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Access to citizenship in transitional Myanmar: Seeking Rohingya rights the wrong way?

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Abstract

The Rohingya have been de jure stateless since Myanmar's 1974 Constitution and 1982 Citizenship Act excluded them as a 'national race,' denying them citizenship and its contingent rights. Racial and religious persecution has intensified, producing intractable displacement and 'in-placement' (containment) of the Rohingya population. I examine why, despite the democratic transition ostensibly underway in Myanmar, access to any measure of justice seems ever less conceivable for the Rohingya. A discussion of the interplay between statelessness, refugeehood and citizenship guides an enquiry into the challenges for leveraging the transitional moment in Myanmar for Rohingyas to exercise their rights. Terms such as 'protection space' and 'humanitarian space' are critiqued, so as to shift focus away from static notions of place and territoriality, and onto the dynamics of disenfranchisement and processes of exercising human rights. I conclude that barriers to accessing rights are exacerbated by the policies and institutional structures of international human rights actors, but that solutions are ultimately political and inter-personal, and hinge upon Myanmar's navigation of its potential new role as an opening democracy, conditioned as it is by the exclusionary inclusion of the nation-state paradigm.

Keywords: Myanmar, Rohingya, human rights, statelessness, citizenship, refugeehood, UNHCR, space.

Introduction

The oft-cited remark that ‘the Rohingya are one of the most persecuted minorities in the world,’¹ reifies this people as much as it invites examination of their multi-faceted persecution. I interrogate the dynamics contributing to the extreme difficulties faced when this group of around 1 million people living mostly in Myanmar’s Rakhine/Arakan state, and displaced into Bangladesh and beyond, seeks to exercise their human rights. The overarching concern framing my enquiry is the interaction between local and international concepts and actors, and how the latter, assumed arbiters of protection, may actually violate Rohingya rights. I examine practical and conceptual barriers to accessing rights, hoping that a combined approach will elucidate pathways for progress at this transitional moment in Myanmar.

The Rohingya – predominantly Muslims – have been severely persecuted since military rule began in 1962, and subjected to forced labour, arbitrary arrest, indefinite detention, torture, killings, sexual abuse, destruction of property and mosques, restricted freedom of movement, internal displacement, education bans, denial of medical treatment and family size limitations, amongst other atrocities. Discrimination and violence are perpetrated by officials, security forces and the Rakhine ethnic majority in Rakhine State, primarily Buddhists, with near total impunity. Although Rakhine are themselves another ethnic minority group, who claim independence from, and have waged armed insurgency against, the national majority Bamar (also Buddhist), Rakhine and Bamar are aligned over the Rohingya issue. Hate speech against Muslims, and the Rohingya in particular, is widely accepted, with monks and politicians leading boycotts against Muslim businesses, and inciting violence.

This follows historical intolerance towards those many Burmese call ‘Bengali immigrants’ given their ethnic similarity to Bangladeshi Chittagonians. Tensions exist since the British colonialists’ encouragement of then-internal labour migration from the sub-continent: the perceived monopoly newcomers held over administrative and economic power triggered anti-Indian riots, killing hundreds in the 1930s, and entrenching mistrust of non-Buddhist minorities. The military intermittently mobilised these divisions subsequently, to divert attention from economic and security issues: ethnically-diverse Myanmar became ‘not so much a melting pot as a pressure cooker.’² Discrimination was fostered legally: the 1982 Citizenship Act denationalised Rohingya, denying their status as one of Myanmar’s 135 recognised ‘national races.’ Only children of ‘national races’ were recognised as full citizens. Rohingyas’ resultant statelessness has exacerbated their poor access to protection domestically and abroad.

Rohingya fled to Bangladesh in three major waves, of approximately 250,000 in 1978 and 1991-92 each, and then in a more recent wave in 2012, though low-level displacement occurs regularly. Most Rohingya refugees are not recognised in Bangladesh, and are deemed illegal economic migrants and decried as Islamic terrorists. They have no local integration routes, live in an easily-exploited situation of precarious human security, and are detained or *refouled* occasionally. The UN Refugee Agency (UNHCR) supplies basic aid to 30,470 individuals registered in camps, and is blocked by the Government of Bangladesh (GoB) from

¹ AFP, ‘Myanmar, Bangladesh leaders ‘to discuss Rohingya’ (UNHCR, 2012) <<http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=4fe952205>> accessed 15 August 2013.

² Michael W. Charney, *A History of Modern Burma* (CUP 2009) 18.

assisting an estimated 400,000 unregistered refugees.³ Approximately 635,000 Rohingya live as refugees or (generally irregular) migrants in Thailand, India, Malaysia, and further afield,⁴ though *refoulement* has intensified regionally, with Thai authorities towing Rohingya boats out to sea and leaving hundreds to die,⁵ fearful of creating pull-factors to their territory. The 2012 violence, which left 140,000 displaced internally,⁶ now effectively imprisoned in segregated camps, focussed international attention on what many commentators deem to be Myanmar's nascent quasi-civilian democracy: Human Rights Watch reports signal state complicity in – and instigation of – violence, eliciting allegations of 'outsourcing genocide.'⁷ Domestic impunity is mirrored by the international impunity the Government of Myanmar (GoM) enjoys, with other states and international institutions quick to praise reforms and compete as investors unencumbered by previous rights-centric, conditional approaches.⁸

Whereas many other minority groups work alongside the opposition National League for Democracy, and are resolving their conflicts with the government, the Rohingya are shunned from these alliances. Rohingya resistance has been depicted as Islamist terrorism, as opposed to other ethnicities' 'freedom fighters.' Aung San Suu Kyi's human rights rhetoric does not extend to the Rohingya, given fears of alienating the Buddhist majority electorate now that meaningful political contestation is proving possible. Strong declarations – 'trying to drive someone out of their own country is totally unacceptable'⁹ – have ceded to platitudes: 'I will not take a stand.'¹⁰ Typically, analyses of Burmese minorities focus on recognised highlander groups: the Rohingyas' unique situation of statelessness lies outside the centre-periphery paradigm, and is side-lined. Marginalisation by purported human rights activists suggests human rights are just demands against power, a signifier whose substance has not been internalised, and underscores the intractability of the Rohingya issue, despite changes on other fronts in Myanmar and the consequent resurgence of interest in its affairs.

My analysis contemplates both those Rohingyas who remain stateless in Myanmar, and those who have fled as stateless refugees to Bangladesh and further. It is fuelled by unease with resignation towards this as a 'protracted displacement' deadlock, and humanitarian actors' impotence in the face of sovereign power – particularly one party to few human rights

³ Esther Kiragu, Angela Li Rosi and Tim Morris, 'States of Denial: A review of UNHCR's response to the protracted situation of stateless Rohingya refugees in Bangladesh' (*UNHCR Policy Development and Evaluation Service*, 2011) <<http://www.unhcr.org/4ee754c19.pdf>> accessed 15 August 2013, 7.

⁴ *ibid.*

⁵ IRIN, 'Thailand: Government, Army to investigate claims of Rohingya abuse' (*IRIN*, 2009) <<http://www.irinnews.org/report/82474/thailand-government-army-to-investigate-claims-of-rohingya-abuse>> accessed 22 August 2013.

⁶ IRIN, 'Analysis: Keeping human rights on the agenda in Myanmar' (*IRIN*, 2013)

<<http://www.irinnews.org/report/98178/myanmar-still-way-behind-on-human-rights>> accessed 15 August 2013.

⁷ Maung Zarni, 'Genocidal Buddhists: An Interview with Burmese Dissident Maung Zarni' (*Tricycle*, 2013) <<http://www.tricycle.com/blog/genocidal-buddhists-interview-burmese-dissident-maung-zarni>> accessed 15 August 2013.

⁸ Maung Zarni, 'TIME's Cover Story on "Buddhist Terror" misses the point while raising the specter of further anti-Muslim violence in Myanmar' (*Maung Zarni*, 2013a) <<http://www.maungzarni.com/2013/06/times-cover-story-on-buddhist-terror.html>> accessed 15 August 2013.

⁹ Aung San Suu Kyi, 'Transcript of conversation with Aung San Suu Kyi, Congressman Richard, Mr Raheem (UNDP Resident Representative)' (*Refugee Studies Centre Archives, University of Oxford*, unpublished c.1993) 25.

¹⁰ International Crisis Group (ICG), 'Myanmar: Storm Clouds on the Horizon,' Asia Report No. 238 (*ICG*, 2012), <<http://www.crisisgroup.org/~media/Files/asia/south-east-asia/burma-myanmar/238-myanmar-storm-clouds-on-the-horizon>> accessed 16 August 2013.

instruments.¹¹ Lack of citizenship is a lesser-understood phenomenon, and this case highlights the interconnectedness of statelessness, vulnerability, persecution and displacement. I am compelled by the idea that while Rohingyas pierce the fiction of historical unity in Myanmar,¹² the plight of exiled Rohingya carries wider significance, for ‘by breaking up the identity between man and citizen, between nativity and nationality, the refugee throws into crisis the original fiction of sovereignty.’¹³ Stateless refugees thus represent that most unknowable of ‘Others,’ simultaneously explaining their comprehensive rejection at all doors and, conversely, ‘clear[ing] the field for a no-longer-delayable renewal of categories’¹⁴ – the spark for creative thinking and fresh advocacy is ushered in.

I situate my analysis in light of Marc Galanter’s reflections on the expanding domain of ‘access to justice’ efforts and theorising, given increased human capabilities and consequent widening perceptions of what constitutes injustice to be redressed.¹⁵ My community rapprochement discussion vindicates Galanter’s original argument that ‘access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged,’¹⁶ setting a wide stage for innovative conceptualisations of the now-institutionalised movement. I eschew rigid silos of first, second and third wave of access to justice – ‘Western’ chronology ill-fits the Burmese context, catapulting into globalised modernity – and highlight daily access to rights, independent of legal institutions, as a precondition for accessing any measure of just treatment. If states primarily protect and guarantee rights, belonging to a state – through citizenship – equates to the ‘right to have rights.’¹⁷ Access to citizenship, therefore, is key to accessing rights and justice (however conceptualised), though it cannot open all doors alone. My observation is not far extrapolated from mainstream access to justice theorising, epitomised in Mauro Cappelletti’s 1981 study, which characterises class actions for diffuse interest groups (encompassing minority rights) as a key feature of the ‘second wave’ in the evolution of the access to justice movement.

I begin by framing the debate, picking apart fluid, obfuscatory terms like nationality, state, citizen, race and ethnicity. This informs discussion of the legal peculiarities behind statelessness, compared to refugeehood, and the pressing responsibility question. I pick apart the most commonly proffered solution to the Rohingya problem (eventual acquisition of citizenship), arguing that this quick-fix ignores myriad other barriers preventing Rohingya from accessing their rights, at ‘home’ and abroad. I then dwell on the inconsistencies of the UNHCR-administered protection, and UNHCR’s role as a surrogate state, all the while acknowledging the Agency’s difficult position. To stimulate fresh thinking, I highlight the negatives of uncritically-deployed buzzwords like ‘protection space,’ and suggest a less

¹¹ Myanmar is only party to the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of Discrimination Against Women and the 1948 Genocide Treaty, but does not recognise complaint mechanisms of the latter two.

