



# Refugees / Migrants

## Refugee Mobility, Recognition and Rights

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### The Displacement Regime Complex: Reform for Protection

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*Working Paper No. 09*



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### **About RefMig Project**

The RefMig project aims to examine the global refugee regime, with a particular focus on the institutionalisation of the refugee/migrant binary globally. The project is divided into two strands: Recognising Refugees and Organisations of Protection. This report falls under the Recognising Refugees strand, which examines the institutional practices that seek to distinguish refugees from migrants. We take a purposefully broad conception of refugee recognition, encompassing not only individual refugee status determination (RSD) but also the institutional processes that determine access to RSD, as well as various forms of group determination. We examine the role of state institutions in this context (bureaucracies, legislatures, and the judiciary), as well as UNHCR's mandate RSD practices, and its handovers to state authorities.

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RefMig Working Papers are available to download at: <https://www.refmig.org/working-papers>

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## 1. Introduction

This working paper aims to examine the ‘displacement regime complex’, displacement referring to both internally and externally displaced persons, taking into account the competing roles of UNHCR and IOM in both spheres of activity.<sup>1</sup> In this paper, displaced persons is taken to include both internally displaced persons (IDP) and those displaced externally, many of whom will be recognised as refugees. A regime complex is ‘an array of partially overlapping and non-hierarchical institutions’, including various overlapping international norms and agreements, in this case defined by their common function of addressing displacement, both within and across states.<sup>2</sup> The concept is drawn from international relations scholarship (IR), and is also informed by legal scholarship on overlapping legal standards and principles in international law. In IR, scholarship on ‘regime complexes’ helps us to understand how distinctive international regimes overlap and intersect in different contexts.<sup>3</sup> This scholarship has developed over the past 15 years, and now provides some insights into the challenges of international cooperation in many fields. While the ‘refugee regime complex’ has been studied,<sup>4</sup> the wider ‘displacement regime complex’, which also embraces internal displacement, is the focus of this paper. This IR scholarship has affinities with legal scholarship on fragmentation and integration of international norms, the field of international legal scholarship that examines overlapping norms and institutions, and the potential for these overlaps to either lead to more or less coherence and efficacy of those norms.<sup>5</sup>

This fragmentation scholarship now focuses on the role of different actors at the *interfaces* of different regimes, acknowledging the important and multifaceted role of IOs. IOs typically have both a normative and operational role in regime complexes. Normatively, IOs are bearers of obligations under international human rights law (IHRL), and often have a role in the development of international legal standards.<sup>6</sup> They may also be mandated to ensure states are held to account. Operationally, they are both potential guarantors and violators of rights. Accordingly, IOs need to be held to account when violating IHRL and other norms. The accountability of IOs is itself a burgeoning topic, in need of greater scholarly and practical attention, but which is outside the scope of this paper.<sup>7</sup> Rather we focus here on the normative and operational role of UNHCR and IOM, in particular in the regime complex, and how it appears to shape the protection offered to displaced people.

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<sup>1</sup> This Working Paper was originally prepared by the authors as a background paper for the UNHCR publication *People Forced to Flee: History, Change and Challenge* (Ninette Kelley ed, UNHCR, 2022), and subsequently updated. Although the original research was commissioned by UNHCR, the working paper reflects the views of the authors, which may not necessarily be shared by UNHCR, and UNHCR may not be held responsible for any use that may be made of the information contained therein. The authors thank UNHCR reviewers for helpful comments and discussion. All errors and final views remain of course our own.

<sup>2</sup> Raustiala and Victor define a regime complex as ‘an array of partially overlapping and nonhierarchical institutions governing a particular issue-area’: Kal Raustiala and David G Victor, ‘The Regime Complex for Plant Genetic Resources’ (2004) 58 *International Organization* 277, 279.

<sup>3</sup> Karen J Alter and Kal Raustiala, ‘The Rise of International Regime Complexity’ (2018) 14 *Annual Review of Law and Social Science* 329.

<sup>4</sup> Alexander Betts, ‘Institutional Proliferation and the Global Refugee Regime’ (2009) 7 *Perspectives on Politics* 53; Alexander Betts, ‘The Refugee Regime and Issue-Linkage’ in Rey Koslowski (ed), *Global Mobility Regimes* (Palgrave Macmillan 2011).

<sup>5</sup> Kerstin Blome and others (eds), *Contested Regime Collisions: Norm Fragmentation in World Society* (CUP 2016); Colin Murray and Aoife O’Donoghue, ‘A Path Already Travelled in Domestic Orders? From Fragmentation to Constitutionalisation in the Global Legal Order’ (2017) 13 *International Journal of Law in Context* 225; Anne Peters, ‘The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization’ (2017) 15 *International Journal of Constitutional Law* 671.

<sup>6</sup> Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) ch 3.

<sup>7</sup> See generally leading works by Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (OUP 2017); Monika Heupel and Michael Zurn (eds), *Protecting the Individual from International Authority: Human Rights in International Organizations* (CUP 2017); Stian Øby Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (CUP 2020).

The most recent scholarship on interfaces in regime complexes helps us to understand that these complexes may have negative consequences (for example, by allowing states to evade obligations and cherry pick between institutional actors), but whether that is so depends on how the actors within the regime complex manage the complexity and potential conflicts.<sup>8</sup> Studies as yet have not closely examined how IOM and UNHCR interact in the displacement regime complex, and how their respective dynamics may in turn influence state behaviour for better or worse. This paper makes a small contribution by examining the overlapping roles of UNHCR and IOM in the displacement regime complex, both internal and cross-border. Their roles in this ‘displacement regime complex’ are characterised variously by complementarity, competition, and cooperation. We illustrate these dynamics with a small selection of pertinent case studies.

The paper opens with some clarifications on its approach to protection, one rooted in IHRL, and its key concepts of ‘international protection’ and ‘protection.’ (**Part II**). The title of the paper ‘Reform for protection’, aims to outline institutional reforms that aim to increase protection for the displaced, informed by binding universal human rights standards, and institutional principles relating to accountability and participation of most affected populations. We then identify the dynamics in the regime around ‘**Norms, Implementation and Effectiveness**’ (**Part III**), and in **Part IV** explore the role of ‘**Institutions and Mandates**’. We then illustrate the various complementary, competitive, and cooperative roles with the three selected case studies: displacement in Haiti, and the displacement exoduses from Myanmar and Venezuela (**Part V**). The case studies explore the practical implications of regime complexity for protection. **Part VI** concludes, by surveying some pertinent reform proposals, identifying those best suited within current realistic constraints to foster protection for displaced persons.

## II. Current Challenges and Reform for Protection

This section provides a brief account of the premises of the paper, in terms of both the main challenges in the current regime complex, and the realistic political constraints on reforms. The challenges are identified as ‘containment’, lack of responsibility-sharing, and a failure to give effect to existing obligations.

### 1. Containment

It has long been noted that many practices in the regime aim to contained displaced persons, by which is meant ensuring that people do not flee internationally, or if they do, that they stay close to their state of origin, in particular rather than fleeing to wealthy countries of the so-called Global North. One of the most significant features of the global refugee regime is the proliferation of ‘containment practices’ which make seeking asylum in the Global North difficult. Through a process of policy diffusion, states in the Global North have shared practices that preclude legal flight, including migration measures (visas, carrier sanctions, and cooperative migration control practices), as well as asylum-specific policies (eg, ‘safe third country’ and related inadmissibility practices, safe country of origin and other procedural barriers to protection). Although UNHCR has often sought to limit and challenge some containment practices, they have proliferated. Accordingly, one of the key interfaces between the refugee and migration regimes concerns how migration control practices limit refugee flight and onward migration, and how this ought to be addressed.

The interface between refugee and IDP protection is also a potential site of containment. While the development of standards of protection for IDPs has a protective aim and impact, some practices in this field do also collude in containment. There has long been a concern that the IDP regime would come to undermine refugee protection, either by undermining the right to leave to seek international protection or to justify the return of refugees to their own countries, where the IDP regime could be invoked as a

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<sup>8</sup> Julia Fuß and others, ‘Managing Regime Complexity: Introducing the Interface Conflicts 1.0 Dataset’ (2021) WZB Discussion Paper, No. SP IV 2021-101 <<https://doi.org/10.7802/2241>> accessed 10 May 2021.

demonstration that internal protection is available.<sup>9</sup> While UNHCR<sup>10</sup> and indeed the General Assembly have emphasised that IDP protection ought not to undermine asylum,<sup>11</sup> in practice states do invoke ‘safe zones’ and the existence of IDP protection in efforts to attempt to justify both border closures and returns.<sup>12</sup> For example, Betts also argues that in Bosnia and Herzegovina, UNHCR’s dual responsibilities for IDPs and refugees had the effect of undermining protection through the creation of so-called safe havens in country which were used to undermine refugees’ access to protection.<sup>13</sup> The Turkish actions in Northern Syria in October 2019 were framed as creating a ‘safe zone’<sup>14</sup> for returning Syrian refugees, for example.<sup>15</sup>

## 2. Responsibility-Sharing

There is wide consensus that the major problem of the displacement regime is the lack of responsibility-sharing. The lack of responsibility-sharing is a contributory factor for protracted displacement situations, in particular when the causes of flight are protracted, as most conflicts are under current conditions. If return is not safe or feasible, without responsibility-sharing the displaced often remain in rights-restricted limbo. This means that the responsibility for displacement falls upon states experiencing conflict, oppression and climate-related stresses, and their immediate neighbours. Over the years, scholars have proposed major institutional reforms to address this problem, of varying degrees of formality. This paper will not repeat the range of formal responsibility-sharing proposals that have been developed over the years. The most interesting of the recent proposals is Wall’s ‘Framework Convention for Refugee Responsibility Sharing’.<sup>16</sup> His proposal Convention would have six key elements:

- (i) an existence independent of the 1951 Convention and 1967 Protocol so as to keep those treaties intact and to allow non-parties to join the Framework Convention; (ii) clearly stated and ambitious objectives and principles; (iii) a lean institutional structure; (iv) regular meetings of the conference of the parties, in which States would indicate the contribution to refugee protection they were willing to make; (v) a way for non-parties – including sub-State entities and non-State actors – to participate and contribute; and (vi) a forum for discussions to deepen,

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<sup>9</sup> See generally Bríd Ní Ghráinne, ‘Challenges in the Relationship between the Protection of Internally Displaced Persons and International Refugee Law’ (DPhil thesis, University of Oxford 2014); Bríd Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (OUP 2022) (forthcoming) in particular ch 2 ‘The Relationship Between Internally Displaced Persons and Refugees’.

<sup>10</sup> UNHCR, ‘Internally Displaced Persons - The Role of the High Commissioner for Refugees’ (20 June 2000) UN Doc EC/50/SC/INF.2. See also the address of the former High Commissioner for Refugees, Sadako Ogata, who stressed that ‘any attempt to develop protection standards for the internally displaced should take care not to undermine the existing obligations of refugee law, particularly that of asylum and non-refoulement’: Norwegian Refugee Council, *Norwegian Government Roundtable Discussion on United Nations Human Rights Protection for Internally Displaced Persons* (Refugee Policy Group 1993) 84.

<sup>11</sup> UNGA Res 49/169 (23 December 1994) UN Doc A/RES/49/169; UNGA Res 50/152 (9 February 1996) UN Doc A/RES/50/152.

<sup>12</sup> Mikhael Barutciski, ‘The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992–94)’ (1996) 8 IJRL 49; Katy Long, ‘No Entry! A Review of UNHCR’s Response to Border Closures in Situations of Mass Refugee Influx’ (2010) UNHCR Policy Development and Evaluation Service PDES/2010/07 <<https://www.unhcr.org/4c207bd59.pdf>> accessed 26 April 2021.

<sup>13</sup> Betts, ‘Institutional Proliferation’ (n 4) 56.

<sup>14</sup> Bríd Ní Ghráinne, ‘Safe Zones and the Internal Protection Alternative’ (2020) 69 ICLQ 335; Bríd Ní Ghráinne, ‘The Syrian Safe Zone and International Law’ (Policy Brief, Institute of International Relations Prague 2020) <[https://www.dokumenty-iir.cz/PolicyPapers/2020/SYRIAN\\_SAFE\\_ZONE\\_AND\\_INTERNATIONAL\\_LAW.pdf](https://www.dokumenty-iir.cz/PolicyPapers/2020/SYRIAN_SAFE_ZONE_AND_INTERNATIONAL_LAW.pdf)> accessed 26 April 2021.

<sup>15</sup> *Ibid.*

<sup>16</sup> For an overview and a particularly insightful example, see Patrick Wall, ‘A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?’ (2017) 29 *International Journal of Refugee Law* 201.

with time, international cooperation on refugee responsibility sharing. This approach would reorient States towards a process for solutions by establishing an inclusive, principled, and comprehensive framework for an integrated approach to refugee responsibility sharing.

We start from the premise that a large formal responsibility-sharing mechanism is at present politically unfeasible, at least at the global level. In that context, we start from a set of mid-level proposals made in 2017 by Betts, Costello and Zaun, which aim to generate greater clarity on the distribution of responsibility and engender greater political will. These include:

1) First, at the level of metrics, a responsibility-sharing index might offer not only a means to measure state contributions but also a source of normative influence over state behaviour. 2) Second, in relation to principles, it is crucial that responsibility-sharing be for the purpose of enhancing rather than undermining refugees' access to protection, assistance, and solutions. 3) Third, it requires the development of organisational capacities, and it requires relevant international institutions to have an ongoing capacity to engage in political analysis and political facilitation. 4) Fourth, it needs a set of new operational tools, which may go beyond traditional operational approaches including in areas such as preference matching, development-based approaches, and alternative migration pathways.<sup>17</sup> Concerning complementary migration pathways, the need is to ensure greater refugee agency than resettlement processes, and that they offer protection is key.<sup>18</sup>

In the absence of responsibility-sharing, most displacement situations become protracted. 77% of the world's refugees, almost 16 million, are estimated to be in situations of long-term forced displacement. At the end of 2019, a total of 51 protracted refugee situations were registered, characterised by at least 25,000 refugees hosted for five consecutive years in the same host country. One example is the Afghan refugee situation, now in its fifth decade.<sup>19</sup> The Global Compact for Refugees (GCR) and Comprehensive Refugee Response Framework (CRRF) are the current global responses seeking to address this problem, but their impact is yet to be seen. In essence, there is a simultaneous focus on fostering refugees' economic inclusion in host states, while encouraging greater support for those states and host communities, including by development actors. Meanwhile, the predicament of IDPs is not explicitly addressed in the Compacts.

