THE REFUGEE REGIME COMPLEX

*Alexander Betts**

At the time of its creation, the refugee regime was relatively isolated amongst international institutions regulating human mobility. However, since its creation, globalization and interdependence have led to the creation of a range of new international institutions both in human mobility regimes, such as travel and labour migration, and non-mobility regimes, such as human rights, humanitarianism, development, and security. Many of these new regimes overlap with the refugee regime in significant ways, some complementary and some contradictory, relocating some of the most relevant politics for refugee protection into other issue-areas. This article argues that it is no longer possible to speak of a compartmentalized refugee regime; rather, there is now a "refugee regime complex", in which the refugee regime overlaps with a range of other regimes within which States engage in forms of institutionalized cooperation that have a direct and an indirect impact upon refugee protection. The article explores what the emerging refugee regime complex means for States' behaviour towards refugees, for refugees' access to protection, and for the work of the Office of the United Nations High Commissioner for Refugees.

1. Introduction

The refugee regime was created in the aftermath of the Second World War. At first glance, it appears relatively straightforward. It comprises two main elements: the 1951 Convention on the Status of Refugees defines who is a refugee and sets out the rights to which they are entitled, and the Office of the United Nations High Commissioner for Refugees (UNHCR) has responsibility for overseeing

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States' implementation of the Convention.[1] At the time of its creation, the refugee regime was virtually the only form of institutionalized cooperation in the area of human mobility and it remains the most developed and coherent aspect of global migration governance.[2] With globalization and increasing interdependence, however, there has been rapid institutional proliferation within and beyond the United Nations (UN) system. Within the area of human mobility, the travel regime, which regulates the ability of people to cross borders has evolved and strengthened, and an embryonic labour migration regime is emerging.[3] Outside the area of human mobility, international institutions have developed in the area of human rights, humanitarianism, security, development, and peace-building, for example.

Many of these new institutions have implications for refugee protection. In particular, some of them overlap with the refugee regime in the sense that they may have authority over related issues. Some of these overlaps – such as the sources of complementary protection provided by the human rights regime – complement and reinforce the refugee regime. Others – such as the humanitarian regime's approach to in-country protection or the travel regime's restriction on access to asylum – potentially contradict and even undermine aspects of the refugee regime. In this context, it no longer makes sense to speak of the "refugee regime". Instead, there is what may be described as a "*refugee regime complex*", in which different institutions overlap, exist in parallel to one another and are nested within one another in ways that shape States' responses towards refugees.[4] Recognizing and understanding this complex is important because it has significant implications for refugees' access to protection and durable solutions as well as for the work of UNHCR.

This article outlines the refugee regime complex and explores what impact the new institutional proliferation has on the refugee regime. In order to do so, it draws upon an emerging literature in International Relations which examines the impact of institutional proliferation on world politics: regime complexity. Regime complexity refers to the way in which two or more institutions intersect in terms of their scope and purpose. This literature sets out three concepts which describe different aspects of complexity. First, institutions may be *nested* – regional or issue-specific institutions may be part of wider multilateral framework. Second, they may be *parallel* – obligations in similar areas may or may not

[1] G. Loescher, A. Betts and J. Milner, *UNHCR: The Politics and Practice of Refugee Protection into the Twenty-First Century*, London, Routledge, 2008; G. Loescher, *UNHCR and World Politics: The Perilous Path*, Oxford, Oxford University Press, 2001.

[2] B. Ghosh, *Managing Migration: Time for a New International Regime?*, Oxford, Oxford University Press, 2000; J. Hollifield, "The emerging migration state", in A. Portes and J. DeWind (eds.), *Rethinking Migration: New Theoretical and Empirical Perspectives*, London, Berghahn Books, 2007, 62–89.

[3] R. Koslowski, "Global Mobility Regimes", paper presented at the Global Mobility Regimes Conference, 27 Apr. 2009, the Levin Institute, New York City. M. Salter, "The Global Visa Regime and the Political Technologies of the International Self", *Alternatives: Global, Local, Political*, 31(2), 2006, 167–89.

[4] A. Betts, "Institutional proliferation and the global refugee regime", *Perspectives on Politics*, 2009, 7(1), 53–8.

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contradict one another. And third, they may be *overlapping* – multiple institutions may have authority over the same issue.[5]

The existence of nesting, parallel, and overlapping institutions may be complementary or contradictory in its implications for a given regime. Indeed, it has been identified as offering States an opportunity to engage in cross-institutional strategies, strategically choosing between multiple and competing institutions. Alter and Meunier identify three types of cross-institutional strategy that might be enabled by the existence of regime complexity.[6] *Regime shifting* occurs when States move from addressing problems through one regime to addressing those problems through an alternative parallel regime, possibly relocating the most relevant politics for a given issue-area from one regime to another.[7] *Forum-shopping* occurs where actors select the international venues based on where they are best able to promote specific policy preferences.[8] *Strategic inconsistency* occurs where contradictory rules are created in a parallel regime with the intention of undermining a rule in another agreement.[9]

In order to illustrate the wide-reaching implications of complexity for the refugee regime, this article focuses primarily on one aspect of this increasing complexity: the overlap between the refugee regime and the so-called travel regime. Although there is no coherent global migration regime, there has been an emerging array of formal and informal institutionalized cooperative arrangements, most notably in the area that Koslowski subsumes under "travel".[10] Even in the absence of a UN migration organization or a formal multilateral treaty framework, a panoply of institutional arrangements have been created by States with a focus on travel security and the control and management of undocumented or "irregular" migration.[11]

In the context of growing concern with South–North migration since the 1980s, a range of formal and informal forms of institutionalized cooperation were

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5 V. Aggarwal, "Reconciling Institutions: Nested, Horizontal, Overlapping, and Independent Institutions", paper presented at Workshop on Nested and Overlapping Institutions, Princeton, 24 Feb. 2006; K. Raustiala and D. Victor, "The Regime Complex for Plant Genetic Resources", *International Organization* 58(2), 2004, 277–309; K. Alter and S. Meunier, "The International Politics of Regime Complexity", *Perspectives on Politics* 7(1), 2009, 13–24.

6 Alter and Meunier, *ibid*.

7 L. Helfer, "Regime Shifting: The TRIPS Agreement and the New Dynamics of International Intellectual Property Making", *Yale Journal of International Law*, 29, 2004, 1–81; A. Betts, "Institutional Proliferation and the Global Refugee Regime", *Perspectives on Politics* 7(1), 2009, 53–8.

8 K. Abbott and D. Snidal, "Why states act through formal international organizations", in P. Diehl (ed), *The Politics of Global Governance*, Boulder, CO, Lynne Rienner, 2001; M. Busch, "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade", *International Organization*, 61(4), 2007, 735–61.

9 Raustiala and Victor, "The Regime Complex for Plant Genetic Resources", *op. cit*. 277–309.

10 Koslowski, "Global Mobility Regimes", *op. cit*.

11 F. Duvell, "Irregular Migration", in A. Betts (ed), *Global Migration Governance*, Oxford, Oxford University Press, forthcoming.

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created that increase Northern States' extra-territorial control over the trans-boundary movement of people. On a formal regional level, European Union has most notably developed significant cooperation on migration,[12] which includes a significant external dimension, involving mobility partnerships with a range of third countries.[13] On an informal regional and inter-regional level, trans-governmental policy networks known as Regional Consultative Processes (RCPs) have emerged, beginning with the so-called Intergovernmental Consultations on Asylum, Refugees and Migration (IGC) in 1985.[14] These are behind closed doors, State-led dialogue, between the civil servants of groups of "like-minded States". Many – such as the IGC, the Budapest Process, the Bali Process, the Med 5+5 Process, and the Regional Consultative Mechanism (RCM) – have a focus on irregular migration. They have contributed to coordination and standardization in travel security and collaboration on issues such as readmission agreements. Meanwhile, the International Organization for Migration (IOM) now plays a significant role in enabling States to collaborate with third countries in the control of human mobility. Its role as a facilitator of "managed" irregular migration has expanded rapidly since the 1990s.