¹² Maung Zarni, ‘An Inside View of Reconciliation,’ in Lex Rieffel (ed.), *Myanmar/Burma: Inside Challenges, Outside Interests* (The Brookings Institution and Konrad Adenauer Foundation 2010) 67.

¹³ Giorgio Agamben, ‘We Refugees’ (1995) 49(2) *Symposium* 114, 117.

¹⁴ *ibid.*

¹⁵ Marc Galanter, ‘Access to Justice in a World of Expanding Social Capability’ (2009) 37(1) *Fordham Urban Law Journal*, 115.

¹⁶ Marc Galanter, ‘Justice in Many Rooms,’ in Mauro Cappelletti (ed.), *Access to Justice and the Welfare State*, (European University Institute 1981) 147 – 182, 161.

¹⁷ Hannah Arendt, ‘The Decline of the Nation-State and the End of the Rights of Man,’ in Hannah Arendt (ed.), *The Origins of Totalitarianism* (The World Publishing Company 1951, Second enlarged edition 1958), 267 – 302, 296.

‘spatialised’ use of rights discourses. Finally, I assess what potential exists for Rohingya to exercise their rights, through interpersonal and community relations of tolerance (as opposed to explicit rights claims), and through aspects of a potential democratic transition the state could leverage – whilst questioning the assumption that Myanmar is in fact moving towards greater democracy.

1. Contextualising, conceptualising

Framing the debate

The major human rights treaties and legal frameworks covering displacement and statelessness – the 1951 Convention Relating to the Status of Refugees and 1967 Protocol (Refugee Convention); the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness (Statelessness Conventions) – are geographically biased, given their drafting early in the post-colonial moment. Unravelling Burmese issues through this Eurocentric lens risks misfiring. Myanmar’s regions – more accurately, nations (social, co-ethnic groups) – were named ‘ethnic states,’ by British colonists and administered as ‘Scheduled Areas’ rather than ‘Burma Proper,’ fostering division; claims to independence from liberated Burma; armed insurgencies, and parallel post-colonial governance structures. The intractability of these divisions is disproportionate to their arbitrary genesis, and many deem the resultant fault-lines between the Bamar and other groups a greater obstacle to peace than military authoritarianism.¹⁸ These ethnically-delineated constituencies institutionalised a politics based on European concepts of race and ethnicity, essentialising peoples and reifying their historic relations to render them legible to colonists. This myth of ethnicity as a ‘basic and ineluctable’¹⁹ category characterised ethnic conflict as inevitable.

The sovereign nation-state paradigm is generally considered an immutable concept underpinning international law and relations, though ‘growing portions of humanity can no longer be represented within it.’²⁰ ‘Nation’ in mid-twentieth-century Europe was coterminous with ‘state,’ given European populations’ relative homogeneity. In ethnically-diverse territories like Myanmar, nations without statehood abound. Nonetheless, many international instruments (the Refugee and Statelessness Conventions, the Convention on the Rights of the Child, and the Universal Declaration of Human Rights [UDHR]) use nationality interchangeably with citizenship, though citizenship more precisely denotes formal membership status in a politically-shaped legal entity (the state), and the processes this involves. It will be understood as such herein, alongside my above conceptualisation of citizenship as a distinct aspect of access to justice. Similarly, the ‘national’ is used to denote aspects particular to a state, in contradistinction to the ‘international,’ further conflating nation and state. Nationality is polysemic and politicised in Myanmar, referring both to membership in co-ethnic groups, or to belonging within the state. International blurring of nationality and citizenship reinforces caveats surrounding external interpretation of Myanmar: declaring ‘nationality remains the principal international legal status by which access to a state’s territory

¹⁸ Alan Saw U, ‘Reflections on Confidence-building and Cooperation among Ethnic Groups in Myanmar: A Karen Case Study,’ in N. Ganesan and Kyaw Yin Hlaing (eds.), *Myanmar: State, Society and Ethnicity* (Institute of Southeast Asian Studies and Hiroshima Peace Institute 2007), 219 – 235.

¹⁹ Anthony Reid, *Imperial Alchemy: Nationalism and Political Identity in Southeast Asia* (CUP 2010) 33.

²⁰ Agamben (n 13) 117.

is achieved,'²¹ obscures more than it enlightens. Although nationality can carry legal qualities, I use it to signify social or ethnic belonging.

The military's popularisation of the term 'national race' for 'ethnic minority' is a state-building strategy, linguistically whitewashing the actual marginalisation of non-Bamar groups. Aligning nationality with race further muddies the water. Again present as a static concept in refugee law and other international legal instruments, including the Convention on the Elimination of All Forms of Racial Discrimination, 'race' is highly contested in Myanmar. The government's total of 135 'races' recognised by the Citizenship Act is at odds with international understandings of race (although an equally constructed categorisation, 'ethnicities' is more applicable, denoting shared language and culture rather than phenotype), and derives from a colonial-era linguistic diversity survey.²² That race confers citizenship is the controversy at the crux of the Rohingyas' persecution. Race and religion are then conflated: Muslims' ID cards read 'Indian' or 'Bengali' under 'religion,' rendering them foreign and cementing Buddhism's centrality. Consequently, other recognised Muslim minorities with full citizenship are discriminated against: 12,000 Kaman Muslims in central Myanmar also remain displaced following attacks during 2012 anti-Rohingya violence. Terminology is highly volatile – even Myanmar/Burma deploys loaded connotations that undermine reconciliatory aims.

Categorisation as stateless or refugees (or both) also mobilises connotations, and affects rights and identities. Predicated on the inability to return to a polity where one belonged, refugeehood and statelessness were identical in the World War II mass denationalisation and expulsion that engendered the international refugee regime and revealed the chasm between man, in spurious possession of human rights, and citizen, whose rights were anchored positively in legislation or constitutions. Today, refugeehood hinges on persecution and crossing a border; stateless individuals need not be displaced, and may simply result from administrative anomalies. Although not necessarily persecuted, their legal vulnerability is easily exploited. From an Arendtian perspective, the 'calamity' of stateless persons is 'not that they are oppressed but that nobody wants even to oppress them.'²³ Guy Goodwin-Gill argues that a lack of interest in statelessness globally partly stems from situations where it is but an unfashionable legal-technical problem, causing 'few ...[to] ever look... to the underlying human rights issues.'²⁴

Rohingya abroad are both stateless and refugees, however 'the refugee' cuts a more political figure. The stateless are discriminated against for who they are – refugeehood encompasses this, but can also include those persecuted for their actions and beliefs. Consequently statelessness connotes no political activity *per se*, and can be aligned with a lack of agency, fostering disempowering narratives around stateless people (and compounding the denial of persecution in Bangladesh's classifying Rohingya arrivals as economic migrants). The linkages, however, are clear: lack of any state's protection creates a particular vulnerability to abuse, often triggering refugee flows. Defining as stateless risks diluting claims to repatriation and the responsibility of the state in which membership is claimed, problematic especially when this is a persecutor state whose accountability is sought. Conversely, 'refugee' connotes political resistance, exile networks, diaspora cultures – a general identity of pride.

²¹ Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (OUP 2012) 21.

²² David I. Steinberg, *Burma: The State of Myanmar* (Georgetown University Press 2001) 182.

²³ Arendt (n 17) 295 – 296.

²⁴ Guy Goodwin-Gill, 'The rights of refugees and stateless persons,' in K. P. Saksena (ed.) *Human Rights Perspective and Challenges (In 1990 and Beyond)* (Lancers Books 1994) 378 – 401.

Regarding rights, unlike refugee status, statelessness does not always confer exemption from unlawful entry penalties: the stateless could then be exempt from the International Covenant on Civil and Political Rights' (ICCPR) provision for liberty of movement, extended only to 'everyone lawfully within the territory of a State' (Article 12). This Covenant depends on presumptions of legal personality – precisely what statelessness denies.²⁵ The Rohingyas' invisibility, outside outbursts of widespread violence, has characterised their struggle: when not hidden from humanitarian actors denied access to Rohingya areas, the military's withholding of food and livelihoods induced permanent low-level movement into Bangladesh – relatively unremarkable, and attributable to economic motivations according to restrictive official classifications. 'Illegible' refugees were subsumed into the 'economic migrant' label, excising them from UNHCR's protection. UNHCR officials themselves utilised this label in Bangladesh, legitimising unequal protection hierarchies.²⁶ That most Rohingya-hosting states are not party to the Refugee Convention normalises lower protection standards, creating a regional gap, which I consider in Chapter 2.

Though, unlike refugee law, the Statelessness Conventions do not privilege border-crossing (a dubious needs indicator, ignoring internally encamped Rohingya, or non-Rohingya residents, equally violence-affected), their protections are still suboptimal. Whilst the 1961 Convention contains positive obligations for states to confer nationality in some situations (see Articles 1, 4), and circumscribes denationalisation, its sparse ratification (53 signatories) prevents these progressive norms from gaining traction. Article 32 of the 1954 Convention encourages States to 'as far as possible facilitate the assimilation and naturalization of stateless persons' – a restrained exhortation compelling scant action. It excludes *de facto* stateless persons possessing a formal, but not operational or protective nationality, 'as a counterbalance to the fact that otherwise, statelessness can afford the individual greater protection than his or her own strictly legal status,'²⁷ eliciting 'flood-gate' fears, even though ending legal ties between state and citizen can be a more humane action. Kelly Staples suggests that drafters cared mostly about affording non-citizen residents a status that allowed host states to treat them as foreign: 'whether or not this identity conferred assistance or protection was a secondary question,'²⁸ recalling the fragility of rights – not innate, but agreed upon by the powerful. This further justifies an expanded access to justice perspective, beyond bringing law to the disenfranchised: addressing restrictive formulations of rights rather than accepting existing constructions of 'justice.'

Whose problem?

Although 'beneficiaries' are out of fashion, and 'rights-holders' *du jour*, corresponding duty-bearers are less identifiable. If no state accepts responsibility for a group, it is controversial that they should become the responsibility of the international community or its institutions. It may be unrealistic to expect a government which renders people stateless and permits persecution to step in and offer some level of protection: Myanmar's president and the 2014 draft of the 'Rakhine Action Plan' both advocate segregation and encampment of

²⁵ Kelly Staples, *Rethorising Statelessness: A Background Theory of Membership in World Politics* (Edinburgh University Press 2012)

²⁶ United States Committee for Refugees (USCR), *U.S. Committee for Refugees Site Visit to Bangladesh, June 20 – July 1, 1996* (USCR 1996) 7.

²⁷ Staples (n 25) 20.