### **3. Implementation Gaps and the Shift to Informality**

International law requires implementation in order to be effective. Implementation generally means through state actions (incorporation in domestic law, application by domestic bureaucracies, and enforcement by domestic courts and other bodies). IOs also have an important role in making international commitments effective, both in their own practices, and how they engage with states. While there is a significant body of empirical scholarship on the implementation of IHRL and under what conditions it becomes effective,<sup>20</sup> this is not the case to the same extent with international refugee law. Although many refugees are hosted in states that have not ratified the 1951 Refugee Convention, the link between the Convention and the effectiveness of protection has not been empirically explored. In regions with strong refugee norms and widespread ratification such as Africa, there are systematic problems with compliance and implementation.<sup>21</sup> All of this is to say that the link between strong

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<sup>17</sup> Alexander Betts, Cathryn Costello and Natascha Zaun, *A Fair Share: Refugees and Responsibility Sharing* (Delmi Report 2017:10).

<sup>18</sup> Tamara Wood, 'The Role of "Complementary Pathways" in Refugee Protection' (Report, Kaldor Centre for International Refugee Law 2020) <<https://www.kaldorcentre.unsw.edu.au/publication/role-complementary-pathways-refugee-protection>> accessed 14 May 2021.

<sup>19</sup> UNHCR, 'Global Trends: Forced Displacement in 2019' (2020) <<https://www.unhcr.org/globaltrends2019/>> accessed 14 May 2021.

<sup>20</sup> See eg Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887; Beth A Simmons, 'Compliance with International Agreements' (1998) 45 *Annual Review of Political Science* 75.

<sup>21</sup> Marina Sharpe, 'The Supervision (or Not) of the 1969 OAU Refugee Convention' (2019) 31 *IJRL* 261.

commitments and effective compliance needs much greater research and further exploration. From the scholarship on IHRL, it appears that international norms become effective when they are domesticated and when local political actors invoke them in political and legal fora, often supported by transnational actors.

There is some scholarship on the implementation of the IDP norms, which suggests that although they are soft law, they have been widely translated into domestic law. Although soft law gives states more room for political manoeuvre, enabling them to redefine or downplay hard law commitments, it can also be quite effective in garnering political support.<sup>22</sup> However, leading studies on the impact of the United Nations Guiding Principles on Internal Displacement (1998)<sup>23</sup> (GPs) reveal a significant implementation gap.<sup>24</sup> Although many states have domestic IDP legislation, it often takes a narrow view of the category of IDP, for example. Adeola and Orchard's recent work suggests that 'trigger points' help explain not only when states engage with IDP laws, but also their implementation. This concept of 'trigger points' refer to 'contextual factors and actors at the domestic, regional, and international levels that can create political will within governments to lead to successful policy implementation.' Adeola and Orchard identify timing as a critical contextual factor, namely the onset of internal displacement or the ending of a conflict following a peace agreement, as well as linkages with regional and international processes. With respect to actors, they highlight the importance of independent domestic institutions (such as the judiciary) and civil society throughout the process.<sup>25</sup>

As has been noted in other fields, there is a **shift to informality** in many fields of international cooperation.<sup>26</sup> This informality may bring certain benefits in terms of flexibility for states and IOs, but it also has risks in terms of undermining the clarity of core obligations, rendering measuring policy success and establishing political and legal accountability challenging. To illustrate the emergence of informality in the global displacement regime, consider the contrast between the Refugee Convention and 1967 Protocol, the UN Guiding Principles on IDPs, and the Global Compacts.<sup>27</sup> The Global Compact for Safe, Orderly and Regular Migration and the GCR were adopted in 2018, based on the New York Declaration.<sup>28</sup> These may be viewed on a continuum from formality and bindingness to informality and non-normativity. While the Convention is binding international law, the GPs are not, but they do purport to synthesise binding standards, and in turn influence the development of IL. In contrast, the Compacts in part reflect IL, but not entirely. Moreover, they are not only not binding, but they are also largely programmatic rather than normative in character, and leave a range of actors (states and non-state actors) many explicit choices as to how to achieve the broad objective they set.

This trend to informality is noted, and taken as a sign that at present, there is little general appetite for new *global* instruments, although we do note that some regions, Africa in particular, have seen the successful adoption and implementation of binding standards on IDPs. We set out some reform proposals for new Conventions, framework conventions and protocols in **Part VI** below, but the bulk of the paper focuses on the clarification and implementation of existing binding international human

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<sup>22</sup> Thomas Gammeltoft-Hansen, Stéphanie Lagoutte and John Cerone, 'Introduction' in Stéphanie Lagoutte and others (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016).

<sup>23</sup> UNHCR, 'Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.2 (UN Guiding Principles on Internal Displacement).

<sup>24</sup> Romola Adeola and Phil Orchard, 'The Role of Law and Policy in Fostering Responsibility and Accountability of Governments Towards Internally Displaced Persons' (2020) 39 *Refugee Survey Quarterly* 412.

<sup>25</sup> *Ibid* 419-22.

<sup>26</sup> See Charles B Roger, *The Origins of Informality: Why the Legal Foundations of Global Governance are Shifting, and Why It Matters* (OUP 2020).

<sup>27</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267; UNGA, 'Global Compact for Safe, Orderly and Regular Migration' (30 July 2018) UN Doc A/CONF.231/3; UNGA, 'Report of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees' GAOR 73rd Session Supp No 12 (2 August 2018) UN Doc A/73/12.

<sup>28</sup> UNGA, 'New York Declaration for Refugees and Migrants' (3 October 2016) UN Doc A/RES/71/1.

rights standards. Accordingly, ‘reform for protection’ in this paper is informed by the concepts of ‘international protection’ (set out in detail in **Part III.3** below) and indeed ‘protection’ more broadly.

We distinguish between the legal concept of ‘international protection’ and the operational concept of ‘protection’. The operational concept emerged through consultations convened by the International Committee of the Red Cross (ICRC) with human rights and humanitarian actors, and has been widely endorsed.<sup>29</sup> For example, the IASC has defined protection as:

‘all activities aimed at obtaining full respect for the rights of the individual, in accordance with the letter and the spirit of the relevant bodies of law (i.e. HR law, IHRL, refugee law). (IASC 1999, 4, *emphasis added*).’

This paper is principally concerned with protection rooted in international law. To the extent that humanitarian action seeks to ensure human rights, it is part of protection in an operational sense. But reforms to the humanitarian system *generally* are outside the scope of this paper, in particular reforms to the Cluster System. To the extent that we examine cooperation and competition between IOs, UNHCR and IOM, in particular the Cluster System, is relevant, so we introduce it here. In 2005, a Cluster Approach was developed under the auspices of UN-led humanitarian reform, aiming to improve the coordination between states, UN agencies, and international and national NGOs in humanitarian emergencies. It applies in non-refugee humanitarian emergencies. It designates specific agencies as cluster leads, who in turn are to be answerable to a Humanitarian Coordinator (HC) and to national authorities.<sup>30</sup> While the system is aimed at more efficient and effective humanitarian cooperation, scholars suggest that by selecting a lead agency to manage particular areas, it may sometimes have the opposite effect.<sup>31</sup> IOM is now the lead of the Global Camp Coordination and Camp Management (CCCM) Cluster for Natural Disasters, which it co-chairs with UNHCR.<sup>32</sup> UNHCR currently leads the Protection Cluster for IDPs.

In contrast, when it comes to external displacement, based on its international legal mandate, UNHCR leads and coordinates refugee responses.<sup>33</sup>

### III. Norms, Implementation & Effectiveness

#### 1. Norms on Internal Displacement

The *UN Guiding Principles on Internal Displacement (1998) (GPs)* are a progressive synthesis of international humanitarian law and IHRL, which in turn have catalysed further legal development. The concept of IDP is broad and descriptive, and turns on the fact of displacement, not its cause. Definitionally, an IDP has ‘not crossed an internationally recognised state border.’ However, there is no qualification as to nationality, so an IDP can be a national or non-national of the state in question.

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<sup>29</sup> IASC, ‘Protection of Internally Displaced Persons’ (Policy Paper December 1999) <<https://interagencystandingcommittee.org/focal-points/iasc-policy-paper-protection-internally-displaced-persons-1999>> accessed 23 April 2021; UNHCR, ‘The Protection of Internally Displaced Persons and the Role of UNHCR’ (21 February 2007) para 20; Nansen Initiative on Disaster-Induced Cross-Border Displacement, ‘Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change’ (2015) vol 1, 7 <<https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>> accessed 23 April 2021.

<sup>30</sup> J Benton Heath, ‘Managing the “Republic of NGOs”: Accountability and Legitimation Problems Facing the U.N. Cluster System’ (2013) 47 *Vanderbilt Journal of Transnational Law* 239.

<sup>31</sup> *Ibid.*

<sup>32</sup> IOM, ‘IOM in Humanitarian Operations and Clusters’ <<https://www.iom.int/iom-humanitarian-operations-and-clusters>> accessed 14 May 2021.

<sup>33</sup> As confirmed by recent UN General Assembly Resolutions: UNGA Res 69/152 (17 February 2015) UN Doc A/RES/69/152; UNGA Res 70/135 (23 February 2016) A/RES/70/135.

The notion of displacement itself is broad, encompassing being (a) forced to flee, (b) obliged to flee, (c) forced to leave, or (d) obliged to leave their homes or places of habitual residence.<sup>34</sup> The pertinent causes for displacement in the GPs are broad, and expressed in a non-exhaustive manner, including ‘in particular’ ‘armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters’. Principle 6 further includes development-related causes of internal displacement, identifying large-scale development projects ‘not justified by compelling or overriding public interests’ as constitutive of ‘arbitrary displacement.’<sup>35</sup>

In contrast to the status of a refugee, the IDP label is a ‘descriptive identification’,<sup>36</sup> rather than a legal definition. Rather, it entails the recognition of a condition of special vulnerability linked to the experience of being displaced, and recognises states’ obligations to ensure that IDPs enjoy the same rights and freedoms as nationals under international and domestic law.<sup>37</sup> The GPs comprise thirty standards to guide states and the international community in protecting IDPs during displacement and during their pursuit of durable solutions. First and foremost, they stipulate that states have the ‘primary duty and responsibility to provide protection and humanitarian assistance to internally displaced people’ (Principle 3). They further outline the right of the international community ‘to offer their services in support of the internally displaced’ (Principle 25). The GPs thus have an affinity with the Responsibility to Protect doctrine<sup>38</sup> and its core notion that the international community has an interest in ensuring that states respect their human rights obligations to their own citizens, or the idea of ‘responsible sovereignty’.<sup>39</sup> Principle 30 also safeguards humanitarian access to displaced people by requiring states to guarantee humanitarian actors ‘rapid and unimpeded access’ to IDPs during their return and reintegration *in the exercise of their respective mandates* [emphasis added].

Other key protection principles from the GPs include: protection from displacement, including prohibition from arbitrary displacement (Principles 7-9); the right to legal recognition (Principle 20); and the right to a durable solution (Principles 28-30). Principle 28 further stipulates that voluntariness is an essential component of return or resettlement. *The Framework on Durable Solutions (2010)* complements the GPs restating the right of an IDP to a durable solution to their displacement, and outlines the criteria that must be satisfied for their achievement. According to the Framework, ‘durable solutions’ have been achieved when IDPs ‘no longer have specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination on account of their displacement.’<sup>40</sup>

The fact that the GPs are non-binding does not mean they lack legal effects.<sup>41</sup> Many states have incorporated IDP standards in national legislation,<sup>42</sup> and the GPs have also catalysed the development

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<sup>34</sup> Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (n 9) ch 2.

<sup>35</sup> UN Guiding Principles on Internal Displacement.

<sup>36</sup> Walter Kälin, *Guiding Principles on Internal Displacement Annotations* (The American Society of International Law and The Brookings Institution 2008) 3.

<sup>37</sup> Principle 1 of the Guiding Principles on Internal Displacement provides: ‘Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.’

<sup>38</sup> Erin Mooney, ‘The Guiding Principles and the Responsibility to Protect’ (2008) GP10 Forced Migration Review 11.

<sup>39</sup> Roberta Cohen and Francis M Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Brookings Institution Press 1998).

<sup>40</sup> IASC, ‘Framework on Durable Solutions for Internally Displaced Persons’ (The Brookings Institution 2010) <<https://interagencystandingcommittee.org/other/iasc-framework-durable-solutions-internally-displaced-persons/>> accessed 10 May 2021.

<sup>41</sup> Megan Bradley and Angela Sherwood, ‘Addressing and Resolving Internal Displacement: Reflections on a Soft Law “Success Story”’ in Stéphanie Lagoutte and others (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016).

<sup>42</sup> See the database of countries with laws and policies on internal displacement compiled by the Global Protection Cluster, *Global Database on IDP Laws and Policies*’ <<https://www.globalprotectioncluster.org/global-database-on-idp-laws-and-policies/>> accessed 26 April 2021.

of the Great Lakes Protocol<sup>43</sup> and the Kampala Convention<sup>44</sup>, unquestionably the best examples of the ‘hardening’ of IDP soft law. The Convention has been ratified by thirty-two African states,<sup>45</sup> obliging them to protect IDPs according to the standards laid out in the GPs. In addition, the AU 2018 Model Law for the Implementation of the AU Convention for the Protection of and Assistance to Internally Displaced Persons in Africa has proved to be influential on domestic laws.<sup>46</sup>

Regional and national courts and UN human rights treaty bodies have also drawn upon the GPs to interpret states’ obligations to internally displaced people.<sup>47</sup> David Cantor’s work on Principle 28<sup>48</sup> is noteworthy in revealing both the progressive synthesis in the original GP text, and its subsequent development. As he puts it ‘the [pre-existing right to freedom of movement ... in human rights treaties provides little basis for the far-reaching and apparently unconditional obligations to ensure voluntary, safe and dignified return that are articulated by Guiding Principle 28(1).’ Accordingly, it provides a good case study to assess the impact of the soft GPs. He notes that GP28 has been cited and indeed in effect enforced by the HRC, ECtHR, InterAmerican Court and African Commission.<sup>49</sup>

The Guiding Principles serve as a useful example of effective norm entrepreneurship for protection, in particular in focusing on the fact of displacement rather than particular causes. Nonetheless, there are two key concerns about their role. First, there is a concern about the category of IDP, including whether IDPs constitute a coherent category, as necessary for the formulation of effective legal and policy responses.<sup>50</sup> Some sceptics argue that the category lacks empirical distinction, and in practice fails to map onto a particularly vulnerable or needy group.<sup>51</sup> Indeed, often those who are not displaced, who are rendered immobile or are unable to flee for material or other reasons, may be more vulnerable to harm or needy. There are related concerns that in bureaucratic translation the IDP category has the potential to create hierarchies of assistance between displaced people and other highly marginalised social groups.<sup>52</sup> We explore this issue in the Haiti case study in **Part V.1** below. Secondly, there are concerns about the soft law nature of the GPs and consequent implementation challenges, discussed above **Part II.3**.

