

Refugees and the Evolution of International Cooperation

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1. Introduction

The plight of refugees is a fascinating case for international relations theory for two reasons.¹ The first is that as a phenomenon, refugees contradict the logic of the territorially-based state system. The second is state practice over a very long period- since 1685, when 200,000 Huguenots fled France- has reflected recognition by states that refugees are individuals who can no longer count on protection from their own state and are outside of that state's territory.

Within this broad understanding, however, change has occurred. These changes include which individuals or groups fit within this definition; whether individual states or international organizations had primary responsibility for refugees; whether protection was offered through domestic, bilateral or international law; and whether assistance was offered by states, by international organizations, or by voluntary organizations.

The current refugee regime reflects such elements. It is based in international law (particularly the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol), in state policy and practice, and in the role played by formal institutions, particularly the United Nations High Commissioner for Refugees (UNHCR). (Van Hear 1998: 342, see also Loescher 1994: 352) In addition, this regime is established on a foundation of social norms which help form states' identities. Thus states accept today that refugees need to be dealt with through an international organization (rather than

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through unilateral or bilateral action) and protections need to be provided in international law (rather than domestic law, bilateral agreements or, worse, no protections at all).

Any yet, this regime is under challenge. Refugee numbers and the relative decline in state support for the regime due to ‘donor fatigue’ in the post Cold War period (Loescher 2001: 321-22) form part of this challenge. But states increasingly see refugees as broader ‘threats’- whether migratory or security based- which has led to the narrowing of refugee protection and the adoption of more restrictive asylum practices.

Even so, the challenges the regime faces today are similar to the ones that it has faced in the past: sovereignty has always affected the way that states view refugees. This, however, does not explain why there is an enduring pattern of state practice providing protection to refugees. Nor do existing theories of state cooperation offer an adequate account of this phenomenon- regime theory, rational design, and a constructivist approach all offer important insights into part of the puzzle, but none adequately explain state practice over such a long historical scope.

2. Refugees, Structures, and International Society

Rather, we need to focus on uncovering the interactions between different levels of structure and independent actors in international society, interactions which occur in a mutual constitutive manner. In particular, there is a need to focus on the role played by three different and independent elements of structure -including fundamental institutions,² regimes,³ and norms⁴- in not only constituting the identity of independent actors -including states, international organizations, and even individual norm entrepreneurs- but also in regulating the behaviour of these actors.

Two differing orders of change are crucial here. The first is reflected in the fundamental institutions of international society, the quintessential ‘rules of the game’ which not only ensure order and cooperation (Bull 2002) but also constitute the actors within it. (Reus-Smit 1999: 27-36, Ruggie 1992: 567) Regimes are issue-specific and enact these “basic institutional practices in particular realms of interstate relations.” These levels, he notes, “are ‘hierarchically ordered...” (Reus-Smit 1999: 14-15, see also Buzan 2004) In such a framework, “the deeper structural levels have causal priority, and the structural levels closer to the surface of visible phenomena take effect only within a context that is already ‘prestructured’ by the deeper levels.” (Ruggie 1986: 283, Reus-Smit 1999: 15)⁵ Regimes may emerge due to the interactions of these fundamental

² These are defined by Christian Reus-Smit as the “elementary rules of practice that states formulate to solve the coordination and collaboration problems associated with coexistence under anarchy.” (Reus-Smit 1997: 557)

³ The traditional definition of regimes, following Stephen Krasner, is that they are composed around “implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.” (Krasner 1982: 186)

⁴ Norms are defined as shared understandings of appropriate behaviour for actors with a given identity which isolates a single strand of behaviour. (Klotz 1995: 14, Finnemore 1996: 22, Jepperson, et al. 1996: 52, Finnemore and Sikkink 1998: 891)

⁵ Similar views are suggested by Robert Keohane (1988: 385) and Wendt and Duvall (1989: 54)

institutions, creating transterritorial issues that require state cooperation.⁶ But while these institutions, through their role in constituting state identity, create a set of possible responses for states, the actual result is indeterminate- it will require no single response. Thus, first-order change matters primarily when a new issue emerges. It may result in the creation of a regime, but the form that the regime will take is unclear. This offers only a partial explanation, since it neither pre-determines the state response nor can it explain change in a pre-existing issue area when no change in fundamental institutions occurs.