²⁸ *ibid.*

Rohingya pending their mass resettlement,²⁹ a policy resembling ethnic cleansing. UN and international non-governmental organisations' (INGO) reports detail authorities' failure to protect Muslims even with intelligence on planned attacks.³⁰ Rather than punishing the border forces, the GoM's Inquiry Commission on the Sectarian Violence in Rakhine State recommended increasing troops 'equipped with weapons for conflict resolution;' 'assault boats' for the Navy, and prolonged segregation of Rohingya internally displaced persons (IDPs) in containment camps rather than return to their homes.³¹ It further proposed implementing the provisions of the current citizenship law, likely to be manipulated to their exclusion, judging by preliminary results of a now stalled 'citizenship verification' process in 2014.³²

Nonetheless, shunting such populations into the domain of bureaucratic, opaque UN Agencies raises accountability questions, and illustrates how Rohingya fall through international protection safety nets: after 35 years hosting, there remains 'no clarity on who is responsible for ensuring that the basic needs of unregistered refugees are met' in Bangladesh.³³ Although mandated to protect stateless persons since 1974, when the 1961 Statelessness Convention came into force, staffing and budget constraints impede UNHCR's effective execution of these duties. The estimated 12 million stateless people worldwide³⁴ therefore inhabit the continuum between an aspirational institutional mandate, and that same institution's endeavours to promote government ownership of protection.

Despite UNHCR's interest in statelessness, and recent campaigns to boost this, operational realities hamper the protection of stateless people's rights. UNHCR assumes *de facto* sovereignty when running a camp – were it a state actor, its effective jurisdiction would trigger duties on its part. International legal personality should anchor the Agency's governance in human rights law, however 'the obligatory side of personality is almost completely ignored,'³⁵ with emphasis on what UNHCR is entitled to do. UNHCR's presence in Bangladesh derives its legal basis from a 1993 repatriation-focussed Memorandum of Understanding, impeding it from addressing rights violations inflicted on Rohingya refugees by host communities or GoB officials. The indeterminate legal status of its other activities thus leaves them at the mercy of the organisation's diplomatic relations with the GoB, which deteriorated to the point of forced closure of income-generating activities and skills-training in 2010. Accusations of UNHCR 'stepping out of its mandate and getting involved in development

²⁹ IRIN, 'Briefing: Myanmar's Rohingya crisis' (*IRIN*, 2012) <<http://www.irinnews.org/report/96801/briefing-myanmar-s-rohingya-crisis>> accessed 19 August 2013.

³⁰ Fédération Internationale des Ligues des Droits de l'Homme (FIDH), 'Joint Open Letter on review of the European Union's joint decision on Burma' (FIDH, 2013) <http://www.fidh.org/IMG/article_PDF/Joint-Open-Letter-on-review-of-the-European-Union-s-joint-decision-on_a13139.pdf> accessed 19 August 2013.

³¹ Inquiry Commission on the Sectarian Violence in Rakhine State, 'Executive Summary of the Final Report' (*Burma Partnership*, 2013) <<http://www.burmapartnership.org/wp-content/uploads/2013/04/Executive-SummaryEnglish-Version.pdf>> accessed 21 August 2013, 2.

³² Sarnata Reynolds and Jeff Crisp, 'Myanmar: A tipping point for Rohingya rights?' (Refugees International, 2014) <http://reliefweb.int/sites/reliefweb.int/files/resources/111714_myanmar_a_tipping_point_for_rohingya_rights_letterhead_0.pdf> accessed 23 March 2015.

³³ Refugees International (RI), 'Rohingya in Bangladesh: Maintaining the Status Quo; Squandering a Rare Opportunity' (*RI*, 2012a) <http://www.refintl.org/sites/default/files/103012_Rohingya_In_Bangladesh%20letterhead.pdf> accessed 19 August 2013, 1.

³⁴ UNHCR, 'Millions are Stateless, Living in Legal Limbo' (*UNHCR*, 2011) <<http://www.unhcr.org/4e54ec469.html>> accessed 20 August 2013, 1.

³⁵ Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (CUP 2011) 73.

initiatives,³⁶ illustrate the fragility of international protection mandates in the face of state sovereignty, and the sensitivities surrounding ceding some responsibility for populations present on a state's territory. That criticism is directed at UNHCR demonstrates the extent to which 'UNHCR, rather than states, becomes seen as being responsible for rights,'³⁷ acquiring comparable power and creating similar accountability black-holes. Mandates aside, protection offered by UN Agencies cannot be comparable to that of a state, because 'liberty and human rights do not exist in a political vacuum; the state provides a political space which no international organisation has been able to match.'³⁸ States permit agency, which is central to protection; Agencies inhibit it.

Additionally, there are concerns about diluting UNHCR's mandate. Expanded formally in 1998 to cover IDPs, doubts resurface intermittently regarding capacity. The UN Country Team in Myanmar is presently overstretched, with humanitarian and development activities attributed to the same actors.³⁹ In Myanmar, UNHCR maintains camps hosting thousands of internally displaced Rohingya following the 2012 violence. As Barbara Harrell-Bond and Guglielmo Verdirame conclusively documented in 2005, despite being born of a Convention establishing refugee rights, UNHCR bows to budget constraints and realpolitik to the detriment of rights protection. Indeed statelessness is amongst the most sensitive topics for UNHCR to engage governments on, for it relates directly to identity and sovereignty issues. In the semi-authoritarian Burmese context, and in the impasse with the GoB, humanitarian actors trade access for silence. How this service-provider role constrains outspokenness on human rights is epitomised by the resigned 'harm minimization strategy' followed in Bangladeshi camps.⁴⁰ Long-term, this has instigated dependency, making effective protection delivery harder. Similarly, UN-maintained IDP camps in Myanmar, subject to increasingly long-term pledges of support, effectively '[enable] the government of Myanmar to pursue a strategy which is based on systematic discrimination and the violation of human rights... [suggesting] the humanitarian and human rights imperatives of the United Nations are not always easy to reconcile.'⁴¹ Indeed rights violations are inherent to encampment, especially in protracted settings, whether in IDP or refugee contexts: restricting movement undermines a host of rights concerning livelihoods, health and education, which I unpack shortly with particular reference to refugee situations.

The UN endorses Myanmar's 'communal violence' narrative, circumventing the extent of state involvement.⁴² Artificial separation of the 'humanitarian' – or the 'legal' – from the

³⁶ Kiragu *et al.* (n 3) 12.

³⁷ Sarah Deardoff, 'How long is too long? Questioning the legality of long-term encampment through a human rights lens,' Working Paper Series No. 54 (*Refugee Studies Centre, University of Oxford*, 2009) <http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper54.pdf> accessed 23 August 2013, 32.

³⁸ Verdirame (n 35) 395.

³⁹ Refugees International (RI), 'Myanmar: Protecting Minority Rights is Non-Negotiable,' Field Report (RI, 2013) <http://www.refintl.org/sites/default/files/053013_Myanmar_Protecting_Minority%20letterhead.pdf> accessed 18 August 2013, 2.

⁴⁰ Eileen Pittaway, 'The Rohingya Refugees in Bangladesh: A Failure of the International Protection Regime,' in Howard Adelman (ed.), *Protracted Displacement in Asia: No Place to Call Home* (Ashgate 2008), 83 – 104, 99.

⁴¹ Jeff Crisp, 'Get Up, Stand Up: How Serious Is the UN's New Human Rights Initiative?' (RI, 2014) <<http://refugeesinternational.org/blog/get-stand-how-serious-un%E2%80%99s-new-human-rights-initiative>> accessed 23 March 2015.

⁴² UNHCHR, 'Religious violence in Myanmar, the consequences of Government inaction in tackling prejudice and discrimination – UN expert' (*OHCHR*, 2013)

'political' contradicts UNHCR's own guidance: former High Commissioner Sadako Ogata stressed 'there are no humanitarian solutions to humanitarian problems.'⁴³ That UNHCR's Executive Committee is comprised of states which frequently violate refugee rights (including Bangladesh) further undermines its purported neutrality, exacerbating accusations that answerability is to donor states rather than refugees. Statelessness can only be resolved through sovereign action: any push for this by humanitarians is necessarily political. Glossing over political involvement and *de facto* responsibility for human lives is bad faith. David Kennedy highlights reluctance to embrace 'responsible rulership' as a key hindrance to the international human rights regime. However, if 'activists... embrace the exercise of power and... develop an enhanced appetite for political conflict, and for the responsible exercise of human freedom,'⁴⁴ this again relegates state responsibility, extracting the creators of statelessness from its resolution.

2. Problems

Citizenship: a panacea?

Full Burmese citizenship is the most widely advocated solution for Rohingyas' problems, exalted as the right to have rights; the key to accessing just treatment, and at least negative peace.⁴⁵ Article 3 of the Citizenship Act limits indigeneity temporally, declaring 'Nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D. are Burma citizens.' Few Rohingya can document their ancestors' residence in territories that later became Myanmar this far back (British rule began in 1824, though Muslims in present-day Rakhine State pre-date this); decades of arson, confiscation of papers and displacement have decimated evidence, rendering many claims ineligible. 'Naturalised' citizenship, under Article 42 of the Act was ostensibly offered to Rohingya under a 'citizenship verification' exercise initiated in 2014 and now stalled, however this rested on a disavowal of Rohingya identity: only the few who agreed to identify as 'Bengali' were admitted to the verification process.⁴⁶ This category of citizenship is essentially inferior, and equally inaccessible. It requires 'conclusive evidence' that an applicant has 'entered and resided in the State anterior to 4th January, 1948, and their offsprings [were] born within the State,' again difficult for Rohingya to establish before restrictive governmental interpretation and evidentiary standards.⁴⁷ Status is withheld if the applicant is judged not to 'be of good character [or]... sound mind,' under Articles 44(d) and (e), and can be rescinded under Article 58(d) and (f) for 'showing disaffection or disloyalty to the State... [or] committing an offence involving moral turpitude.'

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13205&LangID=E>> accessed 19 August 2013.

⁴³ UNHCR, 'Ogata calls for stronger political will to solve refugee crises' (UNHCR, 2005)

<<http://www.unhcr.org/4297406a2.html>> accessed 19 August 2013.

⁴⁴ David Kennedy, 'The international human rights regime: still part of the problem?' in Rob Dickinson, Elena Katselli, Colin Murray and Ole W. Pederson (eds.), *Examining Critical Perspectives on Human Rights* (CUP 2012), 19 – 34, 32 – 33.

⁴⁵ Refugees International (n 39); UNHCR, 'Refugee Consultations: Bangladesh' (*Refworld*, 2007a)

<<http://www.refworld.org/topic,50ffbce510,50ffbce52b,46f0ec002,0,,RESEARCH,BGD.html>> accessed 10 September 2013.

⁴⁶ Reynolds and Crisp (n 32).

⁴⁷ Refugees International (n 39) 5.

