or community sponsorship programmes, humanitarian admission, evacuation schemes, protected entry or embassy procedures, family reunification, educational scholarships, or labour mobility schemes.[3] These are normally small-scale and available only for persons who are deemed to qualify as refugees, who have undergone some form of status determination by either UNHCR or the officials of the State concerned, and who find themselves in a particularly vulnerable situation or have special family or other ties to the country of destination. Additional conditions may well be imposed to ensure that only those who are perceived to be more valuable, more deserving or better able to make a net contribution to the receiving country's economy will benefit from these initiatives. This leaves the vast majority of refugees to fend for themselves, forced to try to reach protection by their own means.[4]

However, 'complementary pathways' remain voluntary, and there is no legal duty for States to set them up in a systematic way. In short, there is no legally binding obligation on so-called States of destination to regulate, let alone facilitate, access to international protection. As a result, there are no refugee-specific channels to escape persecution in a safe and regular fashion and to request admission as a (yet-to-be-recognised) refugee specifically for the purpose of seeking asylum. There are no 'primary' pathways to international protection.

What about the right to flee?

A change of approach is required, which can be based on two key legal elements relating

to existing obligations under international human rights law – elements that tend to be too speedily dismissed. These are relevant not only to signatories to the 1951 Refugee Convention but also to non-signatory States.

Firstly, there is the right to leave any country. This right is enshrined at the global level in the International Covenant on Civil and Political Rights and, when coupled with the prohibition of *refoulement*, creates a distinct obligation on States to admit the person concerned to avoid exposure to irreversible harm. At the intersection between the two provisions (the right to leave plus the principle of *non-refoulement*), there emerges what I have called the 'right to flee': the right to leave any country in order to remove oneself from a situation of grave peril. This resulting composite right, based as it is on international human rights law provisions, has legally binding force. It generates not only negative but also positive duties on the part of States to be vigilant when designing policies of border management or implementing measures of migration control, whether unilaterally or in cooperation with other countries.[5]

Secondly, the right to asylum has been enshrined in the main regional instruments of human rights protection in legally binding form. The African Charter on Human and Peoples' Rights, the American Convention on Human Rights, and the Charter of Fundamental Rights of the European Union have all configured the right to asylum as a right of the individual, rather than as a privilege conferred by States on a discretionary basis.[6] Furthermore, the right to asylum should be understood to entail a positive obligation on signatory States to ensure that it can be effectively relied upon and exercised by those to whom the provision is addressed (that is, 'every person' or 'every individual' – as stated in these instruments – regardless of prior recognition as a refugee). It goes without saying that combining the right to asylum with the right to leave and the principle of *non-refoulement* further reinforces the 'right to flee', particularly in respect of countries that are parties to the relevant instruments in

Africa, the Americas or Europe. Given this, the international community ought to move away from the prevailing discretion-based model towards a rights-based paradigm. The 'right to flee' must be taken seriously.

This right to flee does not imply a total ban on border surveillance or migration controls. It is not a call for 'open borders'. Rather, it requires that any exercise of sovereign power that obstructs refugees' access to protection be abandoned and replaced with mechanisms that establish the means of safe and regular admission for the purpose of seeking asylum as a matter of right (rather than as a gift or a favour on the part of the State concerned). Refugees' right to flee should trigger a fundamental reflection on how 'primary' pathways for admission are designed and implemented – prior to, and regardless of, any discussion on 'complementary' pathways to protection. Without the former, the latter become superfluous.

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4. In the European context, it has been estimated that up to 90% of those who go on to be recognised as beneficiaries of international protection reached the territory of the European Union Member States through irregular means. See European Parliament, Resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)), para E www.europarl.europa.eu/doceo/document/TA-8-2018-0494_EN.html

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Challenging the legality of externalisation in Oceania, Europe and South America: an impossible task?

Luisa Feline Freier, Eleni Karageorgiou and Kate Ogg

Recent legal developments in different continents exemplify the near impossibility of using courts to challenge the legality of externalisation practices.

This article highlights the ways in which various actors have engaged in externalised migration management cooperation in a manner that leaves little room for judicial scrutiny and accountability. It builds upon prior research by the authors which examined how externalisation practices have resulted in a dilution of refugee protection standards.[1]

Oceania

Australia's offshore processing policy has been challenged in court in Australia, Papua New Guinea and Nauru. While the first Australian case was successful, subsequent legislative reforms and judicial decisions have rendered futile any further court challenges to the validity of offshore processing. Individual asylum seekers and refugees can start legal proceedings based on tort law – that is, law that deals with cases where a person commits a wrong against another person – but only to apply for urgent transfers to receive medical treatment.[2] These medical transfer cases do not directly challenge the validity of offshore processing.

The saga of offshore processing litigation commenced with a 2011 challenge to Australia's externalisation agreement with Malaysia.[3] The High Court of Australia ruled that the Minister for Immigration's decision to declare Malaysia a safe place to which asylum seekers and refugees could be sent was invalid. Key to the decision was that the Migration Act 1958 stipulated that the Minister could only make such a declaration if the third country provided protection. The Court interpreted 'protection' as rights enshrined in the 1951 Refugee Convention including, but not limited to, *non-refoulement* and concluded that Malaysia did not provide these protections in law or practice. In response, Australia's

parliament amended the Migration Act to remove the reference to 'protection' and to state that the only condition required for the Minister to designate a third country as a regional processing centre is that it is 'in the national interest'.

All subsequent cases before Australian courts in which refugees have attempted to challenge offshore processing have not only been unsuccessful but have also closed off the prospect of future successful litigation. In 2014, an Iranian asylum seeker detained on Manus Island challenged the Minister's decision to designate Papua New Guinea as a regional processing centre.[4] He argued that the Minister is obliged to take into account Australia's and Papua New Guinea's international legal obligations, Papua New Guinea's domestic law and practice, and the conditions in which asylum seekers were being detained. In a brief judgment, the High Court of Australia rejected this submission on the grounds that – as per the Migration Act – the only condition for the Minister's exercise of power is that the Minister thinks it is in the national interest, which is a political as opposed to a legal question. By designating the 'national interest' as a political consideration, the Court has closed off such legal challenges.

In 2015, a Bangladeshi asylum seeker attempted to challenge Australia's offshore processing regime by seeking a declaration that her detention in Nauru was unlawful.[5] The High Court of Australia found that although she was detained by Australia it was only for the purpose of transferring her to Nauru; thereafter she was detained by Nauru (despite Australia being heavily involved in the administration of Nauruan detention centres). In ruling against the applicant, the Court held that constitutional

limitations on Australia's power to detain her did not apply once she was transferred to Nauru. Further, the Court ruled that it could not make a determination as to the validity of her detention in Nauru under the Constitution of Nauru. Pursuant to this decision, asylum seekers subject to offshore processing can challenge detention that occurs in Australia before Australian courts and can challenge the legality of their detention in Nauru or Papua New Guinea in courts in those countries.[6] However, the prospect of undermining Australia's externalisation practices through challenging the validity of offshore detention in Australian courts has been diminished.

In 2016, refugees detained on Manus Island successfully argued against their detention in the Supreme Court of Papua New Guinea on human rights grounds. However, their subsequent action in the High Court of Australia challenging the validity of the agreement between Australia and Papua New Guinea failed, with the High Court concluding that "neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to the domestic law of another country".[7]

Europe

Unlike Oceania's institutionalised offshore processing, the EU's externalisation strategy favours a model of deterrence based on informal cooperation with key countries of origin and transit. Framed as part of the EU's longstanding objective to combat irregular migration and as a life-saving tool designed to put an end to perilous refugee journeys, such cooperation has intensified during and after the so-called European refugee crisis. The most emblematic example of this strategy is the infamous EU–Turkey deal. Its main objective was "to remove the incentive for migrants and asylum seekers to seek irregular routes to the EU"[8] with Turkey committing to readmit migrants who had not applied for asylum in Greece or whose application had been found 'inadmissible' under the EU's Asylum Procedures Directive (APD). Turkey also committed to prevent

irregular migrants from using new sea or land routes to enter the EU in exchange for visa liberalisation for Turkish citizens and the disbursement of €3 billion for humanitarian aid to refugees in Turkey.

Under the APD, EU States have the right to reject an asylum application as inadmissible on the basis that the applicant could have sought protection in a 'safe' non-EU country. The non-EU country is not required to have ratified the Refugee Convention, yet the applicant must have the possibility to acquire refugee status and to receive protection "in accordance with" the Refugee Convention. Turkey has ratified the 1967 Protocol to the Refugee Convention but maintains a geographical limitation, whereby it is only obliged to consider as refugees those individuals who have fled from events taking place in Europe. This effectively excludes the majority of those currently seeking refuge in Turkey. Despite the fact that Turkey has, as a result of the deal, amended its domestic legislation so as to enable access to rights for Syrian refugees, reception conditions in Turkey are considered not to be compatible with international standards. Furthermore, the EU-Turkey deal has been criticised for legitimising the confinement of refugees to first countries of asylum, undermining the right to asylum and the principle of solidarity as enshrined in European and international law.

In terms of judicial scrutiny, the deal has been challenged before the Court of Justice of the European Union (CJEU) by two Pakistani nationals and one Afghan national, all located in Greece. That would have been an opportunity for the Court to clarify the formal rules applicable in the adoption of such agreements within the EU as well as their human rights implications. Unfortunately, the EU General Court did not go into the substance of the complaint, holding that it had no jurisdiction to decide the case.[9] The key question at stake was whether the deal, which took the form of a press release under the title 'EU-Turkey Statement', has been adopted by an EU institution. Recognising the ambiguity of the language of the press release, the Court turned to the EU institutions

involved in the process, namely the European Council, the Council of the EU and the Commission, and asked about the authorship of the deal. Following a barrage of denials of responsibility,[10] the Court concluded that the agreement has been adopted by the individual EU Member States and Turkey, and thus the Court had no jurisdiction to rule on its lawfulness. The main critique of this conclusion is that that the Court did not acknowledge that EU Member States would not have had the power to conclude an agreement covering matters (such as border control and asylum) already regulated by EU law. The other major criticism is that the Court ignored evidence which indicated that the European Council had in fact adopted the agreement. The applicants' appeals were declared inadmissible.

The EU-Turkey deal reflects the EU's informalised, ad hoc decision-making process and crisis-led migration governance, allowing for the possibility of escaping democratic checks and balances and thus creating spaces of liminal legality. It is worth noting that the practices which facilitate the implementation of such agreements – including detention and border procedures – have been the subject of a number of judgements by the European Court of Human Rights (ECtHR), yet the legality of these agreements has not

been questioned. It is also striking that the existence of readmission agreements between the EU or individual Member States with third countries (for example, EU–Turkey, Italy–Libya, Italy–Tunisia) in combination with the 'exceptional' migratory pressure put on national authorities of so-called frontline European States has been used by the ECtHR to justify lower standards in national asylum and reception systems and to effectively reject any claims for redress.

South America
NGOs and UNHCR representatives have reported use of 'safe third country' practices – often lacking any legal basis – in the South American region. Since 2015, the Venezuelan displacement crisis has put the region's relatively progressive refugee protection system to the test. Based on the refugee definition found in the Cartagena Declaration, South American countries are obliged to recognise most displaced Venezuelans as refugees.[11] However, many States have implemented increasing restrictions on legal access, residence and the asylum procedure.

For example, prior to mid-2019, many Venezuelans applied for asylum at the Peruvian border before entering and continuing their asylum process. However, between mid-2019 and the closure of borders

Venezuelan refugees and migrants arrive at the border town of Tumbes, Peru.

UNHCR/Santiago Escobar-Jaramillo

at the beginning of the COVID-19 pandemic in early 2020, Peru introduced pre-screening interviews at the border, leaving many applicants stranded for extended periods of time while awaiting a response. In most cases, asylum claims were rejected. Between June and December 2019, only 13% of claimants were admitted into the country at the Ecuador-Peru border, leaving applicants in a legal limbo as they could neither enter Peru nor legally return to Ecuador since re-entry to Ecuador after 48 hours, without documentation, is not allowed.[12] Peruvian immigration authorities in some cases rejected asylum applicants if they could not explain why they had not applied for asylum in Colombia or Ecuador, citing a safe third country (STC) provision in the country's refugee legislation. These decisions have not been challenged in Peruvian courts.

This policy shift violates asylum seekers' right to due process, as the ad hoc mechanisms in place do not ensure that pre-screenings comply with international legal standards. It ignores the principle of *non-refoulement* and also goes against UNHCR's Refugee Status Determination guidance of 1977 which emphasises that States must allow asylum seekers to remain in their territory throughout the asylum procedure. Although UNHCR officials have reported informal STC practices in other countries in the region (such as in Chile and Ecuador), Peru represents the first case of a South American country systematically implementing a unilateral STC measure to limit the inflow of asylum seekers. It has done so without respecting minimum standards of effective protection.

Conclusion

This article has discussed recent developments in externalisation practices in Oceania, Europe and South America. Each case-study highlights the near impossibility of judicially challenging the legality of externalisation practices. In the Oceanic context, the difficulties stem from the lack of a regional human rights system. However, in Europe, where such regional rights protections exist, judges have been reticent to arbitrate the legality of externalisation

agreements. In South America, STC policies are being applied non-systematically and informally, which makes it difficult to use the court system to challenge these practices.

A central question for refugee law scholars to explore in the future is how to realign understandings of effective protection with the Refugee Convention rights regime, supplemented by international human rights law and due process guarantees. Our findings suggest that there also needs to be greater emphasis on comparative scholarship. Finally, there is a need for further investigation of how international solidarity can be harnessed to inform and influence policymaking, legislative change and judicial proceedings.

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Lessons from Australia's Pacific Solution

Neha Prasad

Nine years after it was first implemented, Australia's 'Pacific Solution' has not proven to be the promised panacea. Any country or region hoping to emulate the Australian offshore framework should be wary of its legal, ethical and operational failings.

Asylum seekers, and maritime arrivals in particular, were a contentious topic in the period leading up to the 2013 Australian federal elections. The preceding years had seen a rise in the number of asylum seekers arriving by boat and this was used by the two major political parties as a key electoral ground, with both parties attempting to outdo the other in terms of hard-line policies. Offshore processing was offered as the ideal deterrence model. The primary motivation of this process, the country was told, was to save lives at sea. However, nine years on many refugees remain in limbo, living in punitive conditions.

Australia announced its current offshore processing policy on 19th July 2013. Anyone arriving in Australia by boat after this date was to be transferred, processed and resettled in 'regional processing countries' – Nauru and Papua New Guinea (PNG). Since then, Australia has sent 3,127 people to Nauru and PNG. As of December 2020, 900 refugees have been resettled in the US, seven in Cambodia, and 23 in other countries.[1] Forty-seven percent of the initial population (1,500 individuals) remain in limbo despite 86.7% of this population being recognised as refugees.[2] Thirteen people have died. One was murdered. At least three killed themselves.

By any economic or ethical measure, this has been an exorbitantly uneconomical exercise. The Australian government has spent $7.618 billion on regional processing since 2013, representing $2.44 million spent for each of the 3,127 people sent to regional processing countries.[3] This is likely to be an underestimate as it does not include the funding used to assist with resettlement deals, such as $40 million in foreign aid for Cambodia, where seven refugees were resettled.