The emerging travel regime exists in parallel to and significantly overlaps with the refugee regime, such that one might refer to a "*travel–refugee regime complex*".[15] The principal overlap between the regimes relates to the regulation of spontaneous arrival asylum-seekers' access to territorial asylum. This overlap exists because, in most parts of the world, the refugee regime is premised upon refugees having access to asylum. In some States, such as USA, Canada, and Australia, asylum is traditionally provided through resettlement. However, elsewhere – including in Europe – access to asylum relies mainly upon the ability of refugees to travel independently to the State in which they make an asylum claim.

This article argues that the effect of institutional proliferation in the area of travel has double-edged implications of the refugee regime. It represents both a constraint and a potential opportunity for international cooperation within the regime. International cooperation can take place on the provision of refugee

[12] A. Geddes, *The Politics of Migration and Immigration in Europe*, London, Sage, 2003; R. Koslowski, *Migrants and Citizens: Demographic Change in the European State System,* Ithaca, Cornell University Press, 2000; G. Lahav, *Immigration and Politics in the New Europe*, Cambridge: Cambridge University Press, 2004.

[13] See, for example, M. Garlick, "The EU Discussions on Extraterritorial Processing: Solutions or Conundrum?", *International Journal of Refugee Law*, 18(3), 2006, 601–29; E. Guild, "The Europeanisation of Europe's Asylum Policy", *International Journal of Refugee Law*, 18(3–4), 2006, 630–51; E. Haddad, *The Refugee: The Individual between Sovereigns,* Cambridge: Cambridge University Press, 2008; L. Schuster, "The Realities of a New Asylum Paradigm", *COMPAS Working Papers Series*, WP-05-20, 2005.

[14] J. Koehler, "What States Do and How They Organize Themselves in Regional Consultative Processes (RCPS)", paper presented at workshop on *"Migration and International Cooperation"*, 7–8 August, 2008, IOM Headquarters, Geneva; A-G. Nielsen, "Cooperation mechanisms", in R. Cholewinski, R. Perruchoud and E. Macdonald (eds.), *International Migration Law: Developing Paradigms and Key Challenges*, Cambridge: Cambridge University Press, 2007, 405–26; A-M. Slaughter, *A New World Order*, Princeton University Press, Princeton, 2004.

[15] This phrase follows the language of Raustiala and Victor, "The Regime Complex for Plant Genetic Resources", *op. cit.* 277.

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protection through two primary means. First, States cooperate on the provision of asylum by reciprocally protecting refugees on their territory. And second, States cooperate on burden-sharing by contributing (through resettlement or financial support) to supporting refugees who are on the territory of another State.

The travel–refugee regime complex has contributed to a reduction in international cooperation on the provision of asylum by enabling States, Northern States in particular, to engage in regime shifting.[16] It has enabled States to address their concerns with spontaneous arrival asylum through the travel regime, while bypassing the refugee regime. It has allowed States to limit access to spontaneous arrival asylum without overtly violating their explicit obligations to refrain from *non-refoulement* (not forcibly returning an individual to a country in which s/he faces a well-founded fear of persecution). This opportunity to "bypass without overtly violating" represents an implicit renegotiation of the distribution of responsibilities within the regime, which many Southern States have recognized and responded to with reductions in their own commitment to asylum. Without the development of new mechanisms of cooperation on travel, States would have lacked the mechanisms of international cooperation to restrict the ability of spontaneous arrival asylum-seekers before they reach the territory of the State and so would have been less able to bypass the obligations of the regime without explicit violation.

On the other hand, however, the complex potentially offers opportunities for cooperation on burden-sharing. This is because the complex creates greater interdependence between Northern and Southern States. Northern States are reliant upon Southern States to support the securitization of travel through, for example, visas, readmission agreements, and border control. This potentially gives Northern States a stake in enhancing the quality of refugee protection in the South because it may reduce the need for the onward movement of asylum-seekers from South to North. The complex, therefore, offers an opportunity for issue-linkage between Northern State interests in the securitization of travel and Southern State interests in attracting greater burden-sharing in relation to refugee protection.

Given the implications of complexity for cooperation on refugee protection, this article argues that complexity poses a fundamental challenge to UNHCR. Like many international organizations (IOs), UNHCR was created to work within and oversee a particular regime. However, if the most relevant politics for that issue-area increasingly takes place in other regimes beyond the border of the refugee regime, how can UNHCR adapt to ensure its ongoing relevance? In a context in which States have increased opportunity to choose between alternative, competing institutions, within and outside the area of human mobility, the Office's work is adapting and being changed by complexity. Gradually, UNHCR is being drawn into working in other issue-areas. In particular, it is being drawn

[16] Helfer, "Regime Shifting", *op. cit.*; Betts, "Institutional Proliferation and the Global Refugee Regime", *op. cit.* 53–4.

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into pursuing States into the regimes into which they are shifting and engaging increasingly in politics beyond its regime, adapting its mandate to incorporate those other issue-areas into its work, using issue-linkage to channel interests in those issue-areas into a State commitment to protection, and itinerantly advocating for protection in a range of non-refugee forums. However, the Office faces the dilemma of how far to engage with the politics of these issue-areas beyond the boundaries of the refugee regime. If it remains within the confines of the refugee regime, it risks irrelevance; however, if it strays beyond the politics of the regime, it risks being accused of exceeding its mandate.

The article divides into four main parts. The first part outlines the global refugee regime complex. It outlines the basis of the refugee regime and its relationship to other mobility and non-mobility regimes. It highlights how, over time, with institutional proliferation in other issue-areas, the refugee regime has gone from being a relatively isolated regime to being part of a broader regime complex, within which it has come to exist in parallel to, overlap, and be nested within a growing range of other institutions. The second part examines one particular aspect of this broader regime-complex: the "travel–refugee regime complex". It explores the institutional overlaps between the refugee regime and the travel regime. It identifies the core overlap as relating to spontaneous arrival asylum. The third part explains the impact that this overlap has had on international cooperation on refugee protection. It argues that the complex has led to a net reduction in international cooperation in the refugee regime through the effect that it has had on States' commitment to asylum. However, it suggests that the complex may also present a potential means to reinvigorate cooperation in relation to burden-sharing by enabling issue-linkage between the securitization of travel in the North and refugee protection in the South. Finally, the article examines the ways in which regime complexity is altering the role of UNHCR and the ways in which it will need to adapt in order to mitigate the threats and maximize the opportunities for cooperation that emerge from regime complexity.

2. The refugee regime complex

The global refugee regime represents the set of norms, rules, principles, and decision-making procedures that regulate States' responses to refugee protection.[17] The regime has its origins in the Inter-War years. In the aftermath of the First World War, the League of Nations High Commissioner for Refugees (LNHCR) did not represent a formal treaty-based regime but tried to develop *ad hoc* solutions to human displacement in Europe.[18] In contrast, the post-Second World War era has led to the development of a formal, treaty-based regime with a surveillance mechanism. The contemporary regime is based on, first, the 1951

[17] S. Krasner, "Structural causes and regime consequences: Regimes as intervening variables" in S. Krasner (ed.), *International Regimes*, Ithaca, Cornell University Press, 1983, 2.

[18] C. Skran, *Refugees in Inter-war Europe: The Emergence of a Regime*, Oxford, Clarendon Press, 1995.