Regimes, as a second-order form of change, provides for this significant level of variation in state behavior. Regimes need to be considered as structural elements that play a role in constituting state interests and identities within a single issue area by mediating the effects of fundamental institutions and of norms. While they are composed of a set of norms within that issue, regimes are independent, exerting their own compliance pull.

Regime theory suggests that regimes exist as a guide for the behavior of state members to mitigate the effects of anarchy by providing information and raising the costs of defection, but also to produce outcomes which are in harmony with the principles of the regime. (Milner 1992: 475, Hasenclever, et al. 1997: 9) Constructivists argue that by assuming the state is the crucial actor, regime theory treats state interests as exogenous and thereby removes the processes which shape the self-understandings and identities of particular states. (Klotz 1995: 18-19, Wendt 1994: 384)⁷ Consequently, the theory neglects the international environment and the pivotal role that mutual understandings between states and other actors play in constituting their identities.

Constructivists see regimes in a different light. For them, all institutions, even the most enduring, are based on collective understandings. (Adler 1997) Regimes are forged around a bundle of norms. Norms reflect single standards of behaviour, whereas regimes and institutions “emphasize the way in which behavioural rules are structured together and interrelate.” (Finnemore and Sikkink 1998: 891, see also Bernstein 2000) It is shifting strengths among these contending norms which causes regime change and allows for a system-level explanation of interest theory. (Klotz 1995: 14-19)

Thus, norms account for a significant level of variation in and between regimes. This is reflected in how norms are internalized by states. This process may occur either through pressure by activists (Risse and Sikkink 1999: , Keck and Sikkink 1998) or through social learning which leads decision-makers “to adopt prescriptions embodied in international norms.” (Checkel 1999: 88) But internalization includes not only the government as an actor, but also broader internalization within the public, when, as

⁶ Transterritorial issues, Ruggie notes, form the space in which international society is anchored. (1998: 191)

⁷ Traditional regime theory has also been criticized on a number of other dimensions: it can explain demand for, but not the supply of, regimes (Haggard and Simmons 1987: 506, Cortell and Davis 1996: 451);⁷ it downplays the role of other actors in the international system, including formal international organizations, by treating them as passive entities, (Abbott and Snidal 1998: 7, Rochester 1986: , Simmons and Martin 2002); and it has problems accounting for issue areas, including human rights, which do not simply reflect national objectives. (Donnelly 1986: 604-05, Cronin 2003: 8-12)

Harold Koh notes, “a norm acquires so much public legitimacy that there is widespread general obedience to it.” (1997: 2656-7, see also Finnemore 1996: 2)

Factors that increase the likelihood of internalization include the important role played by norm entrepreneurs in calling attention to or creating issues “by using language that names, interprets, and dramatizes them.”(Finnemore and Sikkink 1998: 897)⁸ But exogenous shocks- crises- can also help because they serve to discredit pre-existing norm-governed understanding and consequently require a new form of action, including the creation and negotiation of new international norms. (Florini 1996: 378, Price 1998: 616, Reus-Smit 2004: 288) Changing conditions may provide openings for outsiders with knowledge to influence the state decision-making apparatus (Hass 1992: , Simmons, et al. 2006: 789) and, as Checkel notes, decision makers will “engage in an information search and are thus more receptive to new ideas.”(1997: 7) The likelihood of internalization, however, is hut by the presence of contradictory norms or when norms are unclear or inconsistent. (Thomas 2001: 8-15, see also Cortell and Davis 1996: 452)

In summary, fundamental institutions- particularly territoriality, international law, and citizenship- play an important role in initially constituting state identities in order to facilitate a cooperative approach (either tacitly or formally) towards refugees. Regimes also play a role in entrenching cooperation and generating state responses to novel situations.