Externalisation in practice

A key factor that was overlooked in the embryonic stage of this policy was the sovereignty of both Papua New Guinea (PNG) and Nauru. The offshore policy appeared to ignore the fact that both these countries were no longer Australian colonies but sovereign states with their own distinct laws and procedures. Ninety-seven percent of the land is held under customary law in PNG[4] and it is extremely difficult to negotiate the sale of such land. One might have expected this to have had an impact on decisions around resettlement of refugees there. In April 2016, the PNG Supreme Court also ruled that the detention of asylum seekers on Manus Island was illegal and unconstitutional.[5] While the Memorandum of Understanding was signed by the PNG Prime Minister in 2013, the judiciary – as a separate arm of government – identified the failings of this detention policy which had by then been ongoing for three years. There is speculation that this reflected shifting public perception in PNG towards detaining asylum seekers in the country, with citizens increasingly viewing it as a blight on their national conscience. In addition, little attention was paid to the cultural impact of any potential integration.

Nauru, whose economy is more reliant on Australia, has been less vocal in its opposition but has refused to let anyone stay for longer than five years.[6]

These complications have led to an irrational and conflicting treatment of refugees who, though they have been granted refugee status, have not been granted any certainty in terms of permanency, travel documentation and the prospect of family reunion. Nine years on, all the refugees should have been given status, resettled, and allowed to bring their families to join them. These are not aspirational standards

but ones that Australia has committed to under various conventions and treaties.

By not factoring in the countries' sovereignty, domestic issues or moral compass, the Pacific solution has been a short-sighted expensive policy without resolution in sight.

Improvements and solutions – a matter of perspective?

The current government in Australia prides itself on following through on its convictions, and its adherence to the offshore processing is credited with 'stopping the boats'. It is another matter entirely that the boats may have also stopped largely due to Australia's 'turn back the boat' policy and not just because of offshore processing alone. Australia's punishment of those who seek refuge on its shores runs counter to evidence of the rich contributions that refugees make to the social fabric of Australian communities. A change in perspective could open alternative pathways to ensure safe and legal access to Europe and Australia in humane conditions. This would help stop asylum seekers from having to resort to smuggling, reduce fatalities at sea, and allow for more orderly arrivals.

The status of the remaining offshore cohort of refugees needs to be resolved quickly. If bringing them to Australia entails unacceptable compromises for the Australian government (unacceptable because this would necessitate a softening of the hard-line policies they believe have 'stopped the boats'), then other options need to be given genuine consideration. Every year since 2013 New Zealand has offered to resettle 150 of these refugees but Australia has yet to accept the offer.

Solutions may have always been available closer to home if approached with a genuine desire for resolution and commitment to protection obligations as opposed to punishment. For example, in 2013, Australia had already excised Christmas Island from its migration zone. A possible strategy to allay fears of the mainland being 'overwhelmed' by boat arrivals would have been to hold asylum seekers there to

be processed. Processing could have been conducted in a timely manner, from initial interview to outcome in a few months. If the expenditure on offshore processing is anything to go by, the federal coffers have the resources for dedicated taskforces and for training staff to enable efficient application processing. After initial interviews and recording of biometrics, applicants could also have been allowed to live in community detention on Christmas Island while they wait for their applications to be processed in order to minimise detention trauma. The high risk of retraumatising asylum seekers fleeing oppressive regimes by subjecting them to high security detention centres is often overlooked or justified in the name of national security. A more nuanced approach is needed and it is possible. Although community detention is a form of detention where supervision arrangements would be in place, asylum seekers are not monitored by security guards as they would be in 'held' detention. Community detention would allow asylum seekers to experience some semblance of normality by allowing them independence in their living space, and movement within the community. Community detention also costs less, both financially and in terms of detainees' mental health.[7]

Australia's offshore policy was set up to discourage 'irregular maritime arrivals' who often arrived without any identity papers. However, there are enough checks and balances in Australia's robust Refugee Status Determination (RSD) process to detect inauthentic claims. The process involves an initial transferee interview, an RSD interview, provision of biometrics and access to information sharing between governments, and not every application for refugee status is accepted.

Successful applicants could have been allowed resettlement in Australia, an island continent capable of accommodating this. Changes to its humanitarian quota for each year could have been made to reflect resettlement levels in order to better inform budgetary forecasts and resource allocation for resettlement services. Arrangements for removal, another part of

the RSD process, could have been made for applicants who had exhausted all avenues of appeal, to avoid indefinite detention.

Australia has followed its current path to such an extent that for a major party to suggest alternatives might well be political suicide. However, alternatives are needed. Offshore processing and turning the boats away are not realistic solutions at a time when the world has the highest number of refugees ever recorded. Resolution may lie in less fear-mongering, increased quotas, more efficient processing and increased diplomacy to do more to resolve armed conflicts and prevent the human rights violations that force people to flee. Deterrence simply shifts the problem out of sight; it does not offer any practical solution to address protection needs.

There is arguably still room for a suite of measures and approaches that allow Australia to be in compliance with its Convention obligations without compromising the integrity of Australia's borders.

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Challenging externalisation: is litigation the answer?

Jessica Marsh

Litigation has achieved some positive results in challenging Australia's offshore processing framework but comes with risks.

Since August 2012, more than 4,000 people attempting to reach Australia by sea have been subject to offshore processing in 'regional processing countries' (RPCs) Nauru and Papua New Guinea. From July 2013, Australia's policy under Operation Sovereign Borders has barred people arriving by sea from ever being permanently settled in Australia. Litigation has become an important mechanism for holding the government to account and protecting the rights of people held offshore,[1] as well as 'transitory persons' transferred from RPCs to Australia.[2]

Medevac transfers
In response to a lack of adequate medical treatment in RPCs, from early 2018 to March 2019 lawyers made a large volume of applications in the Federal Court seeking urgent medical transfers for people (including many children) from RPCs to Australia. The underlying claims alleged negligence – that is, a breach of duty of care – and in each case the Court granted an 'interlocutory'

(temporary) injunction based on the risk of significant injury, ordering that the individuals in question be transferred to somewhere they could access treatment (that is, Australia) pending the hearing of the substantive negligence claim. As a result of this innovative strategy and the ensuing threatened and actual legal action, around 320 people were transferred onshore in 2018–19.[3]

On 1 March 2019, the Migration Amendment (Urgent Medical Treatment) Bill 2018 (known as the Medevac Bill) became law, with the government suffering a historic defeat, losing the first substantive vote in the House of Representatives since 1929. The purpose of the bill was to require that transfer decisions be based on medical assessments rather than on opaque bureaucratic processes. Until its repeal by the government in December 2019, the Medevac law facilitated 192 medical transfers to Australia without the need for court injunctions. Following the repeal, the need for litigation in the face of government inaction has arisen once again.

Habeas corpus litigation

Many transferees remained in some form of detention onshore – in immigration detention centres, community detention or 'alternative places of detention' (APODs) – and to date most are yet to receive the desperately needed medical interventions which were the basis for their urgent transfer to Australia. Due to the continuing deprivation of liberty, their mental and physical health conditions deteriorated further, and some even requested to return to RPCs. Those in APODs in particular faced unbearable situations, confined to small hotel rooms in urban centres for months, with no access to fresh air or direct sunlight, limited to pacing hotel corridors for exercise. These conditions became even more stifling and unsafe in the context of the COVID-19 global pandemic.

In September 2020, the Federal Court handed down a landmark judgment, *AJL20*, ordering – under the ancient writ of *habeas corpus* (protection against unlawful detention) – the immediate release of a 29-year-old Syrian (pseudonym 'AJL20') who had been held in onshore immigration detention for six years.[4] The Federal Court found that detention is only lawful if it is for a permissible purpose under the Migration Act. In this case, the purported purpose was removal of AJL20 from Australia. The Court found that the government was not taking steps to remove AJL20 'as soon as reasonably practicable' as required by the Act, and his detention had therefore become unlawful.

The decision was significant because indefinite detention has long been permissible under Australian law[5] and this decision opened up new questions regarding the limits on the power to hold a person in immigration detention. The government would now be required to consider available pathways (such as removal) for people subject to prolonged detention; if such pathways were not progressing, alternatives to detention would need to be considered.

Following the decision, lawyers mobilised to identify further cases whereby detention was not supported by

High Court of Australia, Canberra.

a 'permissible purpose' under the Act – that is, removal or determination of a visa application – and began to prepare further *habeas corpus* applications, including for transitory persons detained onshore.

Around 100 *habeas corpus* applications were made to the courts, with many applications for transitory persons focusing on a short-term outcome – their release from onshore detention. The basis of many of these applications centred on a request by the individual to return to an RPC, with arguments that any subsequent detention onshore was unlawful if the government was not taking active steps towards removal. In many cases the applicant was desperate to be released from onshore detention but may not have appreciated the actual risk of return to an RPC and may not have wanted to return. This scenario therefore raised considerable ethical concerns for lawyers, and it was difficult to secure sector-wide agreement on a strategic approach.

In early 2021, the government began releasing some people from detention into the community. As the pattern of release seemed arbitrary, it is unclear to what extent the impending legal action may have played a role. Sustained public protests outside hotel APODs were also putting pressure on the government during this time.

As has often occurred following developments in the courts, the government introduced legislation in response to the Federal Court's *AJL20* decision, seeking to safeguard the government's power to indefinitely detain refugees.[6]

Unsurprisingly, the government also appealed against *AJL20* to the High Court. On 23 June 2021, the High Court handed down a narrowly split judgment overturning the Federal Court decision. The High Court found that Australia's mandatory detention regime requires only that the detaining officer reasonably suspects a person to be an unlawful non-citizen until their actual removal (or other outcome), and that the legality of detention is not affected if that officer has some other unauthorised or even *mala fides* (bad faith) purpose for detaining or continuing to detain.[7]

Observations

Be mindful of unintended consequences: Litigation carries a range of risks, including setting unfavourable precedent that might prevent future claims, and settlement of cases without admission of liability and with confidentiality obligations that prevent disclosure of information that might lead to more informed public debate and ultimately to policy change. Further, in Australia, time and time again we have seen ostensible progress made through the courts followed by legislative change to prevent further challenges, often resulting in more draconian law and policy.

In relation to the medevac transfers, an unintended outcome for many people transferred onshore was ongoing restrictive detention, and in some cases prolonged family separation of immediate family members.

In relation to the *habeas corpus* applications, the serious ethical questions raised were well founded. In the context of prolonged and damaging detention, desperate people have been faced with impossible choices – remain in indefinite detention onshore or return to unsafe situations in RPCs (in probable breach of *non-refoulement* obligations). As feared, following the releases, the government did start returning some people to RPCs. Further, following the seemingly arbitrary pattern of release, the resulting chaos and confusion caused some refugees to withdraw their applications for resettlement to the US, their only available durable solution, due to the mistaken belief that those with ongoing applications would continue to be detained.

These episodes illustrate complex dilemmas that can arise for human rights lawyers who are accountable to their individual client and to the courts, but who should also be mindful of systemic impacts and who must balance short-term outcomes with longer-term risks.

Sector coordination is important: The medevac litigation and resulting injunctions were the result of coordinated efforts by lawyers, advocates and medical professionals

who formed the Medical Evacuation Response Group. While cases were assessed on their own merits and strategy was necessarily tailored to individual circumstances, the coordinated approach allowed for a rapid scaling up of assistance, including shared resources and learning. This is an example of where strategic litigation opened up a feasible litigation pathway for others to follow in the slipstream, and probably resulted in many saved lives. National Justice Project lawyers said of the medevac litigation, "…there is now an army of lawyers around Australia with the expertise to challenge the Minister when he withholds life-saving care."[8]

The ethical concerns arising from the high-volume *habeas corpus* litigation underlined the importance of public interest lawyers coordinating to ensure consistent messaging to a large group of prospective litigants, ensuring they are properly informed of risks and the need for individualised legal advice.[9] Following the disappointing *AJL20* High Court decision, sector coordination will remain crucial, as advocates continue to seek an appropriate test case with which to challenge indefinite detention in Australia.

Litigation must be complemented by other strategies: Legal action has resulted in some individual results; however, it has not been able to provide the ultimate durable solutions desperately needed for those subject to Australia's externalisation policies. Legal efforts must operate in parallel with wider advocacy, such as the effective Kids Off Nauru campaign, the ongoing Operation Not Forgotten campaign which aims to secure community-sponsored resettlement to Canada for refugees excluded from the Australia-US resettlement deal, and the Time for a Home campaign aimed at refugees who still lack permanent protection after all these years.

Conclusion

In Australia, litigation has proved an important means of challenging the offshore framework and has had some successes at the individual level, resulting in compensation, medical transfers, and release from detention. However, it has failed to dismantle the system

of externalisation, and often a step forward in the courts has led to a harsh legislative response by the government, reversing any gains and blocking future challenges. Perhaps the most important role that litigation plays is ensuring an authoritative court record of injustices, which may one day support a national reckoning of a cruel era of externalisation and the shameful treatment of those punished so harshly for simply seeking Australia's protection.

In recent times, it has been disturbing to see other States replicating Australia's inhumane approach. Strategies of resistance used by lawyers in Australia may well provide instructive for lawyers in other countries whose governments are improperly seeking to externalise their own international responsibilities.

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This article is written in the author's personal capacity.

1. This article discusses recent litigation. For analysis of earlier challenges to the externalisation framework see: Refugee Council of Australia 'Australia's offshore processing regime: The facts – Legal challenges'
www.refugeecouncil.org.au/offshore-processing-facts/6/;
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2. Australia's *Migration Act 1958* deems all people transferred to RPCs to be 'transitory persons.' The government has power to transfer a transitory person from an RPC to Australia for a 'temporary purpose' including medical treatment. See Kaldor Centre, 15 December 2020, 'Medical transfers from offshore processing to Australia' bit.ly/Kaldor-medical-transfers-2020

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4. *AJL20 v Commonwealth of Australia* [2020] FCA 1305 bit.ly/AJL20-judgment-2020

5. *Al-Kateb v Godwin* [2004] HCA 37: https://eresources.hcourt.gov.au/showCase/2004/HCA/37

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7. *Commonwealth of Australia v AJL20* [2021] HCA 21 www.hcourt.gov.au/cases/case_c16-2020

8. Talbot A and Newhouse G (2019) 'Strategic litigation, offshore detention and the Medevac Bill', *Court of Conscience*, Issue 13, pp85-90 bit.ly/Conscience-Talbot-Newhouse-2019

9. See Asylum Seeker Resource Centre et al (2020) 'Information Sheet for People in Detention Considering Legal Action Seeking Release' bit.ly/ASRC-factsheet-people-in-detention-2020

Expanding Canada's borders

Claire Ellis, Idil Atak and Zainab Abu Alrob

Although Canada enjoys a good international reputation for its refugee resettlement programmes, it has also externalised refugee protection under the pretext of preserving the integrity of its asylum system and responsibility sharing.

In recent decades, Canadian authorities have been actively involved in intercepting asylum seekers and impeding their entry. The expansion of Canada's externalisation practices – such as border cooperation agreements, surveillance through data sharing and new technologies, and migration diplomacy tactics – is having an impact on the mobility of asylum seekers, and narrowing the space in which asylum seekers can access refugee protection in Canada.

The Canada–US border

The externalisation of Canada's asylum system has been facilitated by its well-established immigration and border relationship with the United States of America (US). The Canada–US Safe Third Country Agreement (STCA), established in 2004, requires asylum seekers to claim refugee protection in the first safe country (Canada or the US) they pass through. Accordingly, most asylum seekers from third countries who seek to enter Canada from the US at an official land border crossing point are found ineligible by Canadian authorities and returned to the US, without any form of risk assessment.

