A Right to Leave

Refugees, the State and International Society

Paper Prepared for the 2006 International Studies Association Conference

DRAFT
Please Do Not Cite Without Permission
Comments Welcome

Phil Orchard
PhD Candidate, Department of Political Science
University of British Columbia
CCHS Human Security Fellow, Doctoral Dissertation Category
philorchard@hotmail.com
Since 1951, refugees,\(^1\) have had clear protections, both in international law through core legal documents such as the *Refugee Convention* and the *Refugee Protocol*, and through the work of institutions such as the United Nations High Commission for Refugees and the International Organization for Migration as well as a number of non-governmental organizations. These mechanisms can be seen to represent a regime.\(^2\) However, regimes are limited given that a substantive change in the norms and principles of a regime will cause it to either collapse or emerge as a new regime.

Refugees are not simply a post-World War II phenomenon, or even a 20th century one. A tension has existed since the emergence of the modern system of states between the individual and the state. Hedley Bull argued that in a system of sovereign states, “in which rights and duties applied directly to states and nations, the notion of human rights and duties has survived but it has gone underground… The basic compact of coexistence between states, expressed in the exchange of recognition of sovereign jurisdictions, implies a conspiracy of silence entered into by governments about the rights and duties of their respective citizens. This conspiracy is mitigated by the practice of granting rights of asylum to foreign political refugees…”(Bull 1977: 83)

To reconcile such a fundamental contradiction, in the late Seventeenth Century, states adopted a common pattern of practice towards refugees, supporting the right of persecuted individuals to leave their own state. This rapidly became a core principle of the international system and of international society, and can be seen in terms of being a fundamental institution. Such institutions are defined by Christian Reus-Smit as:

\(^1\)My thanks to Brian L. Job for comments, as well as to Richard Price and Katia Coleman for comments on a previous draft. This paper reflects part of a broader work, namely my PhD Thesis. This research has been made possible through financial support from the Social Sciences and Humanities Research Council of Canada, the Canadian Consortium on Human Security (CCHS) and the Human Security Program of the Canadian Department of Foreign Affairs and International Trade (FAC). Assistance to attend this conference has also been provided by the UBC Centre of International Relations.

\(^2\)I refer here to regimes according to Krasner’s now classic definition as “[I]mplicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.” (Krasner 1982: 186) Laura Barnett makes this argument. (2002: 238-239) Similarly, Claudena Skran argues that efforts to assist refugees during the interwar period can similarly be seen to constitute a separate regime, albeit one that influenced the core norms and principles of the present regime. (Skran 1995)
“‘generic’ structural elements of international societies. That is, they provide the basic framework for cooperative interaction between states, and institutional practices transcend shifts in the balance of power and the configuration of interests, even if these practices’ density and efficacy vary.” (Reus-Smit 1999: 4)

It is important that there were two key limitations to this institution. First, while states did accept an individual’s right to leave, they did not accept a corresponding right of asylum or non-refoulment. This clearly is a contradiction, but it is one that remains present to this day. Myron Weiner pointed this as a fundamental moral contradiction “between the notion that emigration is widely regarded as a matter of human rights… while immigration is regarded as a matter of national sovereignty.” (1996: 171) Such a norm has emerged only since the 1951 Convention, and remains contested today, although there was some movement towards it in the interwar period. Second, this pattern of behavior among states did not apply globally, but rather only to those states that were part of, and saw each other to part of, international society.

Even with these limitations we can observe the gradual spread of refugee rights, starting in the seventeenth century and in particular around the time of the Revocation of the Edict of Nantes by Louis XIV in 1685. Until the twentieth century, refugees were dealt with by states in an ad hoc manner. Only in the past century, and particularly since the Second World War, have refugees become a global phenomenon.³

The goal of this paper is to explore the emergence and continued existence of this fundamental institution, reflected in the right of individuals to leave their own state. This leads to two important questions. The first is why did states accept that people had a right to leave? This occurred because of two substantive changes in the international system. The first change was at the system level, with the replacement of the medieval system of organization with unitary, territoriality independent, sovereign states. The second change is within states themselves, as the state-citizen relationship evolved with the creation of the European sovereign state system. This saw a mutually constitutive relationship created

³ As Skran notes, even the League of Nations machinery dealt with “refugees in Europe or in the nearby Middle East, not those in what was perceived to be far-off Africa or Asia. The delegates also expressed more humanitarian concern on behalf of Christian refugees, and to a lesser extent towards Jewish ones, than they did those of Muslim origin. On some occasions, especially in regard to the treatment of Russian refugees in China, League members displayed a bias in favour of whites.” (Skran 1995: 275)
between states and their citizens in which states guaranteed sets of rights in exchange for legitimacy. Therefore, the right to leave emerged because of change in two dimensions: At the inter-state level and also at the domestic level.

The second question is why does this right to leave continue to exist? In order to explain this, we must examine change in two levels of norms. The first, deeper level, of norms, meta-norms in other words, constitute this fundamental institution. These metanorms establish the nature of refugees and the rights and obligations of states towards them. These norms are not immutable. Change in their interpretation by states has occurred, and this change has led to changes within and of regimes.

In fact, we can point to the existence of three different regimes for the protection of refugees over this period. Each of these regimes has accepted at a fundamental level the right of refugees to leave their own state, but the way states have implemented such ideas have differed considerably. Thus at the regime level, we see a number of other norms at play. These norms provide direction and guidance to states in how they shall deal with refugees. They include:

- Who has responsibility for refugees? In other words, should states determine their policies at the domestic state level (including through bilateral negotiations) or at the international level.
- Can individual states return refugees to their country of origin? In other words, is there a right of non-refoulment?
- Where should refugees go? In other words, who should accept them, and is there a requirement for individual states to accept refugees?

Given length requirements, this paper will not examine all of these issues, but will rather focus on the evolution of refugee protection from the domestic to international level. This change resonates through all three of the regimes, which will be described in greater detail below.

**A. The Emergence of a Fundamental Institution**
What explains the materialization of a fundamental institution, particularly one that resolves such a deep-seated contradiction within the sovereign state system? As mentioned above, it was caused by the interplay between two dimensions of change. The first was the emergence of the modern state system, and in particular the idea of the sovereign, territorial state. The second is a change at the domestic level, in the relationship between the state and its citizens. Because of these changes, states needed to grapple with the problem of people fleeing from persecution in their own state. The solution was a right to leave.