Regimes over this period have been composed of three key elements. The first element identifies who has *responsibility* for refugees- whether this responsibility rests on individual states, allowing them to set varying policies, or rests instead within a formal international institutional structure. The second element identifies how *legal protection* is formulated- whether protections are offered at the domestic, bilateral, or international level (as we shall see in Chapter 2, some form of legal protection has been offered continuously since 1685) and whether refugee status is clearly defined in law. An important corollary to this is whether refugees are provided with a protection against *refoulement*, or return, to a state where they may face persecution. The third element identifies how *assistance* should be provided- whether the state provides it on an ad hoc or reciprocal basis, to an international organization, or instead relies on voluntary organizations to do so.

These elements have been present in each regime and represent logical social understandings. By this, I mean that each successive regime has had these as base elements and that it is unlikely that a refugee regime could function without this basis. But I also mean it to imply something deeper: that these are shared understandings

⁸ Norm entrepreneurs can include transnational moral entrepreneurs or important decision-makers within government who seek to persuade domestic opinion through their moral or cosmopolitan views (Nadelmann 1990: 479-84, Price 1998: 616) and transnational advocacy networks focused on influencing international actors to condemn norm-violating states. (Klotz 2002: 56, Risse 1999). Increasingly, too, the independent influence of international organizations is seen as important, as “they devise new categories of problems to be governed and create new norms, interests, actors, and shared social tasks” (Barnett and Finnemore 2004: 7) and also help and support the efforts of activists at the domestic level. (Keck and Sikkink 1998: , Risse and Sikkink 1999: , Klotz 2006)

between states which reflect a logic of appropriateness. By the same token, these understandings are essentially ‘blank.’ Each element, while present, is subject to changed or reinterpreted understandings by states. Individual norms, therefore, while present in one regime may not be in the next. Norm variation has been ever present.

Figure 1: The different norms (shading represents norms which were in contention)

	1685	1918	1951
Responsibility is Domestic	—————		
Responsibility is International			—————
Legal Basis is primarily Domestic	—————		
Legal Basis is bilateral		—————	—————
Legal Basis is primarily Multilateral			—————
Assistance is from private Organizations	—————		
Assistance is a state Responsibility			—————
Non-Refoulement			

Regime change does require some form of norm change to occur. But it also requires some form of exogenous change- usually a situation perceived as a crisis by states- and the actions of motivated and successful norm entrepreneurs which sees the core understandings of the regime- and thus of refugees- be reinterpreted or redefined. Consequently, regime change requires a broad shift in state identity regarding the issue as a whole, as opposed to single norms.

Regimes, once created, will continue to play an important role in forming and sustaining state identity. Norms may have two crucial effects on regimes. If norms are either incoherent or are in conflict with other norms, either those within the regime, or with other domestic or international norms, the regime itself will be *less effective*.⁹

⁹ The conception of norm incoherence and contestation is based on (Franck 1990) and (Donnelly 1986). For Franck, rules within the international system are legitimate when they exert a “pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”(1990: 24) A rule’s legitimacy depends on how clear, coherent, symbolic valid it is and how many states adhere to it. Coherence, here, suggests the connection of the rule to: “1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems.” (Franck 1990: 147) Donnelly suggests that a regime’s strength is dependent both on its scope and on its coherence, which depends on the extent to which states abide by and make use of the norms of

Individual norms within the regime may still be widely held- for example, in the 1930s states continued to support creating international organizations to protect refugees- but the regime itself will no longer effectively frame state identity. Even so, the shared beliefs that initially led to the formation of the regime will ensure that the regime will continue to exist.

By contrast, if the norms are in harmony- both non-contradictory and compatible with other norm-governed elements of states' identities- the regime will have increased resonance and will be *more effective*. This will enable it to better withstand norm changes and exogenous shocks. Thus the post-Second World War II regime successfully weathered an international organization replacement and a dramatic increase in the global number of refugees.