Granting citizenship does not mean all other rights follow, for conceptual and practical reasons. As Hannah Arendt explored, rights cannot be anchored in bare humanity (evidenced in Nazi Germany), but rather demonstrate the necessity of membership in a political sphere that can protect them.⁴⁸ Assertions of rights, without a guarantor, were effectively worthless: rights became government-dependent. The state, however, when aligned with the nation, posed a threat to humanity: the production of subordinate, racialised ‘minorities,’ again reveals cracks in membership’s protections. This process is legal, social and cultural – and not easily deactivated: all-encompassing ‘discursive and material practices create the Other, and then take the ascribed Otherness as a justification for... differential treatment.’⁴⁹ Arendt’s solutions, while recognising the nation-state’s potentially repressive omnipotence, remain citizenship-centric, indicating her persistent trust in law, the state and its derivatives. Perhaps given her stature and personal experience of persecution, statelessness and exile, this focus on citizenship remains relatively unquestioned in mainstream discourse. It is a practical option in many situations, however critical examination of the institution of citizenship is vital. Citizenship’s protections and enhanced entitlements (compared to non-citizens) are not uniform. Its internal barriers augment the overarching exclusionary logic producing citizens and non-citizens. This is explicit in Myanmar’s tiered citizenship laws, but is often *de facto*: poverty, internal displacement and discrimination are common barriers to exercising citizenship-derived rights, from voting to socio-economic rights. Formal citizenship often proves insufficient to guarantee the latter in particular: substantive citizenship is thus required.

Citizenship’s internal barriers highlight the importance of recognition in society, beyond governmental bestowal of papers – though institutions are necessary for safeguarding rights. ‘Political understandings of rights regimes’⁵⁰ are paramount, as laws are enmeshed within the societies shaping and interpreting them. Community recognition and inclusion enable participation in governance and countenance intolerance at the grassroots level. The long history of the nation-state, or ethnicity/nation as a structuring principle, is hard to transcend. ‘Dislodging citizenship from the confines of the national [and]... decentering the national frame of reference from its privileged position in citizenship theory’⁵¹ remains a challenge globally, and a chimera in what has been deemed ‘transitional’ Myanmar. Now power is being diversified, pluralisation of citizenship receives even greater suspicion than that entrenched by decades-long one-party rule. Nation and law remain conflated, though the nation-state does not match reality. Transcending these limitations at all levels is vital, for rights rest on being socially embedded in a community. However, GoM officials admit that ‘even after being given citizenship and resettlement... a Bengali [*sic*] with a citizenship card still won’t be able to walk into a Rakhine village.’⁵²

As the modern construct upon which exercising human rights demonstrably hinges, citizenship is part of the problem and the solution: ‘the law divides inside from outside and is then asked to heal the scar or bandage it by offering limited protection to its own creations.’⁵³ Conventions may declare a right to nationality, but this depends on acts of state sovereignty.

⁴⁸ Arendt (n 17).

⁴⁹ Stephen Castles and Alastair Davidson, *Citizenship and Migration: Globalization and the politics of belonging* (Palgrave 2000) 82.

⁵⁰ Staples (n 25) 136.

⁵¹ Dora Kostakopoulou, *The Future Governance of Citizenship* (CUP 2008) 10.

⁵² Reuters, ‘Rohingya could face detention under Myanmar draft plan’ (*Reuters*, 2014)

<<http://uk.reuters.com/article/2014/09/27/uk-myanmar-rohingya-idUKKCN0HM09B20140927>> accessed 23 March 2015.

⁵³ Costas Douzinas, *The end of human rights* (Hart Publishing 2000) 358.

Denationalisation, or production of statelessness, Staples argues, is ‘unlawful under international human rights law,’ yet simultaneously valid, as states retain the sovereign right to determine citizenship criteria.⁵⁴ Exclusion is the corollary of inclusion, and laws institutionalise this insider/outsider division. Invoking citizenship to counteract political exclusion dilutes claims to rights as attached to humanity; invoking humanity ‘subsumes the citizen such that the agency of the political status of citizenship is reduced to the passive condition of being a rights-bearer.’⁵⁵ In sum, citizenship’s protection needs comprehensive recognition at all levels; purely legalistic belonging still permits the suffering of egregious rights violations.

Further barriers

Whilst prospects for Rohingya within Myanmar to exercise their human rights remain slim, and dependent on the GoM’s acts and reconciliation amongst inhabitants, further barriers to accessing rights exist which are particular to the situation of those living abroad as refugees, confirming citizenship’s limitations. Recourse to international protection is no panacea either: it does not guarantee an acceptable range of rights, and substandard international protection can be synonymous with grave violations itself, an issue to be highlighted given persistent trust in international organisations as rights-protectors. I concur that ‘any authority, however constituted, has the potential to violate the rights and liberties of the individual,’⁵⁶ and should be scrutinised.

Refoulement

Statelessness can impede recognition as a refugee, meaning that Rohingya outside Myanmar may be at greater risk of *refoulement*, the prohibition of which is the cornerstone of international refugee law. Its status as customary international law, an offshoot of the universal prohibition on torture, is amongst the less frequently violated protections conferred on refugees, as it theoretically binds even countries not party to the Refugee Convention, like Bangladesh and Thailand. However, the treatment of Rohingya by Bangladeshi and other Asian states reveals erosion at this powerful norm’s margins. Whilst clear instances of *refoulement* have previously occurred from Bangladesh (200,000 Rohingya were returned in 1992-94, initially with UNHCR assistance though UNHCR withdrew when involuntariness became patent), it is this poorly concealed *refoulement* I seek to interrogate. Closing borders to refugees – as Bangladesh did in 2012, 2008 and previously – equates to *refoulement*, and engages the destination state’s responsibility. Boat push-backs have caused loss of life, however the Thai government’s evasion of responsibility is unsound: it alleges that *refoulement* has not occurred, because its ‘help on’ policy entails ‘donating’ (inadequate) sustenance and fuel, on the understanding that boats continue onward to Indonesia or Malaysia⁵⁷ – perversely, this is posited as assisting Rohingyas. The practical impossibilities of displaced Rohingya ever pursuing remedies for these serious violations – without ever reaching Bangladeshi or Thai territory – illustrate the fragility of access to international protection.

Despite scrutiny following the 1990s ‘repatriations,’ debates around voluntariness of return to Myanmar persist. Repatriation is more than physical return: it connotes the restoration

⁵⁴ Staples (n 25) 19.

⁵⁵ Kesby (n 21) 144.

⁵⁶ Verdirame (n 35) 298.

⁵⁷ Human Rights Watch (HRW), ‘Thailand: Release and Protect Rohingya “Boat People”’ (HRW, 2013a) <<http://www.hrw.org/news/2013/08/20/thailand-release-and-protect-rohingya-boat-people>> accessed 22 August 2013.

of ruptured bonds with a state, and returnees' full inclusion. Significantly, governments and UNHCR are bound by different thresholds for return. States not party to the Refugee Convention are only required not to *refouler* refugees (send them to where their lives or freedom would be threatened), but UNHCR's Statute only permits it to promote and facilitate voluntary repatriation. UNHCR can therefore assist refugees who freely choose return, without ascertaining safety conditions in the country of origin. Admirably, emphasis is on refugees' agency and consent. However, UNHCR is thus incentivised to downplay accusations of coercion, and back arguably cosmetic procedures to demonstrate refugees' volition. A profiling survey recently aborted in Thailand, angered (non-Rohingya) Burmese refugees, for it 'solicits answers that favour repatriation [and which]... signatories fear... could be used as an indication of "voluntary return."'”⁵⁸ This suggests an institutional propensity to encourage return (without repatriation, or restoration of bonds) despite refugees' vocal opposition – Agency-driven rather than rights- or needs-based. Although violence has subsided in Rakhine, returning Rohingya to a situation where the citizenship impasse institutionalises persecution, amounts to cruel, inhuman and degrading treatment (a degree 'below' torture), incurring the *refoulement* prohibition.

Containment

Before addressing whether down-scaling of UNHCR-administered services in camps amounts to forcing return (and at what point), I make the case against encampment, which inescapably violates forced migrants' human rights; swaps displacement with in-placement, and is the backdrop against which additional privations are experienced. It is pertinent to note that there are no references to camps in the entire Refugee Convention, stemming as it does from the horrors of the Second World War in Europe.⁵⁹ The restricted freedom of movement inherent to camp settings is a human rights violation, triggering and institutionalising violations of other rights. Nonetheless, countries such as Bangladesh, which are not party to the Refugee Convention, whose article 26 protects freedom of movement, argue that conditions on the ICCPR's freedom of movement protections (in Article 12) – namely, lawful entry – apply, for they are not obliged to regard irregular entrance for asylum-seeking as lawful.

In addition to the evident curbing on the right to freedom of movement (enshrined as well in Article 13 of the UDHR, which is generally – though not always – accepted as customary international law, and is frequently cited by Bangladesh's Supreme Court),⁶⁰ the absence of adequate services in camps, and the barrier on accessing local services outside them, mean that the rights to education, health, property and in many instances the right to a family life are frequently inaccessible.⁶¹ The right to employment or to earn a livelihood is enshrined in

⁵⁸ Democratic Voice of Burma (DVB), 'Fearing repatriation, Mae La refugees shun profiling survey' (*DVB*, 2013) <<http://www.dvb.no/news/fearing-repatriation-mae-la-refugees-shun-profiling-survey/28656>> accessed 22 August 2013.

⁵⁹ Merrill Smith, 'Warehousing Refugees: A Denial of Rights, a Waste of Humanity' (*US Committee for Refugees and Immigrants*, 2004) <http://www.uscrr.org/2010Website/5_Resources/5_5_Refugee_Warehousing/5_5_3_Translations/Warehousing_Refugees_A_Denial_of_Rights.pdf> accessed 22 March 2015.

⁶⁰ Mostafa Hosain, 'Application of UDHR by Supreme Court of Bangladesh: Analysis of Judgments' (*Chancery Law Chronicles*, 2013) <<http://www.clcbd.org/journal/13.html>> accessed 22 March 2015.

⁶¹ The universal right to education is provided by the UDHR's Article 26, and in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Bangladesh is party since 1998. The right to health is protected by Article 12 of the ICESCR and Article 25 of the UDHR. The right to property is found in Article 17 of the UDHR Article 17, and is explicit in the Refugee Convention's Article 13, although this does not currently apply in Bangladesh. Articles 17 and 23 of the ICCPR, ratified by Bangladesh in 2000, guarantee the right to a family life, as do Articles 12 and 16 of the UDHR.