In July 2020, the Federal Court of Canada found that the STCA infringes on asylum seekers' rights to liberty and security as protected by the Canadian Charter of Rights and Freedoms. The Court noted that asylum seekers returned to the US by Canadian officials are systematically detained (often in solitary confinement) and subjected to racist treatment, and are at risk of being denied access to a fair refugee process.[1] Furthermore, the Federal Court emphasised that, far from being a "passive participant",[2] Canada is directly responsible for the violations of the rights of asylum seekers returned to the US. Urging Canadian authorities not to turn a blind eye to the consequences of their actions, the Court concluded that imprisonment and threats to asylum seekers' security cannot be justified for the sake of administrative efficiency or responsibility sharing. On appeal, however, the Federal Court's decision was overturned in April 2021, a decision that was strongly criticised by the Canadian Association of Refugee Lawyers.[3]

The COVID-19 pandemic has further aided the federal government's efforts to externalise asylum by closing Canada's borders to those in need of international protection. Before March 2020, a loophole in the STCA allowed those who managed to arrive on Canadian soil irregularly to stay and make an asylum claim. Since the pandemic, however, the US and Canada have reached a temporary agreement that allows Canada to send back to the US asylum seekers irregularly entering Canada.

In addition to the longstanding cooperation through the STCA, border enforcement between Canada and the US has expanded to include digital technologies that facilitate information collection and sharing of passenger and biometric data. In place of more traditional document checks at the border, digital data are now drawn from a variety of sources. In 2011, under the Beyond the Border Action Plan, Canada began to implement automated information sharing on immigration issues with the US under the Biometrics (Steady State) initiative and the Canada–US Immigration Information Sharing (IIS) initiative. Such programmes claim to improve processes for border officers; however, expediting border procedures through digital technologies further externalises refugee systems by sorting, categorising and profiling the migration history and personal data of asylum seekers before they have an opportunity to explain in person the circumstances of

their migration path. Moreover, asylum seekers of certain racial, ethnic and religious backgrounds or specific countries of origin may be falsely associated with crime and terrorism through discriminatory profiling by border personnel or bias embedded in technology systems.[4] Canada–US cooperation allows Canadian authorities to monitor and restrict the mobility of asylum seekers, thereby preventing them from accessing protection in Canada. A similar trend can be observed in Canada's cooperation with some other countries in the Global North.

Five Eyes alliance

In 2009, Canada began to exchange immigration information through the High Value Data Sharing Protocol with members of the Five Country Conference (also known as Five Eyes), an intelligence alliance between the US, UK, New Zealand, Australia and Canada in areas of national security, borders and immigration. Between 2012 and 2016, the Canadian government entered into information-sharing agreements with all Five Eyes members.

In reality, these international agreements to share biometrics and personal data are largely used to prevent the mobility of asylum seekers. In 2019, for example, the Canadian government announced Can$1.18 billion of funding over five years to support the implementation of the Border Enforcement Strategy in order to "detect and intercept individuals who cross Canadian borders irregularly and who try to exploit Canada's immigration system".[5]

Tellingly, in the same year, a new ground for refugee ineligibility was added to Canada's Immigration and Refugee Protection Act (IRPA). The new provision stipulates that a refugee claimant who previously made a claim for protection in a country with which Canada has an information-sharing agreement is not eligible to make a claim in Canada. With the bilateral Five Eyes agreements on hand to support automated immigration information sharing, legislative changes such as the 2019 ineligibility ground reinforce barriers to making a claim for refugee protection in Canada without

ensuring that asylum seekers are provided with the necessary protection against *refoulement*. This risk has been exacerbated by developments in biometric data collection and the use of artificial intelligence technologies such as facial recognition and fingerprint verification, measures that have been included in a $656 million funding allocation to the Canadian Border Services Agency (CBSA) in the 2021 Canadian federal budget.[6]

Despite concerns around rights violations such as privacy risks, discrimination and barriers to the right to seek asylum, there are clear indications that the Canadian government – along with other Five Eyes States – are pursuing objectives to fully digitise border control in order to externalise asylum. This is exemplified by an emerging Five Country alliance initiative, the Border of the Future Plan, which aims to leverage cooperation and emerging technologies to establish a 'touchless', digitally-based border in the name of global border information sharing and security.[7]

Interception, 'capacity building' and Canada's migration diplomacy

The Canadian government actively collaborates with source and transit countries to interrupt the onward movement of asylum seekers, and has also been eager to support migration control measures abroad through its international assistance and diplomatic engagements. For instance, Canada's Anti-Crime Capacity Building Program (ACCBP) provides support and financial assistance to source and transit States in Asia, Africa and the Americas (especially Mexico) to reinforce their border controls and provide training in investigative techniques to their law enforcement and border security officials.[8] Canada also collaborates with the International Organization for Migration (IOM) to provide training workshops for law enforcement and immigration officers in examining and detecting fraudulent travel documents, and in capacity building for identifying and intercepting migrant smuggling. Passport and border officials from 18 countries were trained through this programme from 2018 to 2019.

Externalisation processes can be rationalised as transnational crime-control strategies to fight migrant trafficking and smuggling[9] but placing its border control measures under the jurisdiction of foreign States allows the Canadian government to divert Canada-bound migration, including of asylum seekers. Available data on diplomatic practices have indicated several legal and human rights implications such as the detention or deportation of migrants in third or transit countries with limited infrastructure to ensure human rights.[10]

Barriers to evaluating impacts
Externalised asylum systems require transparency, oversight and evaluation if their impacts on the rights and experiences of people seeking asylum are to be fully understood. These requirements are not met in the case of Canada's externalisation procedures. Information on the evidence base for policies and their implementation is scarce. For instance, concerning the 2019 refugee ineligibility ground, our team made an access-to-information request to the CBSA, Immigration, Citizenship and Refugees Canada (IRCC) and the Immigration and Refugee Board (IRB) for data on the number of individuals who had made a refugee claim in the US, UK, Australia or New Zealand before making a claim in Canada. The IRB did not have any records to report, while the CBSA and IRCC were only able to produce partial data on previous claims made by those arriving from the US. For those coming from the other Five Eyes countries (other than the US), there was either no data available or the data were not collected. So the question is: what was the impetus for this new ineligibility ground if data on previous refugee claims were not recorded?

Further, information scarcity of government audits and reports on programmes such as the ACCBP make it difficult to track the implementation of such externalisation efforts. More accessible data are needed to examine and understand the full implications of externalisation policies on asylum seekers' rights and States' refugee protection obligations. Better access to

information would also support the creation of independent oversight mechanisms to hold the government to account, mechanisms which are currently lacking in Canada.

The opaque nature of the externalisation process also makes it difficult for civil society and refugee advocates to hold the Canadian government accountable for its actions beyond national boundaries. Transparency and accountability mechanisms that monitor and review externalisation policies are needed in order to ensure an accessible and equitable asylum system in Canada. Otherwise, externalisation practices will continue to hinder the rights of asylum seekers and undermine Canada's refugee protection obligations.

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Denmark's new externalisation law: motives and consequences

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A new law in Denmark, which could ultimately end the integration of refugees on Danish territory, offers important lessons about contemporary externalisation policies and the political motives behind them.

On 4th February 2021, the Danish Social Democratic government sent out a legislative proposal (known as L226) for civil society consultations. L226 proposed shutting down all processing of asylum claims and granting of residence to refugees on Danish territory, barring a few exceptions. People filing asylum applications in Denmark, including unaccompanied minors, would instead undergo an accelerated procedure assessing their 'transferability' to extra-territorial facilities or camps in an unspecified country outside Europe. Should they be recognised as refugees there, they would not be granted access to Denmark but instead would be sent to an unnamed host country, which would be responsible for them. Given Denmark's uncertain commitment to resettling refugees (they accepted 200 quota refugees in 2020 after having refused any during the preceding four years), this could effectively end the reception of refugees on Danish territory.

Two models were proposed: one where the facilities are placed under the authority of Denmark and a second where the facilities are under the authority of the host country. According to the proposal, the processing facilities are to be constructed after an "agreement or equivalent arrangement with a third country" requiring that country to act in accordance with certain obligations.[1] Notably, however, the government did not provide any details about potential host countries, as none had agreed to the plans before the legislative proposal came out. As a result of this, even if passed into law L226 would not have any immediate effects, but its emergence in the Danish political context reflects wider trends in international asylum politics, and in particular an urge to externalise.

L226: criticism and background

As part of public consultations, a significant number of national civil society actors and international organisations spoke out strongly against the government's plans. Among the criticisms of the proposal were: a lack of clarity about legal standards; worries about increased incarceration, deportations and use of force; the lack of realism given multiple countries' refusal to host such extraterritorial facilities; the risk of encouraging (rather than discouraging) the use of irregular smuggling networks; and the risk of undermining international solidarity and collaboration on protection. Several organisations, including UNHCR, Amnesty International and the Danish Refugee Council, recommended that the proposed legislation be withdrawn. Disregarding such criticisms, the proposal was reissued in April 2021 without any substantial changes, and then passed into law on 3rd June 2021 (70 votes for, 24 against). Prime Minister Frederiksen has repeatedly claimed that externalisation is the only possible solution to the challenges that Denmark feels it faces in accommodating asylum seekers and integrating refugees. This problematisation is questionable, however, not least since Denmark currently receives the lowest number of asylum seekers since the country's current registration system was introduced in 1998.

Communication about the exact nature of the proposed policy has been beset by difficulties. Danish politicians named a variety of actors as potential partners, including UNHCR, the EU, Morocco, Tunisia, Algeria, Jordan, Libya and Egypt, but these all rejected involvement in the Danish plans once they were made aware of having been named as potential partners. Moreover,

the envisioned format of the extraterritorial facilities themselves has shrunk dramatically over the last five years. In 2016, Social Democrats imagined "enormous refugee cities with hospitals, schools, universities, farms and companies". This was, however, quickly replaced by the label of "asylum camps", which was then reframed once more in 2018 as "reception centres", before Minister Tesfaye in 2021 began talking about an "experimental mini-centre".[2]

Externalisation and limiting access to asylum on 'humanitarian' grounds

Externalisation can be defined as a series of steps whereby State actors couple policies to control migration across their territorial boundaries with initiatives for extraterritorial migration management through other public, private or non-State agencies.[3] From the perspective of the externalising actor, the policy works by pre-empting people's ability to exercise their right to apply for asylum on that State's territory. Externalisation is not a new phenomenon but use of it has gained pace in the last four decades. While academic studies of externalisation have typically focused on relations between countries from the so-called Global North and South, with cases including Spain–Morocco, US–Mexico, Italy–Libya and EU–Turkey, such policies are also pursued in South–South and North–North relations, with the EU's Dublin Regulation being an example of the latter. This also indicates that externalisation policies may take several different forms, ranging from Libya's European-funded pull-back practices against migrants travelling by sea to the UK's proposals for detaining asylum seekers offshore in the British Channel, and then the Danish L226.

The Social Democratic government has couched their proposal in humanitarian terms: an intervention against smugglers operating in the Mediterranean. By deterring migrants from crossing into Europe, they argue, they are saving lives and cutting off a flow of money for unscrupulous criminals. Yet the focus on the Mediterranean disregards the fact that the land journey across the Sahara is far more dangerous than the Mediterranean, leading to

at least twice as many fatalities.[4] Furthermore, the one-sided focus on smugglers overshadows how migrants can use smugglers to avoid abuse and violence by local authorities.[5]

Externalisation as a foreign policy priority

Externalisation policies depend on externalising States reaching (or trying to reach) an agreement with prospective partners in migration control. This can place the latter in an advantageous position in negotiations. Talk of 'loss of control' of Europe's borders dominated debates in the Danish parliament leading up to the passing of L226, and while the law does not name any countries, the Social Democrats have regularly used the shorthand of 'North Africa' in referring to prospective partners. The possibility of such partnerships has been rejected by North African States but the process has also coincided with other European States trying to get Algeria, Morocco and Tunisia labelled as 'safe third countries'. This has been attempted by European States in order to allow them to deport asylum seekers to these countries, and to make possible expedited asylum processing or pre-screening of asylum claims. By this logic, European States would then seek to declare asylum applications on European territory inadmissible. However, reports by the UN and human rights organisations indicate mass arrests and desert pushbacks of migrants in several of the States identified as potential hosts by Denmark, as well as a range of violence and rights abuses in the region both by State and non-State actors.

These are all issues that the Danish government might be expected to strongly condemn. And yet, repressive regimes are being actively sought out as partners and not only in North Africa. In May 2021, Danish media reported that two Danish Ministers had signed a Memorandum of Understanding (MoU) on asylum issues with Rwanda, although, later on, the Danish Minister of Immigration, and later the Rwandan Ministry of Foreign Affairs and International Cooperation, both acknowledged that neither an agreement nor even negotiations concerning the topic of externalising the Danish asylum system to Rwanda had in

fact taken place. This was in stark contrast to rumours in the Danish media in the run-up to the vote on L226 that the government had already reached a 'Rwandan deal'.

Externalisation and signalling deterrence
Externalisation has often been portrayed as the exporting of border policing away from a State's territorial boundaries. However, L226 involves a) creating an initial processing system to determine whether or not a person seeking asylum on Danish territory can be placed in a 'transfer position' ready for deportation, and b) a dramatic upscaling of Denmark's incarceration and forced deportation mechanisms, as well as of those of any potential host State. So, rather than a decoupling or exporting of border control, the Danish government's externalisation law in reality represents a doubling – or even greater – of territorial migration controls.

The current Danish deportation system with the punitive conditions of its detention and 'departure' centres has resulted in increasing numbers of people going underground in order to avoid the trauma of extended detention and of deportation. L226 seems likely to accelerate this trend – nationally and internationally – as asylum seekers are not likely to willingly comply with the new categorisation for removal to extraterritorial facilities, the Danish term for which (*ledsaget tvangsmæssig overførsel*) translates as accompanied forced transfers.

Denmark has also engaged in the increased use of 'signalling' to appear as restrictive as possible on asylum issues. These measures include: advertisements in Middle Eastern newspapers to emphasise the cold welcome awaiting anyone seeking asylum in Denmark; the notorious 'jewellery law' mandating the seizure of assets from asylum seekers in Denmark; the proposal to place a departure centre on the isolated island of Lindholm; and the tent camps set up in 2016 to offer lower standards of care to asylum seekers.[6] Not all of these measures were carried through, and some were quickly terminated, but the controversy they engendered was part of their purpose, that is, to discourage displaced people from coming to the country and

to communicate resolute action to certain segments of national voters. It is worth noting that, by this logic, the chorus of debate and criticism of these measures by Danish and international NGOs (despite being important responses) also served to amplify the coverage of controversy and polarisation, something its proponents actively sought.

Conclusion
The case of L226 provides important lessons about contemporary externalisation policies, not despite the difficulties in its implementation but because of them. Reaching an agreement with a non-European host country in order to implement L226 is not likely in the immediate future, and the law may therefore not have any immediate policy impact; nevertheless, it is worth considering its vision and potential repercussions across various contexts.

Thus, the debate about L226 has involved criticism and challenges to the policy as endangering rights and being based on paradoxical appeals to humanitarianism. It actively draws on criticism of the current refugee regime to bolster its claims and feeds a perception that it is access to asylum in Europe, rather than States' criminalisation and deterrence measures, that causes harm to migrants. Moreover, for several years, the Danish government has communicated to the public that diplomatic agreements offering development aid to autocratic regimes in exchange for externalisation partnerships were imminent, when in fact they were not. Danish government claims of dialogues with a handful of African countries were countered in August 2021, when the African Union issued a strong condemnation of the Danish desire for externalisation to African territory. This further suggests a move towards letting the desire for externalisation guide foreign policy. Finally, the controversy it has engendered has cemented the Social Democratic government's hardline position on asylum migration in a domestic political context, sending a message about the lengths to which the Danish State is willing to go in order to deter asylum seekers, whether or not the measures can be carried through. In this sense, even a 'failed'

policy may be politically 'successful', where such success is measured not as sustainable international solutions to displacement that respect human rights, but in terms of attracting domestic anti-immigration votes.