## 2. Norms on Refugee Protection

While the Guiding Principles purport to cover all those internally displaced, irrespective of cause, the international protection regime for cross-border displacement turns on particular statuses for ‘refugees’ and an evolving wider notion of ‘international protection’, as elucidated in particular in UNHCR’s 2017

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14 states have adopted national laws on internal displacement (27 laws in total) and 35 states have policies on internal displacement (61 policies in total).

<sup>43</sup> Protocol to the Pact on Security, Stability and Development in the Great Lakes Region on the Protection and Assistance to Internally Displaced Persons (adopted 30 November 2006, entered into force 21 June 2008).

<sup>44</sup> African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 23 October 2009, entered into force 6 December 2012).

<sup>45</sup> Angola, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d’Ivoire, Congo, Djibouti, Equatorial Guinea, Eswatini, Ethiopia, Gabon, Gambia, Guinea-Bissau, Lesotho, Liberia, Malawi, Mali, Mauritania, Mozambique, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Sierra Leone, South Sudan, Somalia, Togo, Uganda, Zambia, and Zimbabwe.

<sup>46</sup> African Union, ‘African Union Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa’ (12 April 2018).

<sup>47</sup> Nicole Phillips and others, ‘Enforcing Remedies from the Inter-American Commission on Human Rights: Forced Evictions and Post-Earthquake Haiti’ (2011) 19 Human Rights Brief 13.

<sup>48</sup> ‘Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.’

<sup>49</sup> David James Cantor, ‘The IDP in Law?: Developments, Debates, Prospects’ (2018) 30 IJRL 191, 199, 200-03.

<sup>50</sup> David Turton, ‘The Politics of Internal Displacement and Options for Institutional Reform’ (2011) 17 DEP: Deportate, esuli, profughe 2.

<sup>51</sup> James C Hathaway, ‘Forced Migration Studies: Could We Agree Just to “Date”?’ (2007) 20 JRS 349.

<sup>52</sup> Turton (n 50).

Note on *Persons in need of international protection*.<sup>53</sup> Article 1A(2) of the 1951 Convention sets out the parameters for the categorisation of a refugee, with provisions also on exclusion from refugee status, and its cessation. The 1951 definition was complemented by the expanded regional refugee treaties and declarations in Africa and Latin America.<sup>54</sup> UNHCR has long included in its own practice an expanded refugee definition, also reflected in its own procedural practices of mandate RSD.<sup>55</sup>

The 1951 Convention, as a living instrument, is subject to evolutive interpretation. Over the past decades, the concept of persecution has been understood to include acts of non-state actors and state failures, and the requisite nexus to Convention grounds met in the context of many generalised risks, especially if they fall on those from particular social groups or those imputed to have particular political opinions. UNHCR has long had an important role both in catalysing and consolidating evolutive interpretation of the Convention.<sup>56</sup> One noteworthy shift has meant the recognition that many of those fleeing conflict are Convention refugees, as exemplified in UNHCR's statements on people fleeing Syria since 2012.<sup>57</sup> In turn, this approach informed its guidance on the scope of international protection for those fleeing conflict<sup>58</sup> and climate related risks.<sup>59</sup>

### 3. International Protection Norms

Refugee protection is a subset of the wider concept of 'international protection'. The overarching conception of 'international protection' cuts across the refugee/migrant binary. As UNHCR put it in 2017:

The need for international protection arises when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them.<sup>60</sup>

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<sup>53</sup> UN High Commissioner for Refugees (UNHCR), *Persons in need of international protection*, June 2017, <http://www.refworld.org/docid/596787734.html> (recognizing it is cited also later).

<sup>54</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45; Cartagena Declaration on Refugees (adopted 22 November 1984 by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama) (Cartagena Declaration).

<sup>55</sup> UN High Commissioner for Refugees (UNHCR), *I. A. v. Secretary of State for the Home Department: Case for the Intervener*, 27 October 2013, UKSC2012/0157, available at: <https://www.refworld.org/docid/52a098e34.html> [accessed 21 January 2024], para 7. UNHCR, 'Procedural Standards for Refugee Status Determination Under UNHCR's Mandate UN High Commissioner for Refugees' (26 August 2020) 213.

<sup>56</sup> For a range of examples, see Venzke (n 6) ch 5.

<sup>57</sup> UNHCR, 'Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update I' (December 2012); UNHCR, 'International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update II' (October 2013); UNHCR, 'International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update III' (October 2014); UNHCR, 'International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update IV' (November 2015) HCR/PC/SYR/01; UNHCR, 'International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update V' (November 2017) HCR/PC/SYR/17/01; UNHCR, 'International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update VI' (March 2021) HCR/PC/SYR/2021/06.

<sup>58</sup> UNHCR, 'Guidelines on International Protection No. 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions' (2 December 2016) HCR/GIP/16/12. For general guidance on claims for refugee status related to violence by organized gangs, see: UNHCR, 'Guidance Note on Refugee Claims Relating to Victims of Organized Gangs' (Division of International Protection Geneva March 2010).

<sup>59</sup> UNHCR, 'Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters' (1 October 2010).

<sup>60</sup> UNHCR, 'Persons in Need of International Protection' (June 2017) 1.

This definition includes, but is not limited to, refugees in a legal sense. Indeed, as UNHCR recognises, there is a category of non-refugees who are ‘otherwise in need of international protection’ namely ‘individuals who are outside their country of origin (typically because they have been forcibly displaced across international borders), such as ‘persons who are displaced across an international border in the context of disasters or the adverse effects of climate change but who are not refugees.’ Importantly, ‘In such situations, a need for international protection would reflect the inability of the country of origin to protect against serious harm.’ Accordingly, as McAdam and Wood put it, ‘Using the term “refugee” as a shorthand for international protection is therefore no longer accurate or desirable, in particular because it risks marginalizing those who require international protection but do not meet the refugee definition’.<sup>61</sup> The attention to a broader notion of international protection does not undermine refugee protection. Rather, if properly understood and applied, it may help to overcome the bifurcation between refugees and migrants in the Compacts. Accordingly, the concept of international protection serves to mitigate some of the risks of the bifurcation of refugees and migrants in the Compacts.<sup>62</sup>

At present, however, three aspects of ‘international protection’ are underdeveloped, which reflect the legal limitations of its origins in *non-refoulement*. First, is the importance of securing access to international protection, by protecting the right to flee. Secondly, legal processes must be adapted to the wider concept of international protection, moving away from individualised RSD. Thirdly, the content of international protection requires further clarification, in particular to ensure it offers security of residence and effective rights.

#### *i. International Protection and the Right to Flee*

*Non-refoulement* at its core protects those who have fled from being removed to a territory where they would be at risk of persecution or serious human rights violations. In some instances, it assists in protecting and giving meaningful effect to the right to flee and the right to seek asylum, in particular when states have obligations to allow those at borders and otherwise within their jurisdiction (such as on board intercepted naval vessels) to enter in order to assess their international protection needs.<sup>63</sup> The prohibition on collective expulsion too creates procedural obligations for states to assess protection needs, but again, mainly pre-removal.<sup>64</sup>

A key aspect of international protection ought to be to ensure that the human right to leave any country, including the right to flee across states, is properly integrated into the concept of international protection.<sup>65</sup> This normative work cuts across both Compacts, and requires a systematic examination of how would-be refugees and others in search of international protection lack legal means to flee and how this can be remedied. The role of visas and carrier sanctions in particular requires such examination.<sup>66</sup>

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<sup>61</sup> Jane McAdam and Tamara Wood, ‘The Concept of “International Protection” in the Global Compacts on Refugees and Migration’ (2021) 23 *Interventions* 191, 193-94.

<sup>62</sup> Cathryn Costello, ‘Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?’ (2018) 30 *IJRL* 643.

<sup>63</sup> Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (OUP 2017) ch 9; Mariagiulia Giuffrè and Violeta Moreno-Lax, ‘The Rise of Consensual Containment: From “Contactless Control” to “Contactless Responsibility” for Forced Migration Flows’ in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 94, 100-01.

<sup>64</sup> See *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 [177], [183]-[186]; *Khlaifia v Italy* App no 16483/12 (ECtHR, 1 September 2015) [238].

<sup>65</sup> See Elspeth Guild and Vladislava Stoyanova, ‘The Human Right to Leave Any Country: A Right to Be Delivered’ in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia, NWV Verlag 2018); Vladislava Stoyanova, ‘The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law’ (2020) 32 *IJRL* 403; Emilie McDonnell, ‘Protecting the Right to Leave in an Era of Externalised Migration Control’ (DPhil thesis, University of Oxford 2021); Violeta Moreno-Lax, ‘Intersectionality, Forced Migration, and the Jus-generation of the Right to Flee: Theorising a Composite Entitlement to Leave to Escape Irreversible Harm’ in Basak Çalı, Ledi Bianku and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (OUP 2021).

<sup>66</sup> Costello (n 62) 647-48; McDonnell (n 65) ch 5.

Without this examination, there is a danger that refugee-specific mobility channels, and in particular resettlement, become part of the edifice of containment, rather than enhancing refugee protection. Moreover, some international protection mechanisms, such as those for victims of trafficking, may even create such a degree of precarity that they entail vulnerability to *refoulement*. Consequently, in some contexts, victims of trafficking seek refugee protection, and indeed have been legally recognised as refugees due to risks of re-trafficking,<sup>67</sup> among other things.

## ii. *Processes to Recognise International Protection Needs*

Whether individuals belong within the protected categories of refugees / IP beneficiaries is not only a matter of legal definition, but more importantly, on how recognition processes work. In diverse settings, the role of determining who is a refugee, while primarily a state responsibility, falls variously to UNHCR, governmental bodies, or a diverse constellation of UNHCR and state actors. While the Refugee Convention is silent on the procedures for RSD, international human rights law, national legislation and international and national jurisprudence establish some key principles.<sup>68</sup> In many systems, recognition processes are attuned principally to the Refugee Convention definition, even sidelining binding regional definitions, for instance in Africa.<sup>69</sup>

Another highly significant issue is the design of recognition processes. Prima facie recognition and other forms of group recognition offer UNHCR and states a way to recognise large numbers of refugees. It has been suggested, for example, that the absence of such mechanisms in Latin America helps explain at least part of why the Venezuelan exodus has not been dealt with under refugee mechanisms in Latin America,<sup>70</sup> as explored further in the Venezuelan case study (**Part V.3** below).

## iii. *The Content of International Protection: Non-refoulement and Beyond*

The second issue is the *content* of international protection. The principle of *non-refoulement* is a core principle, now considered to be a rule of customary international law and ‘ripe for recognition’ as *jus cogens*, that is part of the body of international norms that are central to international legality.<sup>71</sup> Article 33(1) of the Refugee Convention prohibits states from returning a refugee in any manner to a country where he or she would be at risk of persecution. Many other human rights treaties prohibit *refoulement*, including to face risks of torture, or cruel, inhuman or degrading treatment or punishment, bringing many human rights bodies and regional courts to interpret and enforce the norm.<sup>72</sup>

However, in spite of this institutional back up, at its weakest, international protection rooted in *non-refoulement* amounts to a bare right not to be removed, or a right to resist removal to the state of origin, but not a right to status or security of residence in the host state. This is the case, for example, under the

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<sup>67</sup> Catherine Briddick and Vladislava Stoyanova, ‘Human Trafficking and Refugees’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) (forthcoming).

<sup>68</sup> David James Cantor, ‘Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence’ (2015) 34 *Refugee Survey Quarterly* 79.

<sup>69</sup> Tamara Wood, ‘Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention’s Expanded Refugee Definition’ (2014) 26 *IJRL* 555.

<sup>70</sup> See Venezuelan case study below.

<sup>71</sup> Cathryn Costello and Michelle Foster, ‘Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test’ in Maarten den Heijer M and Harmen van der Wilt (eds), *NYIL 2015: Jus Cogens: Quo Vadis?* (TMC Asser Press 2016).

<sup>72</sup> Basak Çali, Cathryn Costello and Stewart Cunningham, ‘Hard Protection through Soft Courts? Non-refoulement before the United Nations Treaty Bodies’ (2020) 21 *German Law Journal* 355.

widely criticised caselaw of the ECtHR, those protected against removal have no right to a residence permit under the ECHR.<sup>73</sup>

Accordingly, developing and ensuring compliance with the human rights content of international protection is crucial. The Refugee Convention sets out an extensive rights catalogue, which is attuned to the gradual incorporation of refugees in host states, unless they are offered settlement elsewhere. Regrettably, many states do not accord refugees their rights under the Convention. IHRL requires higher standards in some respects, for instance regarding the right to work.<sup>74</sup> Other rights, such as family reunification, are not enshrined in the Convention, but rather derive from interpretations of the human right to family life.<sup>75</sup>

One important normative development would be to synthesise human rights standards into a right to security of residence. This would also enhance protection for recognised refugees. The ethos of the Refugee Convention supports this move, but state practice appears to be drifting towards greater precarity, even for recognised refugees. Moreover, many Convention refugees are siphoned into weaker, less formal statuses, which in turn leads to rights restrictions.

The **human right to work** is a key aspect of international protection. At present, displaced people are frequently denied the right to decent work.<sup>76</sup> Costello and O’Cinneide examine two processes to ensure the effectiveness of the right to work, firstly domestic litigation (invoking national bills of rights) and transnational leveraging of better rights for refugees, as exemplified in the Jordan Compact. The former depends on the legal opportunity structures at the national and regional level, including the ability of asylum seekers and refugees to access these structures. There have been some significant legal victories in this context, in both the Global South (Kenya, South Africa) and Global North (EU, Ireland), but often the right to work is protected in minimal terms, only to protect against destitution, rather than the intrinsic freedom to work that is also part of the composite right to work protected in IHRL. In terms of how to develop the content of international protection, examining the right to work offers three sets of insights:

- 1) The importance of normative specification of the human rights baseline on the right to work, to ensure dignified work;
- 2) The need to support domestic and regional litigation, to avoid minimalist readings of the right to work;
- 3) The need to anchor transnational processes in human rights standards, by including considerations of dignified work at the outset, and ensure appropriate benchmarking, participation and oversight.

#### IV. Key Institutions in the Displacement Regime Complex

Drawing upon the concept of regime complexity, we now turn to some of the institutions that have assumed different displacement-related functions, including those that were given a mandate for such

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<sup>73</sup> *Bonger v the Netherlands* App no 10154/04 (ECtHR, 15 September 2005). See critique by Marie-Bénédicte Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) ch 13. Other human rights instruments do require states to offer status to those who are non-removable. See further Maria-Teresa Gil-Bazo, ‘Refugee Protection under International Human Rights Law: From *Non-Refoulement* to Residence and Citizenship’ (2015) 34 *Refugee Survey Quarterly* 11.