3. Refugees as a historical phenomenon

States began to respond to refugees in a cooperative manner soon after the Peace of Westphalia in 1648. It played an important role in rendering notions of refuge and asylum into an understandable form within the then-emergent European state system. The Peace did this by affirming a basic right for emigration by those wishing to leave their own state because their religion differed from that of their prince. This right was listed in the Peace as a right of *jus emigrandi*- the right to emigrate with one's personal property. (Golden, 1988: 17)

The preceding two centuries had been marked by substantial religious refugee movements. (Kamen 2000: 47-50, Sassen 1999: 11) However, when Louis XIV revoked the Edict of Nantes in France in 1685, causing the flight of the Huguenots,¹⁰ other European states quickly accommodated them as both their religious confreres but also for economic reasons. Most importantly, however, is the fact that the Huguenots were granted broad domestic protections through law in the countries they entered, including Brandenburg and the other German states as well as England and Switzerland. (Grahlmadsen 1966: 278-79, Scoville 1952: 400-06)

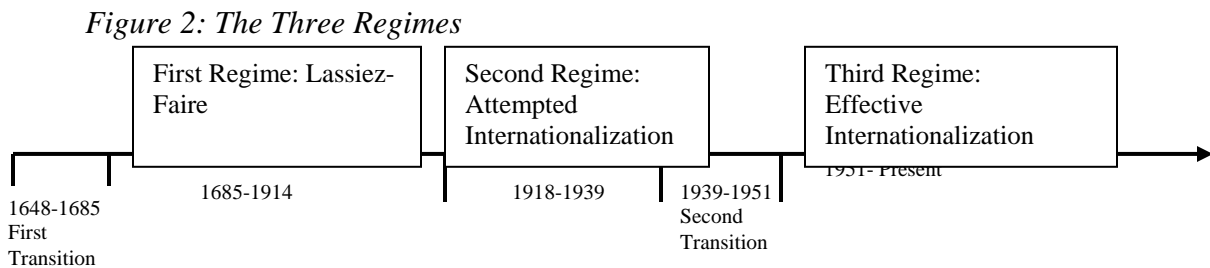
How states responded to this crisis was mediated by a number of fundamental institutions. Territoriality, in demarking the authority of governing within specific spatial areas, (Ruggie 1993: 151, Caporaso 2000: 10), played a crucial role. As Emma Haddad has noted, refugees are “an integral part of the system—as long as there are political borders constructing separate states and creating clear definitions of insiders and outsiders, there will be refugees.” (2003: 297) But emerging doctrines of international law were also crucial. Hugo Grotius, for example, suggested that “it is believed that people consent to the free withdrawal of their nationals, because from granting such liberty they may experience not less advantage than other countries... Thus the state has no legal claim against exiles.”(Grotius and Kelsey 1925: 254) Pufendorf echoes these views, arguing that “having once admitted strangers and foreign guests, to turn them out

the regime to which they have committed themselves, and to the extent that the different parts of the regime operate together as a whole.(Donnelly 1986: 605)

¹⁰ This is also the event that gives us the first recorded usage of “refugee” as a term. (Marrus 2002: 8-9)

again, unless upon good reason, is usually censured as some degree at least of inhumanity.” (Sibley and Elias 1906: 4-5) The mercantilist policies of the time were also crucial, since they “considered in-migration of people a positive matter, an addition of resources.” (Sassen 1999: 11, see also Torpey 2000: 18-20)

For the next two centuries, states gradually developed mechanisms to accommodate refugees independently. As such, the locus of responsibility remained at the domestic level. Sovereignty throughout this period remained sacrosanct. By the same token, however, this emerging normative understanding limited state actions. Consequently, we can identify this period as a tacit or informal regime, marked by understandings and common practices between states without formal negotiations.¹¹



States began this process by recognizing as refugees those fleeing religious and then political persecution. Increasingly, the acceptance of refugees was rooted in the emerging liberal democratic notion of citizenship rights. Thus, legitimate statehood was increasingly tied to the “augmentation of individuals’ purposes and potentialities.” (Reus-Smit 1999: 122) Citizenship buttressed the notion of the territorial state, but also undermined it in cases where the state was seen to be reactionary, to be violating the rights of its own citizens. As Oppenheim notes, “Great Britain, and the other free countries, felt in honour bound not to surrender such exiled patriots to the persecution of their Governments, but to grant them an asylum.” (Oppenheim and Roxburgh 1920: 515) By the beginning of the 19th Century, therefore, the acceptance of refugees was rooted both in notions of citizenship and of law.