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US remote health controls: the past and present of externalisation

David Scott FitzGerald

Measures to control asylum seekers' entry to US territory during the COVID-19 pandemic reflect a long history of remote border controls.

Powerful States have pushed their border controls deep into the territories of other States, disproportionately affecting asylum seekers and often deliberately targeting them. Yet most remote controls pre-date the international refugee regime and the exceptions in restrictive immigration laws for people seeking sanctuary from violence and persecution.[1] Many remote controls that are used today to keep out asylum seekers – such as carrier sanctions, pre-clearance inspections, deployment of liaison officers in ports of embarkation, mandatory documentation issued abroad, and detention in liminal spaces at the edge of a State's territory – were originally designed as health controls.

Uncovering this history is important for at least three reasons. First, as the COVID-19 pandemic has shown, governments can use remote health controls as a pretext to deter and deport asylum seekers. Second, remote health controls have a long history of being used as tools of ethnic and class selection. Third, the public acceptance and incorporation into the law of measures to ostensibly protect public health make it difficult for asylum advocates to effectively challenge remote control policies.

Roots of US policy

In the late nineteenth century, the US federal government stripped individual states like New York of the authority over health controls for arriving immigrants. The Act of 3rd March 1891 banned the admission of foreigners "suffering from a loathsome or a dangerous contagious disease" and mandated the health inspection of all foreigners arriving at US ports of entry. Over the following 35 years, the government put in place a system of remote control built on five components: penalising private transportation companies that carried diseased passengers; stationing US inspectors abroad to conduct screenings at ports of origin; using neighbouring countries as buffer States to screen transit migrants; detaining migrants in quarantine spaces at the territory's edge (under a legal fiction that they had not entered the State's territory);

and mandating documents, such as visas and health passports, as conditions of travel.

Then, as now, the degree to which powerful States such as the US directly reached into the territories of other States to externalise their controls varied but, whether direct or indirect, most migration control took place thousands of kilometres from US shores. More emigrants were refused embarkation from European ports than were banned from admission at US ports of landing.[2]

Many of the earliest forms of international cooperation around health included remote control provisions through the mechanism of health passports issued in advance of travel. In addition, passenger shipping companies were authorised to issue vaccination cards in another instance of de facto deputisation of migration control to private actors.[3]

In addition to its transatlantic and transpacific remote controls, the United States made Canada a buffer state for US-bound passengers arriving at Canadian ports. Canadian authorities screened passengers in transit and issued those who passed the health criteria with an 'alien certificate' to hand over to US border guards at train crossings into the United States.

In 1892, the US Congress introduced inspection prior to admission at US ports of entry. Passengers suspected of being contagious were held in quarantine and sometimes deported when they were healthy enough to travel. Health controls at both departure and arrival were not applied equally to all. Medical officials gave a cursory inspection of first-class passengers in the privacy of their cabins before they disembarked, while passengers in steerage were subject to much more intensive and public inspections at stations like Ellis Island.[4]

On paper, health controls in the US did not discriminate by race. In practice, however, 10–15% of immigrants arriving at Angel Island from Asia were excluded on health grounds, compared to an annual average of only 1% at Ellis Island, where European inflows dominated. Asian immigrants arriving at Angel Island in second and third class were subject to physical examinations and mandatory overnight detention while they underwent laboratory tests. Officials subjected Mexican immigrants at border stations in Texas to humiliating inspections, showers and delousing. European immigrants were spared the worst of these indignities.

The success of global vaccination programmes loosened US inspections and quarantines. While every ship and aircraft arriving in the US was met by a federal health inspector in 1967, by the mid-1970s these inspections had ended unless the pilot reported an illness onboard.[5] In 2021, only 20 of the 328 ports of entry to the US had quarantine stations. Yet the legal infrastructure for strict externalisation remained in place.

COVID-19

Around the world, States pushed remote controls abroad with new vigour during the COVID-19 pandemic. Restrictions on air travel were especially strict for countries with high levels of outbreaks and new variants of the virus. Yet the controls almost immediately reduced international migration of all types, including flows of asylum seekers and refugees in the process of resettlement.

While mobility controls can be legitimate tools for helping slow the spread of epidemics, the administration of President Donald Trump clearly used the coronavirus pandemic as a pretext to target asylum seekers in particular. On 20th March 2020 the federal Centers for Disease Control and Prevention (CDC) issued an order based on an obscure provision of the Public Health Service Act (1944). Section 265 of Title 42 in the 1944 act authorises the suspension of entry of persons from foreign countries as a means to avoid the spread of communicable disease. The 2020 CDC order suspended entry into the US of people crossing from Canada or Mexico whom US authorities would normally hold in detention if they entered, a scenario that primarily applied to migrants without a US visa.

The large number of exceptions to this order, however, was an immediate clue that the CDC order was not motivated in the first instance by public health concerns. Health experts decried the order in a public letter arguing, "There is no public health rationale for denying admission to individuals based on legal status." They wrote that,

in practice, "The rule is thus being used to target certain classes of noncitizens rather than to protect public health."[6]

Their charges were borne out by subsequent developments. Journalists discovered that the invocation of Title 42 was driven by immigration officials in defiance of the objections of CDC officials who said that the order was an inappropriate use of its authority to protect public health. From the first day of the order, the Border Patrol began expelling people without affording them the opportunity to claim asylum. The Trump administration reached an agreement with the Mexican government to accept the forced return of their own nationals and most Guatemalans, Hondurans and Salvadorans. Almost 15,000 asylum seekers waiting in Mexico to present an asylum case at a US port of entry were denied the opportunity to make their claim. These measures continued the policy of using Mexico as a buffer state. At the same time, thousands of Haitian asylum seekers were forcibly flown back to Haiti without being allowed an asylum hearing. In the first year of the CDC order, the US government expelled more than half a million migrants, many of whom had intended to apply for asylum.[7]

In the final CDC order published on 11th September 2020, the administration made clear that it intended to use the measure to deter and expel asylum seekers. The order rejected the claim that expelling asylum seekers under Title 42 violated US treaty commitments to the 1967 Refugee Protocol or the 1984 Convention against Torture, stating that the 1944 Public Health Service Act did not contain relevant exemptions. The order also rejected the argument that asylum seekers could safely quarantine inside the US, stating that public quarantine facilities were inadequate and many of the foreigners covered by the order "would be asylum-seekers, who by definition lack permanent U.S. residences" where they could self-quarantine.[8]

Civil rights and refugee advocates filed a lawsuit against the administration's use of Title 42 to summarily expel unaccompanied children seeking asylum. A federal district court judge blocked the use of Title 42 for this purpose in November 2020 but the DC Appeals Court stayed the order in January 2021, allowing the policy to remain in effect during litigation.[9] As of October 2021, nine months after entering office, the Biden administration had not lifted the Title 42 order.

Conclusion

As with 'securitised' framings of asylum policy, governments use health justifications to effectuate migration control and ignore rights of asylum seekers. States can externalise their borders in this way with little political or legal resistance because health restrictions are so deeply embedded in the legal and bureaucratic machinery of migration control. Stringent controls can be activated overnight by a president or prime minister's flick of the switch. Short of World War III, it is difficult to imagine another set of circumstances in which States could so quickly stop most international movement and violate core norms of *non-refoulement*.

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Eyes in the sky: European aerial surveillance

Angela Smith

Since 2017, aerial surveillance has become central to EU attempts to identify, deter and return intercepted migrants to Libya. As a result, struggles between the EU and civil society rescue actors have also shifted from the seas to the skies.

Since the 2015–16 peak in numbers of migrants crossing the Mediterranean, the European Union has sought to close off the Central Mediterranean route by enabling the interception and forced return of vessels carrying migrants. To facilitate this, the EU and Italy have gradually criminalised and expelled European rescue NGOs from the Central Mediterranean[1] while equipping and supporting the Libyan Coast Guard to become a key actor in the Mediterranean. European reliance on the Libyan Coast Guard for maritime rescue is only possible through increasing investment in European 'aerial assets' such as aeroplanes and drones. The Mediterranean airspace has now assumed a new role in European attempts to identify, track and contain maritime movement, and is fundamental to the EU's strategy of outsourcing pullbacks to the Libyan Coast Guard.

Using air power to transfer responsibility

Prior to a landmark judgement in 2012, the EU had relied on the notion that human rights standards did not apply extraterritorially and had used this to justify intercepting migrants in international waters and returning them to third countries. However, the 2012 judgement by the European Court of Human Rights (ECtHR) against Italy declared that EU Member States had to observe their obligations under the European Convention for Human Rights (ECHR) even during extraterritorial operations.[2] As transfers of intercepted migrants could no longer be made to Libyan vessels, Europeans needed to find another method for intercepting and returning migrants, without being directly implicated.

A new contactless strategy has emerged and has been deployed by EU agencies such as Frontex and the European Naval Force Mediterranean (EUNAVFOR MED), as well as by EU member States such as Italy and Malta. European aerial assets are used for spotting migrant vessels from above; details of the distressed boat are then radioed to their preferred rescue agency, which since 2017 has become the Libyan Coast Guard rather than European rescue vessels. Since the Libyans do not have their own aircraft patrols, drones or radar equipment, the aerial information and coordination passed on from European aerial assets are crucial.

Civilian aerial counter-surveillance

Challenging the state's dominance of the airspace, civilian actors have also taken to the skies. Two European initiatives – the French Pilotes Volontaires, and a partnership between German NGO Sea Watch and the Swiss Humanitarian Pilots Initiative (HPI) – operate their own civilian reconnaissance aircraft to conduct civil aerial surveillance missions alongside the State actors policing the skies. These initiatives can spot boats in distress to advocate for a rescue to be launched, and can also document violations against migrants and cases of non-assistance at sea. Sea Watch and HPI have used their unique bird's-eye position to hold European member States and agencies accountable for their actions at sea through campaigning, advocacy and building court cases against European authorities.

For example, the civilian reconnaissance aircraft *Moonbird* operated by HPI and Sea-Watch has witnessed and documented multiple failures of the Maltese authorities to protect and respect the rights of migrants, refugees and asylum seekers at sea. These failures include: delayed or denied rescues, failure to provide assistance within its own Search and Rescue (SAR) zone, pushbacks from the Maltese SAR zone to Italian waters,

coordinated pushbacks to Libya, arbitrary detention at sea of intercepted migrants, and denial of a place of safety to disembark. These actions are variously in violation of international, refugee, human rights and maritime law, and NGOs are seeking to build legal cases against European authorities based upon what they have documented from the skies.[3]

The circulation of European aircraft also has an impact on those travelling in boats down below – creating a sense of anticipation that a rescue may be imminent. Anecdotal accounts by migrants include the timing of planes overhead, videos or photos of the planes, and at times identifying markers such as those on Frontex planes. For those on the boat, there is a desperate desire to be seen and the passengers may try to communicate with the plane by standing up and waving. The pilots undertaking civilian counter surveillance attempt to communicate with boat passengers by circling overhead so that those on board the vessel in distress will know that they have been seen. Over the course of 2020, the Moonbird crew alone spotted around 4,493 persons in 82 boats in distress at sea, reporting these cases to the relevant authorities and advocating to ensure a timely and legal rescue was undertaken. In 19 of these cases, the crew witnessed the boats being intercepted by the Libyan Coast Guard and the migrants illegally returned to Libya.

Embedded multi-dimensional cooperation
The current collaboration between European and Libyan authorities is taking place in three dimensions with complementary air,

Black Forest Collective/Sea-Watch

Civilian aerial surveillance from the aircraft *Moonbird*.

maritime and submarine vessels working together. The Libyan Coast Guard is functioning as the maritime wing of the European authorities, while the European aircraft function as the aerial wing of the Libyan operation. The deeply embedded nature of the cooperation might lead one to question whether it still makes sense to think of this as externalisation. With such a high degree of coordination and augmenting of each other's pool of assets, perhaps we can consider Italy and Libya as part of one operation, rather than external to each other. And if we begin to think of the Libyan and European authorities as internal to each other's operations, what are the implications for accountability, for resistance, for justice?

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https://eu-libya.info/img/RemoteControl_Report_0620.pdf

2. *Hirsi Jamaa and Others v Italy (2012)* ECtHR Application No. 27765/09 bit.ly/HirsiJamaa-v-Italy-2012

3. See for example the Sea-Watch archive on Crimes of Malta observed from the air: bit.ly/SeaWatch-Crimes-of-Malta

Externalisation, immigration detention and the Committee on Migrant Workers

Michael Flynn

Over the last two decades, new immigration detention systems have emerged across the globe as a direct result of the externalisation policies of wealthy destination states.

Detention has long played a central role in the efforts of major destination countries to externalise their immigration controls and asylum procedures.[1] Under the guise of combatting the trafficking of people and assisting countries on the periphery of the Global North to better manage migration flows, wealthy States have invested heavily in boosting the detention capacities of transit countries. They have operated 'offshore' detention and processing centres, and encouraged neighbouring countries to develop legal and administrative processes that support migration-related detention operations.[2]

An important impact of these externalised detention systems is that they help shield destination countries from having to respect their refugee and human rights obligations, while shifting the site of asylum and migration management to poorer countries where the rule of law tends to be weak or non-existent.

However, a curious and unexpected development has followed closely on the heels of this externalisation phenomenon. The most poorly ratified international human rights treaty, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), has emerged as a critical arena for advocating for the protection of the fundamental rights of migrants and refugees ensnared in offshore control regimes. As of 2021, the ICRMW has been ratified by only 56 States, none of which are major industrialised, migrant-receiving countries, and many of which are countries that are important externalisation targets.

Protections and abuses

It is true that the ICRMW does not provide the same protections as those provided by the 1951 Refugee Convention, nor will it ever have the same on-the-ground impact. Nevertheless, the migrant worker convention does provide many important protections.

Importantly, although the convention notes that it is not intended to cover "refugees" (Article 3d), its definition of "migrant workers" is broad, covering all non-nationals (Article 2). Article 16 states that "Migrant workers and members of their families shall have the right to liberty and security of person." Article 16(4) provides explicit protections for those in detention, stating that migrants "shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law". Additionally, Article 16 requires the provision of procedural standards for migrant detainees (a frequently overlooked aspect of administrative detention systems), including consular access, the right to be informed of the reasons for their detention, and due process rights.

The Committee on Migrant Workers (CMW), the UN treaty body that oversees implementation of the convention, has given increasing importance to detention, as reflected in its recently released 'General Comment' on migrants' rights to liberty and freedom from arbitrary detention. The Committee has resolutely affirmed that the detention of children for migration-related reasons is – in all cases – a violation of a child's best interests, a conclusion that CMW and the Committee on the Rights of the Child (CRC) also extend to children's families. In other words, whenever a country detains an unaccompanied child or a family with children, it is violating fundamental human rights.

Between 2004 and 2016, at least half of the CMW's reviews of States parties' implementation of the treaty contained recommendations relating to immigration detention. The Global Detention Project has found that among the CMW's more frequent detention-related recommendations are: decriminalising migration violations; ceasing the detention of children; employing detention only as a last resort and for the shortest possible period; avoiding indefinite detention; improving conditions in detention; urging provision of procedural guarantees; and, more recently, emphasising 'alternatives to detention'.[3]

In some cases, the CMW has explicitly connected the abuses of migrants in States parties to the convention with the externalisation efforts of wealthy countries. For example, in 2019 in its Concluding Observations on Libya, the Committee highlighted the severe abuses suffered by migrants in detention or other forms of custody, which it explicitly connected to agreements between Libya and Europe. It also used the Libya report to note similar "cooperation agreements on migration" with neighbouring States, including Chad, Niger and Sudan, and called for guarantees "that such multilateral and bilateral agreements are fully consistent with the Convention", with the Committee's general comments, and with its joint general comments with the Committee on the Rights of the Child on the human rights of children in the context of international migration.