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Convention on the Status of Refugees, which defines who qualifies as a refugee and the rights to which refugees are entitled and, second, UNHCR, which is the organization that was created to uphold and oversee implementation of the 1951 Convention. Article 35 of the 1951 Convention gives UNHCR an explicit mandate to monitor implementation of the Convention. A number of regional agreements on refugee protection have since emerged that reinforce the refugee regime and adapt elements of the 1951 Convention to meet regional specificities – the 1969 OAU Convention (Africa), the 1984 Cartagena Declaration (Latin America), and the 2004 European Council Asylum Qualification Directive (Europe).[19]

The purpose of the regime is to ensure that refugees receive access to protection. A refugee is defined in international law as a person who "owing to a well-founded fear of persecution on the grounds of race, religion, nationality, or membership of a social group or political opinion, is outside the country of his nationality". Put simply, they are people who flee their country because of human rights abuses or conflict. They are, therefore, in need of what is referred to as "international protection". Given that their own State is unable or unwilling to ensure their access to their rights, they need to seek them from another State or the wider international community. Refugee protection can be considered to relate to two things: first, a set of civil, political, economic, and social rights accorded to refugees and, second, their long-term reintegration within a State (durable solutions), whether in their country of origin (repatriation), the interim host State (local integration), or another State (resettlement).[20]

There are two ways in which States can contribute to refugee protection: "asylum" and "burden-sharing". Asylum can be considered to relate to the provision of protection to refugees who reach the territory of that State. Burden-sharing can be considered to be the provision of protection to refugees who are on the territory of another State – for example, through resettlement or financial contributions to UNHCR. These two areas have very different logics. Asylum is governed by a strong normative and legal framework, underpinned by the principle of *non-refoulement*, whereby States must refrain from sending a refugee back to a State in which s/he faces a well-founded fear of persecution.[21] In contrast, burden-sharing is governed by a weak normative and legal framework.[22] States' responsibilities towards refugees on the territory of other States

[19] For an overview of the elements of the refugee regime, see, for example, Loescher, Betts and Milner, *UNHCR*, *op. cit*.

[20] For an overview of the content of refugee protection, see, for example, G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Oxford: Oxford University Press, 2007. For an overview of the durable solutions, see UNHCR, *The State of the World's Refugees*, Oxford, Oxford University Press, 2006, Chapter 6.

[21] *Non-refoulement* is widely argued to be part of customary international law. E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement", in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law*, Cambridge, Cambridge University Press, 2001.

[22] For an overview of the limited norms relating to burden-sharing, see, for example, J. Milner, *Refugees, the State and the Politics of Asylum in Africa*, Basingstoke, Palgrave MacMillan, 2009.

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are not made clear, explicit, or binding either in the 1951 Convention or in other supplementary inter-State agreements. UNHCR has simply been given a mandate to convene occasional supplementary initiatives where these are relevant to its mandate.

The very different institutional basis for asylum, on the one hand, and burden-sharing on the other, means that different explanations are required in order to explain the politics of asylum and the politics of burden-sharing. The former exists within an enduring institutional framework, while the latter largely exists outside a binding institutional framework and is almost entirely subject to States' own discretion. Since international cooperation on asylum takes place within a clearly defined regime, it requires an explanation of why States comply with international law.[23] In contrast, since burden-sharing exists largely outside a formal institutional framework, its politics are better explained through a focus on *ad hoc* inter-State bargaining.[24]

Explaining international cooperation in relation to asylum is rather like explaining the broader question of "why States comply with international law".[25] Generally, it can be explained by a combination of reciprocity and legitimacy. Providing asylum imposes a cost on the individual contributing State. However, States generally value the existence of the overall regime because it provides global public goods of security and stability, on the one hand, and humanitarianism, on the other.[26] Insofar as respecting asylum contributes to maintaining the overall regime, long-run reciprocity is likely to be in States' interests. Furthermore, providing asylum also confers legitimacy upon States insofar as compliance with the long-established norm of asylum is an important element of what defines a "civilized State".[27] Legitimacy is important insofar as, when coupled with power, it gives States authority.[28]

Explaining international cooperation in relation to burden-sharing can be explained by issue-linkage. In contrast to asylum, burden-sharing is not subject to a clearly defined normative and legal framework. Cooperation on burden-sharing, therefore, takes place largely in the context of *ad hoc* bargaining,

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[23] For an analysis of this broader question, see, for example, H. Koh, "Why Do States Obey International Law?", *Yale Law Journal*, 106, 2007, 2615–34; C. Reus-Smit, (ed.), *The Politics of International Law*, Cambridge, Cambridge University Press, 2004; K. Raustiala and A-M. Slaughter, "International law, international relations and compliance" in W. Carlsnaes, T. Risse and B. Simmons (eds.), *The Handbook of International Relations*, London, Sage, 2002, 538–58.

[24] For a distinction between cooperation within a regime and *ad hoc* bargaining, see, for example: R. Keohane, "The Demand for International Regimes", *International Organization*, 36(2), 1982, 332–55; J. Fearon, "Bargaining, Enforcement, and International Cooperation" *International Organization*, 52(2), 1998, 269–305.

[25] Koh, "Why Do States Obey International Law?", *op. cit.*; Raustiala and Slaughter "International law, international relations and compliance", *op. cit.* 538–58.

[26] Loescher, Betts and Milner, *UNHCR*, *op. cit.* 1–5.

[27] G. Gong, *The Standard of "Civilization" in International Society*, Oxford, Oxford University Press, 1984; E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, Cambridge, Cambridge University Press, 2002.

[28] A. Hurrell, *On Global Order: Power, Values and the Constitution of International Society*, Oxford, Oxford University Press, 2007.

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whether in relation to UNHCR's annual appeals or in relation to special initiatives to address specific long-standing or mass influx situations. Because burden-sharing is largely discretionary, it is subject to States' interests. Given that the majority of the world's refugees come from, and remain in, the South and Northern States have had little obligation to contribute to protection in the South, there have historically been significant obstacles to North–South burden-sharing. However, on rare occasions, Northern States have voluntarily contributed to burden-sharing. This has happened when, as a result of interdependence between refugee protection in the South and Northern interests in other issue-areas, Northern States have recognized that they have an interest in contributing to protection in the South. This interdependence has made it possible for UNHCR to link Northern interests in security, immigration, or trade, for example, to burden-sharing to support protection in the South.[29]

Yet, even this overview of the refugee regime and the conditions under which cooperation has taken place still does not take sufficiently into account the increasing influence of other regimes on the politics of refugee protection. Over time, there has gradually been a proliferation in international institutions in other issue-areas. With globalization and growing interdependence, States have developed institutionalized cooperation in an increasing number of new areas. This has led to the creation of a dense tapestry of international institutions at the multilateral, regional, and bilateral levels. The literature on regime complexity attempts to explore the political consequences of this institutional proliferation.[30] Complexity refers to the way in which two or more institutions intersect in terms of their scope and purpose. Three main concepts describe different aspects of complexity. First, institutions may be *nested*: regional or issue-specific institutions may be part of wider multilateral framework. Second, they may be *parallel*: obligations in similar areas may or may not contradict one another. And third, they may be *overlapping*: multiple institutions may have authority over the same issue.

Complexity has been explored as an independent variable in world politics.[31] Where more than one institution exists in a given issue-area, the institutions may have a complementary or a competitive relationship. The existence of nesting, parallel, and overlapping institutions has been identified as offering States an opportunity to engage in cross-institutional strategies, strategically choosing between multiple and competing institutions. Alter and Meunier identify three types of cross-institutional strategy that might be enabled by the existence of regime complexity.[32] *Regime shifting* occurs when States move from addressing problems through one regime to addressing those problems

[29] A. Betts, "North-South Cooperation in the Refugee Regime: The Role of Linkages", *Global Governance*, 14(2), 2008, 157–78; A. Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime*, Ithaca, Cornell University Press, 2009.

[30] K. Raustiala and D. Victor (2004), "The Regime Complex for Plant Genetic Resources", *op. cit.*

[31] Alter and Meunier, "The International Politics of Regime Complexity", *op. cit.* 13.

[32] *Ibid.*

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through an alternative parallel regime, possibly relocating the most relevant politics for a given issue-area from one regime to another.[33] *Forum-shopping* occurs where actors select the international venues based on where they are best able to promote specific policy preferences.[34] *Strategic inconsistency* occurs where contradictory rules are created in a parallel regime with the intention of undermining a rule in another agreement.[35] The case study below applies these concepts to understand the changing politics of refugee protection in the context of institutional proliferation.

At its creation, the refugee regime represented the main international institutional framework that existed to regulate any aspect of international human mobility. Over time, new parallel institutions have emerged that, to some extent, overlap with the refugee regime. Since the creation of the modern refugee regime in the early 1950s, new institutions have emerged in regimes both related to and unrelated to human mobility. For example, new institutions have emerged in relation to the human rights, humanitarian, and security regimes and, although the labour migration regime remains underdeveloped, the travel regime has developed rapidly with States' growing concerns with the relationship between migration and security. Although the diagram is not exhaustive, the principal regimes that overlap with the refugee regime are illustrated in Figure 1.