Article 23 of the UDHR and in Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which are applicable in Bangladesh, and in Articles 17 and 18 of the Refugee Convention. In signatory states, is protected in protracted displacement settings in particular by the Refugee Convention's requirement in Article 17(2)(a) that states grant refugees the same treatment as nationals regarding employment if they have spent three years in the first country of asylum. However, work rights are effectively retracted in camps, as residents are cut off from raw materials, markets and skills training. This undermines the self-sufficiency drives UNHCR promotes, impacting also the right to food (found in the ICESCR's Article 11, and the UDHR's Article 25), and is aggravated by the explicit prohibition on post-primary education in Bangladeshi camps, obliterating generations of refugees' self-empowerment potential. Tensions caused by encampment and enforced dependency generate high levels of violence, including rape and sexual and gender-based violence, as has been noted in camp settings globally, including in Rohingya camps in Bangladesh.⁶² Often unable to file a complaint or go to court, due to movement restrictions or prohibitive transport costs from isolated locations, victims' right to due process and to recognition before the law (provided for in Articles 14 and 16 of the ICCPR and in Articles 6 and 7 of the UDHR) is also curtailed. Rape and sexual abuse constitute violations of the fundamental right to freedom from 'torture or... cruel, inhuman or degrading treatment' provided by Article 5 of the UDHR and Article 7 of the ICCPR, as well as violations of victims' right to dignity (found in the UDHR's Articles 1 and 22, and recognised in the preambles of the ICESCR and ICCPR as an inherent quality from which all other rights derive). It is also argued that this can stem simply from a lack of 'the freedom to engage in productive work – ...an important part of human dignity.'⁶³

Indeed the Refugee Convention's protection is selective, excluding 'all mention of civil and political rights once a person has attained refugee status,'⁶⁴ circumscribing entitlements beyond those of human rights regimes, and obfuscating the wrongfulness of camps. That Sphere Project results (minimum humanitarian standards) resemble legal regulations of prisoners of war camps,⁶⁵ signals the permeation of mistrust and securitisation in approaching refugees. Camps encapsulate Agamben's 'space of exception' outside mainstream regulation by law, where individuals are divorced from political management of their own situation and thereby dehumanised, leaving 'bare life' to be institutionalised and governed.⁶⁶

Containment – unproblematised during the 1990s 'repatriation decade,' which viewed host countries as waiting rooms pending return to an often-romanticised 'home'⁶⁷ – contradicts rights-based protection, and I concur that 'the right to life has been bought at the cost of almost every other right.'⁶⁸ The salience accorded to *non-refoulement* and the trade-off this entails, seldom questioned, may not always be justified. Resource pressures often mean host populations cannot exercise socio-economic rights, and 'priority' rights for refugees are the only realistic deliverables. Thus, UNHCR accepts this diluted rights panorama well past initial

⁶² Anuradha Kumar, *Human Rights: Global Perspectives* (Sarup & Sons 2002) 161.

⁶³ James Hathaway, cited in Deardoff (n 37) 18.

⁶⁴ Susan Harris Rimmer, 'Reconceiving refugees and internally displaced persons as transitional justice actors' (UNHCR Policy Development and Evaluation Service, 2010) <<http://www.unhcr.org/4bbb2a589.pdf>> accessed 23 August 2013, 1.

⁶⁵ Verdirame (n 35).

⁶⁶ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998) 78.

⁶⁷ Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus-faced Humanitarianism* (Berghahn Books 2005) 335.

⁶⁸ Jeff Crisp, 'No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa' (2003) 22(4) *Refugee Survey Quarterly* 114, 125.

emergency phases, in which there exists temporary logistical justification for derogations, and for hosting refugees in camps, limited to the immediate purpose of security and identity checks by the Refugee Convention's Article 31(2).⁶⁹ UNHCR posits 'effective protection' as an acceptable bundle of minimum entitlements: lesser but permissible protection which covers merely 'core' rights to non-*refoulement*, life, subsistence, family unity and gender and age-specific rights,⁷⁰ or is itself a barrier to fully accessing rights. Though UNHCR and state obligations differ, the Agency's threshold is arbitrary and unregulated. Nonetheless, its supervision of the sanctity of non-*refoulement* in the Bangladeshi context is a necessity, but not one that should come at the expense of core socio-economic rights, however tied its hands may be. Genuine self-sufficiency drives, predicated on increased freedoms, would in fact free up resources – an argument against flood-gate fears – in the face of the intractability of this protracted refugee situation.

Service cuts

Voluntariness of returns under coercive conditions is questionable, especially given negligible prospects for resettlement or local integration, though UNHCR commonly employs the 'cuts' strategy, to induce relocation and following funding shortfalls. In 2003 this occurred in Bangladesh, though UNHCR insisted that improvements in Rakhine State were substantial and refugees were not pressurised to return. Although accompanied by proposals for self-sufficiency programmes for stayees (language that puts a positive spin on transfer of responsibility), conflating operational constraints and distinct security and protection matters is disingenuous. That Bangladeshi officials allegedly perpetrated the more directly coercive acts, such as threats of detention, withholding aid, and beatings,⁷¹ is unlikely to absolve UNHCR of responsibility in refugees' eyes, for both parties' actions generate a cumulative experience of harassment and pressure eventually culminating in a 'decision' to leave. In 2011 cuts in nutrition services and gender-based violence assistance exacerbated poverty and tensions in the camps, causing increased violence against women.⁷² The gravity of these not-unpredictable results may focus a spotlight on the complicity-culpability debate, however it is not conclusive. The most persuasive argument implicating UNHCR in forced return may be the direct causality asserted by a Bangladeshi official: 'UNHCR's decision to withdraw from the camps... caused us to try to speed up repatriations.'⁷³

UNHCR's continuation of this strategy, fully aware of its implications, typifies international insistence on subjugating refugees' fears and perceptions. Privileging 'objective' institutional 'knowledge' of situations reduces individuals to units requiring logistical management, impeding conception of them as rights-bearers. Reflecting the balancing of tensions between the objective and subjective elements central to refugee law (the 'well-founded fear'), this top-down, knowing-what's-best inhibits agency outright, curtailing what autonomy refugees retain in a camp environment, and further alienating Rohingyas from their rights. When trust in UNHCR is rock-bottom, given coerced repatriations and previous aborted 'pull-out' attempts, as well as resentment for the increasingly critical aid levels for the refugee

⁶⁹ Deardoff (n 37).

⁷⁰ Dallal Stevens, 'What do we mean by protection?' (2013) 20(1) *International Journal on Minority and Group Rights*, Special Issue: Critical Issues in Refugee Law 233.

⁷¹ Refugees International, 'Lack of Protection Plagues Burma Rohingya Refugees in Bangladesh,' Op-Ed (*Asian Tribune*, 2003) <<http://www.asiantribune.com/news/2003/05/31/lack-protection-plagues-burma-rohingya-refugees-bangladesh>> accessed 22 August 2013.

⁷² Refugees International (n 33) 2.

⁷³ Refugees International (n 71).

population, individuals may not come forward with their fears of return (anticipating being ignored, or retaliation for denouncing mistreatment to ‘outsiders’), skewing UNHCR’s understanding of the population. The 1994 repatriations revolved around scant access to information for the encamped Rohingya who, with the shift from individual interviews to mass registration and information sessions, felt ‘confused and pressurised to leave.’⁷⁴ The resultant systematic *refoulement* means that UNHCR is now unlikely to be seen as a promoter of greater access to information, facilitating access to rights and justice, but rather complicit in duping refugees.

Information and return

The politics of knowing acquire new dimensions when applied to the access Rohingya refugees have to information about conditions in Myanmar, and the consequences of this on decisions to return. To access one’s rights requires not just to be informed, but also to be in a position to judge those factors affecting any rights trade-offs one might have to make. A multiplicity of sources is essential for meaningful access to information: it is unsurprising that refugees do not rely on UNHCR-distributed information, however objective this may be. Restrictions on NGOs in Bangladeshi camps hamper information flows, though institutional diversity may not equal reliability, if one views often-subcontracted NGOs, financially-dependent on UNHCR as ‘part and parcel of the power structure of refugee camps,’ and prone to avoiding dissent.⁷⁵ Clarity is lacking on the aims and eventual outcomes of the GoM’s divisive draft ‘Rakhine Action Plan,’ through which citizenship can theoretically be confirmed, but which in practice is more likely to perpetuate mis-labelling of Rohingya as ‘Bengali,’ and entrench segregation, and even detention of Rohingya. Given the centrality of citizenship to the Rohingyas’ persecution, return cannot be expected without the relevant information, regardless of the security situation. UNHCR’s record at facilitating access to information is poor: the 1990s saw manipulation of evidence and omissions of fact, wilful and unwitting, by UNHCR. The ‘credibility’ lens, permanently focussed on asylum seekers, can be reversed to highlight the incoherence of institutional behaviour in the eyes of those who will factor in such inconsistencies when assessing whether to return. This disrupts the propensity to construct refugees as ‘rational actors when they decide to return but moved by extraneous motives if they decide to stay.’⁷⁶ Deconstructing such representations helps comprehend how refugees are disenfranchised within the very systems intended to protect their rights: accessing citizenship is, again, but one front for struggle.

Assessment of the situation in Myanmar was inhibited in the 1990s by UNHCR’s lack of ground presence and the dearth of civilian monitors, and accusations of dishonesty abound: UNHCR told returnees ‘further border crossing would result in arrests for illegal departure,’⁷⁷ and Agency staff allegedly justified repatriation as ‘the forced labour about which the Rohingyas complain does not constitute persecution because all Burmese are required to perform it.’⁷⁸ MSF documented this distorted argument – blind to the citizenship question, and also found that 65% of refugees did not know they could refuse repatriation, despite only 9%

⁷⁴ Australian Council for Overseas Aid (ACFOA), *Repatriation of Burmese Refugees from Thailand and Bangladesh: A Briefing Paper – Research and Information Series No. 8* (ACFOA Burma Human Rights Project 1996) 9.

⁷⁵ Verdirame (n 35) 272.

⁷⁶ B. S. Chimni, ‘From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems’ (2004) 23(3) *Refugee Survey Quarterly* 55, 62.

⁷⁷ Staples (n 25) 144.

⁷⁸ United States Committee for Refugees (n 26) 7.

wanting to return, demonstrating that ‘the refugees [did] not have the necessary information available to take a well-considered decision to repatriate.’⁷⁹ Obtaining information is thus crucial for resisting *refoulement*, and is as important as access to citizenship in enabling Rohingya to exercise their rights.

UNHCR’s dubious credibility record implies overstretched offices pressured to effectuate returns, lacking both critically-reflective practitioners, and the time and space within which to assess the ethics of the policy for implementation. The contradictions in UNHCR’s claim that ‘they had a moral obligation to ensure that repatriation did as little harm as possible, even if doing so meant involving itself in forced repatriation’⁸⁰ are evident, however there is no moral high ground between involvement to minimise immediate suffering, and effectively legitimising oppressive acts. However, Verdirame and Harrell-Bond’s view of the utter reprehensibility of UN humanitarianism is exaggerated, as violations and oversights must also be attributed to testing environments and sovereign states’ inflexibility: ultimately states dictate the restrictive circumstances in which abuses arise. Blaming a system, not individuals, is inescapable: humanitarian systems are shaped by so many individuals that it is generally impossible to pin responsibility to one body or actor. Diffuse action defies accountability and permits internal division, perpetuating dysfunctionality and apparent contradictions. The dispossessed, disenfranchised and displaced Rohingya are left decrying a total lack of access to justice – international humanitarian space empties into a liability void, with no route to a remedy. Despite the gravity of the non-*refoulement* principle, attaching responsibility to UNHCR if it erroneously declares a country safe and facilitates the return of subsequently persecuted individuals remains questionable. If conditions within a UNHCR-run camp are essentially inhuman, but this stems from constraints imposed by the host government, it is problematic to pin full blame on either entity. Once shades of complicity are acknowledged, allocating responsibility becomes even more tenuous. Furthermore, once the international community accepts responsibility in a protracted encampment situation, the duties of host states become obscured.