Civil society groups are increasingly using the CMW's treaty review process to raise awareness of how abuses suffered by migrants and asylum seekers in States parties to the migrant workers convention are directly related to externalisation. Thus, for instance, in a 2020 submission to the CMW concerning Niger, the Global Detention Project stated: "Niger has become a central focus of EU migration 'management' strategies, with some observers dubbing it 'the southern border of Europe'. By 2017, EU engagement had included a pilot project to convince migrants to stop their journeys; encouraging Niger to pass a law against migrant smuggling (Act No. 2015-36); a range of capacity-building projects for law enforcement authorities and the judiciary; and increased cooperation in the 'fight against smugglers'. (As of writing, the CMW's Concluding Observations on its Niger review had yet to be released.)

Respect for international obligations

There is an inexorable connection between externalisation and the growing refusal by countries across the globe to respect the fundamental rights of non-citizens. In the face of this, it is all the more important today to continuously remind States about their obligations to respect the fundamental rights of all vulnerable people on the move, citizens and non-citizens alike. The Convention on Migrant Workers, despite its poor ratification rate, is a key part of this machinery, one that speaks directly not only to the actions of its Member States but also to those countries in the Global North who have sought to avoid it. By exporting abusive detention practices to neighbouring countries that have ratified the CMW, these wealthy countries become culpable in the violations suffered by migrants, refugees and asylum seekers who have been locked up.

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1. See, for example, Flynn M (2014) 'There and Back Again: On the Diffusion of Immigration Detention', *Journal on Migration and Human Security* bit.ly/Flynn-There-and-back-again-2014 ; Ghezelbash D (2018) *Refuge Lost: Asylum Law in an Interdependent World*, Cambridge University Press; FitzGerald D S (2019) *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers*, Oxford University Press

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https://journals.sagepub.com/doi/pdf/10.1177/233150241600400402

3. Grange M and Majcher I (2017) 'Immigration detention under international human rights law: the legal framework and the litmus test of human rights treaty bodies monitoring' in Flynn M J and Flynn M B *Challenging Immigration Detention: Academics, Activists and Policy-makers*, Edward Elgar, pp 265-292
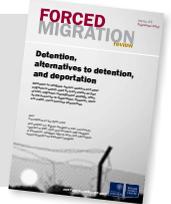
The Khartoum Process and human trafficking

Audrey Lumley-Sapanski, Katarina Schwarz and Ana Valverde-Cano

The Khartoum Process's emphasis on stopping northward migration comes at great cost to vulnerable refugees and asylum seekers.

Sudan ranks 14th in the world for prevalence of modern slavery per capita.[1] Different types of abuse and exploitation occur along mixed migration routes from East and West Africa to and through North Africa – routes travelled by people from Sudan, as well as people moving through Sudan from countries such as Eritrea and Ethiopia.[2] According to the International Organization for Migration, 66–77% of migrants along these routes have experienced either work without payment, forced labour, being held against their will, or being targeted for an arranged marriage. Within Sudan's refugee camps, which are characterised by poor living conditions and inadequate security, refugees are vulnerable to predation by smugglers or traffickers. These vulnerabilities are borne unequally, with women in particular subject to gender and sexual violence.

The EU Horn of Africa Migration Route Initiative, referred to as the Khartoum Process (KP), was launched in November 2014 by 37 State signatories alongside European Union and African Union commissioners in charge of migration and development. It was intended to produce concrete action to prevent and tackle human trafficking and smuggling, and placed the onus of work to curb illegal migration on State actors. It ties development money to migration control, making funding contingent on African States' capacity to influence the flows of 'illegal' migrants.[3]

The Emergency Trust Fund for Africa (EUTF) contributed an initial €40 million to the Khartoum Process for 2016–19. These funds are distributed between policy harmonisation (12.5%), capacity building (62.5%), protection (17.5%) and awareness raising (7.6%). The majority of money allocated to capacity building went to law enforcement, justice and border security.[4]

Border enforcement and insecurity

For some groups, like pastoralists, the ability to cross borders is a historical right and essential for their livelihoods. For others, like Eritreans, migration represents a method of seeking protection from an authoritarian regime. In focusing on controlling irregular migration, and more specifically stopping onward migration, the KP ignores the root causes of migration without investing in alternatives.

The policy approach has been to crack down on smugglers and traffickers ... rather than looking at drivers and why people are moving in the first place. (researcher, March 2021)

The absence of legal and safe paths for mobility has made resorting to smugglers to travel along the Central Mediterranean Route via Sudan to Libya inevitable. Forced to use less traversed routes to cross borders, protection seekers are vulnerable to traffickers and exploitation. Smugglers are also known to sell migrants to traffickers. The fact that migration has been made illegal allows traffickers and smugglers to act with impunity in many cases; traffickers use it to their advantage, manipulating migrants' legal status to prevent engagement with legal authorities.

The Rapid Support Forces (RSF) – mainly former Janjaweed militias which have recently been integrated into the armed forces – have been assigned the task of border management within the government of Sudan. According to experts, these underpaid militias-turned-soldiers are rewarded with supervision of migratory routes as a source of additional revenue. Concerns have been raised about the purpose and use of EUTF funds which may be enabling traffickers: that by providing funding to Sudan for border management, the EU is effectively complicit in human rights abuses

Nineteen-year-old Rumaysa holds up a sign saying "I want to live in safety". During a campaign by UNHCR in 2018, members of the refugee and host community in eastern Sudan came together to demonstrate solidarity against human trafficking. The campaign sought to highlight the risks to refugees, IDPs and host populations and to raise international awareness of the problem.

and trafficking committed by the RSF. An interviewee familiar with the RSF described the benefits of this position, which allows them to tax migrant caravans and to engage in trafficking to benefit themselves:

They play the dual role of being officially tasked with stopping migrants and also profiting from it on the side. There are definitely instances where they've physically ferried migrants, but…if they also come across a group of migrants they'll exploit them because they can. (independent researcher, Sudan, March 2021)

Border agents also engage in sexual exploitation. Interviewees identified cases in which women and girls were abducted and sexually exploited by border agents. The KP–EUTF partnership is therefore indirectly contributing to the trafficking of vulnerable populations while giving lip service to policing irregular migration.

Predation in protected space

The fact there is an encampment policy for hundreds of thousands of refugees who could be there for two or three generations by now, with still no legal ways to generate an income… it increases vulnerability to modern slavery, forced labour, risks of trafficking and onward movement. (NRC staff member, March 2021)

In the words of one interviewee, camps function as 'honey pots' for smugglers and traffickers. Refugees are unable to work legally and are denied a pathway towards long-term residence or citizenship. The lack of livelihood or educational opportunities contributes to a drive towards onward migration. As the above interviewee continued, "There is a disproportionately high number of young people faced with the prospect of staying in a refugee camp for the rest of their lives. It's not something that anyone wants to do."

Predatory traffickers feed on refugees' despair, with little fear of interference from local camp administrators. A law enforcement official described the camps as "huge, impersonal places, where the gangs can walk in and take people out."[5]

Call for interventions

The externalisation policies of the EU have contributed to this outcome by encouraging

UNHCR/Hassan Gamary

the adoption of a migration policy which prioritises border securitisation through rhetoric and spending. The critical problem with this policy is that it ignores questions of security of humanitarian protection seekers. More so, it provides funds and surveillance tools redirected from other development and humanitarian programming which are being used by a security force that has a history of perpetrating human rights abuses. Separately but equally problematically, the emphasis on restricting migration results in a lack of legal migratory pathways, which in turn contributes to prolonged displacement within camps where refugees suffer deprivation. This then leads to a desire for onward migration that traffickers exploit. The emphasis on stopping northward migration comes at an enormous cost.

What can be done? Our research calls for three interventions. First, refugees who accept the terms of camp residence deserve protection from predation. International actors engaged in the region, such as UNHCR, the Norwegian Refugee Council[6] and MMC[7], should advocate for alternatives to the encampment policies and for pathways to local integration. Second, the EU should not use the promise of funding to coerce Sudan or other Horn of Africa States into migration compliance. The government of Sudan should challenge the EU's position and work with IGAD countries[8] to open borders. Lastly, the question of the RSF's involvement is serious and problematic. If the RSF continues to receive EU resources to police borders, it is imperative to hold the EU accountable for tracing how those resources are used. The agreements should be transparent with identified measures of accountability.

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5. Interview, Trainer, ROCK, 2021

6. Global co-lead of the Camp Coordination and Camp Management (CCCM) Cluster

7. MMC, the Mixed Migration Centre, is the lead collector of migration data in the region.

8. The Intergovernmental Authority on Development (IGAD) is an eight-country trade bloc in Africa. It includes governments from the Horn of Africa, Nile Valley and the African Great Lakes.

Understanding the dynamics of protracted displacement

Albert Kraler, Benjamin Etzold and Nuno Ferreira

Displaced persons' mobility and their translocal networks can provide important resources in the search for durable solutions.

Almost 20 years ago, UNHCR coined the term 'protracted refugee situations' to draw attention to the plight of refugees in extended exile and to promote durable solutions. However, the search for solutions for persons in longer-term displacement has been at the heart of the international refugee protection regime ever since its beginnings in the early 1920s. What is more, in several major crises of displacement, mobility options have been a major component of successful strategies to resolve these situations. The emergence of a new term thus highlighted, more than anything else, the failure of the international protection regime to deliver a key promise, namely that displaced persons should be able to regain a degree of normality and to rebuild their lives.[1]

Previous research and policy debates[1] have largely focused on protracted displacement as a policy problem while paying less attention to how displaced persons themselves can shape the conditions of protracted displacement. It is the potential for 'solutions from below' that is the focus of the research project 'Transnational figurations of displacement' (TRAFIG) on which the five articles in this mini-feature are based.[2] In this article, we revisit the concept of protracted displacement and link our understanding of the concept to individuals' agency, understood both in terms of their capability to act and in terms of actual behaviour. Our research has a strong focus on mobility as one expression of displaced persons' agency. Reflecting on historical examples, we examine the role of mobility as a resource for people caught in protracted displacement and as a possible avenue for political solutions to protracted displacement. We end with a brief reflection of the role of current policy approaches in promoting or, indeed, stalling solutions.

Revisiting the concept

In 2004, UNHCR's Executive Committee presented a paper on protracted refugee situations in which it described a protracted refugee situation as "one in which refugees find themselves in a long-lasting and intractable state of limbo".[3] The concept was widely taken up and subsequently also applied to other categories of displacement, giving rise to the broader term 'protracted displacement'.

The concept highlights two aspects of contemporary displacement. Firstly, and reflecting the protracted nature both of conflicts and of persecution in countries of origin, the term simply highlights that exile often extends for many years. Secondly, and more importantly, the notion of protracted displacement emphasises that many displaced persons remain in precarious situations for prolonged periods of time after becoming displaced (in terms of legal status, access to rights and their ability to rebuild their lives), that is, without finding a 'durable solution' to their situation. UNHCR defines a protracted refugee situation as "one in which 25,000 or more refugees from the same nationality have been in exile for five consecutive years or more in a given asylum country". At the end of 2020, some 15.7 million refugees or 76% of the global refugee population were in a situation of protracted displacement, of which a large majority had endured for 10 years or longer.[4] No comparable figures are available for internal displacement. While useful as a broad indication of the scale of the problem, the statistical definition conceals that it is the long-term absence of solutions (rather than the mere duration of exile) that keeps people in protracted displacement. In addition, the statistical concept also does not capture the dynamics of individual

protracted refugee situations. Thus, while the Afghan situation has endured for more than four decades, there have been large-scale returns and new displacements, while individual refugees have often experienced displacement on a recurrent basis.

Reconceptualising protracted displacement

In FMR's 2009 issue on protracted displacement, Gil Loescher and James Milner observed that "protracted refugee situations are the combined result of the prevailing situations in the country of origin, the policy responses of the country of asylum, and the lack of sufficient engagement in these situations by a range of other actors".[5] While this broad observation still holds true today, it is helpful to examine the more structural forces at play in producing protracted displacement. In our view, these go beyond the conditions in the origin and host countries and the role of other actors in engaging with origin and host countries. Rather, protracted displacement should be viewed as the result of three forces: displacing forces, marginalising forces and immobilising forces. This conception mirrors but is not entirely equivalent to the conventional triad of durable solutions (repatriation, local integration and resettlement) promoted by UNHCR, with their respective association with countries of origin, host countries and third countries.

Displacing forces prevent displaced persons from returning and such forces are present in the country or region of origin and can also be active in first, second and further host countries or regions. Marginalising forces effectively block local integration and operate in the country or region of current stay, whereas immobilising forces hinder (onward) mobility and are at play in the country or region of origin, as well as in transit and host countries.[6]

This conception of protracted displacement allows us to understand protracted displacement as a situation shaped by the dynamic between structural forces and displaced people's agency. In so doing, we suggest moving beyond traditional understandings of protracted displacement as being 'stuck' and as involuntary immobility,

that is, an image of protracted displacement often associated with large refugee camps such as Za'atari in Jordan or Dadaab or Kakuma in Northern Kenya. One should not confuse being trapped or stuck with physical immobility. Indeed, our concept of protracted displacement also captures displaced people on the move who have moved elsewhere from a first host country or region, in an attempt to cope with the situation – as a strategy to find a solution which works at an individual or, more often, a household level.

Displacing forces are not only to be located in the country of origin but in receiving contexts too. In addition, we highlight the combined impact of marginalisation and immobilisation in receiving contexts in preventing displaced persons from finding a 'durable solution' and indeed locking them in a precarious situation. Our conception stresses the need to take a multi-level and transnational approach to refugee protection and to re-focus attention on solutions. Protection from physical harm and persecution is simply not enough. The main impetus for this is to shed light on the role that displaced persons themselves play in coping with displacement, whether or not the solutions they find for themselves are supported by policies designed to help them, or are in fact (and more often) irrespective of and sometimes despite such policies. Refugees' mobilities and translocal connections are an example of such strategies. In the following section, we briefly revisit historical examples of solution strategies capitalising on refugees' own resources and promoting refugees' mobility.

Learning from the past[7]

Fritjof Nansen was appointed first High Commissioner for Refugees in 1921 to address the long-term situation of Russian refugees, and later also Armenian and other refugee groups. The combination of impossibility of return and the poor economic conditions in many first countries of asylum, plus his office's own slim resources, led Nansen to place a strong emphasis on mobility and enabling refugees to travel to where there were jobs. The main instrument to do so was a new travel document for refugees, the 'Nansen passport'.

International NGO staff talking with Syrian refugees living in section 6 of Za'atari refugee camp in Jordan.

Subsequently, his efforts were supported by a job placement scheme operated by the International Labour Office, under which some 60,000 refugees found employment. But it was really the combination of a) employment demand, b) a travel document enabling refugees to be mobile, and c) some institutional support that enabled the success of Nansen's initiative and brought down high levels of unemployment among refugees.

After World War II, employment-driven resettlement played an even bigger role in providing solutions to displacement, and continued to take place until the 1960s. While these programmes were not unproblematic and were only made possible by a favourable economic climate and a peak in labour recruitment, they highlight the potential of mobility options in resolving protracted refugee situations. A key contrast between post-War resettlement and Nansen's support for refugees' mobility in the interwar period is the greater and almost exclusive reliance on State-led resettlement supported by a considerable infrastructure provided by international organisations. Today the opportunities for mobility are much more limited, reflected in limited resettlement opportunities but also in restrictions on family reunification and more limited opportunities for labour migration.