1. The Emergence of the Territorial State

The first dimension of change can be seen in the gradual emergence of the state and in the transfer of authority to it away from other medieval structures. As Ruggie has noted,

the consolidation of all parcelized and personalized authority into one public realm… Internally, this monopolization was expressed through the progressive imposition of what was called the ‘king’s peace,’ or the sole right of the king’s authority to enforce the law…Externally, the monopolization of the legitimate use of force was expressed in the sovereign right to make war.” (Ruggie 1993: 151)

Why such a change is debatable. 4 Spruyt argues that the state triumphed over these other forms of organization because its internal organization had less deficiencies; sovereignty had proved to be an effective and efficient means of organizing external, interunit behavior, and sovereign states selected out and delegitimized actors who did not fit the system (Spruyt, 1994: 28). 5 With an international system, or international society, comes a requirement to both ignore unlike units and accept like units. As Spruyt has noted, “Dislike units are …based on different conceptions of internal and external politics. The development of sovereignty meant a formal demarcation of political authority on territorial grounds…the agents that make up the state system thus create a particular structure of interunit behavior… unit change imposes a particular structure on international relations.” (Spruyt 1994:

---

4 The literature on state formation is both disparate and wide. Generally, it can be broken down into arguments based on international factors, such as Spruyt’s; domestic factors, such as Ertman, who points to the organization of local government, the timing of the onset of geopolitical competition, and the independent influence of representative assemblies as all playing key roles (Ertman 1997); or a combination of the two, such as Tilly, who points to states as both the most effective war-making organization and resource extractive entity. (Tilly 1992)

5 In contrast to the state, the Hanseatic city-league did not differentiate its authority by territorial specification, nor did it recognize a final locus of authority. And while the city-state did have a strict demarcation of jurisdiction and externally acted like a state, it was divided internally as one leading city dominated other towns, with the latter always contesting the rule of the leading center: “Sovereignty in the city-state…was fragmented” (Spruyt, 1994: 153-154).
17) This explanation suggests that as important as change within the state has been, the international system also matters greatly.

Needless to say, it should not be surprising that Hedley Bull long wrestled with these issues. Particularly in *The Anarchical Society*, Bull’s main concern was the emergence of order in world politics. (Bull 2002: xxxii) For him, the starting point of international relations is the existence of states, “each of which possesses a government and asserts sovereignty in relation to a particular portion of the earth’s surface and a particular segment of the human population.” Such states are differentiated by both internal sovereignty, “which means supremacy over all other authorities within that territory and population” and external sovereignty “by which is meant not supremacy but independence of outside authorities.” (Bull 2002: 8)

However, sovereignty properly does not exist unless there is a system. As he notes, “An independent political community which merely claims a right to sovereignty (or is judged by others to have such a right), but cannot assert this right in practice, is not a state properly so-called.” (Bull 2002: 8-9) Thus, a system of states or international system is formed “when two or more states have sufficient contact between them, and have sufficient impact on one another’s decision to cause them to behave – at least in some measure- as parts of a whole.” (Bull 2002: 10) This can change into a society of states, or international society, when “a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.” (Bull 2002: 13)

But cooperation does not simply emerge. Rather, state collaboration hinges on institutions of international society, notably the balance of power, international law, diplomacy, great powers, and war. Bull suggests that these institutions should not be seen as regimes, or as organization or administrative machinery, but rather “a set of habits and practices shaped towards the realization of common goals.”(Bull 2002: 71)

Such fundamental institutions do not seek to undermine the central role of states in international society. They are, rather:
an expression of the element of collaboration among states in discharging their political functions—and at the same
time a means of sustaining this collaboration. These institutions serve to symbolize the existence of an international
society that is more than the sum of its members, to give substance and permanence to their collaboration in
carrying out the political functions of international society, and to moderate their tendency to lose sight of common
interests. (Bull 2002: 71)

For Bull, therefore, the primary goal of states is to preserve international society. States are the
central or key actors in society, and they accept a role to police the rules that lead to order.
Fundamental institutions emerge to assist states in co-operating in order to preserve international
order.6

2. Citizens and the State

The second dimension of change reflects the gradual emergence of citizenship. Charles Tilly
has argued that the definition of modern citizenship comes from T. H. Marshall’s (1950) formulation
“which postulated a progression from civic to political to social citizenship, the latter presumably
culminating in the full welfare state.” (Tilly 1996: 3) This suggests that citizenship evolved over time,
as states matured. As Van Steenberg has argued, Marshall’s argument represents the traditional view:

In the eighteenth century the first type emerged: civil citizenship, which established the rights necessary for
individual freedom, such as rights to property, personal liberty, and justice. The second type, political citizenship,
was built primarily in the nineteenth century and encompassed the right to participate in the exercise of political
power. The third type, social citizenship, was constructed in the twentieth century. This type emphasized the
citizen’s rights of economic and social security and gained its expression in the modern welfare state as it
developed in Western Europe. (van Steenbergen 1994: 2)

Through this, he suggests, we “can see a definite shift from a strict political definition of a citizen- with
an emphasis on his or her relationship with the state- to a broader somewhat more sociological
definition, which implies a greater emphasis on the relationship of the citizen with society as a
whole.”(van Steenbergen 1994: 2)

Tilly states that “the core of what we now call ‘citizenship,’ indeed, consists of multiple
bargains hammered out by rulers and ruled in the course of their struggles over the means of state

6 Such views are echoed by many in the English School. Martin Wight points to the fact that a system of states requires
communication and intercourse. Thus, messengers, conferences and international institutions, a diplomatic language, and
trade, all emerge to provide this. (Wight 1977: 29-32) Similarly, Herbert Butterfield points to international law, diplomacy
and the system of balance of power as key institutions. (Butterfield and Wight 1966) Adam Watson, includes the balance of
power, international law, diplomacy, and the Congress system as fundamental institutions. (Watson 1984: 24-25) James
Mayall points to the diplomatic profession and the framework of international law as key institutions. Other aspects,
however, remained contested, including “the balance of power, the special rights and obligations of the great powers, and
war.” (Mayall 2000a: 62; Mayall 2000b: 11-12)
action, especially the making of war.” (Tilly 1992: 102) These bargains were obviously asymmetrical, but forceful rebellion and repression did establish the set of agreements whereby ordinary citizens could seek redress of the state’s errors and injustices. This, however, reflects a privileged position granted to a set of citizens based on which states they reside in. As Tilly notes, “citizenship designates a set of actors- citizens- distinguished by their shared privileged positions vis a vis a particular state.” (Tilly, 1996: 8)

Barry Hindess has argued against the traditional or Marshallian view. For him, it is an essentially internalist conception, focusing on the relationships between an individual and the state in whose territory he or she happens to reside. This promotes discrimination against noncitizens. He suggests, rather that “an understanding of the impact of citizenship in the modern world must focus on its role in dividing a global population of thousands of millions into the smaller subpopulations of territorial states.” (Hindess 2000: 1487) Thus:

The international state system, initiated with the Treaty of Westphalia and later imposed more or less effectively on the rest of the world’s population and territory, can be seen not only as regulating the conduct of states and indeed as constituting them but also as a dispersed regime of governance covering the overall population of the states concerned…Such discrimination, in other words, is not only the result of decisions made by or on behalf of their own citizens but also a structural requirement of the modern state system. A system of governance that partitions the world into discrete, territorially based national populations requires the regulation of movement from one national territory to another.(Hindess 2000: 1494)

For Hindess, traditional views of citizenship reflect clear patterns of exclusion due to the nature of the territorial state. However, he also recognizes that this system places a burden on states to in some way regulate the movements of people.

