Symposium on Reconceptualizing IEL for Migration: Sustainable Humanitarianism? Refugee Finance and the Financialization of International Protection

By:

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Much has been written about how international law generally, and international economic law more specifically, have enabled, facilitated and contributed to the continued racial ordering, discrimination, exploitation, and treatment of people on the move as 'surplus' population. The current COVID-19 pandemic, if anything, has laid bare how current economic structures entrench precarity and inequality, in a world in which borders may be seamless for goods and services, yet fortress-like and unwelcoming for those fleeing persecution, climate breakdown, armed conflict or abject poverty.

An unexpected consequence of the pandemic and of more recent humanitarian emergencies, from armed conflicts to (un)natural disasters, has been the acceleration, and arguably the completion, of what Western states have been seeking to achieve since the end of the Cold War i.e. the end of so-called spontaneous asylum in the Global North. Involuntary 'returns' and non-entrée policies of externalization and containment in the region of displacement have long been the expedient answer to 'managing' migration flows. Over time, a large number of 'innovative' schemes have emerged as a way of circumventing such non-entrée policies, and as a means of providing sanctuary and facilitating entrance to the territories of the Global North for people fleeing persecution. These schemes have included various forms of temporary protection, complementary pathways and humanitarian admission programs. More recently, encouraged by the transformational push of the 2030 Agenda for Sustainable Development and by the 2018 Global Compacts, the focus has shifted towards new forms of private sponsorship and refugee admission as students, family members and labor migrants. As some have claimed, these alternative pathways may provide less dangerous routes to asylum and arguably valuable opportunities for people on the move, in a world that erects walls and barbed wire fences to keep out those most in need of protection. Others, however, have pointed to the fact that these alternatives may ultimately transform the institution of asylum into a 'neoliberal immigration enterprise reserved only for highly skilled and educated migrants', at the expenses of the principles underlying international protection.

Thus, whilst the debate on international protection focuses on sustainable complementary pathways to protection, aimed at enhancing rather than replacing access to asylum, little attention is paid to the political economic structures underpinning these alternative pathways, and to how international economic law enables their implementation. More specifically, what are the financial instruments used to fund these 'new and sustainable' responses to displacement? And what are the implications of an increasing reliance on these instruments for the way in which humanitarian actors, as well as we as international lawyers, understand the concept of international protection?

In this contribution, I present the findings of a preliminary study carried out at Lund University. I examine refugee finance, what I consider to be one of the emerging migration control tools for the containment, externalization and

management of people on the move. The term refugee finance is used to refer to 'innovative' financial instruments aimed at mobilizing private capital to fund responses to large-scale migration movements. These instruments (mainly refugee bonds, technical assistance funds and concessional loans) have been embraced by UN agencies, international financial institutions and states as market-led solutions to the real and/or perceived challenges raised by the arrival of people on the move in significant numbers. The turn to refugee finance marks a paradigm shift 'from funding to financing', a shift based on the assumption that private capital will successfully complement public sector funds to resource refugee responses and support host countries facing the fiscal stress of hosting refugees. For its proponents, refugee finance promises to bridge the gap between humanitarian and development responses and to protect refugees, while at the same time supporting the sustainable development of the host countries. For its opponents, emerging research warns that similar past efforts to attract private capital in the sustainable development and climate change contexts have proven unsustainable and, in certain cases, even detrimental to the relevant communities and to the broader protection of public goods.

In this piece I want to examine how the idea of sustainable humanitarianism has encouraged the emergence of refugee finance. I do so by focusing on the institutional transformation that, over the last decade, has enabled the emergence of this phenomenon, not least through the acceptance of the paradigm shift 'from funding to financing' in relation to the debate over the 'humanitarian-development nexus', i.e. the desire to bridge humanitarian assistance and development programming. Roger Zetter, with his examination of the restructuring of the refugee assistance regime, has been one of the first scholars to identify a 'marked global transformation', which he traces back to the 1990s discourse on the link between relief, rehabilitation and development. He has also observed, in his analysis, that a stronger push for restructuring across key areas governing refugee responses has taken place during the last six years, following the 2015 European 'long summer of migration'.

As mentioned above, already with Agenda 2030 and the adoption of the Sustainable Development Goals in 2015, the international community embraced the notion of transnational multi-stakeholder partnerships as a way to attract private capital to realize development objectives. A similar approach

also characterized the 2015 debates around the Grand Bargain, a humanitarian agenda officially launched at the 2016 World Humanitarian Summit, which had amongst its main objectives a commitment to stimulate and foster 'innovative partnerships with the private sector'. In the specific context of responses to displacement, this push for 'innovative partnerships' was promoted by the 2016 United Nations High-Level Meeting on Addressing Large Movements of Refugees and Migrants as part of its New York Declaration for Refugees and Migrants. A key element in fact in the New York Declaration, is the establishment of the Comprehensive Refugee Response Framework as a vision of 'burden- and responsibility-sharing'. The approach of the New York Declaration and the statement of the 2016 World Humanitarian Forum, and implicitly the commitments of the Grand Bargain, were later officially adopted for practical implementation by the UN Office for the Coordination of Humanitarian Affairs (UN OCHA) in its 2017 policy paper New Way of Working. In this document, UN OCHA acknowledged 'a growing consensus for a new and comprehensive approach to meet the challenges of displacement that goes beyond addressing immediate humanitarian needs', an approach predicated upon the need to bridge the gap between humanitarian and development responses and to 'leverage international financial institutions and the private sector, together with national governments'. This approach was ultimately confirmed in 2018, both conceptually and operationally, with the adoption of the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration.