International rejection

The notable lack of signatories to the Refugee Convention in Southeast Asia may not signal the low priority of forced migration, but rather a resistance to being compelled to address issues through outdated Eurocentric frameworks. States in the region reflect the current global reticence towards accepting refugees, and consequently it is unlikely that such issues will be taken up diplomatically under any remit other than security. Esther Kiragu *et al.* suggest leveraging the Bali Process, an Asia-Pacific anti-trafficking initiative, in the search for solutions.⁸¹ It should be noted that international frameworks on trafficking are not human rights instruments, but instead form protocols to the Convention on Transnational Organized Crime. Deferring refugee protection to a criminal law-enforcement paradigm is risky, however the present impasse makes attempting to engage under this umbrella worthwhile – indeed the Process is asylum-sensitive. There is some hope that regional leadership in addressing the exploitation of migrant workers (many are sender states) could catalyse a focus on the Rohingya issue, for many Rohingya abroad traverse categories, unable to return for fear of

⁷⁹ Médecins Sans Frontières (MSF), ‘MSF’s concerns on the repatriation of Rohingya refugees from Bangladesh to Burma,’ *Open Letter*, 1 May 1995, Amsterdam/Paris (MSF 1995a) 4.

⁸⁰ M. Barnett, cited in Pittaway (n 40) 97.

⁸¹ Kiragu *et al.* (n 3) 25.

persecution, and working as migrant labourers across Asia and the Middle East, though concrete initiatives are lacking at present. The Association of Southeast Asian Nations (ASEAN) has offered (in vain) to mediate between Buddhist and Muslim communities, though the bloc generally refrains from speaking out, given its premium on non-intervention, and members' desire to maintain smooth trade relations with resource-rich Myanmar and avoid secondary movement of Rohingya to their territories. Foregrounding the regional nature of Rohingya displacement is needed, as even India and China are affected, though counting on their influence does not yet look promising: there is little high-level traction behind Rohingya rights campaigns. An Asian alternative to Eurocentric refugee protection frameworks seems far-fetched at the time of writing, though it may be an angle to encourage, particularly through the ASEAN system, in order to push back at the overall international hesitance to accept refugees in recent decades.

International failures could also be alleged according to the Refugee Convention's burden-sharing provisions, considering that most major resettlement states (Australia, Canada, the Nordic countries) are full signatories. However, international cooperation on refugee issues is overshadowed by aid donations and arms-length policies. Resettlement remains an underused protection tool, particularly since destination-countries' heightened post-9/11 security screenings, and a climate of global Islamophobia. This has prejudiced Rohingyas' chances of resettlement, though they were never perceived as an ideal resettlement population prior to this, given their polygamy, damaged health, low education and skills levels and high rates of conflict and sexual abuse – due to decades-long isolation, persecution and tensions induced by encampment conditions.⁸² When selecting Burmese refugees, states displayed a preference for Christian Karen and Karenni refugees.⁸³ States' ability to 'shop' for ideal, 'integratable' groups highlights the dominance of purportedly objective international knowledge, at the expense of a contextualised, non-essentialising explanation of group dynamics. Whilst resettlement states' protection capacities must be considered (indeed Rohingyas are a highly traumatised group who would require intensive support), vulnerable Southeast Asian populations have integrated successfully into various contexts in the past: the driving principle of resettlement has ceased to be refugee needs and rights, but rather the priorities of 'northern' states. Australia's resettlement policies epitomise the cynical use of this pathway: resettlement is deployed to detract attention from increasingly draconian approaches to 'managing' refugees arriving by boat.

The Rohingyas' systematic disenfranchisement and isolation outstrips that of Burmese refugees encamped long-term in Thailand, resulting in differential recognition of these populations. The Thai context is more enabling, resulting in highly organised political, charitable, educational and religious entities amongst Karen, Shan and Kachin refugees. Conversely, Bangladesh's stranglehold on the Rohingya impedes their ability to advocate for themselves internationally: pressure groups in exile are smaller and less networked than other Burmese groups (due also to their rejection by the opposition), contributing to their external invisibility, and exacerbating disproportionately low resettlement rates historically. Although resettlement from Bangladesh was suspended in 2010, and has been stopped from Thailand to the US, Burmese have traditionally featured high in resettlement statistics, becoming the largest

⁸² UNHCR, 'Bangladesh: Analysis of Gaps in the Protection of Rohingya Refugees' (UNHCR, 2007)

<<http://www.unhcr.org/cgi-bin/texis/vtx/home/opedocPDFViewer.html?docid=46fa1af32&query=Bangladesh%20Rohingya>> accessed 24 August 2013; Kiragu *et al.*, (n 3) 9.

⁸³ Pittaway (n 40) 97.

group of refugees submitted globally for resettlement by UNHCR in 2011.⁸⁴ Conversely, between 2006 and 2010 only 1744 Burmese (preponderantly Rohingya) were submitted for resettlement from Bangladesh and only 926 ultimately departed.⁸⁵

Bangladesh's resettlement freeze aims to eliminate 'pull-factors' supposedly prompting or sustaining an influx of refugees. Alongside local integration, some states perceive resettlement to equate to condoning persecution: if a country is intent on driving a population out, supplying an expedited exit could be deemed to be aiding policies of ethnic cleansing. Similarly, states may refuse to resettle stateless groups, seeking to avoid policies perceived to legitimise denationalisation. This would contravene UNHCR's guidelines, which 'promote resettlement as a solution for stateless persons in precarious situations without the prospect of a solution... even if [they] ...do not also qualify as refugees under the... Convention.'⁸⁶ Bangladesh's foreclosing of this avenue underscores the difficulties UNHCR faces when working in a restrictive protection environment ultimately orchestrated within states' own parameters. Established pathways to full enjoyment of rights remain inaccessible to Rohingya, and international protection – much like the national citizenship landscape – remains a site in which barriers proliferate.

3. Solutions

Rethinking displacement

With none of the traditional durable solutions a prospect, and the more progressive 'transnationalism' – allowing refugees to restore the broken bond with their state by acquiring passports, but not requiring their physical return, facilitating cross-border livelihoods and respecting internationalised identities⁸⁷ – an even fainter possibility, re-moulding old concepts may help un-stick the existing stalemate. Humanitarian discourse can coagulate around uncritical buzzwords, stagnating thinking and camouflaging meanings, both productive and obstructive. Describing the scope of one's activities and discussions as 'space' – prefixed by 'humanitarian' or 'protection' – renders processes and dynamics something static. This deflects focus from action and progress, constructing provocative work and the intangible concepts that inform it, such as human rights, as something fixed and knowable. Such anodyne epithets do not ultimately advance the interests of humanitarian actors working with repressive governments: evading direct conceptual engagement on a linguistic level predisposes discussions to circumlocution and deadlock.

This 'spatialised' mode of understanding magnifies notions of place, encouraging thinking in terms of territoriality and borders. This legitimises authorities' fixation with 'who is where' and movement, fostering a view of forced migrants as disruptive and in need of management. This must be replaced with conceptions of refugee, internally displaced and in-placed Rohingya as individuals possessing and exercising rights and duties. Developments

⁸⁴ UNHCR, 'Resettlement: A New Beginning in a Third Country' (*UNHCR*, 2012) <<http://www.unhcr.org/pages/4a16b1676.html>> accessed 24 August 2013.

⁸⁵ UNHCR, 'Bangladesh Fact Sheet March 2013' (*UNHCR*, 2013a) <<http://www.unhcr.org/50001ae09.html>> accessed 15 August 2013, 2.

⁸⁶ UNHCR, 'Self-Study Module on Statelessness' (*UNHCR Global Learning Centre*, 2012a) <<http://www.refworld.org/docid/50b899602.html>> accessed 24 August 2013, 101.

⁸⁷ Katy Long, 'Home alone? A review of the relationship between repatriation, mobility and durable solutions for refugees' (*UNHCR Policy Development and Evaluation Service*, 2010) <<http://www.unhcr.org/4b97afc49.html>> accessed 25 August 2013.

such as the articulation of the right not to be displaced, made explicit in Article 5(1) of the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, and the resultant emphasis on individual choice (to move or not to move), seek to bolster this outlook.⁸⁸ A focus on physical containment and pinning people down must be further shifted to political, legal and human intangibles. The legal discourse of forced migration is also highly geographical: refugee law hinges on border-crossing; accessing citizenship on proving where one ‘belongs’ (increasingly problematic in this globalised age), and citizenship laws on domicile and birthplace. We speak of law’s borders, and ‘spaces of exception’ and rightlessness,⁸⁹ glossing over the processes of disenfranchisement and dehumanisation carried out on legislative and inter-personal levels that create them. Recognising these ‘spaces’ as constructed, not natural, signals their potential for deconstruction, encouraging us to discard the population-control ‘mapping mentality’ and view socio-economic and legal barriers that affect rights as reversible discrimination, rather than just a feature of the landscape.

The combative connotations of much international-organisation-speak is a compelling reason to shed over-spatialisation of the Rohingya rights debate: ubiquitous talk of ‘Operational Objectives: Increase humanitarian space’⁹⁰ and ‘persistence in pushing the boundaries in Burma [to]... effectively expand humanitarian space’⁹¹ can only appear interventionist to the GoM. Moving away from territorial thinking and the practice of mapping mandates onto contested land in fragile states is no cure-all, but it represents a start: language frames attitude. If protection activities and principles become ‘protection space’ and are conflated with ‘humanitarian space,’ the professionalised, privatised domain of international actors, jumpy transitional governments will view them warily. ‘Humanitarian’ is routinely invoked to whitewash intentions: Maung Zarni highlights the perversion of ‘humanitarian space’ in Myanmar after Cyclone Nargis, accusing the aid industry of manipulating this as an opportunity for self-exposure and spreading their influence.⁹² This obstructs collaborative roads to change, entrenching the confrontational dichotomy of foreign human rights actors dictating to local elites that is so easily elided with Western intervention paradigms and thus side-lined. International human rights law may be interventionist in intent, as opposed to the “‘remedial” or palliative’ function of traditional refugee law’ in emergencies,⁹³ necessitating sensitive approaches. Great difficulties exist in speaking to power in anything other than the terms of state interests, though nascent transitions are an opportunity for governments to signal a break with past authoritarianism: now, if any, is the time to push hard to refresh official discourse in Myanmar.

⁸⁸ Michèle Morel, Maria Stavropoulou and Jean-François Durieux ‘The history and status of the right not to be displaced’ (Forced Migration Review, 2012) <http://www.fmreview.org/preventing/morel-et-al#_edn3> accessed 22 March 2015.

⁸⁹ Agamben (n 66).