Similarly, Emma Haddad argues that:

It is a characteristic of sovereignty that the attempt to place all individuals within (homogeneous) territorial spaces will inevitably force some between the borders, into the gaps and spaces between states and thus outside the normal citizen-state-territory hierarchy. Yet since the creation of refugees is inevitable in the international states system, refugees highlight an inherent failure in the system, one way in which the system will always be bound to fail. refugees do not fit into the citizen-state-territory trinity, but are forced, instead, into the gaps between nation-states. (Haddad 2003: 297)

For her, and indeed for the Westphalian system in general, statehood means territory. Accordingly, all individuals will be organized into populations and divided among states occupying

---

7 For a rationalist account of such bargains, see (North and Weingast 1989)
different tracts of territory. (Haddad 2003: 300) But this presents its own contradiction, as we end with a “particularistic concept of the citizen with rights and membership in a state contrasts with the universal outsider who possesses rights only in the abstract and has no state to uphold them.” (Haddad 2003: 302)

Thus, citizenship can not exist solely at the domestic level. The state does not exist in a vacuum. Rather, we also need to understand the international normative and institutional context. One person who has made such a link is Mervyn Frost. He has argued from the perspective of settled norms within the international system. (Frost 1996: 105) There continues to be a basic tension, he argues, between “those norms concerned with the preservation of the system of states and sovereignty on the one hand, and those norms related to individual human rights on the other,” (Frost 1996: 137) echoing Bull’s earlier point. Like Bull, he sees individuals as key to solving this contradiction, but that what is required is a broad constitutive theory encompassing both the state and the individual. Such a theory argues: “that rights are not things which a person can be conceived of as having outside of or prior to any and all social and political institutions… The state as an institution can only be comprehended within the context of a wider social and political practice.” (Frost 1996: 138-139)

Within the state, people participate in the whole by being citizens, which provides a form of mutual recognition with their fellow citizens. Following Hegel, he suggests that it is impossible for membership in a state to be ‘optional,’ but that to become a whole, free and fully ethical person, one has to be a member of a good state. Thus, Frost argues that the state is the “creation of its citizens and yet it is only in the state that any given individual can be fully actualized as a citizen… Thus citizenship of a good state is not an option for a free person, but is rather a precondition for the existence of a free person.” (Frost 1996: 148) In turn, citizenship in and of itself becomes of

8 These norms for Frost include the preservation of the society of sovereign states, sovereignty, nonintervention, patriotism, the balance of power, the protection of the interests of one’s own citizens, self-determination, international law, peace (narrow circumstances under which states can resort to war—jus ad bellum), that in the conduct of war certain rules ought to be obeyed (jus in bello), that there should be collective security to maintain peace, diplomacy, economic sanctions, modernization, economic cooperation, democratic values, and human rights. However, he argues that most of these norms derive from the first two, and thus it appears that the preservation of a system of sovereign states is a primary good. (Frost, 1996:106-112)
fundamental importance and in the fully developed state “citizens perceive a coincidence between what the state requires of them and what they require in order to be free.” (Frost 1996: 150)

In order for there to properly be such a mutually constitutive relationship between individual and state, the state, which “at the level of international affairs the state is an individual vis-à-vis other states and its individuality is reciprocally bound up with the individuality of its citizens…” needs to be autonomous and recognized as such by other states. (Frost 1996: 151)

For him, though, such recognition needs by necessity to be positive. Polities that are so recognized need to be ones where “the people recognize each other as citizens in terms of the law which they in turn recognize as being both constituted by them and a constitutive of them as citizens.”(Frost 1996: 151) He argues that this is something that occurs over time and in fact requires states to be recognized as ‘autonomous’ (here in view of Jackson’s quasi-state argument) before they can truly be autonomous. (Frost 1996: 151-155) But this, as has been stressed in the previous section, takes time. In these states that have legal recognition, but not yet a prior state-citizen relationship, are individuals forced to remain in their own state? Frost argues the treatment of refugees are one of the most pressing normative questions today (Frost 1996: 76), thus one would presume not.

What we are left with, then, is a view of citizenship at the domestic level that is constrained in two ways. The first is through the actions of the state- citizenship can only be fully actualized through the assistance and support of the state in this process, represented clearly in the idea of a mutually constitutive relationship between the two. The second is caused by institutions at the international level, primarily our conceptions of both sovereignty and territoriality. These are so structured as to ensure that the vast majority of citizens will always remain within their own states, even though their ability to enact their primary rights may defer substantially from one state to another.

Some people will not be happy within such a system, particularly those who face individual persecution on the part of the state, of non-state actors, or situations of generalized violence. Thus we have refugees and, when people can not flee their own state, the internally displaced. Displacement, as Haddad has noted, becomes inevitable. (Haddad 2003: 297) It is not, however, a failure of the system.
Rather, states very early on adapted to this problem. This became a problem of cooperation, but one that directly affected the survival of the international order. Without a solution, stateless populations would wander from state to state, disrupting relations between states and, potentially, undermining the fragile international order that was in its infancy.

3. Regimes and Fundamental Institutions

Why, however, should such an understanding be considered as a fundamental institution? Is it, rather, simply a regime? Until recently, outside of the authors of the English School, mainstream international relations tended instead to focus on regime or institutional theory.\(^9\) And regime theory can be used to credibly explain events regarding refugees since the creation of the Refugee Convention, or during the interwar period.

There is, however, a key difference between these two conceptions. Regimes by definition are forged by states and reflect their interests. Fundamental institutions are different. They create the rules of the game, as well as determine who the players are. The fundamental institutions of the modern era have accorded states the role of primary actors in the international system, something that has not been true of past periods. Furthermore, fundamental institutions play what is at heart a mutually constitutive role vis-à-vis states. While states can alter them, these institutions also alter state behavior. Thus they in effect determine state preferences and interests.

Fundamental institutions, however, can not be dismissed merely as norms. They act on states at a deeper level. Since they forge state identity, change in these institutions happen seldomly. Rather what we see is an interplay between the norms of a fundamental institutions, which for definitional clarity I term metanorms,\(^10\) and the norms that comprise regimes or institutions. Thus metanorms can be seen as deeper structures which influence those on the surface. Much like an iceberg, what is visible to us may represent very little of what directly affects us. These metanorms can change, but are more

---

\(^9\) This has recently changed. While English School scholars including Mayall (2000b), Jackson (2000) and Buzan (2004) have been revisiting fundamental institutions, so too have a number of constructivist authors, including Ruggie (1992; ; 1993; ; 1998), Reus-Smit (1997; ; 1999) and Holsti (2004).

\(^10\) Reus-Smit argues that “norms of pure procedural justice are the metanorms that structure the process of communicative action that surrounds the production and reproduction of fundamental institutions.” (1997: 569) I use the term in a more inclusive manner and include in this view all the norms that make up a fundamental institution.
often reinterpreted in line with changes in the surface regimes. As will be shown in the next section, while states have recognized since the mid-seventeenth century that the refugee problem must be dealt with, the responsibility over time has shifted from individual states to the international level. This represents a change in regimes and consequently of the surface norms, however this does not represent a change in the underlying metanorm.

Regimes, therefore, continue to have important explanatory properties. Regimes are:

Implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice (Krasner 1982: 186)

Change occurs in two ways. The first is in the rules and decision-making procedures of any regime. These, Krasner suggests, are changes within the regime, and do not compromise it. The second way, however, are changes in the principles and norms of the regime, which he suggests are changes of the regime itself. He argues that if the norms and principles are abandoned, the regime either disappears from a given issue-area, or transforms into a new regime. (Kranser, 1982: 187-188) This, however, raises a host of questions.