Conclusions

Mobility has always been an important element in the solutions available to address protracted displacement. As some of the other articles in this feature show, mobility is a highly important coping strategy for individuals, often in defiance of existing policies. The recent emphasis in the New York Declaration and the Global Compact on Refugees on complementary pathways to protection reflects an increasing awareness of the role of physical mobility in promoting 'durable solutions'. At the same time, there are severe contradictions in the policies of key receiving States. In the European context, for example, the EU emphasises the need to facilitate access to durable solutions and enhance the self-reliance of displaced populations, for instance by improving the link between humanitarian and development assistance. And yet the EU promotes policies that attempt to address the root causes of displacement and irregular migration largely through the use of deterrence. Similarly, the EU's support for regional integration and free movement regimes enhances access to mobility as a livelihood strategy which is, at the same time, limited by the EU's externalisation policies that demand third countries' compliance with migration control conditions in exchange for support.[8]

In sum, there is a need to both refocus policies relating to international protection in general and protracted displacement in particular on protection outcomes, and to assess the 'fitness' of policies according to their capacity to promote durable solutions.

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1. See FMR issue33 (2009) for a snapshot of debates more than a decade ago www.fmreview.org/protracted

2. The project has received generous funding from the European Union's Horizon 2020 research and innovation programme under grant No 822453. More information on the project is available at www.trafig.eu.

3. bit.ly/EXCOM-2004-protracted

4. UNHCR (2021) *Global Trends: Forced Displacement in 2020* www.unhcr.org/60b638e37/unhcr-global-trends-2020, p20. In 2017, some 22% of the then protracted refugee situations had lasted more than 38 years, and 51% between 10 and 38 years. Calculated from UNHCR (2018) *Global Trends: Forced Displacement in 2017* bit.ly/UNHCR-GlobalTrends2017 p22

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To watch the launch event for this FMR feature (forthcoming after 14 December), visit **https://trafig.eu/events/zooming-in-on-migration-and-asylum**.

Mobility dynamics in protracted displacement: Eritreans and Congolese on the move

Carolien Jacobs and Markus Rudolf

Millions of Eritreans and Congolese find themselves in situations of protracted displacement. A more nuanced understanding of how physical and social mobility affects their daily lives is crucial to developing more effective tailor-made interventions.

The most widely used definition of protracted displacement is UNHCR's term for people who are 'stuck' in a particular place for at least five years. This stresses the static elements of protracted displacement but when such displacement is examined more closely, different patterns of mobility and immobility of individuals become visible. This article draws on empirical findings relating to Eritrean refugees in Ethiopia and internally displaced persons (IDPs) in eastern Democratic Republic of the Congo (DRC) in order to explore different physical and social mobilities.

Protracted conflict and insecurity in both Eritrea and DRC have caused long-term and large-scale displacement of millions of people. For decades, Eritreans have been crossing international borders to seek protection, establishing diaspora communities across the world. Connections with members of this diaspora facilitate the onward mobility of Eritreans over long distances. In contrast, most displaced Congolese flee within their own country, often maintaining direct connections with their communities of origin. The following examples underline that protracted displacement cannot always be equated with confinement, with immobility while in transit, or with individuals stuck in a particular place.[1]

Long-distance or onward-oriented mobility

When refugees are able to move legally to Europe or North America it is often either through a family reunification programme, or through a sponsor. Relatively little is known, however, about those who have not been able to resort to an international network or international organisations for support. They may nevertheless display high levels of mobility. Hassan is a good example. Now a married father of three children, he fled Eritrea during the war in 1987, remaining an irregular migrant for 15 years. He has been a recognised refugee now for 20 years and lives in an Ethiopian refugee camp with his family. His trajectory illustrates long-distance and long-term mobility and shows that this mobility is not necessarily reflected in legal and policy frameworks.

Hassan worked in a number of different jobs throughout his years of displacement: as a fisherman in Port Sudan, a charcoal maker in Puntland, a camel herder in Oman, a shopkeeper in Saudi Arabia, a ship cleaner in Dubai, and a day labourer in Yemen. He hid in a cargo ship headed to Australia and was discovered in Mombasa, Kenya. After being deported back to Somalia multiple times from the countries to which he had moved, he stopped pretending to be a Somali and was put on a plane to be deported to Eritrea in 2001. "I told them I was from Eritrea, because I was tired. [Before this] I always said I am Somali because I was afraid of Eritrea." After serving six months in the Eritrean army he escaped to Sudan, where he moved to a refugee camp and married another Eritrean refugee. "We left in 2008. It was not secure there. Eritrean forces took anyone [Eritreans] from the refugee camp [in Sudan]." He travelled with his family to the camp in Tigray where he has stayed since then. Throughout his irregular journeys Hassan was quite mobile, despite the lack of formal support or status, but each time he entered a camp he faced formal rules that impeded his mobility and that made him feel stuck. Mobility, on the other hand, provided him access to a wide range of livelihoods that enabled him to survive despite the lack of any formal assistance.

Medium- to short-distance, locally oriented mobility

Hassan's case shows that displaced persons on the one hand often succeed in mitigating risks and vulnerabilities by increasing their mobility. The fact that his mobility was often hampered by restrictive refugee policies illustrates on the other hand the de facto negative impact of such restraints. The recent liberalisation of Ethiopia's once restrictive policy, for example, now allows refugees to live outside the camps, which strengthened the position of refugees wishing to live outside the camps. It indeed expanded advantages where there already was a degree of informal flexibility at local level as the next case shows. Muhammed, an unmarried Eritrean from a family of fishermen, who is now in his early twenties, fled from Eritrea as a school student. At his first attempt to cross the border he was imprisoned but released after a few months thanks to his student status. He reached Afar state in Ethiopia on his second attempt with the help of nomads, where he settled in Loggia, a busy market town on the crossroads of regional trade routes.

Upon arrival, Muhammed made friends with other ethnic Afar who directed him to the Aysaita refugee camp. "[But] in the camp you do not get enough [food]", he explained. In Loggia by contrast, "… you have Ethiopian friends. You eat with them. They [Ethiopian Afar] even let me continue my studies [here]." Thanks to a high level of local solidarity, Muhammed has been able to enrol in a management studies course at the local university without any need for identity documents. After the new out-of-camp policy came into effect in Ethiopia he now has both a student and a refugee identity card. He can officially live and study in Loggia and get his monthly food rations in the camp without fear of being punished or caught for his prior irregular status. Muhammed shares the regular food rations from the camp with his hosts outside the camp, and the hosts do not have to worry about possible reprisals for sheltering him. Being a recognised refugee living out of camp,

on the contrary, made it possible to secure a reduction of his student fees. Muhammed benefits from the mobility options that are provided to him through his formal student status, but he is only able to take advantage of these options thanks to his embeddedness in an informal support network.

Backward-oriented mobility

Dewis is a Congolese man in his fifties, a married father of eight children. He originates from one of the rural areas in South Kivu province in the conflict-affected east of DRC. In 2012, when armed forces raped his sister-in-law and killed her husband, Dewis decided to flee to Bukavu, the provincial capital, located some 80km from Dewis' village. Upon arrival, Dewis noted that there was a high and often unmet demand for charcoal in the city so he decided to start a business in charcoal production in his area of origin, where forest resources are abundant. He transports the charcoal to the urban market, where his wife sells it. The business requires Dewis to return to his village about three times a month, enabling him to keep growing and harvesting crops while making a living from trade in the city.

Our research revealed that many IDPs like Dewis and his family frequently return to their respective places of origin despite the continuing insecurity there. It does not necessarily mean that they would return permanently if there was more stability. Our research showed that IDPs' livelihood strategies in displacement depend to a large extent on regular returns to their community of origin: for instance, to benefit from rural-urban trading opportunities, to harvest crops for the household's daily consumption, or to check on property. For many displaced people, it is essential to maintain mobility and assets in order both to cope with their present situation and to allow for a possible return in the future.

Immobility

While many displaced people rely on onward or backward mobility to rebuild their lives in displacement, there is a group of people that can neither make return visits to their community of origin, nor move elsewhere. For some, moving within the host country

or onward might be impeded by legal and policy frameworks that limit their freedom of movement. In circumstances where refugees lack the right to move freely, mobility usually entails illegality and loss of entitlement to formal support. There is a large number of people who have been driven into illegality because of this.

Apart from formal limitations, the dividing line between mobility and immobility is often determined by individual circumstances that are related to pre-displacement experiences. Kazi, for example, is very outspoken about the impossibility of returning to his home community in DRC.[2] Some years ago he was forcibly recruited into an armed group in his area of origin. After about six months in the bush, he managed to escape and flee to Bukavu. He then found that his relatives had taken him for dead, and that his wife had built a life without him, not knowing whether he would ever return. Not having a family to return to, combined with the stigma of having been part of an armed group (and the fear of being recruited again), makes return an unrealistic option for Kazi. He therefore remains in the city, where he is at least able to benefit from his brother's connections to make a living.

Kazi's case is not uncommon. In many cases, the displaced people we met could not return to their community of origin because they had lost all their assets in the community. This could be as a result of looting, or because relatives had appropriated everything in their absence. Relatives often refuse to return property or to compensate returnees, arguing that those who did not suffer the hardships of the war had lost their claim to assets in the village. There is also often a fear of stigmatisation prevalent among a particular group of displaced persons: namely women – and sometimes men – who have been raped. After this traumatic experience, they prefer the anonymity of their place of refuge to the prospect of discrimination upon return to their community of origin. This means that they also cannot turn to former contacts for support.

Fourth durable solution?

In the above, we have set out four different types of mobility that characterise everyday

experiences of protracted displacement. Our empirical results show that mobility is an important part of displaced persons' livelihood strategies. In many cases, this mobility is made possible by virtue of informal connections, and happens despite formal policies. Impediments to mobility also impede people's livelihood opportunities. To categorise displaced persons as stuck has unintended negative impacts in practice. Those eligible to receive assistance as displaced people hide their mobility strategies in order not to jeopardise their access to assistance; coping mechanisms that are based on a degree of mobility remain unrecognised and are often hindered by regulations on aid provision; and mobile individuals must take risks associated with moving under the radar. There is always a risk of losing one's legal status, of extortion at road blocks or by smugglers, of losing belongings or merchandise, or of being kidnapped. All these factors make mobility a risky and costly endeavour. Displaced people have to weigh the costs and benefits when taking the decision to move.

Bada Admagug, in Afar State, Ethiopia. This is a central transport hub close to an irregular border crossing point with Eritrea. From here, goods and people move across the border and within the region.

According to our observations it is evident that the risks and vulnerabilities of those requiring protection may be heightened by aid policies that fail to acknowledge, assess and react to such realities. A lack of awareness that displaced people may need access to other options (such as enabling access to their fields or home communities while staying in camps) may lead not only to a failure of interventions but also to counterproductive effects, for instance by causing irregularity. In contrast, policies that support or at least do not inhibit the mobility patterns of displaced people – mobility patterns which they have established themselves and which have contributed to their livelihoods – were observed to be an effective and more sustainable way to overcome protracted displacement situations.

Measures to foster self-help mechanisms and to mitigate risks need to be tailor-made and needs-based. In the case of Dewis and Kazi, this would entail support for making a living in the city. Dewis could also benefit from improved and more secure road infrastructure. In Muhammed's and Hassan's cases, the benefits of legalising and supporting out-of-camp options for refugees are clear: legal status and continued access to aid improved their economic and social position, and resulted in less exploitation and discrimination. This, in sum, shows that putting people and the solutions they find for themselves before politics and top-down prescriptions could be a hybrid yet realistic fourth durable solution.

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1. Tufa et al (2021) 'Figurations of Displacement in and beyond Ethiopia', TRAFIG Working Paper No 5, BICC bit.ly/TRAFIG-WP5

2. For more detail about his case, see Jacobs et al (2020) 'Figurations of Displacement in the DRC', TRAFIG Working Paper No 4, BICC bit.ly/TRAFIG-WP4

Family networks and Syrian refugees' mobility aspirations

Sarah A Tobin, Fawwaz Momani, Tamara Adel Al Yakoub, and Rola Fares AlMassad

Syrian refugees' aspirations to move contradict the notion that those refugees who are 'stuck' in displacement are passive victims without agency. Rather, in the absence of viable options for physical mobility, refugees may still engage in aspirations to 'move on' even when they are not able to do so physically.

Sustaining local, regional and transnational family networks is a strategy that displaced persons use in order to cope in conditions of protracted displacement. These networks can help provide access to humanitarian aid, socio-economic resources, psychosocial support, and opportunities for mobility. But not always. In this article, we examine the protracted displacement of Syrian refugees in Jordan as they remain restricted from onward mobility yet use family networks to dream of moving outside the country, to move next to, to be among, or to reunite with family networks 'elsewhere'. However, these aspirations are almost always unrealised and remain idealised futures, 'imaginaries' of a life that is likely never to come to pass. Instead, they are practices that reinforce key family networks and assert the agency of the refugees in the context of being 'stuck' rather than serving as a realistic pathway to a durable solution.[1]

For the nearly one million Syrian refugees in Jordan, their stay has become increasingly protracted, with durable solutions – return in safety and dignity, local integration or third-country resettlement – remaining out of reach for nearly all. Fewer than 35,000 Syrians have returned from Jordan; Jordan continues to offer support to Syrians as 'guests' rather than long-term or permanent residents; and Syrian resettlement rates are very low, with only 176,000 having been resettled worldwide and only a small fraction of them coming from Jordan[2]. Our research indicates that only 16% had applied for asylum and resettlement outside Jordan.[3] Despite these odds many Syrians in Jordan continue to actively discuss their aspirations for onward mobility, despite it being extremely unlikely to become a reality.

I really want to move to Canada, or Britain, or America. They say the youth have abundant job opportunities available for them. And they have health insurance if they become sick. My sister is in America now; she has been there for four years. She says that life there is beautiful, except that being a foreigner is hard because she misses the family and her loved ones. Living there is great, especially when it comes to medical care. It's not like the hardships and sufferings people face here in Jordan. (Syrian refugee woman in Jordan)

Mobility aspirations reveal individuals' agency. They express desires for their own future, with a life with their family, in decent work, with educational opportunities and accessible, affordable healthcare. They articulate a vision for 'the good life' in which they can create a fulfilled and contented life in a country where the rule of law is the norm, rather than under an authoritarian regime. It is a future that contrasts strongly with the present, making aspiring towards such a markedly different future particularly challenging.

Furthermore, mobility aspirations reconnect and reinforce family networks through shared and imagined futures. Even – perhaps especially – when they are unable to meet in person, refugees use mobility aspirations to reinforce the importance and place of family networks and their members.

Imagining elsewhere

The United States of America, Canada, Europe (including the UK and Nordic countries) and Australia were the most popular relocation destinations chosen by

those whom we interviewed. Ninety percent said that they desired to connect with and rekindle family networks outside Jordan. Comments such as this were relatively common: "We are thinking of moving, but we cannot afford it. We have no single country in mind, but we would choose Britain if we could." Another said, "Britain is my favourite, but if I had the chance to move to another country such as Canada or Germany, I would." These ill-defined, even interchangeable, North American and European destinations were described to us with vague and idealised images of a better life and lifestyles, with gardens and parks, better work opportunities and pay, and good educational opportunities. One woman said, "I want my kids to go back to school. I cannot afford to send them to private schools in Jordan… I wish I could move to the West to get better education for my children." These kinds of sentiments were common among the Syrians we surveyed and interviewed.