⁹⁰ UNHCR, ‘UNHCR Myanmar March – April 2013’ (UNHCR, 2013b) <<http://www.unhcr.org/hk/files/2013%20Emergency/Myanmar/MYA%20Fact%20Sheet%20April%20March%202013.pdf>> accessed 25 August 2013, 1.

⁹¹ Refugees International (RI), ‘Burma: An Opportunity to Expand Humanitarian Space,’ Field Report (RI, 2012) <http://refugeesinternational.org/sites/default/files/011112_Burma_An_Opportunity%20with%20letterhead.pdf> accessed 25 August 2013, 2.

⁹² Maung Zarni, ‘Orientalisation and Manufacturing of “Civil Society” in Contemporary Burma,’ in Zawawi Ibrahim (ed.) *Social Science and Knowledge in a Globalising World* (Malaysian Social Science Association and Petaling Jaya Strategic Information and Research Development Centre 2012) 287 – 310, 301.

⁹³ James Hathaway, cited in Ralph Wilde, ‘Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of “Development” Refugee Camps Should be Subject to International Human Rights Law’ (1998) 1998(1) Yale Human Rights and Development Law Journal 107, 123.

Neither do I find ‘humanitarian space’ a useful concept in the Bangladeshi context. Situations of protracted displacement constrain humanitarian principles of impartiality and even humanity,⁹⁴ as illustrated by the unclear duties and compromised protection administered in the camps. The proclamation of increased humanitarian space in Rakhine State when UNHCR was granted presence in 1994 directly encouraged the continuation of the controversial returns programme: this ‘expanded humanitarian space’ engendered reasoning that ‘Rohingyas were better off in their homes in Myanmar where the UNHCR... had a presence.’⁹⁵ The term masks questionable practices, and illustrates how anyone can ascribe meaning to ‘space.’ Local commentators have scorned international interpretations of the recent violence as owing to the (little-questioned) transition opening up long-suppressed space to organise,⁹⁶ for this ‘empirically inaccurate... “democratization-contributes-to-the-rise-of-violent-conflicts” framework’⁹⁷ explains away state involvement in fostering unrest to create scapegoats for economic problems, construct a threat and justify the military’s continued prominence.

The meaning of space is highly contextualised and therefore problematic when accepted as immutable, a flaw central to Myanmar’s conflicts: colonial Burma’s artificially delineated territories and their structuring through the census and the map ‘created new ways of understanding space and power’⁹⁸ and inflated the significance of borders. As ‘transnationalism’ demonstrates, creatively thinking around the statist borders paradigm and celebrating or de-problematising mobility is most crucial and productive when faced with the inadequacies of the well-worn durable solutions to refugee situations. This moves the debate outside international law’s paralysing construction of migrants, citizens and refugees as comprehensible only in relation to the ‘bounded spaces’⁹⁹ that categorise and imbue them with meaning. I concur that the figure of the refugee intrinsically ‘unhinges the old trinity of state/nation/territory,’¹⁰⁰ indicating a wealth of potential for transcending blinkered, spatialised understandings and chipping away at conceptual barriers to accessing both citizenship and human rights in general.

Human rights vs. human relations in Myanmar

Alison Kesby invokes the polysemy of ‘space’ to posit a less restrictive characterisation of forced migrants: she eschews predominant vertical concepts of bestowal of immigration or citizenship status in favour of portraying the notion of having a ‘place in the world’ as a horizontal, networked practice through ‘recognition as a rights-holder... conferred upon oneself through a politics of human rights’ that rests on community interaction and inclusion.¹⁰¹ Progress is implausible without these relational practices: durable prospects for the Rohingya are unlikely to be furthered through the human rights rhetoric now so mistrusted by their Bamar

⁹⁴ Michael G. Smith, ‘Better Approaches to Protracted Displacement?’ in Howard Adelman (ed.) *Protracted Displacement in Asia: No Place to Call Home* (Ashgate 2008) 209 – 236.

⁹⁵ Sumbul Rizvi, ‘Managing Refugees: The Role of the UNHCR in South Asia,’ in P. R. Chari, Mallika Joseph and Suba Chandran (eds.) *Missing Boundaries: Refugees, Migrants, Stateless and Internally Displaced Persons in South Asia* (Manohar 2003) 193 – 211, 202.

⁹⁶ International Crisis Group (n 10).

⁹⁷ Zarni (n 8).

⁹⁸ Lisa B. Brooten, ‘Global Communications, Local Conceptions: Human Rights and the Politics of Communication Among the Burmese Opposition in Exile,’ DPhil Dissertation (*Ohio University*, 2003) <http://www.ibiblio.org/obl/docs3/Lisa_Brooten_dissertation-ocr.pdf> accessed 25 August 2013, 9.

⁹⁹ Kesby (n 21) 15.

¹⁰⁰ Agamben (n 13) 117.

¹⁰¹ Kesby (n 21) 7.

and Rakhine persecutors. The need for community reconciliation is overwhelming: despite windows of potential, obstacles are numerous. The legal landscape remains repressive, with discriminatory bills restricting religious freedom presently under discussion in early 2015, in contravention of international instruments, indicating that top-down change in attitudes remains distant.¹⁰² Human rights language retains some usefulness, though its limitations lead me to advocate a mixed approach, with both inter-personal and legal fronts.

These are interdependent: justice and ‘mutually respectful dialogue cannot occur while discrimination... remains unaddressed,’¹⁰³ and in turn, accountability for violations through legal processes is crucial for restoring trust among Rohingya. For Myanmar to recast itself as tolerant country whose strength is diversity, all parties must accept the present moment as a genuine transition, and a phase of opening up, modernisation, and breaking with the past. Fear of the Other has been exacerbated by years of isolation and propaganda – it is unsurprising, but not a given. The present dichotomy of ‘pro-Rohingya or pro-Rakhine, with nothing in between’¹⁰⁴ leaves gaping space between these two poles, to be inscribed with alternatives of cohesion and respect. It is not just ‘citizenship [that] is perhaps the only institution that has the capacity to turn strangers into fellows and residents into associates,’¹⁰⁵ but communities. That decades of military dictatorship have undermined the social contract assumed to underpin the state-citizen bond reveals the fragility of both citizenship and communities – and their consequent malleability.

However, the agency required for rapprochement between communities to occur is problematic. Staples pessimistically posits that ‘an ethnic group whose members are now the victims of cruelty cannot use their existing cultural identity and language to somehow “persuade” their oppressors that they are worthy of respect and protection, for it is that very identity and language which is often the cause of their dehumanisation and oppression.’¹⁰⁶ The practical barriers for Rohingya, segregated and confined, to conduct mentality-altering outreach are daunting. Acts of solidarity must be initiated by other groups, or facilitated by the government. The potential for change is therefore effectively dependent on the charitable empathy of the privileged, compacting Rohingyas’ disenfranchisement, and eliminating them from their own emancipatory struggle. Empathy is distant: widespread conviction endures that Rohingyas receive disproportionate international assistance and local war-affected Rakhine suffer more and invisibly.¹⁰⁷ This underlines the interconnectedness of global and local searches for solutions and their inevitable tensions.

Some interfaith peace initiatives and small-scale inter-community trade persist, but these are the exception. Past semblances of inclusion have had ulterior motives: voting rights in the 2008 constitutional referendum were extended to Rohingya who agreed not to leave

¹⁰² Radio Free Asia, ‘Civil Society Groups Urge Myanmar to Drop Bills to “Protect” Religion, Race’ (*Radio Free Asia*, 2015) <<http://www.rfa.org/english/news/myanmar/bills-01292015150834.html>> accessed 23 March 2015.

¹⁰³ UNHCR, ‘2013 UNHCR regional operations profile - South-East Asia’ (*UNHCR*, 2013) <<http://www.unhcr.org/pages/49e487c66.html>> accessed 20 August 2013, para 56.

¹⁰⁴ IRIN, ‘Prospects for Rakhine reconciliation dim’ (*IRIN*, 2013a) <<http://www.irinnews.org/report/97956/prospects-for-rakhine-reconciliation-dim>> accessed 27 August 2013.

¹⁰⁵ Kostakopoulou (n 51) 4.

¹⁰⁶ Staples (n 25) 59.

¹⁰⁷ Refugees International (RI), ‘Rohingya in Burma: Spotlight on Current Crisis Offers Opportunity for Progress’ (*RI*, 2012b)

<http://www.refugeesinternational.org/sites/default/files/103012_Rohingya_In_Burma%20letterhead.pdf> accessed 27 August 2013, 2.

Myanmar, acting as a barrier to flight in the event of persecution.¹⁰⁸ In places, low-level Rohingya returns are underway,¹⁰⁹ indicating that community-level planning is paramount, and sites for potential rapprochement exist. Grassroots efforts could be the only solutions not viewed as implanted. My own suggestions are inescapably an outsider's, though I am more optimistic regarding those initiatives which endeavour to underscore shared experiences of oppression by the military that both Rakhine and Rohingya groups have suffered, in an attempt to foment solidarity and understanding.

Reconceptualising ethnicity in Burmese discourse is another complex but necessary task, and could be a starting point for community-level critical interrogation of the Rohingya issue, with a view to displacing the resurgence of nationalist pride in Myanmar with pride in diversity. Education is key here: myths of a once-homogenous Myanmar could be addressed through a reformed curriculum, though engendering perceptible attitude shifts takes time. It is short-term thinking that permits exclusion, with Rakhine perceiving benefits from the Rohingyas' reduced freedoms. Long-term, the interdependence and tensions that ensue from such marginalisation can result in a spiral of decline: Rohingya areas are underdeveloped and neglected in healthcare and education, disadvantaging local Rakhine populations too, setting the scene for instability.¹¹⁰

Couching rapprochement in human rights language remains a markedly international tendency, with potential and drawbacks. What with the fragility of the human rights concept itself – perennially undone by positivist/naturalist and universal/relative debates, and the failure of this purported protection in the paradigmatic WWII production of statelessness – this may not be the most useful vocabulary for engendering change in Myanmar. The individualistic nature of human rights as espoused in the 'West' does not communicate the issues of community spirit and group membership at stake here. Rights-speak may be leveraged to instil recognition and support fundraising, however a solution is obscured by the tension between this communicative power and human rights' negative connotations amongst those with whom dialogue is sought. Domestic and foreign manipulation of the term illustrates its polysemy. GoM reasoning that the Rohingya two-child policy will advance women's rights, by reducing their poverty,¹¹¹ mirrors another earlier distortion of rights-based thinking – invoking Rohingyas' purported right to return to Myanmar in the 1990s was a tactic to advance an ASEAN membership bid.¹¹² The 2011 establishment of the Burmese National Human Rights Commission is regarded as a superficial attempt to encourage donors and investors of the new government's reliability, rather than a serious channel for the demands against power that rights-speak has come to frame. Rohingyas' exclusion from opposition alliances highlights how rights-speak has displaced substantive rights – internalisation of such concepts appears lacking.