Regimes are seen as problematic due to their “woolliness” and “imprecision” in regard to such simple issues as boundary conditions. (Kratochwil and Ruggie 1986: 763) Puchala and Hopkins suggest that regimes clearly exceed individual issue areas, and that “more specific regimes often tend to be embedded in broader, more diffuse ones- the principles and norms of the more diffuse regimes are taken as givens in the more specific regimes.” (Puchala and Hopkins 1982: 248) These informal regimes are those “created or maintained by convergence or consensus in objectives among participants, enforced by mutual self-interest and ‘gentlemen’s agreements,’ and monitored by mutual surveillance.” (Puchala and Hopkins 1982: 249) These informal regimes will have few rules or formal

---

11 It is also possible that regimes may also weaken over time, “If the principles, norms, rules, and decision-making procedures of a regime become less coherent, or if actual practice is increasingly inconsistent with principles, norms, rules and procedures, then a regime has weakened.” (Kranser, 1982: 189)
decision-making procedures, but, it can be summarized, rely much more heavily on norms and procedures.\footnote{For them, the colonial regime is clearly indicative of such a diffuse regime. They argue that it was “a pluralistic exercise conducted largely by mutual monitoring and self-regulation practiced in national capitals. The regime was therefore, by and large, informal; there were few codified rules and no permanent organization.” In fact, they note that precisely because of its diffuse nature, this regime may well have lasted longer than one would expect: “that the regime, in its heyday lasted for nearly a half-century may be attributed in part to its informal structure and policy procedures… The less said formally, the better, and the more durable the regime.”(Kratochwil and Ruggie 1986)}

Regimes also attempt to determine under what circumstances states with given interests will cooperate. However, is this even the correct question to ask? As Ruggie notes, these theories, even the informal view of regimes, are “mostly about ‘circumstances’ that states ‘find’ in the object world around them and that constrain their behavior… these theories seek to explain patterns of outcomes. The actors, in the context of these models, merely enact (or fail to) a prior script.” (Ruggie 1998: 876)

Several authors pointed to these concerns through arguments that regimes marked only one, top-level of structure within the international system. Robert Keohane has argued not only that regimes are a subset of a broader category of institutions, but that beneath these exist fundamental practices: “Just as actors in world politics are constrained by existing institutions, so are institutions, and prospects for international change, constrained by the practices taken for granted by their members.” These practices are both deeply embedded, “highly institutionalized in the sociological sense of being taken for granted by participants as social facts that are not to be challenged although their implications for behavior can be explicated…” but are also recognized by the actors involved as rules which define the constraints upon them: “[t]hose engaged in practice recognize the rules as defining it. Were the rules of a practice to change, so would the fundamental nature of the activity in question.” (Keohane 1988: 385) Thus Keohane, while not using the language, is pointing to the existence of fundamental institutions which constitute and regulate the actions of the actors in a given system.

Similarly, Wendt and Duvall point to two differing groups of institutionalists. Old institutionalists focus on “what might be called the ‘fundamental’ institutions of international society.” For them, these institutions “represent the shared intersubjective understandings about the (not
necessarily uncoerced) preconditions for meaningful state action. Put into the discourse of structuration theory, these institutions constitute state actors as subjects of international life in the sense that they make meaningful interaction by the latter possible.” (Wendt and Duvall 1989: 53) Regime theory, by contrast, points to institutions as: “[A]rtifacts of hegemonic or collective action created by preexisting state actors, and as a result they tend to be located at a less fundamental level of structuring in the international system than those of concern to the old institutionalists- economic or security ‘regimes’ rather than balance of power or diplomacy.” (Wendt and Duvall 1989: 54) For them, we need a comprehensive definition of institutions which reflects simultaneously the social and systemic nature of international life. Thus, “institutions are coherent sets of principles that structure and organize ensembles of practices.” (Wendt and Duvall 1989: 61)

This is not to say that regime theory does not have merit. In fact, in examining given issues, it can wield a great deal of explanatory merit. However, it can not provide a full picture. Rather, we need to consider the existence of constraints upon states, which points up to the key arguments raised by constructivists. While there is not space to discuss this in great detail, norms from this perspective are “collective expectations about proper behavior for a given identity.”

Norms can play both a constitutive role, in that they “specify the actions that will cause relevant others to recognize and validate a particular identity and to respond to it appropriately” but also a regulative role, in that they “operate as standards for the proper enactment or deployment of a defined identity.” (Jepperson, Wendt, and Katzenstein 1996: 52)

Norms, therefore:

Either define (‘constitute’) identities in the first place (generating expectation about the proper portfolio of identities for a given context) or prescribe or proscribe (‘regulate’) behaviors for already constituted identities (generating expectations about how those identities will shape behavior in varying circumstances). Taken together, then, norms establish expectations about who the actors will be in a particular environment and about how these particular actors will behave. (Jepperson, Wendt, and Katzenstein 1996: 52)

---

13 This use of norms is substantively different than that of prior work in regimes, and has lead to some confusion. As Neta Crawford notes, “[m]any use norm to mean the most common practice, while other talk about norms as ‘oughts’ or ethical prescriptions. Unfortunately, international relations theorists frequently use ‘norms’ to denote both senses. Further, it is also not uncommon to imply norms are synonymous with shared ideas, a form of common knowledge.” (Crawford 2002: 66) Crawford chooses to make a distinction between norms as describing the dominant practice or behavior, while normative beliefs are prescriptive normative statements. (Crawford 2002: 40)
Thus, as Finnemore has noted, “the international system can change what states want. It is constitutive and generative, creating new interests and values for actors. It changes state action, not by constraining states with a given set of preferences from acting, but by changing their preferences.” (Finnemore 1996: 5-6)

Such a view undercuts regime-based arguments. The problem that we are presented with by regime theory, in Alexander Wendt’s words, is the “dichotomous privileging of structure over process, since transformations of identity and interest through process are transformations of structure… Regimes cannot change identities and interests if the latter are taken as given.” (Wendt, 1992: 393)

International regimes need to be considered as “embedded in the broader normative structures of an international society and that these structures, in turn, escape rationalist theorizing because utilitarian approaches do not problematize the capacity of rational actors to engage in optimizing behavior.” (Hasenclever et al., 1997: 155)

Thus, we need to consider regimes as bound within these broader normative structures. But, at the same time, norms themselves may be bound up in larger structures. Christian Reus-Smit suggests that these fundamental institutions “provide the basic framework for cooperative interaction between states, and institutional practices transcend shifts in the balance of power and the configuration of interests, even if these practices’ density and efficacy vary.” (Reus-Smit 1999: 4)

Reus-Smit argues that fundamental institutions are the actual rules that govern how states interact. He follows Bull in accepting the premise that order is the substantive goal of states, and in order to pursue that goal, states must overcome problems of cooperation, in particular collaboration and coordination problems. Therefore, “fundamental institutions are those elementary rules of practice that states formulate to solve the coordination and collaboration problems associated with coexistence under anarchy.” (Reus-Smit 1997: 557) He also argues that fundamental institutions “are produced and reproduced by basic institutional practices, and the meaning of such practices is defined by the fundamental institutional rules they embody” and that they thereby form a mutually constitutive
relationship. (Reus-Smit 1997: 558) They include contractual law and multilateralism. (Reus-Smit 1997: 555)