<sup>74</sup> Cathryn Costello and Colm O’Cinneide, ‘The Right to Work’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021).

<sup>75</sup> Cathryn Costello, Kees Groenendijk and Louise Halleskov Storgaard, *Realising the Right to Family Reunification of Refugees in Europe* (Issue Paper, Council of Europe Commissioner for Human Rights 2017).

<sup>76</sup> Cathryn Costello and Colm O’Cinneide, ‘The Right to Work of Asylum Seekers and Refugees’ (ASILE 2021) (forthcoming).

purposes and those that have entered the refugee and IDP regimes through linkages between regimes. Our focus here is to draw out some of the challenges for international cooperation and normative consistency given the proliferation of institutions operating within these regimes.

## 1. The United Nations High Commissioner on Refugees (UNHCR)

The United Nations High Commissioner on Refugees (UNHCR) is the most recognisable actor in the field of displacement given its mandate for international protection of refugees. It was created for the purpose of aiding states to foster international cooperation on refugees, with the 1951 Refugee Convention providing the normative basis of its work.<sup>77</sup> Accordingly, its Statute defined two main functions for the organisation: to provide international protection of refugees and to seek permanent solutions for refugees, both in coordination with states.<sup>78</sup> Alongside this mandate, the organisation was further tasked with supervising the application of the Refugee Convention.<sup>79</sup>

UNHCR has from the early days taken a proactive role to characterise cross-border flight as a refugee issue falling within its mandate.<sup>80</sup> For example, it worked to overcome the temporal and geographical limits of the 1951 Convention by engaging in creative normative efforts and practical protection activities, thereby expanding the scope of refugee protection.<sup>81</sup> Its refugee protection mandate has always included a mandate to assist refugee returnees, as voluntary repatriation was a solution envisaged in its Statute from the outset.<sup>82</sup> Its formal mandate regarding stateless persons has expanded over time.<sup>83</sup>

The development of its mandate for IDPs has been incremental: As IDP protection differs from international protection, UNHCR's IDP work is generally under the auspices of the UN Cluster system. More specifically, UNHCR is the leader of the Global Protection Cluster and co-leader of the Global Shelter Cluster and the Global Camp Coordination Camp Management Cluster. Considering its leadership responsibilities, the IDP Operational Review Team has highlighted the need for UNHCR to make protection central to humanitarian action; create stronger and more systematic linkages between refugee and IDP responses; and engage more reliably and predictably in situations of internal displacement.<sup>84</sup> However, such a role expansion means that within the displacement regime complex, UNHCR has sometimes been depicted as a 'challenged institution.'<sup>85</sup> Once the dominant actor in the

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<sup>77</sup> Jérôme Elie, 'The Historical Roots of Cooperation Between the UN High Commissioner for Refugees and the International Organization for Migration' (2010) 16 *Global Governance* 345, 347.

<sup>78</sup> *Ibid.*

<sup>79</sup> Refugee Convention, art 35.

<sup>80</sup> Alexander Betts, Gil Loescher and James Milner, *UNHCR: The Politics and Practice of Refugee Protection* (Routledge 2011).

<sup>81</sup> See on Hungary's 1956 'legal gymnastics': Sara E Davies, 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol' (2017) 19 *International Journal of Refugee Law* 703, 713-14.

<sup>82</sup> UNGA, 'Statute of the Office of the United Nations High Commissioner for Refugees' (14 December 1950) UN Doc A/RES/428(V).

<sup>83</sup> UNHCR's responsibilities were initially limited to stateless persons who were refugees as set out in paragraph 6(A)(II) of the UNHCR Statute and Article 1(A)(2) of the 1951 Convention. In this capacity, UNHCR was involved in the drafting of the 1954 Convention. To undertake the functions foreseen by Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness ("1961 Convention") UNHCR's mandate was expanded to cover persons falling under the terms of that Convention by: UNGA Res 3274 (XXIX) Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply (10 December 1974) UN Doc A/RES/3274(XXIX); UNGA Res 31/36 Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply (30 November 1976) A/RES/31/36.

<sup>84</sup> IDP Operational Review Team, 'Operational Review of UNHCR's Engagement in Situations of Internal Displacement: Final Report' (2018) 30 *IJRL* 373.

<sup>85</sup> Alexander Betts, 'Regime Complexity and International Organizations: UNHCR as a Challenged Institution' (2013) 19 *Global Governance* 69.

refugee regime, UNHCR has increasingly needed to compete with other institutions to maintain its influence and authoritative roles in refugee protection.<sup>86</sup>

Like all IOs, UNHCR exercises a certain degree of autonomy from states, but is also dependent on them for both funding and access to populations of concern.<sup>87</sup> The majority of its budget is comprised of voluntary contributions by states whereby it has limited freedom to allocate where those funds should be spent. In 2019, 87% of UNHCR's budget comprised of voluntary contributions of individual states—and only 15% of this was provided to the organisation as unearmarked funding.<sup>88</sup> These figures suggest that UNHCR may be constrained and incentivised by funding relationships with states. However, recent scholarship on donor influence identifies considerable differences between UNHCR and IOM.<sup>89</sup> It suggests that UNHCR generally focuses its funding on its core mandate of refugee protection, although 'mandate-undermining effects of such influence are limited and most pronounced during salient refugee situations within Europe.' In contrast, studies find that IOM 'appears to be much more donor-driven than the UNHCR'.

There are also tensions between UNHCR's operational role, its dependency on **host states** for access to refugee populations in that role, and its role in encouraging states to protect refugees themselves. These tensions are explored in the recent book by Abdelaaty, who explains state engagement with UNHCR in terms of tensions between the states' domestic and international interests. Often, states delegate more to UNHCR, in terms of both mandate RSD and a humanitarian role, when their perceived international and domestic interests in protecting refugees are in tension.<sup>90</sup> This account helps explain why tensions with host states often constrain UNHCR. For example, in her case studies of Turkey, Egypt and Kenya, Abdelaaty identifies examples of UNHCR's adaptation to host state demands. This scholarship suggests that UNHCR ought to work more closely with other IOs to ensure that humanitarian access is secure and that the threat of denial of that access does not undermine its more general protection mandate. Moreover, it suggests that political leadership in IOs ought to be better attuned to domestic and international interests of host states, as these form part of the local dynamics that determine its ability to foster better protection.

## 2. The International Organization for Migration (IOM)

The International Organization for Migration (IOM) is another prominent actor in the displacement regime complex. Similar to UNHCR, IOM is an institutional product of the post-War era. However, it differs in that it was created outside of the UN system, and designated an operational rather than a protection function. At the time of its creation, IOM was delegated the task of dealing with post-war overpopulation problems, namely organising the transfer and settlement of populations from Europe to overseas countries seeking labour migrants.<sup>91</sup> Over the past seven decades, IOM has expanded massively to assume roles that go far beyond its original functions, which it has justified by appealing to its broad constitutional mandate, which provides a list of services that IOM can provide to states in managing migration.<sup>92</sup> The organisation's endeavour to widely define the term 'migrant', for which there is no international definition, has also facilitated its expansion into different international regimes,

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<sup>86</sup> Ibid.

<sup>87</sup> Betts, Loescher and Milner (n 80) 2.

<sup>88</sup> UNHCR, 'Global Funding Overview 2019' <<https://www.unhcr.org/5eddeb394>> accessed 14 April 2021.

<sup>89</sup> Ronny Patz and Svanhildur Thorvaldsdottir, *The International Organization for Migration* (Springer 2020) ch 4 'Drivers of Expenditure Allocation in the IOM: Refugees, Donors, and International Bureaucracy'; Svanhildur Thorvaldsdottir, Ronny Patz and Klaus H Goetz, 'Mandate or Donors? Explaining the UNHCR's Country-Level Expenditures from 1967 to 2016' (2021) *Political Studies* 1 <<https://doi.org/10.1177%2F0032321720974330>> accessed 10 May 2021.

<sup>90</sup> Lamis Abdelaaty, *Discrimination and Delegation: Explaining State Responses to Refugees* (OUP 2021).

<sup>91</sup> Elie (n 77).

<sup>92</sup> Megan Bradley, *The International Organization for Migration (IOM): Challenges, Commitments, Complexities* (Routledge 2020).

notably becoming a lead IO in the IDP sphere.<sup>93</sup> Indeed, IOM's humanitarian roles related to IDPs constitute the largest share of IOM's operations and financing by states, although these are highly under-researched aspects of the organisation's work.<sup>94</sup> Since 2005, IOM has assumed formal responsibilities for post-disaster camp management under the UN Cluster system. While IOM purports to play a mainly operational role in regimes that touch upon its migration mandate, it actively participates in standard-setting processes, creates new norms and standards, and is involved in the interpretation and implementation of normative standards at the field level.<sup>95</sup>

IOM's growth in displacement responses is significant because the organisation's work is not based on an international convention, nor does its Constitution make any particular reference to the organisation's obligations to respect human rights.<sup>96</sup> Even when IOM formally joined the UN in 2016 as a 'related organisation,' the UN-IOM agreement offered little clarity around the nature of IOM's obligations to perform its work in accordance with the UN Charter.<sup>97</sup> It is through a patchwork of policies and public statements that IOM has formally acknowledged it has an obligation to respect international legal principles and standards relating to the protection of individual human rights,<sup>98</sup> although all IOs are arguably so obliged as a matter of international law. These aspects of the organisation have provoked concerns about IOM's conduct in the field, which are further exacerbated by its perceived deference to sovereign rights over the individual, and its fairly weak mechanisms of accountability and multilateral oversight.<sup>99</sup> In essence, IOM is distinguishable from many other IOs in its institutional set-up as a service provider for states, receiving the majority of its funding from bilaterally funded projects.<sup>100</sup> This reinforces perceptions that it lacks autonomy – more so than other agencies – and is easily influenced by states' interests in its pursuit of funds, institutional growth and survival. Whereas UNHCR is required to publish annually the areas and programmes it intends to pursue, and has its budget approved by its governing body, its Executive Committee, IOM is relatively unencumbered to pursue funding from individual donors without first seeking approval from the IOM Council.<sup>101</sup>

### 3. IOM – UNHCR Complementarity, Competition & Cooperation

Based on these dynamics mentioned above, IOM is commonly portrayed as both a complementary actor and competitor of UNHCR. Its existence has significantly shaped the politics of regimes dealing with displacement, and arguably constituted some of the main challenges to upholding core international norms.<sup>102</sup> This is not to say that IOM's emergence into displacement regimes is entirely negative from the perspective of regime efficacy. Historically speaking, cooperation between IOM and UNHCR have been central to a number of large-scale operations concerning people fleeing war and internal conflict and demonstrating the need for international protection, humanitarian aid, and movement-related assistance; IOM's roles in this regard have extended opportunities for displaced people to move to safety, and operationalised various dimensions of resettlement as a durable solution to displacement.<sup>103</sup>

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<sup>93</sup> IOM, 'Who is a Migrant?' <[www.iom.int/who-is-a-migrant](http://www.iom.int/who-is-a-migrant)> accessed 14 April 2021.

<sup>94</sup> Bradley (n 92).

<sup>95</sup> Antoine Pécoud, 'What Do We Know About the International Organization for Migration?' (2018) 44 *Journal of Ethnic and Migration Studies* 1621.

<sup>96</sup> Bradley (n 92).

<sup>97</sup> Elspeth Guild, Stephanie Grant and Kees Groenendijk, 'Unfinished Business: The IOM and Migrants' Human Rights' in Antoine Pécoud and Martin Geiger (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave Macmillan 2020).

<sup>98</sup> Bradley (n 92).

<sup>99</sup> See Fabian Georgi, 'For the Benefit of Some: The International Organization for Migration (IOM) and its Global Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan 2010).

<sup>100</sup> Jan Klabbers, 'Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-making, and the Market for Migration' (2019) 32 *LJIL* 383, 388.

<sup>101</sup> Bradley (n 92).

<sup>102</sup> Betts, 'Institutional Proliferation' (n 4).

<sup>103</sup> Elie (n 77) 350.

There are indeed multiple examples where UNHCR and IOM have achieved an efficient division of labour in the exercise of their respective mandates.<sup>104</sup> It is also acknowledged that IOM has shown complementarity to UNHCR by leveraging its more flexible mandate to provide basic assistance to populations affected by crises, but not considered to be in need of international protection.<sup>105</sup> Koch warns against a simplistic reading of IOM-UNHCR relations as based on harmful competition. Her study of the division of labour between IOM and UNHCR on IOM's assisted voluntary return (AVR) programmes suggests that the division of labour has benefitted UNHCR, given its limited mandate in this field.<sup>106</sup>

Nevertheless the literature has been far more likely to identify areas of tension, competition and overlap between the two agencies' mandates and work in the field.<sup>107</sup> States have increasingly pursued their objectives for migration control by utilising IOM; at times engaging it when UNHCR has refused to be involved, or side-lining UNHCR because IOM's institutional set-up and operational culture and focus offers a better avenue for states to minimise their legal obligations to refugees and migrants.<sup>108</sup> Scholars contend that IOM's existence as an alternative venue for states poses risks for UNHCR, which may be incentivised to compete in new areas outside its core mandate, or support state agendas that may generate tension with core protection principles.<sup>109</sup> Agreements on paper concerning the appropriate division of roles and responsibilities are important. However, they have not precluded clashes at the field level over resources, responsibilities, and the interpretation of norms and standards.<sup>110</sup>

Moretti has examined IOM-UNHCR relations in Southeast Asia, identifying how the steady growth of IOM in the region was perceived as a direct challenge to UNHCR's role and mandate.<sup>111</sup> He argues that this led UNHCR to carve out a hard distinction between 'refugees' and 'migrants'. Moretti argues that the refugee/migrant binary has not strengthened international protection but had the opposite effect of allowing states to fund IOM to deal with 'irregular migrants' through its more operational approaches. We explore this argument further in the case-study (**Part V.2** below) on responses to Rohingya in Bangladesh, contrasting IOM-UNHCR relations there with the coordinated efforts in Latin America in the Venezuelan response (**Part V.3** below).