Meanwhile, the externalisation of Myanmar's issues generates concern – international human rights actors display inconsistencies, underscored by their perceived partiality towards Rohingya, fostering the view that rights are not universal. A striking incoherence is that the language of refugees' 'right to return' is widely invoked to rush repatriation and keep forced migrants in the global south. The Deputy High Commissioner for Refugees convolutedly

¹⁰⁸ Staples (n 25) 149.

¹⁰⁹ Refugees International (n 39) 4.

¹¹⁰ UNHCR (n 86) 35.

¹¹¹ Aruna Kashyap, 'Burma's Bluff on the Two-Child Policy for Rohingyas' (*The Irrawaddy*, 2013)

<<http://www.irrawaddy.org/archives/38086>> accessed 2 September 2013.

¹¹² Staples (n 25) 153.

constructs refugees' right to a solution under international human rights law, from UDHR's right to a nationality (relying on the instrument's acceptance as custom, which is not universal): if membership in a national community is a prerequisite for effective protection, and since refugees lack membership, states' binding commitment to human rights norms must necessitate provision of membership.¹¹³ He marries the Refugee Convention's Article 35 (state duty to cooperate with UNHCR) with the UNHCR Statute's first Article ('seeking permanent solutions for the problems of refugees'), teasing out a state duty to assist in solving protracted displacement. Such inferred rights and duties are an exercise in academic legalism and serve merely to highlight the irrelevance of rights-speak to many individuals' daily realities, as well as the divergence between human rights provisions and their use in practice.

Rights-talk can further alienate given perceptions that it is 'the newest "civilizing" influence in contemporary neocolonialist manoeuvres [*sic*],'¹¹⁴ which stratifies suffering natives and rights-literate internationals, however necessary international supervision of protection may be. The prevalence of 'victim' when speaking of rights violations renders Rohingya survivors of persecution passive, inhibiting acknowledgment of their strength, dignity and agency beyond this legalistic framework. Perpetuating the 'deficiency model of the natives,' Zarni argues, international actors may have good intentions, but it is precisely the 'morally seductive nature of these new multifaceted "civilising mission(s)" ... which conceal undeclared foreign commercial strategic interests being pursued alongside the rhetoric of human rights and democratisation.'¹¹⁵ Much like the Burmese opposition, international actors appear to validate 'forms of democracy, as opposed to its essence'¹¹⁶ when ending sanctions and strengthening diplomatic and trade relations without foregrounding Rohingyas' continued abuse.

If human rights edify community unification discourses, their differential significance for ethnic groups must be acknowledged. The Bamar majority are primarily depicted as suffering civil and political rights violations, whilst non-Bamar are associated with socio-economic and cultural abuses. That this alignment with 'second tier' rights cements 'second tier' status for minorities, as Lisa Brooten proposes, is persuasive. 'Western' views of human rights are first-generation-centric, with much attention focussed on Myanmar's democracy process, with political rights as a prerequisite. However, when immediate needs are unmet, the significance of civil and political rights is questionable. A rights-centric approach should reassess those issues commonly categorised as 'development' problems, and focus advocacy on historical underdevelopment, poverty, resource exportation and land issues in Rakhine State, to mitigate both Rakhine and Rohingya grievances. This goes hand in hand with reconciliatory efforts, for investment in the region is unlikely while unrest (and mass statelessness) persists, yet at the same time economic disparities do not facilitate rapprochement. Similarly, minority language bans are viewed through a cultural rights prism, rather than seen as a political violation of the right to freedom of expression, as the detention of dissidents may be categorised, revealing how human-rights-talk sheds light on some injustices while concealing others, perpetuating marginalisation.¹¹⁷ Nonetheless, much like citizenship, economic development is no panacea: redistribution is paramount, and exclusion of 'outsiders' is a direct response to perceived resource inequalities – a major manifestation of

¹¹³ T. Alexander Aleinikoff and Stephen Poellot, 'The Responsibility to Solve,' Working Paper Series #3, The Program on Law & Human Development (University of Notre Dame, 2012) <<http://www3.nd.edu/~ndlaw/prog-human-rights/working-papers/AleinikoffResponsibility.pdf>> accessed 2 September 2013, 6.

¹¹⁴ Brooten (n 98) 360.

¹¹⁵ Zarni (n 92) 289.

¹¹⁶ *ibid* 297.

¹¹⁷ Brooten (n 98).

anti-Rohingya prejudice is an economic boycott of Muslim businesses. Access to development is yet another vital component of access to justice.

Moving forwards

Alongside economic issues, rule of law should remain amongst the GoM's highest priorities. Holding more state and non-state actors to account for their role in the 2012 violence may not jump-start community-level reconciliation, but warns future extremists. Existing laws' inadequacies should not be overlooked. Establishing rule of law extends beyond implementation to reform of unjust frameworks that facilitate denial of abuses: re-writing the impenetrable 'magical legalism' of yesteryear¹¹⁸ helps render (legal) justice more accessible. One barrier to citizenship restrictions could be resolved – dependent on political will and local sensitivities – following methodology used in eastern Myanmar, where citizenship cards are issued to undocumented people when two local figureheads vouch for a family.¹¹⁹ The GoM's approval of two stateless Chinese and Hindu communities for naturalisation, identified alongside UNHCR,¹²⁰ sets positive precedent. An unexplored site for action is the relatively strong women's rights stance of government and opposition leaders: the particular risks of statelessness for women (seeking 'protective' marriage to access status, which may trap women in exploitative relationships) could be taken up alongside Aung San Suu Kyi's women's rights campaigns – backed by many Burmese proud of being at the regional vanguard in gender equality.

The Inquiry Commission's report epitomises this tension between momentum and impasse regarding rights-based and reconciliation-based approaches. Mutual understanding; local dispute resolution mechanisms; registration of undocumented children, and banning hate speech are promoted, however they are interspersed with regressive recommendations; a blind-spot on impunity and reforming discriminatory laws, and use 'Bengali' for Rohingya. Proposed psychosocial support evades displacement's root causes, whilst suggestions for civic education dwell less on peace and tolerance than on advancing Burmese language and eliminating solely Muslim extremism.¹²¹ That it addresses sensitive tensions between local and national-level government responsibilities is promising, and semi-progressive sentiment (not terminology) – 'Government entities should also acknowledge the basic human rights of undocumented and illegal immigrants'¹²² – appears complimented by some actions, such as disbanding the persecutory border force. However, recommending prolonged segregation completely contradicts all suggestions for change. It is this hardline approach that initial drafts of the more recent 'Rakhine Action Plan' continued to maintain.¹²³ The range of attitudes underlines the need for locally-sensitive initiatives over sweeping fix-its, whether the latter are in the guise of human rights, reconciliation, or similar lofty ideals.

¹¹⁸ Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Polity Press 2001) 108.

¹¹⁹ Jim Della-Giacoma, 'Will Ethnic Tensions Undermine US-Myanmar Relations?' (*The Global Observatory*, 2013) <<http://www.theglobalobservatory.org/analysis/505-will-ethnic-tensions-undermine-us-myanmar-relations-.html>> accessed 3 September 2013.

¹²⁰ Refugees International (n 91) 2.

¹²¹ Inquiry Commission on the Sectarian Violence in Rakhine State (n 31); Inquiry Commission on the Sectarian Violence in Rakhine State, 'Summary of Recommendations in the Report of the Rakhine Investigation Commission to the Government of Myanmar' (*Burma Campaign*, 2013a) <[http://www.burmacampaign.org.uk/images/uploads/Recommendation\(English_Version\).pdf](http://www.burmacampaign.org.uk/images/uploads/Recommendation(English_Version).pdf)> accessed 24 August 2013.

¹²² Inquiry Commission on the Sectarian Violence in Rakhine State, 2013a (n 121) 22.

¹²³ Reynolds and Crisp (n 32).

Advocating for fresh policies towards Rohingya in Bangladesh is necessary, but only complementary to addressing the root of the issue in Myanmar. Registering, integrating and allowing access to basic services are critically lacking, preventing Rohingya from realising their rights in exile, though small windows of progressive potential exist. Article 31 of the Bangladeshi Constitution affirms that the inalienable right to enjoy the protection of law extends beyond citizens to ‘every other person for the time being within Bangladesh’ and in Article 25(1)(b) asserts that the state shall ‘support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism [*sic*]’ – all of which should feature in advocacy with the GoB. Additionally, Bangladeshi-born children are entitled to citizenship, and mass naturalisation of another stateless population, the Bihari, in 2008 establishes a precedent. Bangladesh has benefited from international protection for its migrants, given its many labourers abroad, and from the 2011 UNHCR-assisted evacuation of almost 6000 Bangladeshis from Libya,¹²⁴ supporting arguments for creating a protective migration status for Rohingya.

Conclusion

Practical difficulties are ultimately underscored by contradictions inherent in the nation-state system and its citizenship-based protection regime, in which nationality (belonging) accords more rights than humanity (being). Whilst concepts of citizenship and nationality are far from immutable, having evolved over time and according to place, the current paradigm is such that ‘the costs of exclusion rise with the institutionalisation of inclusion.’¹²⁵ The greater citizenship’s protections, the more disadvantaged those without access to it become. The Rohingya situation illustrates the crisis of international protection, revealing how dependent this is on sovereign will. Given the state-driven genesis of this ideal, I conclude that responsibility for the failures of international protection lie predominantly with the states that equip the guardians of the refugee regime, rather than with UNHCR. Although access to citizenship equates to the ‘right to have rights,’¹²⁶ which engenders dependency on states, access to justice is a broader concept, entailing a holistic view of the range of individuals’ rights. Here, international organisations have a significant bearing – especially in safeguarding human rights in exile, away from a citizenship-conferring polity, making them at times the protector of Rohingya rights and at times a violator. Easily reduced to accepting just core rights, such organisations should continually review whether their actions perpetuate or alleviate situations of protracted displacement, and whether they do all that is possible to destroy more barriers to accessing rights than they create. Where durable solutions remain ephemeral, security – both human, and of migration status – come to constitute this non-derogable ‘core’ of rights that UNHCR is obliged to pursue at the expense of a comprehensive, or maximal protection guarantee.

This rights-based framework by which organisations are managed and judged is therefore one significant reason to encourage the parallel tracks of community relations *and* human rights advocacy: rights articulate demands from power be it governmental or otherwise. To conclude, whether re-articulations of the stalled Rohingya rights debate can result in a fresh humanitarian and protection approach by states and Agencies – and ultimately in concrete improvements for oppressed Rohingya – is uncertain. Uncertainty, emblematic of most

¹²⁴ Kiragu *et al.* (n 3) 25.

¹²⁵ Staples (n 25) 116.

¹²⁶ Arendt (n 17).

transitions from authoritarianism, holds relatively boundless potential. How boundaries are set through legal reforms ultimately rests with the GoM, though this is not the only actor with influence: INGOs, international Agencies and local communities shape Rohingyas' daily interaction with hierarchies of power and across ethnic lines. They too impinge on access to justice, underscoring just how multifaceted rights protection is, and why accountability should be sought in all possible directions, despite the primacy of local (rather than international) engagement in addressing Rohingya realities.

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