Some of the emerging regimes – such as the human rights regime – have been complementary, reinforcing the norms of the refugee regime. For example, it has been increasingly recognized that a number of international human rights instruments offer sources of "complementary protection" (namely legal sources of refugee protection that come from outside international refugee law) for refugees fleeing persecution.[36] Article 3 of the European Convention on Human Rights (ECHR) and of the Convention against Torture (CAT), in particular, reinforce the principle of *non-refoulement* – that States cannot forcibly return an individual to a State in which s/he may face persecution – which is set out in the 1951 refugee convention. These complementary sources of protection have been used by UNHCR and have served to elevate *non-refoulement* to the level of a non-derogable customary international norm. Other institutions in the area of international security such as the UN Peace-Building Commission, created in 2005, also have the potential to complement the aims and purpose of the

[33] Betts, "Institutional Proliferation and the Global Refugee Regime", *op. cit*.

[34] Busch, "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade", *op cit*.

[35] Raustiala and Victor, "The Regime Complex for Plant Genetic Resources", *op. cit.*

[36] B. Gorlick, "Human Rights and Refugees: Enhancing Protection through International Human Rights Law", *New Issues in Refugee Research*, Working Paper No. 30, Geneva, UNHCR, 2000; J. McAdam, *Complementary Protection in International Law*, Oxford, Oxford University Press, 2007. For example, in the cases of *Tapia Paez v Sweden* at the Committee Against Torture and *Chahal v UK* at the ECtHR, the States against which the cases were brought were prevented from deporting asylum-seekers excluded from refugee status under the exclusion clauses of the 1951 Convention if they were likely to face torture or inhuman or degrading treatment or punishment upon return. *Tapia Paez v Sweden*, CAT, Communication No. 39/1996; *Chahal v United Kingdom* (22414/93) [1996] ECHR 54 (15 Nov. 1996).

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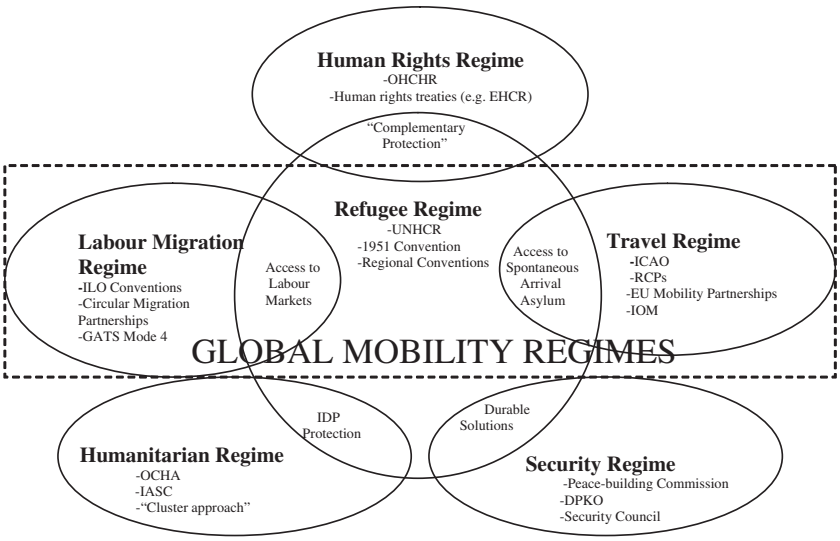

Figure 1. The refugee regime complex. Diagram illustrating the main actors and institutions in the global refugee regime and how the regime exists in parallel to, and partly overlaps with, other mobility and non-mobility regimes. The intersections of the Venn diagram illustrate some of the ways in which the refugee regime overlaps with other regimes.

refugee regime by creating the conditions under which refugees can receive access to durable solutions, most notably repatriation.[37]

Other new institutions have had more ambiguous effects. For example, in the context of humanitarian reform, a new institutional framework for addressing the issue of internally displaced persons (IDPs) has emerged since the 1990s.[38] The emerging humanitarian regime has led to a normative and institutional framework for addressing the needs of IDPs. In 2005, the UN Inter-Agency Standing Committee (IASC) agreed to a "cluster" approach within which different agencies will take responsibility for different aspects of humanitarianism, beginning with IDPs. The creation of an institutional framework for IDP protection has been argued to complement refugee protection by ensuring access to protection to a category of people who previously lacked a protection framework.[39] However, other authors have implied that the new

[37] J. Milner, "Refugees and the Regional Dynamics of Peace-Building", forthcoming in A. Betts and G. Loescher (eds.), *Refugees in International Relations*, Oxford, Oxford University Press, 2010.

[38] T. Weiss and D. Korn, *Internal Displacement: Conceptualization and its Consequences*, London, Routledge, 2007; C. Phuong, *The International Protection of Internally Displaced Persons*, Cambridge, Cambridge University Press, 2005.

[39] R. Cohen, "Developing an International System for Internally Displaced Persons", *International Studies Perspectives*, 7(2), 2006, 87–102.

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framework for IDP protection may have contradictory effects for the refugee regime. Although driven by recognition of protection needs, the new institutional framework for IDPs has also served a migration control agenda.[40] For example, a number of Northern States have used the notion of "internal flight alternative" as a means to ensure that individuals fleeing persecution either do not need to leave their countries of origin or can return to that country.[41] The "internal flight alternative" represents one way in which the new IDP regime overlaps with the refugee regime. This is because it implies that, in situations in which the would-be refugees are able to find protection within their own State, they may be refused asylum and returned to their country of origin.

3. The travel–refugee regime complex

This section turns to examine the interconnections between the refugee regime and the other two emerging global mobility regimes: labour and travel.[42] The global labour migration is rather limited. Consequently, there is only limited institutional overlap between the refugee regime and the embryonic labour migration regime. However, this is not to say that there is not some overlap or that there is not potential to develop potentially complementary interconnections between them. Two examples highlight the potential for complementary overlaps. First, in long-standing protracted refugee situations, refugees lack access to durable solutions such as local integration, resettlement, or repatriation. Many of these people have skills and the ability to work. Simultaneously, many industrialized countries face severe labour shortages in relation to both skilled and unskilled labour. In this context, labour migration may represent a forgotten durable solution for refugees who have been confined to camps or enclosed settlements for many years. This is a solution that could contribute to both the human rights of refugees and the labour market needs of industrialized countries.[43] Second, another possible interconnection relates to the growing protection needs of groups of people who may move across borders in an irregular fashion for a range of mixed motives. For example, many people may initially leave their country of origin for the purposes of labour migration but find themselves in need of international protection. Stranded migrants, people who are trafficked or smuggled, and people who face abuse or exploitation in transit, for example, may have international protection needs in spite of not

[40] C. Dubernet, *The International Containment of Displaced Persons: Humanitarian Spaces without Exit*, Aldershot, Zed Books, 2003; M. Barutcisk, "The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992–94)", *International Journal of Refugee Law*, 8(1–2), 1996, 49–110.

[41] For example, Sweden has used "internal flight alternative" to return and reject refugees and asylum-seekers from Iraq. The UK has done similarly in relation to refugees and asylum-seekers from Afghanistan.

[42] Koslowski, "Global Mobility Regimes", *op. cit.*

[43] UNHCR, *The State of the World's Refugees*, Oxford, Oxford University Press, 2006, 150.

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being refugees. Here, the refugee regime in general and UNHCR, in particular, may have an important role in meeting these protection needs.[44]

More importantly, though, there are significant overlaps that already exist between the emerging international travel regime and the refugee regime. The international travel regime is not new. Visas, passports, border control, and customs and excise all represent important norms and practices that shape how movement across borders is regulated. The core elements of international cooperation on travel are long-standing. However, gradually over the past 20 years, a qualitative change has taken place in the travel regime. Travel has been securitized and States have developed new technologies of border control as well as mechanisms of cooperation with significant extra-territorial scope.