#### **4. The International Development and Labour Regimes: The World Bank, ILO and UN-Habitat**

UNHCR and IOM are not the only pertinent organisations, in particular given that global policy agendas aimed at bridging the 'humanitarian-development' divide have catalysed greater interaction between development agencies and those with mandates related to displacement.<sup>112</sup> Initiatives such as the 2016 World Humanitarian Summit, the 2016 New York Declaration and Global Compacts, and the 2030 Agenda for Sustainable Development have pushed these deeper institutional connections.<sup>113</sup> These forums have sought to create linkages between displacement, poverty, inequality, and climate change, and further recognise that displaced people are increasingly uprooted for long durations of time. They also stress that the nature, scale and duration of displacement requires complementarity between

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<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Anne Koch, 'The Politics and Discourse of Migrant Return: The Role of UNHCR and IOM in the Governance of Return' (2014) 40 *Journal of Ethnic and Migration Studies* 905.

<sup>107</sup> Ibid.

<sup>108</sup> Betts, 'Institutional Proliferation' (n 4); Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 22 *IJHR* 681.

<sup>109</sup> Betts, 'Institutional Proliferation' (n 4).

<sup>110</sup> Bradley (n 92).

<sup>111</sup> Sebastien Moretti, 'Between Refugee Protection and Migration Management: The Quest for Coordination between UNHCR and IOM in the Asia-Pacific Region' (2021) 42 *Third World Quarterly* 34.

<sup>112</sup> Sarah Deardoff Miller, 'The GCR and the Role of Development Actors with Refugees: A Game-Changer, or More of the Same?' (2019) 57 *International Migration* 173.

<sup>113</sup> Ibid.

humanitarian and development actors, as humanitarian-focused institutions and financing mechanisms are ill-equipped to deal with the medium-term, socio-economic dimensions of displacement crises.<sup>114</sup>

The World Bank, International Labour Organisation (ILO) and United Nations Human Settlements Programme (UN-Habitat) increasingly play a role in the displacement regime complex, to name but a few of the pertinent actors. The World Bank's history somewhat parallels that of the UNHCR and IOM in the sense that it was created after World War II to deal with issues related to post-war recovery, and has since substantially enlarged its mandate to respond to emerging global challenges and instabilities.<sup>115</sup> Now considered to be the leading development institution, the World Bank is distinctive in its functions and governance.<sup>116</sup> It exists as a cooperative, owned by its Member States, and through a negotiated agreement has achieved status as a specialised agency of the UN, meaning that it coordinates with the UN, but is not directly subjected to its rules or governance structures.<sup>117</sup> Voting shares of the World Bank's 185 member governments are allocated by financial contribution, enabling economically dominant states a louder voice and greater authority over the Bank's decisions.<sup>118</sup> Of further significance is how the World Bank operates chiefly as a financial organization, designed to give loans and grants to states using different modalities with different conditionalities for borrowers. This, on the one hand anchors its immense power as an IO, and on the other, underscores the state-centric character of the organisation. Governments are the Bank's target population—as clients of its lending practices.<sup>119</sup>

In contrast to the World Bank, the UN-Habitat wields far less influence within the international development regime. In 1977, following the United Nations Conference on Human Settlements, the UN General Assembly recognised the need for international cooperation in the field of human settlements in order to promote socio-economic development and find solutions 'based on equity, justice and solidarity'.<sup>120</sup> General Assembly Resolution 32/162 henceforth transformed the UN Committee on Housing, Building and Planning into a Commission on Human Settlements (originally with 58 elected members), which was charged with promoting the concept of human settlements internationally and increasing funding in that regard. To carry out its function to provide technical assistance to states and other IOs within the UN system, a small technical arm, called the UN Centre for Human Settlements (Habitat), was established.<sup>121</sup> In 2002, the Centre was elevated to the status of a Programme within the United Nations and renamed UN-Habitat, while the Commission was turned into the Governing Council of UN-Habitat, and made into a subsidiary organ of the General Assembly.<sup>122</sup> Alongside this shift, UN-Habitat was recognised as the lead agency for human settlements within the UN system and mandated to implement the internationally-agreed 'Habitat Agenda,' including realising its core goals of 'adequate shelter for all and sustainable human settlements'.<sup>123</sup> Since then, UN-Habitat has secured a lead role on urban issues, brought to light by its annual World Urban Forum that discusses pressing issues of urbanisation, and asserted a mandate for assisting states

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<sup>114</sup> Xavier Devictor, 'Towards a Development Approach to Displacement' (2017) 56 *Forced Migration Review* 73.

<sup>115</sup> Katherine Marshall, *The World Bank: From Reconstruction to Development to Equity* (Routledge 2008).

<sup>116</sup> The World Bank consists formally of two institutions, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) but is further linked to a web of other institutions and facilitates that together comprise the World Bank Group.

<sup>117</sup> UN, 'UN System' <<https://www.un.org/en/about-us/un-system>> accessed 10 May 2021.

<sup>118</sup> Marshall (n 115).

<sup>119</sup> *Ibid.*

<sup>120</sup> UNGA Res 32/162 Institutional arrangements for international cooperation in the field of human settlements (19 December 1977) UN Doc A/RES/32/162.

<sup>121</sup> *Ibid.* section III, para 1.

<sup>122</sup> UNGA Res 58/227 Rules of procedure of the Governing Council of the United Nations Human Settlements Programme (UN-Habitat) (25 February 2004) UN Doc A/RES/58/227; UN (n 117).

<sup>123</sup> UNGA Res 56/206 Strengthening the mandate and status of the Commission on Human Settlements and the status, role and functions of the United Nations Centre for Human Settlements (Habitat) (26 February 2002) UN Doc A/RES/56/206, section III, para 2.

in disaster prevention and post-disaster rehabilitation, in line with its mandate to implement the Habitat Agenda.<sup>124</sup>

From a global policy perspective, the development regime has the potential to complement the refugee and IDP regimes in (at least) three main ways: (1) creating conditions that prevent displacement; (2) advancing durable solutions, including increasing the sustainability of return in countries or areas of origin; (3) improving social stability in countries or areas hosting refugees and IDPs during processes of seeking durable solutions.<sup>125</sup> To illustrate, the GCR stresses that development actors should focus their resources on countries accommodating refugees, to ‘ensure that [host] communities affected by a refugee situation are not impaired in making progress towards the Sustainable Development Goals’.<sup>126</sup> More specifically, development actors are expected to complement the work of humanitarian actors by offering their expertise on issues relating to property rights, housing, livelihoods, services, disaster risk reduction and good governance.<sup>127</sup>

As these policy discourses on the displacement-development continuum have evolved, both the World Bank and UN-Habitat have stepped up their engagement on displacement-related issues, amongst a range of other agencies. Both IOs now participate in the IASC, the World Bank as a standing invitee and UN-Habitat as a full member. The World Bank’s involvement, especially in terms of financing, is most notable here. The Bank has recently advanced two facilities to specifically support refugees and host communities, these being the Global Concessional Financing Facility (GCFF), which offers cheap and accessible loans to middle-income, refugee-hosting countries, and the International Development Association (IDA), which was already established but now adds to the resources available for low-income, refugee-hosting countries.<sup>128</sup> Both mechanisms are aimed at strengthening commitments to refugees in middle and low income countries, whilst generating new economic opportunities for marginalised refugees and host communities.<sup>129</sup> In this way, the World Bank may complement the work of UNHCR and other actors by creating better access to the labour market for refugees who are typically denied opportunities and the right to work.

Yet, the World Bank’s entry into the refugee space has given rise to concern. The agency has a controversial history of advocating for structural adjustment reforms that have arguably deepened conditions of poverty for Southern states, while overwhelmingly benefitting Northern states, in particular those reforms designed to privatise and liberalise Southern economies.<sup>130</sup> In the context of World Bank interventions in the Syrian crisis, scholars have been quick to note that while ‘the right for refugees *to work* must be accompanied by rights *at work*,’ much of the livelihood assistance being provided to countries hosting refugees has not been designed with labour protections in mind.<sup>131</sup> Further research is needed to assess the real impact of the World Bank’s expanded role in the displacement regime, in particular to examine whether displaced persons and host communities really benefit.

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<sup>124</sup> UN-Habitat, ‘Humanitarian Affairs and the Role of UN-HABITAT, Strategic Policy on Human Settlements in Crisis and Sustainable Relief and Reconstruction Framework’ (UN-HABITAT 2008) 9 <[https://mirror.unhabitat.org/downloads/docs/8352\\_67307\\_Publication\\_Humanitarian%20Affairs,%20and%20the%20Role%20of%20UN-Habitat.pdf](https://mirror.unhabitat.org/downloads/docs/8352_67307_Publication_Humanitarian%20Affairs,%20and%20the%20Role%20of%20UN-Habitat.pdf)> accessed 14 April 2021.

<sup>125</sup> Betts, ‘Regime Complexity’ (n 85) 72; Devictor (n 114); Sarah Charles and others, ‘The Role of the World Bank in Fragile and Conflict-Affected Settings: Lessons for IDA19 and the FCV Strategy’ (Center for Global Development, IRC and Mercy Corps 2019) <<https://www.cgdev.org/sites/default/files/role-world-bank-fragile-and-conflict-affected-situations.pdf>> accessed 14 April 2021.

<sup>126</sup> Deardoff Miller (n 112).

<sup>127</sup> Ibid.

<sup>128</sup> Devictor (n 114).

<sup>129</sup> Sarah Charles and others (n 125).

<sup>130</sup> Leah Zamore, ‘Refugees, Development, Debt, Austerity: A Selected History’ (2018) 6 *Journal on Migration and Human Security* 26.

<sup>131</sup> Jennifer Gordon, ‘Refugees and Decent Work: Lessons Learned from Recent Refugee Jobs Compacts’ (2019) ILO Employment Working Paper No 256, 4 <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---ifp\\_skills/documents/publication/wcms\\_732602.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_732602.pdf)> accessed 14 April 2021.

These concerns substantiate the importance of the ILO in the displacement regime complex, especially in the design of refugee labour integration programmes. As Gordon points out, there is a long history of extensive ILO's involvement with refugees, stretching back to its establishment in 1919, when the agency aided refugees to obtain work and monitored respect of their labour rights.<sup>132</sup> While the establishment of the refugee regime in 1951 significantly diminished the ILO's work with refugees, as responsibilities for refugees shifted to UNHCR, renewed focus on refugee 'self-reliance,' rights to work, and access to livelihoods has once again pulled the ILO in the direction of refugee protection. In particular, its involvement with refugees has been catalysed by the lack of attention to the working conditions of Syrian refugees in Turkey, Jordan and Lebanon, who commonly face exploitation based on their employment in the unregulated and informal sectors of the economy.<sup>133</sup> The ILO's contemporary re-entry point on refugees has been its 2016 MoU with UNHCR, as well as its development of the non-binding 'Guiding principles on the Access of Refugees and Other Forcibly Displaced Persons to the Labour Market'<sup>134</sup> and the 'Employment and Decent Work for Peace and Resilience' Recommendation 2017 (No 205).<sup>135</sup> While the ILO's involvement promises to elevate considerations of decent work in responses and policies developed for refugees, its relatively recent inclusion in refugee discussions and policymaking means that most development assistance has yet to fully embrace and incorporate labour protections into policies that aim to promote refugee livelihoods and economic growth for 'host countries.'<sup>136</sup>

UN-Habitat's involvement in the displacement regime complex has been catalysed by the growing concentration of refugees and IDPs in cities, and by overlapping issues between displacement and housing, land and property rights. In 2007, UN-Habitat's Governing Council adopted a policy to guide UN-Habitat's operations in humanitarian contexts, and a year later the agency was delegated the focal point for housing, land and property issues within the IASC-led Emergency Shelter, Protection, and Early Recovery Clusters.<sup>137</sup> It has subsequently defined this in three ways: the promotion of the human rights frameworks related to land rights, security of tenure, women's equality, and sustainable human settlements; development of long-term reconstruction and shelter strategies; and the provision of technical assistance to governments and other agencies in 'site preparation, property management, housing reconstruction, infrastructure rehabilitation, water and sanitation and livelihoods'.<sup>138</sup>

At the World Humanitarian Summit (2016), UN-Habitat publicly committed to addressing forced displacement through its focuses on city-wide planning and design, urban economic financing, and urban policy and legislation.<sup>139</sup> Its current strategy gives considerable attention to displacement, arguing that the UN programme is well placed to offer technical support to governments for managing urban displacement, mentioning the upgrade of camp-like environments into formal neighbourhoods as one potential area of intervention.<sup>140</sup> Whilst UN-Habitat's involvement may complement the work of other agencies, as suggested by its work with UNHCR in Kenya to integrate refugees into sustainable human settlements, there are nonetheless opportunities for competition and overlap between its functions and those of UNHCR and IOM in the area of camp management, disaster displacement, and housing, land

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<sup>132</sup> Ibid 4.

<sup>133</sup> Ibid 8.

<sup>134</sup> ILO, 'Guiding Principles on the Access of Refugees and Other Forcibly Displaced Persons to the Labour Market' (28 November 2016) <[https://www.ilo.org/global/topics/labour-migration/publications/WCMS\\_536440/lang--en/index.htm](https://www.ilo.org/global/topics/labour-migration/publications/WCMS_536440/lang--en/index.htm)> accessed 30 June 2020.

<sup>135</sup> ILO Recommendation R205: Employment and Decent Work for Peace and Resilience (General Conference 16 June 2017).

<sup>136</sup> Gordon (n 131)

<sup>137</sup> UN-Habitat (n 124).

<sup>138</sup> Ibid 13-14.

<sup>139</sup> UN-Habitat Commitments for the World Humanitarian Summit Istanbul (adopted 23-24 May 2016).

<sup>140</sup> UN-Habitat, 'The Strategic Plan 2020-2023' (UN-Habitat 2019) 48 <[https://unhabitat.org/sites/default/files/documents/2019-09/strategic\\_plan\\_2020-2023.pdf](https://unhabitat.org/sites/default/files/documents/2019-09/strategic_plan_2020-2023.pdf)> accessed 14 April 2021.

and property rights.<sup>141</sup> By mapping out these particular areas of institutional competition, it is important to stress that while development agents like the World Bank and UN-Habitat have the potential to complement the IDP and refugee regimes, they also carry with them distinct priority areas, tools and insights that may not necessarily easily integrate with refugees and IDP-specific approaches. For example, development actors might be more inclined to take a needs-based approach to the delivery of assistance, or focus their attention on macro-level conditions, such as poverty reduction, rather than on the individualised needs of the displaced, as is the typical approach for humanitarian actors.<sup>142</sup>

## V. Case Studies: Displacement from Haiti, Myanmar, and Venezuela

These case studies serve as illustrations of the dynamics of the global displacement complex.