The key concept here is that these institutions are mutually constitutive. They are created by states. However, once they are created, they assume a life of their own, and can easily end up constituting state identities. Similarly, these fundamental institutions operate at a much deeper level than issue-specific regimes. As Reus-Smit notes, “when defining fundamental institutions, the challenge of achieving and sustaining international order represents an appropriate starting point.” (Reus-Smit 1999: 13)

However, as Ruggie has suggested, these institutions can also change over time.\textsuperscript{14} This makes sense in two ways. First, as Kal Holsti has recently argued, change often occurs within these institutions.\textsuperscript{15} He finds that the most common form of change has been in complexity, not transformation, replacement, or obsolescence. (Holsti 2004: 300) But fundamental institutions themselves are also pieces of a larger puzzle. Reus-Smit has conceptualized that institutions operate at three levels of modern international society, that in essence a hierarchical structure exists:

\begin{quote}
[C]onstitutional structures are the foundational institutions, comprising the constitutive values that define legitimate statehood and rightful state action; fundamental institutions encapsulate the basic rules of practice that structure how states solve cooperation problems; and issue-specific regimes enact basic institutional practices in particular realms of interstate relations. These three tiers of institutions are ‘hierarchically ordered,’ with constitutional structures constituting fundamental institutions, and basic institutional practices conditioning issue-specific regimes. (Reus-Smit 1997: 558)
\end{quote}

\textsuperscript{14} Ruggie has crafted a similar argument with respect to multilateralism. He argues formal multilateral organizations constitute only one small part of a broader universe of international institutional forms, that some institutional forms take on an even deeper understanding within the international system. (Ruggie 1992: 566) He points to multilateralism, in particular, as being: “[A] generic institutional form of modern international life, and as such it has been present from the start… Historically, the generic form of multilateralism can be found in institutional arrangements to define and stabilize the international property rights of states, to manage coordination problems, and to resolve collaboration problems.” (Ruggie 1992: 567) Ruggie suggests that the few institutions that did exist functioned exclusively in areas of coordination problems, but still has strictly circumscribed rules and roles. Only with the twentieth century did we see a move to formal organizations, and in particular “above all, a completely novel form was added to the institutional repertoire of states in 1919: the multipurpose, universal membership organization, instantiated first by the League of Nations and then by the UN.” (Ruggie, 1992: 583) Thus, he makes the point that “multilateralism was not invented in 1945. It is a generic institutional form in the modern state system, and incipient expressions of it have been present from the start.” (Ruggie, 1992: 584)

\textsuperscript{15} Holsti refers to them as ‘primary order institutions.’ He argues that change can occur in four ways. The first is novelty or replacement: “a significant change is something new, and that new thing is usually the antithesis of something old. This is a discontinuous idea of change. New forms replace old ones, so the problem of transformation does not arise.” The second is addition or subtraction, for example “ ‘international civil society’ does not replace national-level political activity; it only complements or adds to it.” The third is increased or decreased complexity. The fourth is transformation, which can result from quantitative changes, but logically new forms derive from old patterns. “They can partly replace old forms, but by definition they must include residues or legacies of the old.” (Holsti 2004: 12-16)
Thus, the constitutional structure would define who is a valid actor in the international system, a structure which last changed around the time of the Peace of Westphalia. He also suggests that sovereignty has always been embedded in larger complexes of constitutive metavalues that together structure international societies. He argues that there are three such complexes, which can be conceptualized as forming constitutional structures: “a shared belief about the moral purpose of centralized political organization, an organizing principle of sovereignty, and a norm of pure procedural justice.”(Reus-Smit 1997: 556) Such a theme runs throughout this literature from both the English School and constructivist perspectives.

Where does this leave us? Based on these arguments, I suggest that early on in the history of international society, states accepted that they would have to deal with citizens who were persecuted fleeing their own states. This was directly due to the nature of the sovereign, territorially based system that had emerged in the period after the Peace of Westphalia in 1648. But, while their own interests and preferences caused states to initially accept that people would flee their own states, an understanding actually enshrined in the Peace, rapidly this understanding took on aspects of legitimate state behavior and became a fundamental institution.

B. Normative Change in the Treatment of Refugees.

The phenomenon of people forced to flee their homes has always existed. Rights of asylum can be traced back to the Ancient Greeks.(Schuster 2002: 41) Refugees, however, have only emerged in

---

16 Several other authors have pointed to similar conceptions. Bull, for example, sees the Balance of Power as primary. He argues that “the chief function of the balance of power, however, is not to preserve peace, but to preserve the system of states itself.”(Bull 2002: 103) James Mayall accords a similar status to international law, arguing that it is “the bedrock institution on which the idea of an international society stands or falls” (Mayall 2000a: 94) Robert Jackson argues that in addition to key institutions, there are also important procedural norms, particularly sovereignty and respect for human rights. He argues that they are procedural in “that they lay down ways and means of conducting international relations that restrict activities.”(Jackson 2000: 16) Martha Finnemore suggests that “nonintervention is the practice that constitutes the state and sovereignty as foundational institutions of contemporary politics.” However, she suggests that these institutions are in turn limited by the power of intervention. (Finnemore 2003: 8)

In this work, therefore, we can see that fundamental institutions may themselves exist on two levels, with certain key institutions directly preserving the system itself. Holsti points to a level of procedural institutions, which are composed of repetitive practices, ideas, and norms that underlie and regulate interactions and transactions between the separate actors but that are of secondary significance. Buzan suggests that along with fundamental institutions, the institutions of regime theory should be seen as secondary institutions in the international system.(Buzan 2004: 167) The key difference in these two levels is that the primary-order institutions, are constitutive of the system, and thus to use Holsti’s language, are foundational.

17 For the Ancient Greeks, asylum was seen as the right of the asylum-granting state, however territorial asylum ceased under the Romans. Religious asylum, however, has continued on into the modern period. (Schuster 2002: 41-44)
the period after the Peace of Westphalia, when territorial asylum was rediscovered. This change happened in conjunction with the emergence of the modern state system, but also because of the contradictions between rights as citizens and a territorially-based state system. While the Peace may mark the start of this process and the recognition by states that persecuted individuals need a right to leave, this understanding has been shaped by a continual process of change and reinterpretation. By examining the change in crucial norms, we can see that state behavior towards refugees has differed dramatically over three different periods. This provides clear evidence of different regimes.\textsuperscript{18} While length precludes going into detail on these issues, the next few sections will point to the initial recognition by states of a right to leave, then will trace out the evolution of one of the key metanorms of this fundamental institution: Who has responsibility for refugees? As we shall see, it has evolved from being an ad hoc burden accepted by individual states, usually at the domestic level, to one dealt with primarily at the international level.