These ideas often came from family members who were already living in these locations. Interviewees' comments were often prefaced with "My relatives already in Britain [or whichever country] tell us…" Through social media, phone calls and family networks, family members shared a picture of a life abroad that was perhaps painted in an overly positive light and which hid some of the disadvantages and challenges. For example, one said, "My cousin is in Denmark. She does not pay house rent. The government supports them with everything." This family member appears to have neglected to say that the Danish government has been particularly tough on Syrians, even threatening to forcibly return some.

These kinds of statements reveal little about migration intentions, but much about the transnationally embedded nature of these family networks. Such statements also reveal the ways in which refugees can and do exist in multiple places simultaneously: they reside physically in Jordan but imagine being closer to a much beloved family member, being taken care of, and receiving relief from the grinding nature of life in protracted displacement in Jordan. As one said, "I wish I could make it to Canada… My sister in Canada has got citizenship after four years, and she says that life there is different. Her kids are all in schools; they are doing very well. Here in Jordan, it seems that I am losing my sons."

The Case of Umm-Baha

The case of Umm-Baha reveals the agent-centric nature of mobility aspirations, and the ways in which such practices reinforce family networks.

Umm-Baha is a married woman from Daraa, in southern Syria. She is in her late forties, has nine children and is a stay-at-home mother. When conflict began, she and her family considered going to Jordan, assuming they would return after two or three months. Jordan was the first choice because Umm-Baha's husband knew the country well from frequent travel there and it was the closest option. Umm-Baha's husband and four oldest sons began preparing for the journey to Jordan; she and the rest of the children would follow later.

Umm-Baha's decisions about mobility were dictated by fear for her children's safety: she was afraid to stay in Syria with them, afraid to make the journey and endanger them, and afraid to be somewhere new where she would be unable to help them as they needed. As a result, she did not want to leave Syria. However, she changed her mind when one of her daughters was sexually assaulted, and several of her sons were arrested by the Assad regime. After their release, Umm-Baha's sons became more determined to leave for Jordan.

Initially Umm-Baha and five of her children settled near Irbid in northern Jordan, their rent paid for by the Norwegian Refugee Council. They would have liked to live closer to the city centre but the rent, water and electricity were too expensive; on the recommendations of relatives, they moved to the nearby city of Ramtha. Eight of the nine children now live in Ramtha, and Umm-Baha's husband,

parents and siblings are there, all within a five-minute walk from each other.

Despite the close presence of a large extended family in Jordan, Umm-Baha dreams regularly about a better life outside Jordan. Economic conditions in Jordan are hard, and the family must work together to make ends meet. Her sister, brother-in-law and their children were resettled in the US, and they keep in touch. This prompts her to think about possibilities for improving her own life as well. When asked if she intends to stay in Jordan, she said, "No. There is not a good life for my boys here. I am thinking of a country other than Syria with a better place for my boys." However, any real possibilities for onward migration are thwarted because her oldest married son refuses to travel to Europe, and her grandchildren would not be eligible to go with her due to family reunification restrictions. Umm-Baha is worried that any onward migration would split the family apart.

At one point, Umm-Baha collected information from family and friends who are in the US, attempting to make her mobility aspirations a reality. They advised her to join them, and so she asked her family members in those countries to submit the paperwork for family reunification. But then, as she says, "I noticed that they apologised and deferred and said 'it's too long and complicated'. Our relationships have grown distant. I keep asking UNHCR about it. But they said our request in the queue."

As the story of Umm-Baha demonstrates, mobility is not a straightforward and linear trajectory shaped merely by the presence of family. Rather, mobilities are anchored in past experiences, subject to present realities, and informed by future hopes and imagined scenarios. People's mobilities are shaped also by which type of family network they wish to cultivate, and their perceptions of the role of knowledge sharing and trust within those family networks.

Conclusions

Discussions about protracted displacement, mobility and durable solutions often pay little attention to the desires, imaginations and aspirations of the refugees themselves. However, "migration imaginaries"[4] merit attention because they are widely participated in by all refugees and reveal much about ways of being and belonging, especially with regard to family networks. They also reveal the ways in which individuals become active protagonists in the context of protracted displacement, where their agency might otherwise be constrained or stifled.

Resettlement is a durable option but it is available to very few. In the absence of a viable durable option, mobility may exist in multiple places and spaces at the same time. Mobility aspirations enable the actor to contract or expand their family networks at will, without financial costs. Additional research is needed to establish to what extent mobility aspirations have positive outcomes that extend beyond the refugee or family networks in areas that may include improved mental health or physical well-being.

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1. Some of the arguments made in this article are further explored in Tobin S A, Etzold B, Momani F, Al Yakoub T A, AlMassad R F and Shdefat A G (forthcoming) 'Ambivalent entanglements: Syrian refugees' network relations and (im)mobilities in protracted displacement' in Ahrens J and King R (Eds) *Onward Migration and Multi-sited Transnationalism: Complex Trajectories, Practices and Ties*, Cham: Springer.

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'Constrained mobility': a feature of protracted displacement in Greece and Italy

Panos Hatziprokopiou, Evangelia Papatzani, Ferruccio Pastore and Emanuela Roman

People living in protracted displacement in Italy and Greece are frequently more mobile than is generally recognised in public discourse and policy.

Protracted displacement is often implicitly associated with passivity and immobility, and it is not by chance that protracted displacement is often described through the metaphor of 'limbo'. But people living in protracted displacement are far from immobile. On the contrary, both in their everyday lives and over time, they experience 'constrained mobility' at different scales (from local to transnational) and in pursuit of different goals (primarily subsistence and administrative status). While heavily constrained by a complex and constantly evolving combination of legal and socio-economic factors, these mobility patterns are a crucial form of 'agency under duress'.

In this article, we use the cases of Greece and Italy to explore what protracted displacement looks like in reality. These countries share at least three common structural features. First, both are 'first entry' countries in the European Union (EU), where asylum seekers' mobility is constrained by Dublin Regulation rules. Second, both countries have comparatively low administrative capacity, in particular in the fields of reception and integration of asylum seekers and refugees. Finally, they are both characterised by stagnant official labour markets and sizeable underground economies. All of these factors deeply shape the patterns of (im)mobility and inclusion/exclusion of migrants living in protracted displacement.

Immobilising effects of EU and national regulations

Intra-EU mobility constitutes a major challenge for both asylum seekers and protection beneficiaries[1] in Italy and Greece. For asylum seekers, secondary movement within the EU is often (although not

exclusively) motivated by family reasons. The Dublin Regulation represents a massive obstacle, especially for adult asylum seekers who have family members in other EU countries whom they would like to join. Often these relatives do not fall under the Regulation's strict definition of 'family', which includes only the applicant's spouse or children (under the age of 18). Even when asylum seekers are allowed to move within the EU (as in the case of unaccompanied minors), they face extremely long waiting times and many administrative obstacles. For protection beneficiaries holding an Italian or Greek residence permit, and who are able to obtain travel documents, EU law allows them to move freely across the EU for no more than three months – although many opt to overstay this period, accepting the risk this carries.

However, there are deep differences between the two countries as regards mobility between countries, especially for asylum seekers. While both countries have adopted the 'hotspot' approach, in Greece – where it was introduced in conjunction with the 2016 EU–Turkey deal – it has become a key mechanism of migration control, turning the country into an internal EU 'buffer zone'. Migration journeys were interrupted, both to other member States but also within the country itself. This is because asylum seekers' mobility in Greece is directly impacted by the different types of reception facilities and procedures, which in Greece have three distinct forms: a) the forced containment of asylum seekers in hotspots on five eastern Aegean islands until a decision is reached on their asylum claims (with some exceptions); b) asylum seekers' accommodation in isolated 'open temporary accommodation sites' (camps) on the mainland, subject to specific regulations and mobility restrictions; and

c) the accommodation of the most vulnerable in urban apartments.[2] Mobility across these reception facilities is strictly regulated.

In contrast, asylum seekers do not stay in hotspots in southern Italy while their asylum applications are examined but are instead dispersed to reception centres across the country. Their mobility is regulated less strictly than in Greece, although those hosted in reception centres similarly risk losing their accommodation if they are absent for a prolonged period without permission. For asylum seekers and protection beneficiaries who are no longer in the reception system, onward movement within the country is extremely common.

Constrained mobility as a survival strategy

In both countries, migrants living in protracted displacement develop a wide range of mobility-based survival strategies permitting them to navigate the complex asylum systems at both national and EU levels in order to reunite with their networks, meet their basic needs or seek better opportunities elsewhere.

Asylum seekers in Greece may for instance attempt to escape from the islands to the mainland, or to move from their officially allotted camp to another, where they usually remain unregistered. They may also travel for seasonal work (running the risk of losing their camp accommodation and financial assistance if their employment becomes known) or they may remain official residents of the camp but actually move to a rented apartment in the city.

For migrants living in protracted displacement in Italy, regardless of their legal and administrative status, mobility within the country represents a major survival strategy. This is typically an employment-driven circular mobility, with migrants following employment opportunities across the country (for example, seasonal agricultural workers who follow the harvest seasons).

Intra-European movements may take different forms, depending on integration prospects (however limited), labour market opportunities (however precarious), and political geography itself (with Italy bordering three other Schengen countries while Greece borders none). Overall, 'secondary movements' are widely practised, even when not strictly legal. Intra-EU mobility from Italy, in particular, is usually a 'two-way' path with frequent back-and-forth movements; movements from Greece, by contrast, are mainly 'one-way'.

It is very common for protection beneficiaries in Italy to move to another EU country, find an informal job and settle irregularly. This subsistence migration is circular, involving periodic returns to renew their Italian residence permit (every two or five years, depending on the form of protection granted). However, in order to renew the permit, an official residential address in Italy is needed. As migrants rarely have such an address, a profitable illegal market has developed to provide fake documents. This situation is often defined by migrants themselves as a 'trap' whereby, in order to remain 'legal' in country A, one has to stay irregularly in country B and resort to illegal activities.

Similarly, intra-EU mobility is widespread among protection beneficiaries in Greece, triggered by harsh living conditions and limited integration prospects, and also related to where forced migrants have networks in the places they wish to reach. Some migrants attempt to entirely avoid the asylum system's immobilising effects from the very beginning, for instance by crossing the northeastern land border with Turkey. Such a strategy enables them to avoid being identified by State officials and prohibited from onward travel, and to cross subsequent borders irregularly (supported by illegal markets providing housing and fake documents). Similar channels may be used to later pursue legal mobility routes: a spouse, or even children, may be smuggled to relatives in a northern European country, in order to allow, at a later stage, asylum applicants in Greece to reunite with family members under Dublin. A paradox thus arises, by which irregularity allows mobility whereas 'legality' actually prevents it.

The additional immobilising effects of COVID-19

COVID-19 restrictions produced further disruptions of mobility at different levels: within Italy and Greece, across the EU and to/from countries of origin or transit. Measures restricting mobility and imposing social distancing had an especially heavy impact on migrants living in protracted displacement, with those hosted in reception facilities subject to increased prohibitions and controls. Almost all transfers, entries and exits from the asylum system were suspended, and migrants lost their limited educational and recreational opportunities, and their meagre sources of income.

Travel bans and border closures led to a drop in transits to other European destinations. In the Italian case, during the first wave, the complete freezing of secondary intra-EU and internal mobility deprived seasonal agricultural workers of their only means of subsistence, impoverishing them further. At the same time, those who found themselves temporarily outside the country (whether elsewhere in Europe or in the countries of origin) were then stuck and could not return.

The constrained mobility strategies described above became impracticable in both countries, transforming life into "a sort of hyper-limbo, where the usual levels of immobilisation and marginalisation are enhanced by COVID-related restrictions", as an interviewee in Rome told us.

Policy implications and future outlook

The important role that constrained mobility has in shaping everyday lives and prospects of migrants living in protracted displacement in Greece and Italy is either ignored or stigmatised by official policy discourse. It is ignored as long as mobility takes place under the radar of the media and regulatory agencies, as is usually the

Mória refugee camp, Lesvos (Greece), 2018.

case with seasonal employment-driven movements within receiving States. However, when constrained mobility takes place across State borders it quickly becomes a target for media stigmatisation and administrative obstructionism (or even criminalisation). This is counterproductive, as it neglects the potential of mobility as a resource capable of mitigating suffering and reducing the losses experienced by people living in protracted displacement. Such mobility may even be seen as a 'fourth durable solution', as suggested elsewhere in this special feature.

However much it may be needed, a different and more positive attitude towards migrants' mobility would require overcoming massive political obstacles at both the domestic and European level. It is difficult to normalise and facilitate employment-driven circular mobility – for example, by providing proper housing, registered residence and health assistance on agricultural sites – because of the largely irregular and highly exploitative nature of employment in these sectors, both in Italy and in Greece. A step forward could be to relax the excessive controls and prohibitions over asylum seekers' mobility while in reception facilities.

A strategy which recognises and enables intra-EU cross-border mobility faces even bigger obstacles due to the entrenched resistance of most member States to any legalisation of such movements. This was clear during the disrupting (but revealing) legal and political battle over the EU's 2015 relocation schemes. The undocumented status of a large proportion of migrants living in protracted displacement is an even more serious political hurdle.[3] For this especially vulnerable cohort of people, some form of collective amnesty or case-by-case regularisation procedure would be necessary before any pragmatic reflection on facilitating mobility could begin. However, there is currently very little appetite among EU governments to pursue this option. Unless these political hurdles can be tackled it may be pointless to explore different potential technical solutions (such as complementary pathways, intra-EU job search visas, and free movement for protection beneficiaries).[4]

Finally, it is worth commenting that there is now growing awareness of the risk posed when marginalised migrants, especially if undocumented, are not effectively included in COVID-19 vaccination campaigns.[5] In addition to leaving migrants unprotected, slower and lower-than-average vaccine coverage may also increase the risk of migrants being scapegoated as potential vectors of virus variants and future waves of contagion. Targeted efforts to ensure vaccine equity are therefore critically important to avoid further marginalisation, additional immobilisation and an overall worsening of protracted displacement.

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1. People who have been granted 'international protection' status (including both refugee status and subsidiary protection) or national-based complementary forms of protection (which in Italy are mainly used).

2. The ESTIA accommodation programme provides (temporary) housing in rented apartments in Greek cities to the most vulnerable asylum seekers until one month after their asylum claim decision. From late 2020, its management gradually shifted from UNHCR to the Greek government and since January 2021 the programme (renamed ESTIA 21) has been entirely managed by the Greek government. http://estia.unhcr.gr/en/

3. A 2019 study estimated the number of undocumented migrants living in the EU in 2017 at between 3.9 and 4.8 million, about half residing in Germany and the UK alone. https://pewrsr.ch/3neyKQw

4. Wagner M and Katsiaficas C (2021) 'Networks and mobility: A case for complementary pathways', TRAFIG Policy Brief No 3 bit. ly/2X4L8Ig

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Humanitarian Admission Programmes: how networks enable mobility in contexts of protracted displacement

Benjamin Etzold and Simone Christ

Recent research explored how refugees make use of their networks to escape from protracted displacement. Germany's Humanitarian Admission Programmes have been able to provide legal 'complementary' pathways for Syrian refugees who had transnational ties. The effectiveness and reach of these schemes, however, are constrained by various factors.