The combination of growing concern with South–North migration since the 1980s and the post-9/11 concern with the relationship between terrorism and travel have led to the securitization of travel. Koslowski and Salter, for example, have documented the array of new policies, technologies, and cooperative agreements that the United States has adopted to control and regulate international travel.[45] Indeed, in recent years, carrier sanctions, more intricate bilateral visa regimes, readmission agreements, detention, international zones at airports, and the use of biometric data have emerged as common practices to regulate travel.

One particularly important aspect of the securitization of international travel has been the focus on controlling so-called irregular migration. Electorates and policy-makers have become increasingly concerned about the movement of people across borders outside regularized, formal channels of movement. The securitization of travel has led to an attempt to exclude, identify, and filter irregular migrants. Many of the new mechanisms for international cooperation in the area of migration have related to attempts to address South–North irregular migration. For example, a major focus of many of the RCPs has been on developing the partnerships and technologies to control irregular migration. The IGC, the Mediterranean 5+5, and the Budapest Process, for example, have focused significantly on regulating travel in terms of controlling irregular movement.[46]

New international agreements have emerged to identify, exclude, and return irregular migrants. For example, European Mobility Partnerships have been developed between the EU and selected African and Eastern European States. The EU's "Global Approach", for example, has developed pilot mobility partnerships

[44] J. Crisp, "Beyond the Nexus: UNHCR's Evolving Perspective on Refugee Protection and International Migration", *New Issues in Refugee Research*, Working Paper No. 155, Geneva, UNHCR, 2008. A. Betts, "Towards a Soft law Framework for the Protection of Vulnerable Irregular Migrants", *International Journal of Refugee Law*, 22(2), 2010.

[45] Koslowski, "Global Mobility Regime", *op. cit.*; Salter, "The Global Visa Regime and the Political Technologies of the International Self", *op. cit.*

[46] Nielsen, "Cooperation mechanisms", *op. cit.*

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with Cape Verde and Moldova.[47] The EU has created Frontex, as the European border control agency to engage in surveillance and enforcement of its external border. Meanwhile, new bilateral partnerships have strengthened restrictions on South–North movement. For example, agreements between the United States and Mexico, Italy and Libya, and Spain and Morocco, Switzerland and Nigeria, and France and Mali have given Northern States new extra-territorial capacity to control irregular movement and travel.

The development of the international travel regime and its securitization of irregular migration have had implications for the relationship between the travel regime and the refugee regime. In particular, it has led to growing overlap between the refugee regime and the travel regime. This overlap focuses on the notion of spontaneous arrival asylum. In different parts of the world, different States have different traditions of asylum provision. In the United States, Australia, and Canada, the main means of providing protection has been through the resettlement of refugees. In contrast, in Europe and much of the developing world, the most common means by which refugees have found protection has been by spontaneously arriving at the border of the country and claiming asylum. In much of the world, access to asylum has therefore been premised upon access to territory.

The creation of new institutionalized cooperation on travel has therefore overlapped with the refugee regime insofar as it has had significant implications for access to asylum channels. In Europe, in particular, the new methods of regulating travel have rarely been sensitive to the distinctions between irregular migrants, refugees, and asylum-seekers; rather, they have created mechanisms of cooperation through which spontaneous arrival asylum-seekers have found it increasingly challenging to gain access to the territory in order to claim asylum. The overlap between the two regimes is illustrated in Figure 2.

4. The impact of the complex on refugee protection

This section explores the impact of the complex on international cooperation in the refugee regime. It suggests that the effect of the complex on cooperation on refugee protection is double-edged. On the one hand, it has contributed to a net reduction in cooperation on the provision of asylum. On the other hand, however, it may provide an opportunity for increased cooperation on burden-sharing. The causal mechanisms of this impact are explained below.

4.1 A net reduction in cooperation on the provision of asylum

In the context of the increasing politicization of asylum within Europe, concerns with the relationship between immigration and security, and allegations of the "abuse" of asylum channels by "irregular migrants", European States (and many

[47] R. Nellen-Stucky, "Partnering for Mobility: The Ambiguous Case of Mobility Partnerships between the European Union and Selected Third Countries", presented at a workshop on Mobility Partnerships, Lucerne, 25 Sep. 2009.

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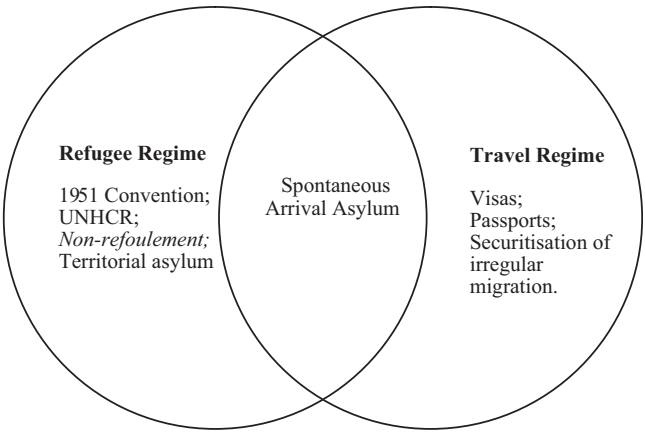

Figure 2. The travel–refugee regime complex. Venn diagram illustrating the overlap between the refugee regime and the travel regime.

other Northern countries) have faced the dilemma of how to limit their liabilities to provide asylum while simultaneously respecting their obligations under international law. The development of the international travel regime has created mechanisms though which they have been able to resolve this dilemma: reducing their own obligations to provide protection but without overtly violating the core tenets of the refugee regime.

The creation of new cooperative mechanisms within the travel regime has enabled Northern States to reduce asylum-seekers' access to spontaneous arrival asylum in the North while not overtly violating the principle of *non-refoulement* set out in the 1951 Convention. Given that the main legal and normative obligations of the refugee regime only kick in once an individual reaches the territory (or jurisdiction) of the asylum State, controlling access to territory has allowed many Northern States – most notably European States – to avoid incurring obligations and bypass the refugee regime.

Visa controls, stationing border guards at airports in Southern States, airline carrier sanctions, and "capacity-building" partnerships with third countries, for example, have facilitated new means to cooperate in limiting the South–North irregular movement of people. This has led to an implicit redistribution of burdens within the refugee regime. The new travel regime has enabled Northern States to reduce asylum-seekers' access to spontaneous arrival asylum in the North while not overtly violating the principle of *non-refoulement* set out in the 1951 Convention. Given that the main legal and normative obligations of the refugee regime only kick in once an individual reaches the territory of the asylum State, controlling access to territory has allowed many Northern States – most notably European States – to avoid incurring obligations and bypass the refugee regime.

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In other words, the development of the travel regime has created opportunities for European States, in particular, to engage in "regime shifting", addressing their concerns with spontaneous arrival asylum not through the refugee regime but through alternative forms of cooperation facilitated by an alternative regime. Implicitly, this has led to the redistribution of costs and benefits within the refugee regime. It has placed an even greater responsibility for refugee protection on Southern States, which have not had the same capacity to engage in limiting refugees' access to territory and so have not been able to bypass the refugee regime in the same manner as Northern States. However, many Southern States have recognized the implicit attempt by European States to redistribute burdens within the refugee regime, and some have responded through increasing their own restrictions on asylum. For example, Tanzania has explicitly used the asylum control practices of the European Union (EU) as a justification for its own restrictive practices towards Burundian refugees.[48]

The development of the travel regime to include mechanisms of cooperation that enable States to extra-territorially control access to their territory has thereby led to a net reduction in international cooperation on asylum. It has enabled Northern States to engage in regime shifting, bypassing the refugee regime without overtly violating its core principles. Meanwhile, this behaviour has been identified by many Southern States as an attempt to engage in burden-shifting and so contributed to them reducing their own commitment to asylum. The emerging travel–refugee regime complex,]therefore, can be considered to have contributed to a net reduction in cooperation in the refugee regime.

4.2 An opportunity for cooperation on burden-sharing

Although institutional proliferation in the travel regime appears to have led to a net reduction in cooperation on asylum, it may offer opportunities as well as constraints. It may offer an opportunity for increased cooperation on burden-sharing. In particular, it may create opportunities for linking Northern States' interests in travel to Southern States' interest in attracting additional burden-sharing. If the two could be linked, it could enable a new North–South bargain that enhances the quality and quantity of protection available to the majority of the world's refugees.