### 1. Disaster IDPs in Haiti

The 2010 Haiti earthquake destroyed 105,000 homes, damaging 188,000, displacing 1.5 million Haitians, out of a population of 9.9 million.<sup>143</sup> Prior to the earthquake, most of Haiti's urban residents lived in overcrowded informal settlements, generally lacking security of tenure, making them particularly vulnerable to displacement.<sup>144</sup> The legal and political barriers to securing land for rebuilding meant both IDP protection and finding a durable solution to displacement were particularly challenging.<sup>145</sup>

The normative framework on IDP protection was weak in Haiti.<sup>146</sup> IDP standards were not incorporated into Haiti's domestic law.<sup>147</sup> Government reconstruction policies did not generally identify IDPs as a special category of concern.<sup>148</sup> No government institution was officially mandated to deal with displacement-related issues for the first two years.<sup>149</sup> The Haitian authorities made clear their preference to end the IDP situation as quickly as possible, by 'return', as other options (local integration and resettlement) would have required addressing complex questions of land ownership.<sup>150</sup> Without the requisite state support for land reform, most IDPs were accommodated in IDP camps on private and state land. In practice, the line between IDP camp and informal settlement was thus blurred. Accommodation was inherently insecure: An estimated one in four IDPs were threatened with eviction during their displacement, and between 2010 and 2013, more than 16,000 families were evicted.<sup>151</sup>

While the international response to the Haitian earthquake was well-funded, it proved difficult to coordinate. The main international body charged with reconstruction<sup>152</sup> was disbanded 18 months into

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<sup>141</sup> UN Habitat, 'UN-Habitat Advisory Support to Kalobyei Integrated Socio-Economic Development Programme (KISEDIP)' <<https://unhabitat.org/project/un-habitat-advisory-support-to-kalobyei-integrated-socio-economic-development-programme>> accessed 14 May 2021.

<sup>142</sup> Deardoff Miller (n 112).

<sup>143</sup> Angela Sherwood, "'Grabbing' Solutions: Internal Displacement and Postdisaster Land Occupations in Haiti" in Megan Bradley, James Milner and Blair Peruniak (eds), *Refugees' Roles in Resolving Displacement and Building Peace: Beyond Beneficiaries* (Georgetown University Press 2019).

<sup>144</sup> Ibid.

<sup>145</sup> Elizabeth Ferris and Sara Ferro-Ribeiro, 'Protecting People in Cities: The Disturbing Case of Haiti' (2012) 36 *Disasters* S43 <<https://doi.org/10.1111/j.1467-7717.2012.01285.x>> accessed 14 April 2021.

<sup>146</sup> Bradley and Sherwood (n 41).

<sup>147</sup> Greger B Calhan, 'Forced Evictions, Mass Displacement, and the Uncertain Promise of Land and Property Restitution in Haiti' (2014) 11 *Hastings Race and Poverty Law Journal* 157.

<sup>148</sup> Bradley and Sherwood (n 41).

<sup>149</sup> Ibid.

<sup>150</sup> Sherwood (n 143).

<sup>151</sup> Amnesty International, 'Nowhere to Go' Forced Evictions in Haiti's Displacement Camps' (Amnesty International 2013) <<https://www.amnesty.org/download/Documents/12000/amr360012013en.pdf>> accessed 6 May 2021.

<sup>152</sup> The Interim Haiti Reconstruction Commission (IHRC). The commission was co-chaired by Haiti Prime Minister at the time Jean-Max Bellerive and UN Special Envoy Bill Clinton. (Source, Joris Willems,

the response.<sup>153</sup> The competing international actors showed little engagement with IDP standards.<sup>154</sup> Different approaches emerged to populations inside and outside camps, and hindered effective cooperation and monitoring of displacement conditions.<sup>155</sup> Ferris and Ribeiro demonstrate that disagreement about the meaning of protection contributed to a fragmented response.<sup>156</sup> Both the Protection Cluster (led by OHCHR) and the Camp Management and Coordination Cluster (CCCM – led by IOM) were activated.<sup>157</sup> However, the Protection Cluster had limited operational capacity and its influence was limited. Meanwhile, IOM, emerged as a dominant actor and played key roles in formulating solutions to the displacement through its role as the lead agency for Camp Management and Coordination (CCCM).<sup>158</sup>

Departing from the Guiding Principles, IOM narrowly defined an IDP as someone living in a camp. Its programmes sought to bring that ‘displacement’ to an end, defined in terms of no longer being a camp resident.<sup>159</sup> In reality, many IDPs remained in camps because of poverty, unemployment, and lack of access to land and housing.<sup>160</sup> Under CCCM return (ie camp closure) programmes, large numbers of IDPs were assisted to ‘return’ through the provision of one-year cash grants for rental housing, which were conditional on IDPs’ exit from camps and their de-registration as IDPs.<sup>161</sup> These programmes were criticised for undermining the human right to housing.<sup>162</sup> They apparently placed many IDPs at risk of becoming homeless after their one-year cash grants had ended,<sup>163</sup> and obscured the ongoing displacement of many IDPs.<sup>164</sup>

This case study illustrates an internal displacement scenario with: (1) weak incorporation of international IDP and human rights standards; (2) strong state and international support for ending displacement, including by means in tension with human rights; (3) a strong IOM operation, with strong donor and host state support; and (4) a weak UNHCR role and presence. While the Haitian context made protection and solutions for IDPs challenging, it does appear that the failure to engage with the IDP standards led to a set of responses that were particularly likely to undermine human rights protection. Moreover, the fragmented cluster system, and weak role for actors with a clear conception of protection, meant that IOM took the lead, and was able to develop metrics for its own success that secured its ongoing donor and host state support, leaving only weak local and international actors to contest its actions.

## 2. Rohingya Refugees from Myanmar – Bangladesh Response

The Rohingya, an ethnic and religious minority in Myanmar, have since the 1950s been subject to sustained and systematic state human rights violations.<sup>165</sup> Most Rohingya have been rendered stateless through discriminatory laws and practices.<sup>166</sup> This systematic violence and oppression has triggered

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‘Deconstructing the Reconstruction: The IHRC’ in Mark Schuller and Pablo Morales (eds), *Tectonic Shifts: Haiti Since the Earthquake* (Kumarian Press 2012)).

<sup>153</sup> Schuller and Morales (n 152).

<sup>154</sup> Sherwood (n 143).

<sup>155</sup> Ibid.

<sup>156</sup> Ferris and Ferro-Ribeiro (n 145).

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Bradley (n 92).

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Schuller and Morales (n 152).

<sup>163</sup> Ibid.

<sup>164</sup> Sherwood (n 143).

<sup>165</sup> Penny Green, Thomas MacManus, and Alicia De Law Cour Venning, *Countdown to Annihilation: Genocide in Myanmar* (International State Crime Initiative 2015).

<sup>166</sup> UNHRC, ‘Report of the Independent International Fact-finding Mission on Myanmar’ (12 September 2018) UN Doc A/HRC/39/64.

successive waves of forced displacement, both internally and across borders.<sup>167</sup> For the three million Rohingya living outside Myanmar in protracted refugee situations, their return is unlikely given ongoing state repression and military rule. Only limited numbers of Rohingya refugees have been resettled, and political, economic, and ecological factors pose barriers to integration within host countries.<sup>168</sup>

Bangladesh hosts nine out of ten registered refugees in the Asia-Pacific,<sup>169</sup> totalling a population of nearly one million people.<sup>170</sup> Its responses to large-scale influxes have been largely ad-hoc. Bangladesh is not a signatory to the 1951 Refugee Convention or its 1967 Protocol, nor a party to international conventions on statelessness, and it does not have domestic refugee law.<sup>171</sup> Rohingyas in Bangladesh are governed by the Foreigners Act (1946), which classifies them as ‘illegal foreigners’.<sup>172</sup> Under the Act, state authorities may restrict freedom of movement, stipulate location of residence, and prohibit classified ‘foreigners’ from engaging in specific activities, such as work or education.<sup>173</sup> These powers have been used to restrict Rohingyas’ freedom of movement.<sup>174</sup> Some domestic protection is available through the Constitution. For example, in 2017, Bangladesh’s Supreme Court declared unlawful the detention of five Rohingya refugees and prevented their refoulement.<sup>175</sup> Bangladesh emphasises the temporariness of refugee stays,<sup>176</sup> eschewing formal recognition of refugees, settling on the term ‘Forcibly Displaced Myanmar Nationals.’<sup>177</sup> Bangladesh has recently sought to relocate and confine many Rohingya refugees on the low-level island of Bhasan Char.<sup>178</sup> In spite of the likelihood that this population will stay in Bangladesh long-term, the Government of Bangladesh has consistently maintained that repatriation is the preferred solution, based in part on its view that to permit refugees permanent stay in Bangladesh would absolve Myanmar of its obligations.

A periodically-updated MoU governs the relationship between the government and UNHCR, which at present allows it to exercise two aspects of its mandate—the protection of refugees in camps and voluntary repatriation in line with international standards.<sup>179</sup> In practice, Bangladesh has at times denied UNHCR authorisation to register Rohingya refugees.<sup>180</sup> The response is characterised by longstanding competition between IOM and UNHCR. Through its mandate, UNHCR is understood to have the lead

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<sup>167</sup> Jeff Crisp, ‘“Primitive people”: The Untold Story of UNHCR’s Historical Engagement with Rohingya Refugees’ (2018) Humanitarian Exchange No 73 <<https://odihpn.org/magazine/primitive-people-the-untold-story-of-unhcrs-historical-engagement-with-rohingya-refugees/>> accessed 15 April 2021.

<sup>168</sup> Brian Gorlick, ‘The Rohingya Refugee Crisis: Rethinking Solutions and Accountability’ (2019) RSC Refugee Working Paper Series 131 <<https://www.rsc.ox.ac.uk/publications/the-rohingya-refugee-crisis-rethinking-solutions-and-accountability>> accessed 15 April 2021.

<sup>169</sup> ‘Rohingya Crisis Needs Lasting Solutions: UNHCR’ *The Daily Star* (21 August 2020) <<https://www.thedailystar.net/rohingya-crisis/news/rohingya-crisis-needs-lasting-solutions-unhcr-1948717>> accessed 15 April 2021.

<sup>170</sup> Gorlick (n 168).

<sup>171</sup> UNHCR, ‘Submission by the United Nations High Commissioner for refugees (UNHCR) for the Office of the High Commissioner for Human Rights Compilation Report - Universal Periodic Review: BANGLADESH’ (2012).

<sup>172</sup> Ashraful Azad, ‘Foreigners Act and the Freedom of Movement of the Rohingyas in Bangladesh’ (2017) 5 Griffith Journal of Law and Human Dignity 183.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Syeda Rozana Rashid, ‘Finding a Durable Solution to Bangladesh’s Rohingya Refugee Problem: Policies, Prospects and Politics’ (2020) 5 Asian Journal of Comparative Politics 174.

<sup>177</sup> Moretti (n 111) 46.

<sup>178</sup> Mushfique Wadud, ‘Disease Fears Grow as Bangladesh Plans Giant Rohingya Refugee Camp’ *The New Humanitarian* (4 October 2017) <<https://www.thenewhumanitarian.org/news/2017/10/04/disease-fears-grow-bangladesh-plans-giant-rohingya-refugee-camp>> accessed 15 April 2021.

<sup>179</sup> UNHCR, ‘Submission by the United Nations High Commissioner for refugees (UNHCR) for the Office of the High Commissioner for Human Rights Compilation Report - Universal Periodic Review: BANGLADESH’ (2012).

<sup>180</sup> Ibid.

coordination role for international responses to refugees. However, Bangladesh has sought at times to grant significant responsibilities to IOM, declaring it at one point to be the lead agency for the response. IOM's close ties with key government personnel and its operational focus appeared to have influenced the government's decision-making in this regard.<sup>181</sup> Framing the refugee population as 'Undocumented Myanmar Nationals' (UMN) at one point blurred the institutional mandates.<sup>182</sup> While both IOM and UNHCR now assume co-leadership roles in the Rohingya response, there are concerns that institutional competition has somewhat muted UNHCR's advocacy for refugees, and contributed to inefficiency.<sup>183</sup>

This case study illustrates the responses to Rohingya Refugees in Bangladesh, illustrating: (1) weak state normative commitments; (2) institutional competition between IOM and UNHCR; (3) and limited protection and solutions. In many ways the situation is typical of the dynamics in many states that host large numbers of refugees and are non-signatories of the Refugee Convention. Absent prospects for safe and voluntary repatriation, the solution of resettlement is unavailable for lack of resettlement places. In these contexts, UNHCR is seriously constrained. Maintaining access to the population of concern curtails UNHCR's ability to advocate for and establish better protection. However, it appears that in this context, IOM / UNHCR competition may have further eroded the protection space, enabling the host state to leverage underlying dynamics of resource competition between the two agencies (ie their competing roles/mandates) It appears that the fact that repatriation (although home country conditions are still treacherous) has not been entirely ruled out may be attributable to these competitive dynamics.

### 3. Venezuelan Refugees - Latin American Responses

Since the early 2000s, Venezuelans have fled their country due to political repression, economic collapse, humanitarian crisis and generalised violence.<sup>184</sup> Venezuela have faced hyperinflation, food and medical shortages, and outbreaks of vaccine-preventable disease, in addition to government crackdowns, arbitrary arrest and detention, torture and extrajudicial executions by security forces, and other violations of due process rights.<sup>185</sup> Some 5.4 million Venezuelans have fled, making the exodus one of the largest displacement crises in Latin American history.<sup>186</sup> Most cross-border displacement has been contained regionally, with Colombia, Peru, Ecuador, and Chile initially receiving some of the largest numbers of Venezuelans, followed by Argentina and Brazil.<sup>187</sup> A number of Southern Caribbean countries also host Venezuelans seeking protection, including Trinidad and Tobago, Curacao, and the Dominican Republic.

Latin America generally has a robust legal framework for refugee protection.<sup>188</sup> There are many examples of Latin American states hosting refugees and promoting responsibility-sharing, sometimes leading to characterising the region as an example of 'openness, solidarity and humanitarianism'.<sup>189</sup> Most states in Latin America are signatories to the 1951 Convention and its Protocol, and to the

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<sup>181</sup> Moretti (n 111).

<sup>182</sup> UNHCR, 'Submission by the United Nations High Commissioner for refugees (UNHCR) for the Office of the High Commissioner for Human Rights Compilation Report - Universal Periodic Review: BANGLADESH' (2012).

<sup>183</sup> Human Rights Watch, "Bangladesh Is Not My Country" The Plight of Rohingya Refugees from Myanmar (HRW 2018).

<sup>184</sup> Luisa Feline Freier and Nicolas Parent, 'The Regional Response to the Venezuelan Exodus' (2019) 118 *Current History* 56.

<sup>185</sup> Human Rights Watch, *The Venezuelan Exodus: The Need for International Protection and the Region's Response* (HRW 2018).