\textbf{Figure 1: The Three Regimes}

\begin{center}
\begin{tikzpicture}
\fill[gray!10] (0,0) rectangle (8,1.5);
\draw (0,0) -- (8,0) -- (8,1.5) -- (0,1.5) -- (0,0);
\draw (0.5,0) -- (0.5,1.5);
\draw (2.5,0) -- (2.5,1.5);
\draw (4.5,0) -- (4.5,1.5);
\draw (6.5,0) -- (6.5,1.5);
\draw (8.5,0) -- (8.5,1.5);
\node at (0.5,0.5) {First Regime: Lassiez-Faire};
\node at (2.5,0.5) {Second Regime: Attempted Internationalization};
\node at (4.5,0.5) {Third Regime: Effective Internationalization};
\node at (0,0) {1648-1685};
\node at (0,1.5) {1685-1914};
\node at (2.5,0) {1918-1939};
\node at (2.5,1.5) {1939-1951 Transition};
\node at (4.5,0) {1951- 1991};
\node at (4.5,1.5) {1991- Present A New Transition?};
\end{tikzpicture}
\end{center}

\textit{i. The First Transition: Emergence of a Right to Leave}

The Peace of Westphalia played a critical role in the emergence of a number of normative institutions, especially sovereignty. Heather Rae has argued that prior to this, few international norms

\textsuperscript{18} This work is still in progress and thus this history is significantly truncated. Within the next year, I hope to able to provide significantly expanded support for this argument, based in large part on archival research.
existed. The Peace of Westphalia fundamentally altered this. It created a thin normative order, but “all the same it reflects the beginnings of a society of states resting on some shared norms. Though by no means uncontested, the effort to articulate minimum standards of coexistence extending to internal behavior distinguish this period from the lack of such standards in the late fifteenth century when the system was taking shape.” (Rae, 2002: 219)

While in principle the Peace only applied to Germany, in practice it fundamentally altered the relations between sovereign states throughout Europe. The focus on the Peace of Westphalia as a “crucial watershed in the transition from a heteronomous system of rule to a system of territorial sovereign states” (Reus-Smit 1999: 112) is considerable.19

The refugee institution itself emerged only after the Peace of Westphalia as a way, initially, to deal with religious minorities. However, this agreement is foreshadowed in the Peace of Augsburg, in 1555. This treaty concluded a settlement under which “the formula cuius regio, eius religio (‘whose the region, his the religion’), allowed rulers in Germany to determine whether their states would be either Lutheran or Catholic.”(Golden 1988: 8) The Peace of Westphalia built upon this foundation20 by arguing the right of jus emigrandi- the right to emigrate with one’s personal property. (Golden, 1988: 17)

ii. The First Regime- A Lassiez Faire Approach

The term refugee emerged to denote a separate class of people from ordinary migrants, and was first used in reference to the Huguenots, French Protestants, some 200,000 of whom fled France

19 Mark W. Zacher has argued that the Peace recognized the state as the supreme or sovereign power within its boundaries and put to rest the church’s transnational claims to political authority” (Zacher 1992: 59) and F. H. Hinsley that they “came to be looked upon as the public law of Europe.” (Hinsley 1967: 168). That is not to say such a view is universally accepted. Other authors, however, argue that this transition occurred after the Peace, if it occurred at all. Janice E. Thomson argues that “the ‘disarming’ of nonstate transnational activities marked the transition from heteronomy to sovereignty and the transformation of states into the national state system.” (Thomson, 1994:4) Consequently, she dates the true transition to a modern state system as occurring around the turn of the 20th Century. Reus-Smit argues that it the Peace of Westphalia did mark the birth of a new society of states, but one that was “absolutist, not modern. For almost two centuries after Westphalia a decidedly premodern set of Christian and dynastic intersubjective values defined legitimate statehood and rightful state action.” (Reus-Smit, 1999: 88)

20 There is some dispute as to whether the cuius regio, eius religio formula was in fact renewed. Golden argues that it was, and extended to Calvinism, which seems to be generally the consensus. Osiander, however, argues that the Peace of Westphalia abolished this concept in the Holy Roman Empire “and forbade the German princes to impose their religion on their subjects.” (Osiander, 1994: 12)
following the Revocation of the Edict of Nantes by Louis XIV. The Revocation was the final step in a series of events that not only declared Protestantism illegal in France, but also officially denied exit to the protestant community, many of whom (needless to say) ignored this. (Rae, 2002: 83-85) 21 The repercussions from this event were substantial. Louis’ revocation “abrogated the jus emigrandi which had been granted to religious minorities in Germany under the Treaty of Osnabruck and had gained a status of regional norm…In the international arena, the Revocation was regarded as illegitimate and it had a ‘marked effect upon an international opinion growing increasingly hostile to French pretensions and the Bourbon methods.’” (Rae, 2002: 218-219) Friedrich Wilhelm, the Great Elector of Brandenburg, issued the Edict of Potsdam, whereby the French Huguenots were authorized to establish themselves in his territory. And in 1708 England, which had received the bulk of the Huguenot population, passed an Act for Naturalizing Foreign Protestants. As Grahl-Madsen notes, “this Act, like the Edict of Potsdam, was clearly an invitation to refugees to come and establish themselves in the Kingdom for the mutual benefit.” (1966: 278-279) Similarly, opponents to the Revocation proceeded to attack Louis in medals, prints and pamphlets. Moreover, while Louis had hoped to gain the Pope’s approval through the Revocation, the Pope was less than enthusiastic about Louis’ actions. (Rae 2002: 118-119)

It was at this point in time that such a group became differentiated and given a separate title than groups who had previously been similarly excluded. Rae argued that this represented a substantial change in the normative environment concerning what rulers could do to their own populations.

By 1685:

The international system had experienced some further normative development, though its normative structure remained quite thin…The Revocation and its consequences were widely condemned by European powers, reflecting that in the late seventeenth century such behavior was regarded as illegitimate as it breached the minimal standards of coexistence that had been articulated at this time. (Rae, 2002: 301)

---

21 For a description of the events leading up to the Revocation please see (Labrousse 1985), (Bell 2001: ; Benedict 2001) and (Bell 2001). For discussions of the Huguenot refugee flows, particularly to Great Britain, see (Burn 1846), (Reaman 1963), and (Weiss 1854). During the Revocation, Protestant pastors who refused to convert were given two weeks to leave the country. All other Huguenots were prohibited from leaving France on pain of the galleys for men and confiscation of property for women. See Rae, 2002: 117
These standards were those articulated in the Peace of Westphalia. This established the grounds for religious toleration through such ideas as the *jus emigrandi* and the modified *cuius regio, eius religio*, and it was these same principles that Louis XIV violated some 40 years later.\^22

The refugee institution, therefore, emerged during this time of transition, in conjunction with ideas of state sovereignty and of territoriality, as a way to deal with individuals who otherwise might be stateless, and thus have no real place within the system. The first incarnation of the refugee regime itself, however, was very incorporeal. As Barnett has noted:

> The regime was characterized by elements of the modern state system established at the Peace of Westphalia in 1648, firmly entrenching the concept of refugees within the territorial notion of boundaries. Borders may have been open for refugees to cross but each nation remained in territorial isolation, ignoring the collective and international implications of the refugee issue. No groups or policies were established to deal with refugees, and each nation reacted to them in its own way and on an entirely *ad hoc* basis. There was no definition for a refugee in this international system...The refugee regime itself was based on the almost entirely *laissez-faire* attitude of nations towards the fugitives that crossed their borders. (Barnett, 2002: 240)\(^23\)