Humanitarian Admission Programmes (HAPs) can play an important role as 'complementary pathways' for refugees out of protracted displacement, as shown in initiatives by the German government and its federal states during the Syrian war. Such initiatives are particularly effective if they build on refugees' social networks.[1] Within the framework of the HAPs set up by German federal states, displaced people could rely on long-established transnational connections. For example, those who had previously migrated to Germany were able to help other family members to take advantage of private and community sponsorship schemes in order to come to Germany. However, there are limits to the potential of these network-based schemes to be fruitful 'complementary pathways' out of protracted displacement, the most obvious limit being their sole focus on Syrians and the neglect of other nationals.[2]

Private sponsorship

At the end of 2010, 30,000 Syrian nationals were living in Germany. By the end of 2020 there were more than 818,000 Syrians in the country. After the outbreak of conflict in Syria, many German residents were looking to bring family members still in Syria to safety. Initially, a substantial number of Syrians came to Germany via different legal pathways, as students and tourists, on work visas and through family reunification, and many (though not all) also applied for asylum after their arrival.[3] As both political persecution and the violent conflict in Syria worsened, it became clear that the existing legal pathways could only be used by a

small minority of those who had a personal affiliation with Germany and who needed protection. The humanitarian situation in Syria's refugee-hosting neighbours also worsened, meaning that hundreds of thousands of Syrian refugees needed longer-term prospects that were often not available in countries of first reception. The number of Syrian refugees who were resettled to third countries remained critically low and the number of those who irregularly crossed the external borders of the European Union steadily increased. In response to this, there was a call for new legal frameworks that would allow onward mobility for Syrian refugees at risk of protracted displacement.

In this critical period, the German government set up a Humanitarian Admission Programme through which 19,000 Syrian nationals could enter Germany via a safe and legal route between 2013 and 2015. In addition, several German federal states created their own programmes through which almost 24,000 Syrian nationals arrived in Germany between 2013 and 2017.[4] The HAPs set up by the German government and its federal states had a distinct selection criterion: they built on Syrian refugees' own networks, allowing mobility to Germany based on existing ties to the country, either through close family relationships or through proven prior stays in the country.

However, this route was still not open to all who had transnational kin relations or previous migration experience. Only close family members of German residents (parents, children and siblings, but not uncles, aunts and cousins) could be registered for these

admission programmes. After registration, Syrians migrants in Germany had to sign a 'declaration of commitment' to guarantee to cover travel costs and provide adequate accommodation and costs of living (with the exception of health insurance which was covered by the state). These commitments released the German state of its responsibility to cover all the costs. Once declarations were signed and a visa (providing two-year temporary residence) was issued by the German embassy in the respective country of first reception, the Syrian refugees could then travel to Germany by plane. While the whole process took only few weeks in some cases, others waited for up to two years due to the overly bureaucratic process or because they lacked documents. Signing the declaration of commitment was challenging for those who were themselves in a precarious economic situation and could not provide the necessary financial guarantees. Many then turned to local solidarity networks such as church groups or refugee activists and asked if they could provide the guarantees and bear the travel, resettlement and initial living costs for their relatives. Some Syrians managed to bring in several relatives but subsequently felt both financially and psychologically overburdened as their family members were so dependent on them.

Moving on through transnational networks

The cases of Abdulrahem and Suli point to the central importance both of transnational family networks and of local networks of solidarity and support in order to facilitate humanitarian admission and avoid life-threatening irregular journeys to Europe.

Abdulraheem, a Syrian man in his forties, worked as an accountant at a private company. He had always been critical of the Syrian government and had been persecuted by the secret services, even before the war had started. In early 2014, he fled with his wife and two children to a city in Eastern Turkey. They lived in a small flat using their own savings, as they had no other income. The only potential way out of this protracted situation was through his sister, who had been living in Germany since 2005 and who suggested

that they join her there. Abdulraheem's sister found out about North Rhine-Westphalia's HAP. As she could not provide the financial guarantees for all family members that she wanted to bring to safety, she asked a local group of volunteers for support. In the end, she and her husband signed the required 'declarations of commitment' for four people, while four volunteers from a church group – all Germans – signed four further guarantees. In total, eight people had the chance to travel to Germany in 2015 via a safe route. Other members of the extended family were not able to follow through the HAP and instead came to Germany via irregular pathways (via Turkey, Greece, the Western Balkans and Austria). Abdulraheem emphasised that while family support reaches across borders, ultimately living in one place was "very important […] We have to stick together".

Suli, a Syrian woman in her early twenties, grew up in Aleppo, where she graduated from university in 2012. Soon after, she had to flee with her parents and four siblings to their family's village of origin close to the Turkish border. When the civil war reached that region as well, Suli and her family crossed the border to Turkey in the summer of 2013, temporarily settling in a city in the south east. For Suli, the connections with her cousin Lya paved the way to a 'third-country solution' for her family. Lya's family had moved to Germany in the 1990s but frequently visited Syria during the summers. With Lya's help, Suli obtained a study visa and flew to Germany with a temporary residence permit. She lived with her cousin's family in a city in North Rhine-Westphalia but was still separated from her own parents and siblings. As she had just turned 18 and was therefore no longer a minor, however, the regular family reunification procedures did not provide options for her family to follow her to Germany. Her 17-year-old brother then embarked on a journey facilitated by smugglers via the eastern Mediterranean and western Balkan route, and joined an uncle in Switzerland. Her parents and younger siblings did not want to risk this dangerous route and remained in Turkey. In early 2014, Suli learned about the HAP in North Rhine-

Westphalia and registered her parents, only to learn that the available places – 5,000 at that time – had already been filled. In autumn 2014, a new phase of the programme was opened and Suli registered her parents and siblings again. Due to her temporary status and lack of funds, she could not sign the required declaration of commitment herself but after almost a year she found private sponsors from a local church community. A few weeks later her parents and younger siblings received their visas at the German embassy in Ankara and arrived in Germany by plane in September 2015.

UNHCR/Chris Melzer

Syrian teenager reunited with his family in Germany after three years apart.

Safe pathways for a few

Between 2013 and 2017, the number of resettlement places available in Germany was minimal – 3,000 individuals (of which only 44% were Syrians) were resettled in this period – and other legal pathways such as student and work visas and family reunification were not viable options for tens of thousands of Syrians. During the same period, around 44,000 Syrian nationals benefitted from the various HAPs set up by the German government and its federal states. In contrast to the insecure irregular journeys along the Eastern Mediterranean, which approximately 1.2 million people made between 2013 and 2017 in order to reach Europe, the German HAPs were indeed a humanitarian solution that provided a promising pathway out of protractedness. However, five key caveats remained:

Firstly, the HAPs were only temporary. After 2015, the German government did not prolong its programme despite the ongoing need. Instead, humanitarian admission continued under different conditions after the controversial 2016 EU–Turkey deal:

resettlement procedures that focused on particularly vulnerable refugees were implemented and 10,000 Syrian nationals were flown from Turkey to Germany between 2017 and 2020. Existing family affiliations to Germany were not a selection criterion and German residents could not name relatives at risk of protracted displacement in Turkey to be included in these resettlements. As the political climate had changed, only six federal states continued their HAPs – and these offered only a limited number of places to German residents' family members.[5]

Secondly, the more recent HAPs[6] have always been limited to Syrian nationals. Other nationalities, such as Afghan, Iraqi, Somali and Eritrean refugees, who have also experienced protracted displacement, were never included in the design of HAPs that are sensitive to existing networks ties. This is despite the fact that many refugees from these countries also maintain strong transnational family relations to German residents or have other proven ties to the country.

Thirdly, there is a socio-economic bias in the design of network-sensitive HAPs as they privilege refugees with strong transnational relations and those comparatively well-off family networks that have sufficient financial means to provide guarantees for their relatives. Less wealthy Syrians who were not supported by local solidarity groups either could not facilitate their family members' safe and legal journey via the HAP or did manage to but then faced economic ruin after their relatives' arrival in Germany due to their financial responsibility for their relatives.

Fourthly, in Germany, the duration of the 'declaration of commitment' was much debated, including the question of whether it is the responsibility of the private sponsors (mostly family members) or the State to pay for the costs of living in the first years after arrival. This issue was resolved with the introduction of the German 'integration law' in 2016,[7] but it also shows some of the difficulties that arise in private sponsorship schemes. Whenever States involve sponsors in refugee reception, and particularly if private or community sponsorship becomes obligatory for admission, there is the risk that States seek to circumvent their duty to provide protection to displaced persons by outsourcing risks and by privatising the costs of refugee admission and integration.

Fifthly, the HAPs were initiated and facilitated by different state bodies – the German federal government and 15 out of 16 federal states – and had quite different rules and timelines. This multiplicity of actors and programmes created overcomplicated administrative procedures and, more importantly, led to a confusing variety of beneficiaries' legal rights (such as access to state benefits, housing, work, education and permanent residency) and sponsors' obligations. A standardised, coordinated and more generous approach would have been required to scale up humanitarian admission to Germany, but was not politically viable at that time.[8]

The experience from the German HAPs during the early years of the Syrian war show that networks can enable refugees' mobility out of protracted displacement.

Humanitarian admissions schemes that include elements of private and/or community sponsorship, and thus pay due attention to refugees' familial and personal networks, can thus fulfill their potential as viable 'complementary pathways' to protection. But their shortcomings need to be addressed.

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1. For a further discussion of the role of networks in facilitating refugees' movements to third countries see Wagner M and Katsiaficas C (2021) 'Networks and mobility: A case for complementary pathways', TRAFIG Policy Brief No 3 https://trafig.eu/output/policy-briefs/policy-brief-no-3.

2. This article draws on 58 qualitative interviews with Syrian, Afghan and Eritrean refugees, one focus group discussion with resettled refugees, plus 12 interviews with experts, conducted between August 2020 and March 2021 in Germany. Full results are presented in Christ S et al (2021) 'Figurations of Displacement in and beyond Germany. Empirical findings and reflections on mobility and translocal connections of refugees living in Germany', TRAFIG Working Paper No 10 https://trafig.eu/output/working-papers

3. The number of foreigners, including Syrian nationals, living in Germany is available from DESTATIS, Germany's statistical office (Code 12521) www-genesis.destatis.de/genesis/online. According to the government's annual 'migration report', the share of visas issued to Syrian nationals for study, work or family reasons decreased substantially between 2010 and 2014, while both the share and absolute number of visas issued for humanitarian reasons and the temporary residency permits issued for the duration of the asylum procedure increased from 50 to 75%. bit.ly/BAMF-migration-report

4. There is contrasting information on the number of people who actually arrived via HAPs in this timeframe. The figures here are based on information provided by the German Federal Agency for Migration and Asylum (BAMF) in 2017. bit.ly/BAMF-HAP-2017

5. For an up-to-date list of federal states that currently have HAPs and most recent arrival statistics, see https://resettlement.de/landesaufnahme/ and https://resettlement.de/aktuelle-aufnahmen/.

6. At the federal level, there were HAPs for refugees from Vietnam in the 1970s, for refugees from Bosnia in the 1990s, and for Iraqis in 2009/10.

7 See BAMF (2017/2018) 'Migration, Integration, Asylum: Political Developments in Germany 2017', Annual Policy Report by the German National Contact Point for the European Migration Network bit.ly/BAMF-policy-report-2017

8. For a more detailed discussion of the differences between the federal and the state-level HAPs as well as Germany's resettlement schemes, and the variations of legal rights and obligations of the beneficiaries, see Tometten C (2018) 'Resettlement, Humanitarian Admission, and Family Reunion. The Intricacies of Germany's Legal Entry Regimes for Syrian Refugees', *Refugee Survey Quarterly* 37 (2), S. 187–203. DOI: 10.1093/rsq/hdy002.

Refugee Economies Programme: 2021-24

The RSC's Refugee Economies Programme is delighted to announce a new three-year funding agreement with the IKEA Foundation. The new funding will support a series of activities that build on the Programme's previous research on the socio-economic inclusion of refugees, based on participatory research methods. These activities focus on refugees in camps and cities in East Africa. In this region – as in other parts of the world – refugees face major challenges to economic participation due, for example, to legal barriers, the remoteness of refugee camps, and a lack of job or business opportunities.

The new grant will support four new areas of work: Borders, mobility and livelihoods; Shocks, vulnerability and livelihoods; The politics of socio-economic rights; and a new Refugee-Led Research Hub (RLRH) hosted at the British Institute in Eastern Africa (BIEA) in Nairobi, which will provide training, mentorship and support to aspiring researchers who have lived experience of forced displacement.

www.rsc.ox.ac.uk/news/major-new-funding-from-the-ikea-foundation-to-study-the-socio-economic-inclusion-of-refugees

RSC-BIEA Fellowship in Refugee Studies for researchers with a displacement background

Just launched! a new 12-month fellowship scheme for aspiring researchers with lived experience of forced displacement. The RSC-BIEA Fellowship in Refugee Studies provides teaching, mentorship and professional development to early-career social science and humanities researchers who are mainly based in East Africa and have lived experience of displacement – for example, as refugees, stateless persons or internally displaced persons. The fellowship is delivered in collaboration with the British Institute in Eastern Africa (BIEA), and is available both remotely and with some optional in-person activities at the RSC's new Refugee-Led Research Hub in Nairobi.

RSC public seminars

In the academic year 2020–21, all RSC public seminars were held online, and many are available to watch on YouTube at: www.youtube.com/user/RefugeeStudiesCentre/playlists

The January–March 2021 term's series examined the historical entanglements between migration, im/mobility, colonialism, race and borders, while the summer term's series examined research on refugees and forced migration within the broader localisation agenda, as well as methodological attempts to 'localise' refugee research through co-creating and co-conducting research with refugees and local hosts.

The RSC's YouTube channel also includes the latest annual Harrell-Bond and Elizabeth Colson lectures, given by Professor E Tendayi Achiume (UCLA) and Professor Heath Cabot (University of Pittsburgh) respectively.

For more information, read the RSC's 2020-21 Newsletter at www.rsc.ox.ac.uk/files/about/rsc-newsletter-2020-2021-web.pdf

The Refugee Studies Centre (RSC) was founded in 1982 and is part of the Oxford Department of International Development at the University of Oxford. Find out about the RSC's research and teaching at www.rsc.org.uk and sign up for notifications at www.rsc.ox.ac.uk/forms/general/connect. Forced Migration Review is an RSC publication.

Forced Migration Review issue 70: Knowledge, voice and power

Due out July 2022

In the field of forced migration, whose knowledge is valued and whose voices are heard? What needs to change in order to address significant power imbalances in representation in policy, practice and research?

Over recent years, debates about race, representation and inequality have brought questions of power and voice to people who had not previously engaged with issues of marginalisation and exclusion, and at the same time have given momentum to others who were already active in challenging the status quo. Localisation agendas within the aid sector, social movements such as Black Lives Matter and wider debates about decolonisation have generated reflection on the inequalities that exist within the field of forced migration, in research and knowledge, policy and practice.

Forced Migration Review issue 70 will focus on how knowledge is produced, shared and received, and what changes can and should be made to help ensure that power is shared and more diverse voices are heard and valued. We are delighted to be working on this issue alongside the Local Engagement Refugee Research Network (LERRN) project at Carleton University.

Please see www.fmreview.org/issue70 for the full call for articles, with questions to help guide you, plus our submission requirements. We ask that you send us a short outline of your proposed article so that we can offer feedback (before you start writing the article).

Articles can be written in English, Arabic, French and Spanish (with other languages considered on a case-by-case basis). The full call for articles is also available in these languages on the FMR website.

Deadline for submission of articles: Monday 15 February 2022

Interested in writing for this issue? We provide full guidance on how to write both your article proposal and the article itself. Please visit www.fmreview.org/writing-fmr.

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British Institute in Eastern Africa

Students on the BIEA Graduate Attachment Scheme discuss their research projects. (See previous page for news about the RSC-BIEA Fellowship in Refugee Studies.)

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