<sup>186</sup> Regional Interagency Coordination Platform for Refugees and Migrants from Venezuela (RV4), 'Response for Venezuelans - RMRP 2020 Dashboard' <<https://r4v.info/en/situations/platform>> accessed 15 April 2021.

<sup>187</sup> Human Rights Watch, *The Venezuelan Exodus* (n 185).

<sup>188</sup> Freier and Parent (n 184).

<sup>189</sup> Filippo Grandi, 'Foreword: Regional Solidarity and Commitment to Protection in Latin America and the Caribbean' in Marion Couldrey and Jenny Peebles (eds), *Forced Migration Review 56: Latin America and the Caribbean Building on a Tradition of Protection* (FMR 2017) 4.

Cartagena Declaration, which broadens the refugee definition to persons fleeing generalised violence and ‘massive violation of human rights or other circumstances which have seriously disturbed public order.’<sup>190</sup> On paper at least, most states in the region have legislative standards for refugee protection that are more protective than those of other regions, including the EU.<sup>191</sup> According to UNHCR’s International Protection Considerations for Venezuelans (March 2018 and May 2019)<sup>192</sup> the majority of displaced people from Venezuela are in need of international protection.

However, in practice, many states in Latin America have not responded to Venezuelans as refugees, even under the expanded Cartagena definition.<sup>193</sup> States have chosen to apply or design specialised visa schemes to govern the legal status and stay arrangements of Venezuelans, rather than implement domestic legislation that would allow for the recognition of Venezuelans as refugees.<sup>194</sup> Colombia, Peru, Brazil and Chile have created a special permit for Venezuelans, while Argentina and Uruguay have allowed Venezuelans to apply for visas available to nationals whose countries are part of a regional trade bloc. Ecuador has also made visas available under its Human Mobility Law (2017).<sup>195</sup> The scale and quality of Colombia’s temporary protection approach make it particularly note-worthy. While states have repeatedly demonstrated that they believe Venezuelans are leaving circumstances that fit the Cartagena definition of a refugee, they have nonetheless avoided applying the relevant laws and procedures that would materialise refugee status and grant them accompanying rights. This, in turn, has consolidated the view amongst governments that ‘Cartagena does not apply to Venezuela’s displacement crisis’.<sup>196</sup>

Over time, the openness of states in the region appears to have diminished. Some Latin American governments have gradually adopted more restrictive measures to limit the entry of Venezuelans.<sup>197</sup> Chile, Peru and Ecuador began requiring Venezuelans to present passports when applying for special visas and temporary permits - a requirement that most Venezuelans were unable to fulfil given constraints inside Venezuela. In Peru and Ecuador, measures for curtailing access to asylum have been subject to legal challenge, but with varying levels of success as both governments have managed to find ways around court judgements to meet their original objectives.<sup>198</sup> Peru has also experimented with other ways of restricting access to territory, such as repeatedly changing and shortening application deadlines to restrict entry; requiring applicants for humanitarian visas to apply in Venezuela; and making ad-hoc changes to entry and asylum procedures so that asylum seekers may be denied entry at the border.<sup>199</sup> These ad hoc and frequently changing policies on visa arrangements have led to large

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<sup>190</sup> Cartagena Declaration, section III, para 3.

<sup>191</sup> Luisa Feline Freier and Jean-Pierre Gauci, ‘Refugees’ Rights Across Regions: A Comparative Overview of Legislative Good Practices in Latin America and the EU’ (2020) 39 Refugee Studies Quarterly 321.

<sup>192</sup> UNHCR, ‘Guidance Note on the Outflow of Venezuelans’ (March 2018); UNHCR, ‘Guidance Note on International Protection Considerations for Venezuelans – Update I’ (May 2019).

<sup>193</sup> Luisa Feline Freier, Isabel Berganza and Cecile Blouin, ‘The Cartagena Refugee Definition and Venezuelan Displacement in Latin America’ (2020) International Migration 1 <<https://doi.org/10.1111/imig.12791>> accessed 10 May 2021; Leiza Brunat, ‘State control + Human Rights: Venezuelan Displacement to Colombia and Lessons from South American Migration Governance’ (*MPC Blog*, 15 April 2021) <<https://blogs.eui.eu/migrationpolicycentre/state-control-human-rights-venezuelan-displacement-to-colombia-south-american-migration-governance/>> accessed 13 May 2021.

<sup>194</sup> Freier and Parent (n 184).

<sup>195</sup> Luisa Feline Freier and Soledad Castillo Jara, ‘Regional Responses to Venezuela’s Mass Population Displacement’ (2020) E-International Relations 1 <<https://www.e-ir.info/2020/09/16/regional-responses-to-venezuelas-mass-population-displacement/>> accessed 15 April 2021.

<sup>196</sup> Freier and Parent (n 184) 59.

<sup>197</sup> Freier and Castillo Jara (n 195).

<sup>198</sup> Ibid.

<sup>199</sup> Amnesty International, ‘In Search of Safety: Peru Turns Its Back on People Fleeing Venezuela’ (2020) <<https://www.amnesty.org/download/Documents/AMR4616752020ENGLISH.PDF>> accessed 15 April 2021.

numbers of people being stranded at the Peru-Ecuador border.<sup>200</sup> These restrictions on mobility and access to work and services for Venezuelans have only worsened during the current global pandemic.

UNHCR has cautioned that complementary protection measures must not prejudice the right of Venezuelans to seek asylum, especially in the event that a recipient of temporary stay arrangements faces expulsion, detention, or non-renewal of their residence permit.<sup>201</sup> The litmus test of these responses is whether they offer Venezuelan's security of residence (more than mere protection against *refoulement*) and rights akin to or surpassing those required by international law. In some cases, at first glance at least, the statuses granted appear secure and rights-endowing, such as Colombia's grant of 10-year residence permits with immediate work rights. However, according to the 2020 Refugee and Migrant Response Plan, Venezuelans have been routinely 'excluded from national responses or support programs, access to health services and social protection' during the pandemic,<sup>202</sup> with some being compelled to leave and return to untenable conditions in Venezuela.<sup>203</sup> These outcomes may be seen as a consequence of the ad-hoc responses, and insecure status.

The mixed responses reflect some of the limitations of an individualised approach to asylum. Notwithstanding the strong commitment to broad refugee norms in the region, asylum systems are often weak, criticised for lack of reliability<sup>204</sup> and long delays.<sup>205</sup> In particular, it has been suggested that the Cartagena Declaration's lack of implementation via *prima facie* mechanisms presents a significant policy implementation gap.<sup>206</sup> Indeed, the Brazilian practices suggest that refugeehood for Venezuelans has emerged only with a bespoke group-based process.<sup>207</sup>

Another possible explanation lies in the structure of the coordinated IOM-UNHCR response, which has meant that the label of 'refugees and migrants' has been used in general, and that IO support does not turn on framing those fleeing as refugees. The Inter-Agency Coordination Platform for the Response for Refugees and Migrants from Venezuela, established in 2018, has enabled this development of responses under both refugee and migration systems. What remains to be seen is whether this move will ultimately enable or undermine protection.

In this case study, we focused on responses in Latin America to the flight of Venezuelans, which has three defining factors: (1) strong normative commitments, but widespread state sidelining of formal refugee processes; (2) the use of mainly *ad hoc* migration responses, albeit in some cases highly protective ones; and (3) a coordinated joint UNHCR / IOM response. What remains largely to be seen is whether this combined migration / refugee response will ultimately serve to protect the rights of those fleeing and their search for solutions. Some of the responses are certainly noteworthy for their security and rights-endowing character and seem likely to enable local integration.

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<sup>200</sup> Ibid.

<sup>201</sup> UNHCR, 'Guidance Note on the Outflow of Venezuelans' (March 2018) para 3; UNHCR, 'Guidance Note on International Protection Considerations for Venezuelans – Update I' (May 2019) para 4.

<sup>202</sup> Regional Interagency Coordination Platform for Refugees and Migrants from Venezuela (RV4), 'RMRP 2020 for Refugees and Migrants from Venezuela' (2020) <<https://data2.unhcr.org/en/documents/details/73277>> accessed 15 April 2021.

<sup>203</sup> Ibid.

<sup>204</sup> Nicolas Parent, 'Falling Short of Protection: Peru's New Migration Scheme for Venezuelans' in Marion Couldrey and Jenny Peebles (eds), *Forced Migration Review 56: Latin America and the Caribbean Building on a Tradition of Protection* (FMR 2017) 41.

<sup>205</sup> Asylum Access, "'To Have Work is to Have Life': Refugees' Experience with the Right to Work in Ecuador' (2011) <<https://asylumaccess.org/wp-content/uploads/2014/08/asylum-access-right-to-work-in-ecuador.pdf>> accessed 15 April 2021.

<sup>206</sup> Freier, Berganza and Blouin (n 193) 9.

<sup>207</sup> Liliana Lyra Jubilit and João Carlos Jarochinski Silva, 'Group recognition of Venezuelans in Brazil: An Adequate New Model?' (2020) FMR <https://www.fmreview.org/recognising-refugees/jubilit-jarochinskisilva>

## VI. Conclusions

### 1. Norms, Implementation and Effectiveness

This paper has identified many settings where protection norms are weak, or even where states have committed to strong norms, implementation is lacking. Given that current global processes based on the GCR and GCM are highly flexible, the need to ensure a baseline of human rights protection is all the more important.

#### *i. New binding norms?*

There are many reform proposals to draft new protocols to the Refugee Convention, mainly on responsibility-sharing,<sup>208</sup> but also on other discrete topics.<sup>209</sup> At the regional level, given greater appetite for entering into binding treaties on the continent, one might envisage a protocol to the 1969 OAU Convention on Refugees, clarifying the burden-sharing clause contained in Article II.<sup>210</sup> One could even envisage a mechanism whereby its entry into force could be made conditional on other states adopting an adapted OAU69 Convention, widening the refugee definition there, in the manner that the 1967 Protocol did for the 1951 Convention.

#### *ii. International Protection*

In general, this paper assumes that developing the concepts of international protection and protection based on existing human rights commitments is the most fruitful avenue to pursue. Concerning international protection, three key normative developments are needed to ensure the vitality and efficacy of this concept. First, the content and scope of the right to leave to seek international protection ought to be clarified, representing a key measure to develop a tool to examine various containment practices against human rights standards. Secondly, flexible processes ought to be developed to ensure the accessibility of international protection, whether by ensuring group mechanisms for formal refugee recognition, or the protective character of ad hoc and migration status for those fleeing. Thirdly, the content of international protection ought to be clarified, in particular regarding securing residence and the right to work. A final important move is the need to ensure wide IO buy-in, as the concept's utility also in part lies in its ability to transcend the migrant-refugee dichotomy.

#### *iii. Implementation and Effectiveness*

We suggest that the scholarship both on human rights and IDP norms is instructive, in that it clarifies that implementation and effectiveness often depend on transnational actors lending support to the domestication of norms into national law and its internalisation into institutional practice. This key insight is highly context sensitive, so what 'works' in one context will not necessarily 'work' in another. But it suggests that IOs like UNHCR should consider the various legal opportunity structures to which they have access, whether directly or indirectly, in order to encourage states to comply with their human rights obligations. Concerning the efficacy of the IDP Guiding Principles, it appears that the AU Model Law has been influential, and could be replicated at the international level. It is also important that all IOs and other actors within the Cluster Approach internalise IDP norms.

One proposal in this regard made by Betts and Milner (and also mentioned by other scholars<sup>211</sup>), is that better use should be made of existing accountability mechanisms to encourage state compliance - such

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<sup>208</sup> Wall (n 16).

<sup>209</sup> Jean-Francois Durieux, 'The 2021 Protocols' (Draft paper, RLI Conference June 2021) on file with the author.

<sup>210</sup> *Ibid*, X.

<sup>211</sup> See Ben Hudson and Brid Ní Ghráinne, 'Inter-State Dialogue on Internal Displacement: Promoting Global Platforms?' (2020) IDRP Research Briefing Paper <<https://www.un.org/internal-displacement->

as the UN Human Rights Council's Universal Periodic Review (UPR). The UPR process engages states, IOs and civil society in a review of the human rights record of a particular state and requires states to declare what actions they have taken with respect to the promotion and protection of human rights. It also provides an opportunity for states to share best practices.<sup>212</sup> However, the UPR appears to be a fairly weak global human rights accountability mechanism. UNTBs, 'soft courts' of the UN Treaty system, in contrast, offer a combination of periodic monitoring and individual complaints. They have taken on a significant role in relation to *non-refoulement*,<sup>213</sup> and potentially could become important for the clarification of access to and content of international protection. UNHCR has for some time engaged with UN Human Rights mechanisms, both UPR and UNTBs.<sup>214</sup> UNHCR and IOM could further support local actors to engage in shadow reporting and individual complaints, as part of a wider strategy.

Another suggestion to improve state compliance is to establish a new 'peer review' mechanism for the refugee regime, following the review conference model of other regimes. For example, the Treaty on the Non-Proliferation of Nuclear Weapons has a Review Conference that assesses the implementation of the treaty every five years and is supported by a preparatory committee which assesses state compliance with the principles and objectives of the nuclear non-proliferation regime and makes recommendations to the Review Conference.<sup>215</sup> The Review Conference reports are meant to be both backward and forward looking. They reaffirm state commitments, identify weaknesses in the implementation of the regime, and identify areas for future progress to achieve universality in the implementation of the regime's norms and principles.<sup>216</sup> Recently published empirical evidence suggests that self-reporting can have important impacts on state behaviour.<sup>217</sup> This suggests that even a relatively 'soft' mechanism of self-reporting can alter state behaviour, under the right conditions.

Another example is the Conference of Parties (COP) that has been established to implement the UN Framework Convention on Climate Change. The COP is the highest decision-level body of the Convention and meets yearly to adopt decisions, assess progress in the implementation of the Convention, with particular focus on the emissions inventories submitted by states. The COP also considers what further action is necessary for states, including the development of new legal instruments.<sup>218</sup> The work of the COP is supported by a Secretariat. Finally, a third potential model is the Organisation for Economic Co-operation and Development's Development Assistance Committee (DAC) review committee, which has been established to achieve the OECD's aims to promote policies that advance economic and social well-being. The Committee meets every two to three years and is supported by a Directorate which is tasked to assist with the peer review process. States are reviewed by the DAC roughly every five years. During review processes, states must provide a memorandum outlining their progress in line with OECD objectives, and are further required to provide access and support to the DAC field assessment missions (interviews of government officials, parliamentarians, civil society, etc). At DAC meetings, government officials must respond to questions posed by the DAC examiner. The peer review process is intended to '[hold] DAC members accountable for the commitments they have made' and '[review] their performance against key dimensions of development co-operation and other domestic policies with an impact on developing countries'.<sup>219</sup>

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panel/sites/www.un.org.internal-displacement-panel/files/idrp\_hlp\_submission\_ws1\_global\_platforms.pdf> accessed 15 April 2021.