A regime, none the less, existed, representing an unwillingness of states to not allow individuals to leave their own states. This is not to suggest that expulsions ceased, as was shown both by Maria Theresa’s decision in 1744 to expel some 20,000 Jews from Bohemia or the British decisions to remove 15,000 Acadians from Nova Scotia in 1755. (De Zayas 1988: 16) However, following the French Revolution, a number of countries were quick to accept the *émigrés*, and, particularly in the case of Great Britain, first providing assistance via private organizations, then directly through government, which led to the creation of the first *Aliens Act* in the country in 1793. (Carpenter 1999)\(^24\)

As Carpenter notes, “the British reception of the refugees was ... somewhat involuntary but prompted

\^22 Andreas Osiander has argued that the Peace represented a bridge between the medieval and modern periods. He notes that “a chief reason why the war had been so prolonged and acrimonious was that each party could convince itself that it was fighting for fundamental rights. Conversely, once an agreement had at last been reached as to what exactly those rights were, the need to fight would be eliminated.” (Osiander 1994: 48) Therefore, the negotiators were hoping, to at least some degree, to negotiate a lasting peace. He goes on to argue that they worked three framing principles: Loyalty, legality, and the inviolability of existing structures. These three were closely bound up and hard to distinguish, and thus “the international system was a transitional set of structures on the threshold between the defunct medieval system and the new ‘classical’ European state system.” (Osiander 1994: 72)

\^23 An additional, helpful, element for the *laissez-faire* regime was the existence of open territory in the new world which welcomed settlement. Particularly during the nineteenth century, it is unclear if the regime would have held up had this not existed, and in fact what the longer term political effects might have been. Alan Dowty has suggested that “in Europe as a whole, emigration contributed to social stability. Emigration helps explain how Europe managed to survive a period of such wrenching social and economic changes with so few internal convulsions. America served as a safety valve. The exit of so many activists and potential revolutionaries probably facilitated the political accommodation of those left behind.” (Dowty 1987: 50)

\^24 For details of these flows, see also (Gamblin 2000) and (Weiner 1960)
by a sense of duty, honour and obligation to support those whose position was in sympathy with their own.” (1999: xv) Revolutionary France was also quick to enshrine a right of free emigration to the country, émigrés were often restricted in their right to return, and during some periods were actually condemned to death upon return.(Carpenter 1999: xviii- xxiv) These restrictions persisted well into Napoleon’s reign. (Woloch 2001: 56-57)

By the 1848 Revolutions, there was clear evidence that at least Great Britain clearly assumed there existed a right to leave, no matter the situation. When Russia and Austria requested the refoulment of refugees from Turkey:

The question began to interest European governments. Lord Palmerston sent a message to the English ambassador in St. Petersburg on November 6, 1849, commenting that in principle no nation should return political refugees, except where there was a constitutional obligation to do so. He based his opinion on the right of hospitality and the requirements of humanity as well as natural sentiments which rebel against such extradition. (Otto Kimminich, cited in Plaut 1995: 39)

Evidence of the right of refugees to leave their own state and seek sanctuary elsewhere became even more prevalent towards the end of the 19th Century as first the United States, and then Great Britain, enshrined rights of asylum in domestic law.25 Such rights can also be seen clearly delineated in many bilateral extradition treaties of the period. (see for example American Journal of International Law 1911)

During this period, states dealt with refugees in an ad hoc manner. However, there was a move to codify the rights of refugees in domestic and then bilateral law. This did not so much represent a fundamental change as rather a protracted process. The first moves towards legalizing the issue occurred in the late seventeenth century. A second wave occurred as states dealt with refugee influxes due to the French Revolution. A third wave occurred following the Revolutions of 1848 and this wave marked the beginning of bilateral negotiations. Multilateral negotiations, by contrast, were almost non-existent.26

25 “The [United States Act of Congress to regulate Immigration, 1882] merely confirms the benefit of the Right of Asylum to ‘foreign convicts who have been convicted of political offences’… [In] The [Great Britain] Aliens Act [1905] the Right of Asylum is conferred on persons seeking admission into this country either to avoid ‘prosecution or punishment’ for a political offence or on religious grounds.”(Sibley and Elias 1906: 25)

26 The exception to this is in Latin America, where the 1889 Treaty on International Penal Law, signed in Montevideo, recognized in Article XVI that “Asylum is inviolable for those sought for political crimes…” (Cited in Riveles 1989: 146)
ii. The Second Regime: Attempted Internationalization

The laissez-faire regime lasted until World War I, which created vast numbers of refugees and stateless people - the Russian revolution alone displacing over 1 million people, many of whom then had their citizenship revoked by the Soviet regime. (Torpey 2000: 124) These were numbers too large to be ignored, but the refugees also could not expect reasonably to return home, nor seek out any one single sanctuary. (Barnett, 2002: 3; Farer, 1995: 76-77) Those governments who were willing to receive them already faced serious reconstruction problems and “were ill-equipped for an influx of destitute people whose attitudes and dubious legal status made them a political problem… the countries of first asylum were not able to absorb the refugees into their economic life…” It was increasingly recognized that “the vast WWI refugee problem could be successfully tackled only by internationally coordinate action.” (Holborn, 1975: 4-5) This led to the creation of the League of Nations High Commissioner for Refugees (HCR), under direction of Fridthof Nansen. (Barnett 2002: 4; Skran 1995)

Dealing with refugees also was complicated by the fact that stateless people had no recognition within international law. Therefore the High Commissioner created ‘Nansen Passports’, which were legal documents that gave refugees a recognizable status and allowed them to travel more freely. For the first time “refugees of specified categories became the possessors of a legal and juridical status.” (Holborn, 1975: 10) Fifty-one states agreed to recognize these passports, however it did not ensure that a foreign government would actually grant them entry visas. Thus, “the right to grant or deny admission remained the prerogative of sovereign states, and even those that granted asylum did not necessarily acknowledge any legal obligation to do so.” (Loescher, 1993: 38-9) Throughout the next two decades, HCR’s scope and provision of assistance programs expanded, “as efforts were made to regularize the status and control of stateless and denationalized people.” (Loescher, 1993: 33) Two legally binding documents- the 1933 League of Nations’ Convention relating to the International Status of Refugees and the 1951 Convention Relating to the Status of Refugees. (Barnett 2002: 13)

27 In addition to this, the breakup of the Austro-Hungarian Empire and border changes done at the Peace of Paris resulted in the creation of large minority groups in a number of new states in Eastern Europe. In order to protect these groups, monitoring and guarantee of minority rights provisions were entrusted to the League of Nations. For a review of this regime, and its eventual collapse, see (Mazower 2004)
of Refugees and the 1938 Convention concerning the Status of Refugees coming from Germany- were created, but had little international support. (UNHCR, 2001; Farer, 1995: 77) In particular, German Jews were left with few safe havens under this attempted regime. John Torpey has noted that Nazi plans to expel the Jews “were not necessarily consistent with an international system that reserved the right to admit only those whom they chose to admit, a fact that may ultimately have helped to push the Nazis toward extermination as the ‘final solution’ of the ‘Jewish problem.’” (Torpey, 2000: 135-136)

iv. The Third Regime: Successful Internationalization?