Historically, North–South burden-sharing has generally only taken place insofar as Northern States have had an interest in another issue-area and this has been linked to refugee protection. The recognition of these interests has relied upon there being structural interdependence between refugee protection in the South and Northern interests in other areas, such as security, immigration, and trade. For example, past attempts by UNHCR to facilitate burden-sharing

[48] A. Betts and J. Milner, "The Externalisation of EU Asylum Policy: The Position of African States", *COMPAS Working Paper*, 2006.

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in South-East Asia and Central America in the late 1980s and 1990s relied upon issue-linkage based on these wider interdependencies across issue-areas.[49]

The emerging Northern focus on the securitization of travel creates an opportunity to channel those concerns into a commitment to support refugee protection in the South. Indeed, the emergence of a travel–refugee regime complex might create a new opportunity for issue-linkage between Northern interests in securitizing travel and Southern interests in burden-sharing. The Northern interest in securitizing travel arguably enhances Southern bargaining power in negotiations with Northern States, which could be used to create tactical linkages within negotiations.

There may also be scope for linkage based on the material relationship between refugee protection and onward movement. For example, a UNHCR-commissioned study by the Swiss Forum on Migration highlighted that, in the case of Somali refugees, there was a correlation between the quality and quantity of refugee protection in the region of origin and the onward, secondary movement of Somali refugees to Europe. In other words, it suggested, burden-sharing on refugee protection might be a means to reduce the need for refugees to engage in South–North movement.[50] Furthermore, many Northern States seem to have recognized that a commitment to refugee protection "in the region of origin" is an important part of legitimating the securitization of travel because it may serve to reduce the likelihood of *refoulement*.

Between 2003 and 2005, UNHCR convened an initiative called the Convention Plus in order to try to facilitate the development of a normative framework on burden-sharing, given its inadequate treatment by the 1951 Convention. In many ways, this initiative was premised upon the idea of linking Northern interests in controlling irregular migration to Southern interests in greater burden-sharing. The initiative had three "strands" of debate: "irregular secondary movements", which related to the Northern interest in irregular migration control, "resettlement," and "targeted development assistance" (both of which related to the Southern interest in burden-sharing). The aim of the initiative was to facilitate issue-linkage across these areas in order to develop a new consensus on international burden-sharing. The initiative ultimately failed, polarizing along North–South lines due to a lack of trust in the process on both sides. However, it serves to illustrate the potential for using issue-linkage across the travel and refugee regimes as the basis of a grand North–South bargain on burden-sharing.[51]

The logic of such an agreement would represent a reconfiguration of the refugee regime along the lines of Hathaway and Neve's conception of "common

[49] Betts, *Protection by Persuasion, op. cit.*

[50] Swiss Forum on Migration, *Movements of Somali Refugees and Asylum Seekers and States Responses Thereto*, Neuchatel, SFM, 2005.

[51] A. Betts and J-F Durieux, "Convention Plus as a Norm-Setting Exercise", *Journal of Refugee Studies*, 20(1), 2007, 509–35.

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but differentiated responsibility sharing".[52] It tries to channel contemporary political constraints into a greater commitment to burden-sharing, premised upon a division of labour between North and South. Northern States would primarily contribute to burden-sharing (through financial contribution and resettlement), and Southern States would contribute to asylum. Such a conception has many problems.[53] However, given the securitization of travel and the diminished political space for spontaneous arrival asylum, such a North–South bargain may offer the greatest potential for simultaneously benefiting Northern and Southern States while opening up protection space for refugees.

5. Implications for UNHCR

The new institutional proliferation in the area of migration, therefore, has enabled Northern States to implicitly redistribute the costs of the refugee regime without formally renegotiating the regime. By using the alternative regimes to develop cooperation that limits the access of spontaneous arrival asylum-seekers to their territories, States have bypassed incurring the core obligations of the 1951 Convention. This has shifted the distribution of burdens in the refugee regime from Northern States to Southern States. In response, many Southern States have recognized this strategy of implicit burden-shifting by the North and, in many cases, reduced their levels of commitment to refugee protection. The proliferation of new, alternative regimes has thereby contributed to a net reduction in international cooperation in the provision of asylum even though it may offer opportunities for an increase in cooperation on burden-sharing.

UNHCR has consequently faced an increasingly competitive institutional environment, in which States have increasingly used alternative regimes outside the refugee regime in order to cooperate in addressing asylum and refugee protection. In the changing institutional context, UNHCR has faced the challenge of how to "make itself relevant" to States. This poses the important yet unexplored question of how an IO responds when States start to shift to alternative regimes to address the core problems that the IO (and the regime it was set up to oversee) was created to address. In response to regime complexity and the resulting regime shifting by States, UNHCR has effectively begun to move outwards from its traditional "home" within the refugee regime to engage in the politics of a range of other regimes. This response – of moving outwards to other regimes – can be illustrated in Figure 3.

In order to engage with the politics of other areas of the refugee regime complex, UNHCR has adopted three strategies: mandate adaptation, an itinerant political actor, and issue-linkage. This section highlights the relationship between regime complexity and these strategies of IO adaptation.

[52] J. Hathaway and A. Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection", *Harvard Human Rights Journal,* 10, 1997, 112–211.

[53] Betts and Milner, "The Externalisation of EU Asylum Policy", *op. cit.*

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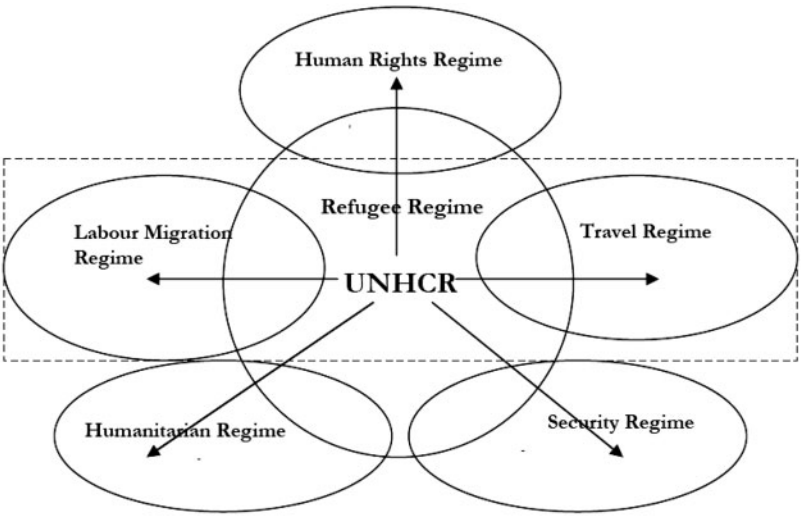

Figure 3. UNHCR's response to the refugee regime complex. Venn diagram illustrating UNHCR's gradual shift from working purely within the refugee regime to engage in the politics of other regimes.

5.1 Mandate change

Complexity may be an important intervening variable in explaining UNHCR's mandate change. At various stages in its history, UNHCR's mandate and work have changed. In 1967, the geographical scope of its work expanded from Europe to the rest of the world. In the 1980s, it took on a growing role in providing material assistance to refugees. However, two fundamental changes have occurred since the 1990s, which take UNHCR's work beyond the boundaries of refugee protection. Since the 1990s, it has taken on a growing role in humanitarian relief. Since the early 2000s, it has become increasingly active in the broader area of migration. Both of these two trends may be partly attributable to increased institutional competition. The proliferation of new parallel institutions in each of these areas has allowed States an opportunity to "bypass without violating" the 1951 Convention, and has thereby encouraged regime shifting. In order to compete with the other emerging institutions and to "make itself relevant" to States, UNHCR has therefore gradually expanded into the areas in which it faces institutional competition.