<sup>212</sup> See UNHRC, 'Basic Facts About the UPR'

<<https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>> accessed 15 April 2021.

<sup>213</sup> Çali, Costello and Cunningham (n 72).

<sup>214</sup> Feller E, 'Where Principle and Pragmatic Meet: The World of UNHCR's Protection Work' (2013) Durham Law Review 149.

<sup>215</sup> Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Organization and Work of the Conference (1995) UN Doc NPT/CONF.1995/32 (Part I).

<sup>216</sup> Ibid.

<sup>217</sup> Cosette Creamer and Beth Simmons, 'The Proof is in the Process: Self-Reporting Under International Human Rights Treaties' (2020) 114 American Journal of International Law 1.

<sup>218</sup> United Nations Climate Change, 'Conference of the Parties (COP)'

<<https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop>> accessed 15 April 2021.

<sup>219</sup> OECD, 'DAC Peer Review Reference Guide, 2019-20' (13 March 2019) DCD/DAC(2019)3/FINAL.

## 2. Institutions and Mandates

### *i. A Mandate for all Displaced Persons?*

Three key issues tend to undermine IDP protection. First, the topic seems to have fallen off the global political agenda, as the GCR and GCM exemplify. Secondly, there is an implementation gap for the IDP GPs. Thirdly, there is a fragmented institutional response.

The most wide-scale reform proposed in this area is to create an IO with a general mandate to protect all displaced persons, which would address all three of these shortcomings. In his first report on IDPs, former UN Special Representative, Francis Deng, recommended that states either create an entirely new UN agency for the protection of IDPs, or allocate responsibility for IDP protection to an existing UN institution.<sup>220</sup> In 2000, the former US Ambassador to the UN, Richard Holbrooke, suggested that UNHCR should be allocated responsibility for IDPs.<sup>221</sup> Yet, some have argued to the contrary that such a move would risk diluting UNHCR's core mandate on refugee protection, or would risk enabling states to use UNHCR to provide IDP protection as a containment measure.<sup>222</sup>

In 2004, Martin, recognising gaps in IDP protection, contemplated the creation of a single-lead agency for refugees and IDPs - one that would replace UNHCR and undertake responsibility for all forced migrants, including refugees and people internally or externally displaced as a result of 'repression, conflict, natural disasters, environmental degradation and development-induced displacement'.<sup>223</sup> Martin argued that the establishment of a single UN agency for forced migrants would eliminate clear inconsistencies in the treatment between different categories of forced migrants, especially between refugees and IDPs. UNHCR, according to Martin, would not be suitable to take on this role given its longstanding organisational focus on refugees. A fresh institutional start was needed for creating a single agenda for 'forced migrants', and for ensuring that IDPs received attention, funding, and advocacy on par with that availed to refugees. This new 'UN High Commissioner for Forced Migrants' (HCFM) would promote both international refugee and IDP norms, protect refugees and IDPs, and seek solutions for them. The HCFM would also be governed by an Executive Committee, which would provide guidance to a High Commissioner appointed by the General Assembly. The HCFM would continue to receive funds through voluntary state contributions, supplemented by an emergency fund. The agency would also be expected to coordinate with other parts of the UN system to broaden assistance and protection to forced migrants in accordance with their various needs (e.g. development). These features of the HCFM, Martin admits, means that it would face many similar problems to that of UNHCR, in terms of addressing barriers of state sovereignty and lack of political will to address the plight of forced migrants, as well as the lack of financial resources and independence to implement protection and solutions for forced migrants. The single agency model would nevertheless, in Martin's view, provide a more comprehensive picture of protection and assistance needs, and improve consistency and coherence in responses to forced migrants.

Subsequent reform proposals on IDPs have continued to focus on the lack of political attention to IDPs and the coordination challenges created by the Cluster Approach, which in the absence of a single agency for IDPs, has assigned responsibilities for different aspects of IDP protection and assistance to multiple actors under the auspices of the Emergency Relief Coordinator (ERC) and the Office for the Coordination of Humanitarian Affairs (OCHA). Recognising many of these above-mentioned challenges, the World Refugee Council (WRC) in 2019 recommended that states and the UN system consider one of three proposals: (1) to give UNHCR a formal mandate for IDPs; (2) establish a dedicated agency for IDP protection and assistance; or (3) 'revitalise' the cluster system to improve its

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<sup>220</sup> Turton (n 50) 8.

<sup>221</sup> Susan Martin, 'Making the UN Work: Forced Migration and Institutional Reform' (2004) 17 JRS 301, 314.

<sup>222</sup> Jeff Crisp, 'Refugees, Persons of Concern, and People on the Move: Broadening the Boundaries of UNHCR' (2009) 26 Refuge 73.

<sup>223</sup> Martin (n 221) 314.

effectiveness. The latter would include reviewing existing coordination mechanisms, funding and agency mandates, and support on durable solutions. The WRC's recommendations for institutional reform on IDPs also articulated the need for IOM to 'adopt a human rights and protection-oriented focus in its work with IDPs' and to 'develop the capacity to implement a human rights approach'.<sup>224</sup>

As part of the WRC paper series, Kälin highlighted the weaknesses of the current system, in which there is no single agency that is responsible for IDP advocacy or ensuring states are accountable to the Guiding Principles. To address the political marginalisation of IDP issues, Kälin proposes the creation of a Special Representative of the Secretary General (SRSG) or Assistant Secretary General to improve advocacy on IDP issues and coordination between UN institutions operating with the Cluster Approach. He further recommends the development of funding models to achieve 'collective outcomes', defining collective outcomes as 'strategic, clear, quantifiable and measurable'. Funding based on 'collective outcomes' would therefore replace the current situation whereby donors fund individual clusters and agencies.<sup>225</sup> Deardorff Miller's analysis of the challenges for IDP protection mirrors some of Kälin's observations. Miller recommends a UN working group be convened to examine how the 'Delivering as One Initiative' might serve as a platform for improving cross-institutional coordination in both IDP and refugee contexts.<sup>226</sup>

Hudson and Ní Ghráinne identify the need for an IDP-specific forum for state dialogue and learning for states either affected by or concerned with internal displacement.<sup>227</sup> At present, mechanisms for inter-state dialogue on IDP issues are either informal or co-opted into forums primarily designed for refugees or human rights issues. Examples of informal mechanisms include the GP20 process, a three-year multi-stakeholder initiative beginning in 2018 that has facilitated two regional 'state-to-state' exchanges for governments, and the Displacement Dialogues, which was also established in 2018 to provide a forum for states affected by internal displacement to 'identify common challenges, share concerns and consider solutions'. Aside from these IDP-specific forums, IDP issues may be discussed in the Universal Periodic Review (UPR process), UNHCR's ExCom, and the Global Refugee Forum as established under the Global Compact Process. However, as Hudson and Ní Ghráinne point out, the interest and capacity of these forums to facilitate inter-state dialogue on IDPs is limited.

It is notably that although the UN Secretary General established a High-Level Panel on Internal Displacement in October 2019, which reported in 2021.<sup>228</sup> Its recommendations did not engage with institutional reform, focusing more on funding and political will. The IDP regime clearly needs a stronger champion. The Global Compacts focus on cross-border migration and displacement, further side-lining IDPs. The Cluster Approach has widely-acknowledged shortcomings. IDP protection is multifaceted, and without an anchor in the Guiding Principles and human rights standards, can degenerate into containment and precarity. Assuming the political impetus for large-scale UN reform is lacking, the need for a stronger IDP voice suggests that upgrading the UN Special Rapporteur on IDPs to a Special Representative of the Secretary General (SRSG) or Assistant Secretary General may garner sufficient support and ensure greater attention to IDP issues.

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<sup>224</sup> World Refugee Council, 'A Call to Action: Transforming the Global Refugee System' (Centre for International Governance Innovation 2019) 28

<[https://www.cigionline.org/sites/default/files/documents/WRC\\_Call\\_to\\_Action.pdf](https://www.cigionline.org/sites/default/files/documents/WRC_Call_to_Action.pdf)> accessed 15 April 2021.

<sup>225</sup> Walter Kälin, 'Innovative Global Governance for Internally Displaced Persons' (2019) WRC Research Paper No 10 <<https://www.cigionline.org/publications/innovative-global-governance-internally-displaced-persons>> accessed 15 April 2021.

<sup>226</sup> Sarah Deardorff Miller, 'The Global Refugee Regime and UN System-wide Reforms' (2019) WRC Research Paper No 16, 10 <<https://www.cigionline.org/publications/global-refugee-regime-and-un-system-wide-reforms>> accessed 15 April 2021.

<sup>227</sup> Hudson and Ní Ghráinne (n 211).

<sup>228</sup> United Nations, 'Shining a Light on Internal Displacement: A Vision for the Future' (Report of the UN Secretary-General's High-Level Panel on Internal Displacement 2021)

<<https://internaldisplacement-panel.org/wp-content/uploads/2021/09/HLP-report-WEB.pdf>> accessed 15 September 2021

## ii. *IO Autonomy and Financing*

One of the core features of IOs is that they are generally constrained by their reliance on state funding in order to deliver on their mandates. Critically, it is well-established that certain forms of funding may lead IOs to follow the wishes of particular donor states, and again, may undermine the ability of IOs to deliver their core mandates. There is a contrast between standing core budgetary contributions and voluntary projectized contributions, ‘earmarked’ for particular uses.<sup>229</sup> Earmarking allows donors to shape the agendas and activities of these IOs and avoid funding policies and interventions that they, for whatever reason, reject.

The issue of earmarking was taken up between donors and humanitarian actors at the World Humanitarian Summit (2016) High-Level Panel on Humanitarian Financing. Although the ‘Grand Bargain’<sup>230</sup> negotiated between the top donors and humanitarian actors promised to reverse the trend that has seen a greater proportion of funding earmarked and remove earmarks for 30 percent of donor funds to humanitarian organisations by 2020,<sup>231</sup> issues of transparency in humanitarian financing make it difficult to assess if donors have followed through on their commitments.<sup>232</sup> Research shows that data sources that are meant to provide a comprehensive picture of humanitarian financing, such as the Grand Bargain self-reporting process, OCHA’s Financial Tracking Service (FTS), and the International Aid Transparency Initiative (IATI), do not adequately capture the full amount or nature of donor funding that passes through the humanitarian system.<sup>233</sup>

Earmarked resources may either support or undermine IO’s ability to deliver their mandates.<sup>234</sup> In the case of UNHCR, empirical studies suggest that its core mandate dictates its actions, often over and above major donor preferences.<sup>235</sup> In the context of IOM, however, this problem appears to be exacerbated because of IOM’s limited administrative budget, decentralised structure and project-based funding model, and lack of budgetary oversight by its Council. As noted above, scholarship comparing UNHCR and IOM note very different impacts of earmarking, with UNHCR’s funding apparently more focused on its core mandate of refugee protection, while IOM is more beholden to donor state interests.

In her assessment of earmarking trends in IO governance generally and their effects on multilateralism and transparency, Graham proposes four recommendations:

- Member states should work to loosen or remove the restrictions they place on earmarked funding to restore multilateral governance over a larger portion of IGO resources;
- IOs should conduct systematic empirical analysis to assess how earmarked resources are distributed across issues and countries relative to mandatory and core funding;
- IO staff should be ready to turn down earmarked funding when the interests or actions of a donor raise conflict of interest issues; and

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<sup>229</sup> See generally, Erin Graham *Transforming International Institutions – How Money Quietly Sidelines Multilateralism at the United Nations* (OUP 2023).

<sup>230</sup> See IASC, ‘About the Grand Bargain’ <<https://interagencystandingcommittee.org/about-the-grand-bargain>> accessed 15 April 2021.

<sup>231</sup> Abby Stoddard and others, ‘Efficiency and Inefficiency in Humanitarian Financing’ (Humanitarian Outcomes 2017) 30 <<https://www.humanitarianoutcomes.org/publications/efficiency-and-inefficiency-humanitarian-financing>> accessed 15 April 2021.

<sup>232</sup> See Daniele Milani and Luminita Tüchel, ‘Multi-year Humanitarian Funding: Global Baselines and Trends’ (Development Initiatives 2020) 5 <<https://devinit.org/resources/multi-year-humanitarian-funding/#downloads>> accessed 15 April 2021.

<sup>233</sup> Ibid.

<sup>234</sup> Erin R Graham, ‘Follow the Money: How Trends in Financing Are Changing Governance at International Organizations’ (2017) 8 *Global Policy* 15.

<sup>235</sup> See, eg Thorvaldsdottir, S., Patz, R., & Goetz, K. H. (2022). Mandate or Donors? Explaining the UNHCR’s Country-Level Expenditures from 1967 to 2016. *Political Studies*, 70(2), 443-464

- IOs should improve the transparency of governance arrangements over pooled funding mechanisms.<sup>236</sup>

### *iii. Cooperation between IOs*

A recurring theme of the paper has been the importance of cooperation between IOs, in particular to ensure that the interfaces in the regime complex do not become sites of containment. The contrasting case studies on the response to Rohingya flight to Bangladesh and Venezuelans fleeing to Latin American states suggest that the dynamic between IOM and UNHCR may be highly consequential. Further research is required to determine whether the trends noted in the case studies can be generalised, and indeed to establish the different forms of cooperation and whether they can be institutionalised on a more general basis so as to avoid states picking between the two IOs in order to undermine protection norms, and more positively, whether there are modes of cooperation which can encourage the use of mobility and migration processes to benefit those fleeing, without undermining international protection.

### **3. Conclusions**

This paper has identified various frictions in the global displacement regime and noted the main shortcomings in the protection of those displaced within states and internationally. Normatively, the concept of international protection offers an opportunity to re-anchor the global regime in existing binding standards. We have identified key normative and institutional developments that UNHCR could support in order to develop the concept further and use it to clarify and support existing processes. Concerning norm implementation, we stress making strategic use of a range of global, regional and domestic fora to hold states to account, whether directly or indirectly, supported by refugees and displaced people to exercise their rights through strategic litigation and advocacy. The paper acknowledges the institutional constraints within current mandates and financing structures, and suggests some ways to mitigate these. In the absence of a single IO with a clear mandate to protect *all* displaced persons, establishing a better understanding of how IOM and UNHCR's cooperation may support protection is a vital future task for research. This research could in turn help develop better models and cooperative practices.

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<sup>236</sup> Ibid.