These relatively ineffective attempts were replaced and shelved as what we now consider to be the modern refugee regime emerged in order to deal with the massive displacements caused by and following World War II, which displaced over 30 million people: “Often unwilling to repatriate, the residue of this displaced population increasingly became an object of international attention as the ideological confrontation of the Cold War emerged. Resettlement became the routine, and return the exception during the East-West struggle.” (Helton, 2000: 64) Also helpful was the fact that these refugees were generally in demand as the economies of the West flourished and needed labour. (Hans and Suhrke, 1997: 86) Thus, “the reception of refugees opposed to Communist regimes…reinforced the ideological and strategic objectives of the capitalist world. This pervasive interest-convergence between refugees and the governments of industrialized states resulted in a pattern of generous admission policies” (Hathaway, 1997: xix).

The United Nations High Commission for Refugees was created in 1951 and quickly became a permanent independent agency of the UN. (Barnett 2002: 7) The international community also decided that an international legal framework was required, leading to the 1951 Convention on the Status of Refugees. While the Convention dealt only with this hard core, it was amended in 1967 by the Protocol Relating to the Status of Refugees, which universalized UNHCR’s mandate, in order to reflect the fact that increasingly refugees were coming from the developing world. (Helton 2000)

---

28 For a description of the problems associated with the League of Nations refugee regime, particularly in the 1930s, see (MacDonald 1936), (Simpson 1939), (Simpson 1940), (UNHCR 1961), (Skran 1995), and (Marrus 2002).
The Convention created two major norms. The norm of non-refoulment established that parties to the Convention shall not: “expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened…” (UNHCR 2000: 23) Therefore, asylum seekers cannot be sent back home against their will, at least until their cases are examined, and are protected by the United Nations High Commission for Refugees. However, “in practice, the UNHCR is rarely able to provide full protection.” (Loescher 1993: 143) Non-refoulment also protects the interests of states, in that it ensures that there would be no duty imposed on states to admit all refugees who arrive at their borders, but rather only to not return them. (Hathaway 1997: xviii) The Convention also created a second norm, which precludes punishment for illegal entry of persons who had entered in search of asylum. (Farer 1995: 79)

The refugee regime has been challenged by decolonization and the end of the Cold War, which caused the humanitarian response to evolve “from one of providing asylum in Western countries to containment of movement and humanitarian intervention to address the proximate causes of displacement in the states of origin of would-be refugees.” (Helton 2002: 65-66)

v. What Happens Now?

With the end of the Cold War, the political advantage that had motivated states to accept refugees disappeared. (Cohen and Deng 1998: 3) Instead, refugees today are often seen “as potential migration threats that may cross an international border without permission and adversely affect nearby countries” (Helton, 2002: 10). Furthermore, starting in the 1970s, refugee numbers increased dramatically. There were approximately 2.1 million refugees in 1951, a number which expanded to about 6.3 million in 1979, only to more than double in the next decade before peaking in 1992 at 18.3 million. (UNHCR 2000: 310) Therefore a number of states have argued in favour of more restrictive asylum practices, which have made it harder for people to cross national borders. (Towle 2000: 30)

---

29 This is not that unusual, since, in the human rights field, a number of conventional and customary norms have emerged that were accompanied by implementation organs at both the international and regional level. (Fitzpatrick, 2000: 3)
This also reflects an end to the interest-convergence that gripped the West during the Cold War. By 1990, the economic and socio-cultural conditions no longer favoured receiving refugees and there were no compelling foreign policy reasons to do so (Hans and Sihrke, 1997: 87). Further, most refugees are now from the developing world, and their ‘different’ racial and social profiles are seen as a challenge to the cultural cohesion of the Western industrialized countries (Hathaway, 1997: xix).

Strong states have taken a number of measures to prevent would-be refugees from claiming asylum, including challenging the norm of non-refoulment at the edges, such as claiming “that it does not apply to groups seeking asylum if these are encountered before they actually enter a state’s territory.” (Loescher 1993: 143) The refugee definition itself is narrowly applied. As David Matas argued, “it’s not enough to be the victim or potential victim of generalized violence. The violence must be directed at the claimant... the notion of persecution implies that refugees must be victimized by governments. A person victimized by the opposition is not legally considered to be within the refugee definition.”(Matas and Simon 1989: 42) Further, the vast majority of refugees are in the developing world, within weak states, where the “cost falls disproportionately on nations least able to afford it, where the presence of large impoverished refugee populations further strains resources and perpetuates the poverty of the host nation.”(Dowty and Loescher 1996: 47)

But, if this does mark a new transition phase, we are not entirely without hope that the underlying fundamental institution will be preserved. Hans and Suhrke, for example, have noted that to begin with, states are unlikely to cooperate to create a refugee regime, since beggar-thy-neighbour policies can still work effectively, thus, cooperation does not promise clear mutual benefits (Hans and Suhrke, 1997: 105). They argue, rather, that states generally accept refugees based on a “fear of greater international disorder which may occur by not helping them.” There is also a global moral imperative to counter any ‘global apartheid’ tendencies that may exist, another benefit that the refugee regime provides. (Hans and Suhrke 1997: 104) Therefore, when refugees are accepted by any state, the entire global community benefits in at least a small way through the reduction of potential disorder.
Similarly, even while strong states challenge the regime around its edges, they have not challenged the fundamental norms of the regime. In particular, strong states have not generally been willing to revert to admitting refugees only temporarily. This resistance “to treating temporary protection as the norm is partly explained by deeply ingrained policy preferences in traditional countries of immigration…” (Hathaway, 1997: xix). Such arguments certainly answer part of the question. But there is also a deeper reason why the international refugee regime continues to persevere, the continued existence of a underlying fundamental institution

Conclusions

This represents a brief attempt to provide a historical perspective to a clearer theoretical perspective. Refugees matter, and matter a great deal to the international system. They are inevitable, based on the form that the current system of international states and international society took on. But states rapidly saw the benefits of allowing refugees to leave their own state- first because it was in their interests, then because it rapidly took on the form of the way legitimate states behaved. Thus, it assumed the form of a fundamental institution of the international system.

Beyond this, however, we have seen it increase dramatically in complexity through three different regimes. The first was substantively lassiez-faire, and can be seen only in the ways that states were willing to allow (or unable to prevent) persecuted populations from leaving, while other states were willing to accommodate them. This gradually took on a legalistic structure in domestic law and bilateral extradition treaties. The second regime represented an attempt to deal with a burgeoning refugee population by internationalizing the regime. This failed, however, in part due to the international situation in the 1930s, but also because of an unwillingness of the League of Nations to treat the problem other than on a case by case and temporary arrangement. The third regime represents what has so far been a generally successful move to internationalize the regime through legal conventions and international organizations. However, it too has come under fire over the last decade and a half.
What this paper has attempted to demonstrate is the existence of this fundamental institution. But it has also sought to demonstrate that regime change alone cannot destroy this understanding. Thus, even if we are currently watching the unraveling of the regime (a contestable point to be sure) a subsequent regime will continue to include a right to leave.

Bibliography