UNHCR's role in relation to humanitarian relief has expanded since the 1990s. Under the leadership of High Commissioner Sadako Ogata, the Office took on a role of providing relief to refugees and, increasingly, IDPs. UNHCR's role in relation to IDPs expanded dramatically with the creation of a normative framework on the protection of IDPs, the so-called Guiding Principles on

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International Displacement, completed in 1997. Alongside this, there was debate within the international community about which agency should take the "lead" on different aspects of IDP protection. Initially, UNHCR became the lead agency within a "collaborative approach". In 2006, this role was formalized through an agreement at the IASC, at which a "cluster approach" was agreed in relation to humanitarian reform.

The logic of the "cluster approach" is that different agencies have responsibility for different "clusters" of humanitarian relief. Within this approach, UNHCR agreed to take on responsibility for the "protection" cluster. The approach has been initially operationalized with respect to IDPs but has the potential to be applied to other areas of humanitarian relief, such as natural disasters or environmental catastrophe. However, given that many people inside and outside UNHCR had expressed concern that an IDP protection regime might be in contradiction to refugee protection, by offering a means through which States can "contain" potential refugees in their country of origin or obviate the need for asylum-seeking, and given that UNHCR was given no guaranteed source of additional funding for more than doubling its potential "population of concern", it is important to question why this expansion in mandate took place.

UNHCR's role in relation to migration has also begun to expand in the early 2000s. Although UNHCR has shunned the idea that it is a migration organization and has repeatedly stated that "refugees are not migrants", its work has increasingly touched upon migration. Under High Commissioner Antonio Guterres, it made one of its priorities engaging with asylum in the context of international migration and attempting to ensure that refugee protection is offered in the context of broader migratory movements. For example, UNHCR developed a 10-point plan in relation to international migration, made the so-called "asylum-migration nexus" one of its core priorities, and became engaged in a range of migration-related debates.[54] Examining asylum in the context of migration represents a new departure in UNHCR's work that is based on recognition that the majority of States now perceive asylum as a migration issue.

Furthermore, UNHCR has increasingly sought to play a broader role in relation to migration. High Commissioner Guterres has argued that, in the context of "people on the move", there is a need for protection for a number of groups other than refugees.

UNHCR's Jeff Crisp quotes from a report of the proceedings at the UN General Assembly on 8/9 November 2007, which summarizes the position of the High Commissioner:

> Antonio Guterres, UN High Commissioner for Refugees, explained that while UNHCR has a precise mandate in relation to refugees, the complexity of today's displacement goes well beyond the asylum-migration nexus.

[54] UNHCR, Refugee Protection and Mixed Migration: A 10-Point Plan of Action, Geneva, UNHCR, 2007.

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> More and more people are forced to move because of extreme deprivation, environmental degradation and climate change, as well as conflict and persecution. Meeting the needs of people who have left their country to find food and sending them back to extreme deprivation if they are not refugees are some of the complex questions that arise. While the answers go beyond UNHCR's mandate, it is UNHCR's duty to alert states to these problems and to help find answers to the new challenges they present.[55].

In December 2007, UNHCR convened the High Commissioner's Dialogue on Protection Challenges with the theme of "Refugee Protection, Durable Solutions and International Migration" partly to facilitate discussion of the wider protection needs of migrants.[56] This led to subsequent debate on UNHCR's potential role in relation to stranded migrants, trafficked persons, and climate change "refugees", for example.[57] UNHCR has consistently drawn the line at playing an operational role in the area of migrant protection or changing its mandate. However, the shift in position and the attempt by UNHCR to play a "convening role" in this area nevertheless represents recognition of the need to engage with migration in ways that fundamentally transform the focus of the organization.[58] The willingness to facilitate on issues unrelated to refugees is partly driven by need but is also a response to the increasing competitive institutional environment and the risk of UNHCR being bypassed. As the High Commissioner has recognized, facilitating this discussion is necessary simply in order to "effectively exercise its mandate for refugee protection and solutions".[59]

There is therefore an empirical puzzle to explain why this mandate shift has taken place, and why UNHCR has expanded its mandate into the areas of humanitarianism and migration. A number of plausible hypotheses exist. First, it could be suggested that mandate expansion has taken place because the original problem for which UNHCR and the refugee regime was created has disappeared. Yet, the number of refugees in the world has remained relatively constant since the late 1990s and UNHCR still struggles to meet the needs of refugees and fulfil its core obligations towards protecting refugees and finding solutions to their plight. Second, it could be suggested that the preferences of the most powerful donor States have changed and so they have redirected UNHCR's work. Yet, there is no evidence of this and, on the contrary, there have been repeated calls by large donor States for UNHCR "not to exceed its mandate". At UNHCR's Executive Committee meetings, the large donors repeatedly warn against UNHCR "becoming a migration organization", and the United States

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55 Crisp, "Beyond the Nexus", *op. cit.*

56 UNHCR, "Discussion Paper: Refugee Protection and Durable Solutions in the Context of International Migration", Geneva, UNHCR, 2007, UNHCR/DPC/2007/doc.02

57 Crisp, "Beyond the Nexus", *op. cit.*

58 UNHCR, "Chairman's Summary, High Commissioner's Dialogue on Protection Challenges", Geneva, UNHCR, 12 Dec. 2007.

59 *Ibid.*

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is particularly focused on ensuring UNHCR does not exceed its mandate. This resistance is such that senior UNHCR staff acknowledges that UNHCR has had to resort to "expansion by stealth".

The more plausible explanation of mandate expansion is linked to the need for UNHCR to compete within an increasingly competitive institutional environment. Interviews with senior UNHCR staff reveal that there is a significant awareness that a failure to actively work within the broader humanitarian and migration context will result in its role as the UN's protection agency being eroded by other institutions better placed to fulfil the preferences of States. High Commissioner Guterres, for example, has spoken of the need for UNHCR not to be an agency stuck in the 1950s but to assert its ongoing relevance.

5.2 Itinerant actor

UNHCR has also become what may be described as an itinerant actor. IOs can be conceived in a range of ways – including as a forum, as a service provider, or as a secretariat. However, irrespective of this variation, the conventional conception of an IO regards it as formally linked to a specific regime and its work as largely confined to that regime. This conception is certainly true of normative IOs, such as UNHCR, International Labour Organization, or ICRC, which were created precisely to oversee the implementation of a normative treaty regime. This assumed relationship between an IO and a specific regime applies in the case of UNHCR, which it formally linked to the refugee regime through the 1951 Convention: Article 35 of the Convention gives UNHCR "supervisory responsibility" for the Convention.

However, the consequences of regime shifting have contributed to partly de-coupling UNHCR and the regime. As States have bypassed the refugee regime, UNHCR has taken on a broader role beyond the boundaries of the refugee regime, becoming what might be referred to as an "itinerant actor", no longer working exclusively within the confines of the regime. In order to advocate for refugee protection, UNHCR has increasingly recognized the need to engage in the politics of other regimes, by attending forums in other regimes in which the politics of refugee protection is now a part.

For example, UNHCR has followed and participated in the Global Forum on Migration Development (GFMD), regularly attends EU Justice and Home Affairs meetings, and has engaged in humanitarian and peace-building forums such as the Office for the Coordination of Humanitarian Affairs (OCHA) and the UN Peace-building Commission. This participation in the wider debates in the migration and IDP regimes is part of a broader trend in which UNHCR has also begun to participate, for example, the development regime, joining the United Nations Development Group (UNDG) in 2005 and regularly attending the Development Assistance Committee of the Organisation for Economic Co-operation and Development (OECD). The widely acknowledged reason for this is that the most relevant politics for the refugee regime no longer takes place within the inter-State forums provided by UNHCR.