It is important to note that the transformation of the institutional structure underpinning and enabling refugee finance, developed in parallel to the escalating political concerns over the so-called European refugee 'crisis' and an increase in spontaneous migration movement. Both 2018 Global Compacts take as their starting point the 'reinforcement of protection' and the active promotion of development-led approaches to displacement. As we have seen above, these development-led approaches are largely based on the multi-stakeholder governance model promoted with the 2015 Grand Bargain which envisaged an increased collaboration with state donors, multilateral agencies and, crucially, private stakeholders, including impact investors. A key aspect of the 2018 Global Compacts, not usually examined in legal discussions on these two policy documents, is the fact that that they endorsed and consolidated

specific modalities of responsibility-sharing which included the financial modalities elaborated upon in the Grand Bargain, and the responsibility-sharing recommendations put forward in the policy document. This means that international donor states, international agencies and private business representatives, including philanthropic organizations, developed commitments for a comprehensive overhaul of the humanitarian response system and introduced important changes at the operational level which in turn also affected the modalities of funding made available to refugee responses.

These changes raise significant concerns, not least from the perspective of international economic law given the protections it affords, for instance, to foreign investors. First, by looking at the policy and operational documents of UN agencies, UN-related organizations and international non-governmental organizations working with people on the move, it appears that their key priorities may have somehow shifted, potentially to the detriment of the same international legal mechanisms of international protection designed to protect refugees and (other) migrants. In these documents reference continues to be made to durable solutions, human rights safeguards and to the notion of international protection. Yet, the changes examined in this contribution prompts us to question whether the conceptualization of international protection promoted and prioritized by refugee finance and by the institutional infrastructures supporting it fully reflects the international legal commitments enshrined for instance in international refugee law and in international human rights law.

Second, the development-led approach to refugee responses which underpins refugee finance seems to prioritize and promote a very specific understanding of ‘development’ and targeted market-led responses. Such a conceptualization of development, as I mention at the beginning of this contribution, is perfectly aligned with the model of external(ized) protection and containment favoured by states in the Global North and successfully touted by those who provide advice to states and international organizations on how best to implement this migration management model. External(ized) protection fundamentally prioritizes the identification of ‘pragmatic’ solutions in countries geographically adjacent to a refugee’s country of origin. Strategically, this means that host-countries in the Global South are not only seen as the *de facto* primary source of refugee protection, but also as the countries best placed, and potentially the

only one suitable to provide protection within this new multi-stakeholder architecture. This appears to be in in line with current policy trends at the international level which prioritize the idea of 'protection elsewhere' and states' efforts to close off spontaneous arrivals and access to asylum claims on their territory or within their jurisdiction. EU member states, for instance, are markedly stepping away from the concept of local integration towards the idea of 'enforced' cessation of refugee status, whereby refugees are sent back to their country of origin as soon as the situation there is considered to have 'improved'. Under the new development-led paradigm described so far, therefore, whilst 'voluntary returns' are still presented as the preferable solution, the involuntary nature of such returns has become apparent. Furthermore, the other solutions prioritized by relevant protection actors appear to be 'local solutions', not necessarily aimed at local *integration*, in countries adjacent to a refugee's country of origin. As already mentioned, with the current focus on alternative and 'complementary' pathways to admission and protection, resettlement has become increasingly unlikely, démodé, and in most cases only aimed at a selected, privileged few. This situation, further exacerbated by the slowing down in donors' funding for humanitarian assistance, has been accompanied by a consolidated shift towards the use of public funds to facilitate and enable private investment in refugee assistance, not least through the use of impact investments and concessional loans.

This enabling of private investment, in turn, transforms the ways in which people in need of protection are perceived and, ultimately, it narrows down and hollows out the conception of refugeehood. Refugees and (other) migrants are increasingly portrayed as a resilient and entrepreneurial subject 'at all costs', while the concept of resilience depoliticizes refugees' lives and experiences, rendering them intangible assets to be sold and traded on the global financial markets. Protection measures are reoriented towards a dependence upon private investors which are now seen as key enablers and co-providers of 'protection'. Refugee finance mechanisms may ultimately transform the very meaning of international protection, now that the focus of humanitarian responses moves towards the creation of an enabling environment for investors and towards policies which will support self-sufficiency. Within these frameworks, people on the move become customers, whose resilience and adaptation need strengthening and optimizing, rather than people in need of

protection and holders of rights.

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