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5.3 Issue-linkage

Given the acknowledgment that States' preferences in other issue-areas are shaping their behaviour towards refugees, UNHCR has engaged increasingly in attempting to use issue-linkage. The recognition that the most relevant politics for refugee protection now takes place beyond the confines of the refugee regime has meant that UNHCR has needed to find new ways in which to appeal to States' interests and channel them into a commitment to refugee protection. Recognizing that Northern States' core interests in relation to asylum are migration and security, UNHCR has attempted to find a way to link these wider interests to refugee protection. Whether through tactical or substantive issue-linkage, it has thereby attempted to win back its departing principals by appealing to the very interests that led them to engage in regime shifting.[60]

For example, recognizing that the 1951 Convention was not adequate to address States' contemporary concerns with asylum and refugees, UNHCR conceived the Convention Plus initiative in 2003.[61] Its aim was to supplement the aspects of refugee protection inadequately addressed by the Convention. The initiative attempted to facilitate a "grand bargain" on the allocation of responsibility for refugee protection, whereby Northern States could meet their interest in limiting irregular migration through contributing to refugee protection in the South. The initiative thereby attempted to use issue-linkage to connect Northern States' interests in migration to refugee protection. Central to this initiative was the notion that "protection in the region of origin" could serve as a substitute for spontaneous arrival asylum and an implicit recognition that, so long as Northern States funded protection in the South, they could legitimately control immigration.

Regime complexity offered UNHCR an opportunity to engage in issue-linkage as a means to channel States' wider interests in other issue-areas back into a commitment to refugee protection. This is because the institutional connections across different regimes made it more plausible to States that a relationship between refugee protection and the other issues existed. However, these attempted linkages were not always successful because the States did not always accept that their wider interests in migration and security could be met through re-engaging with the refugee regime.[62]

Collectively, these three strategies amount to an attempt by UNHCR to pursue States into the regimes into which they have been shifting. Given the competitive environment and the risk that the Office and the refugee regime will be bypassed, UNHCR has had little option other than to engage in the politics

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[60] V. Aggarwal, "Reconciling multiple institutions: Bargaining, linkages, and nesting", in V. Aggarwal (ed.), *Institutional Designs for a Complex World*, Ithaca, Cornell University Press, 2000, pp. 1–31; E. Haas, "Why collaborate? Issue-linkages and international regimes", in F. Kratochwil and E. Mansfield (eds.), *International Organization: A Reader*, New York, Harper Collins, 1980/1994; E. Haas, *When Power is Knowledge*, Berkeley, California University Press, 1990.

[61] Betts and Durieux, "Convention Plus as a Norm-Setting Exercise", *op cit*.

[62] Betts, *Protection by Persuasion*, *op. cit*.

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of the regimes into which States are shifting. However, the Office needs to be aware of what the potential tradeoffs are that go with such a strategic change. The problem arises if and when these three strategies potentially contradict and even undermine UNHCR's core mandate of refugee protection and solutions, which has historically been the basis of its legitimacy.

It is challenging to causally attribute UNHCR's engagement with the politics of other issue-areas directly to regime complexity. The ultimate reason for UNHCR's changing role is, of course, the underlying politics which has led to States' changing demand for regimes that deal with issues such as travel security. Nevertheless, institutional proliferation may be an important intervening variable insofar as the existence of alternative forms of institutionalized cooperation has created competitive alternative through which States can avoid their refugee regime obligations by instead working through, for example, the travel regime or the humanitarian regime. This, in turn, has created an environment within which UNHCR has needed to engage in the politics of these other regimes or risk irrelevance to States.

6. Conclusion

The refugee regime is the most established and long-standing regime governing human mobility. The regime was initially fairly isolated and faced very little institutional competition. Over time, though, new institutional proliferation in other issue-areas has taken place. Some of these new institutions have overlapped with the refugee regime, sometimes in complementary and sometimes in contradictory ways. Drawing on the emerging literature on regime complexity, this article has examined the ways in which the development of the other two global mobility regimes set out by Koslowski has changed the politics of refugee protection.

In particular, the article has examined how the emergence of a "travel–refugee regime complex" has had significant implications for international cooperation on the provision of asylum. The travel regime has overlapped with the refugee regime in terms of its regulation of spontaneous arrival asylum. Access to territory is an especially crucial component of asylum in much of the world, particularly in Europe, and this has been affected by the aspects of the new travel regime which restrict irregular migrants' access to territory. New cooperative mechanisms on travel have enabled Northern States – especially European States – to bypass the 1951 Convention and UNHCR without overtly violating their obligations under international refugee law. By creating opportunities for regime shifting and bypassing the refugee regime, regime complexity has thereby led to a net reduction in international cooperation on the provision of asylum – even if it may have increased opportunities for burden-sharing.

Attributing causal significance for the reduction in cooperation on asylum to complexity is possible because of the counterfactual that without alternative forms of institutionalized cooperation on travel security it would not have been possible for States to "bypass without violating". Although the underlying

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independent variable explaining this is likely to be the changed politics that has led States to have a demand for new forms of illiberal cooperation, institutional proliferation represents an important intervening variable insofar as it makes regime shifting practically viable.

The more challenging area of causal explanation is in relation to the claim that the change in UNHCR's mandate and strategy can be attributed to its changed external environment. Nevertheless, the article provides at least preliminary evidence to show that UNHCR's growing engagement with the politics of other regimes is attributable to the relocation of the most relevant politics for refugee protection to those other regimes, and the need for UNHCR to engage or to lose relevance. This observation has wider theoretical implications because it draws attention to the role of institutional proliferation and competition in shaping change in the mandate and strategy of IOs. Indeed, UNHCR is not alone in facing significant competition from alternative institutional venues. Other IOs – such as United Nations Development Programme (UNDP) or World Intellectual Property Organization (WIPO), for example, may be similarly conceived as "challenged organizations" in facing a context in which States are bypassing old institutions through new cooperative arrangements.

On a theoretical level, a number of important hypotheses and further research questions emerge in relation to institutional proliferation and its explanatory role in IO change. First, does institutional proliferation help to explain IO adaptation? What role does the changed institutional environment play alongside other alternative levels of explanation, such as system level accounts of changing State preferences[63] and internal accounts of organizational sociology?[64] How do these three levels interact to explain adaptation? This article provides preliminary evidence to support the hypothesis that the external institutional environment offers an important third level on which to understand IO change. Second, how do "challenged organizations" behave when they are faced with States using cross-institutional strategies such as forum-shifting? When we look at questions of "institutional choice"[65] or cross-institutional strategy, there appears to be a need not only to look at State choice in isolation but also interaction between State strategy and IO strategy. Furthermore, what explains variation in the strategy and response of challenged IOs? When do they engage in expansion rather than contraction? UNHCR's approach has been proactive and expansionary but this may not necessarily hold for other challenged IOs. For example, UNDP and WIPO may not have been able to adapt in

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[63] R. Keohane, "The Demand for International Regimes", *International Organization*, 36(2), 1982, 332–55; R. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, New Jersey, Princeton University Press, 1984; J. Mearsheimer, "The False Promise of International Institutions", *International Security*, 19(3), 1994–5, 5–49.

[64] M. Barnett and M. Finnemore, "The Politics, Power, and Pathologies of International Organizations", *International Organization*, 1999, 699–732; M. Barnett and M. Finnemore, *Rules for the World: International Organizations and Global Politics*, Ithaca, Cornell University Press, 2004.

[65] D. Snidal, J. Jupille and W. Mattli, "Explaining Institutional Choice in Trade", paper presented at a seminar of the Oxford University Global Economic Governance Programme on 25 Apr 2008.

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this way. Third, the concept of "itinerancy" developed by the article poses a number of possible hypotheses about the work and effectiveness of normative IOs. Some normative IOs such as International Committee of the Red Cross remain symbiotically attached to "their" regime. Others, such as UNHCR in this case, have become more itinerant. Under what conditions does itinerancy contribute to or reduce IO effectiveness?

On a policy level, recognizing the existence of a refugee regime complex has important relevance for the work of UNHCR. In particular, it has faced the dilemma of how to uphold its core mandate while maintaining relevance. It needs to adapt to a complex institutional environment very different from the one into which it was born. In order to do so, it will need to shift from a technocratic role of monitoring States' compliance with their asylum obligations to a pro-active and more politically engaged role. It needs to be aware of the growing inter-relationships between refugee protection and other aspects of human mobility, and the way in which new institutional proliferation is shaping the politics of refugee protection. Responding to these challenges will require a renewed analytical and political capacity within the organization. That is not to say that UNHCR needs to become a "migration organization" nor a "politicized" actor, but rather that it needs to develop the analytical and political capacity to engage with a rapidly changing political and institutional context.

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