4. The 19th Century: A Tacit Regime

By the 1848 Revolutions, Great Britain not only had entrenched a notion of granting asylum to political refugees, but also that it was a requirement for legitimate statehood. Thus Lord Palmerston, then Foreign Secretary, argued after Russia and Austria demanded the expulsion of refugees from Turkey in 1851:

If there is one rule which more than another has been observed in modern times by all independent states... it is the rule not to deliver up refugees unless the states is bound to do so by the positive obligations of a treaty; and Her Majesty’s government believes that such treaty engagements are

¹¹ Explanations that states during this period did not have the ability to control their own borders have been challenged recently. In particular, Fahrmeir, Faron and Weil argue that open migration did not indicate an absence of regulation but rather that states “took an active interest in ‘their’ emigrants and in the immigrants who crossed their borders, and used various means of classifying international migrants as ‘desirable’ or ‘undesirable.’”(Fahrmeir, et al. 2003: 2)

few, if indeed any such exist. The laws of hospitality, the dictates of humanity, the general feelings of humankind forbid such surrenders; and any independent government which of its own free will were to make such a surrender would be universally and deservedly stigmatised as degraded and dishonoured.¹²

Bernard Porter suggests that the British government in the Nineteenth century was keenly aware of the refugee issue, fearing war with other states over their liberal refugee admission policies on at least two occasions. (Porter 1979) Perhaps most notably, Porter finds that between 1823 and 1906, “no refugee who came to Britain was ever denied entry, or expelled.” (1979: 8) Britain’s practice towards refugees therefore appears to reflect a set of more than just materialist interests.

Other states received refugees in different manners but still demonstrated a normative resonance. Revolutionary France, for example, was quick to enshrine a right of free emigration to the country, (Carpenter 1999: xviii-xxiv) and were codified by the French government in 1832. (Grahl-Madsen 1966: 280) The United States offered no limits on immigration until 1875(Reimers 2002: 360),¹³ implicitly accepting refugees, reflecting the view espoused in the Revolution that citizenship was a matter of “individual choice. Every man had to have the right to decide whether to be a citizen or an alien. His power to make this choice was clearly acknowledged to be a matter of right...” (Kettner 1978: 208)

Another important element of this tacit regime was the steady advancement of refugee protection in first domestic and then bilateral law. Evidence of this transformation became clear by the end of the 19th Century as first the United States and then Great Britain enshrined rights of asylum in domestic law¹⁴ and bilateral extradition treaties. (Goodwin-Gill 1983: 35-8) By 1875, Bassiouni notes that not only did almost every European treaty contain an exception for political offences, but that “the practice was sufficiently established that the determination of what constituted a political offence was reached in accordance with the laws of the requested state.”(Bassiouni 1974: 371) In this change, we see doctrines of the non-extradition of individuals for political offences became part of the larger liberal democratic project within Europe. (Gilbert 1991: 115, Radzinowicz and Hood 1979: 1421)

¹² Correspondence respecting refugees from Hungary within the Turkish dominions presented to Parliament, 28 February 1851. (cited in Schuster 2003: 95 fn. 66)

¹³ Prior to this, immigration law had been left up to individual states to establish their own laws. As early as the 1780s, Pennsylvania, Massachusetts, South Carolina, and Virginia had banned persons convicted of a crime. New York, however, the main port of entry, did not do so until 1833. This change came about because the Supreme Court ruled that state rules about immigration were unconstitutional. (Reimers 1998: 9-11) Following this, Congress through legislative changes and the Supreme Court, in a series of six ‘Chinese Exclusion Cases’ between 1884 and 1893 moved to limit immigration. (Dunne 2002: 120)

¹⁴ “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)

These efforts were ad hoc and they 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.¹⁵ Even so, this process of legalization, as Grahl-Madsen has argued, marked an important evolution. By the beginning of the 20th Century, he suggests the two cornerstones of modern refugee law had already been created:

a realization of the broken bond between the individual and the government of his country of origin, resulting on the international plane in lack of protection; and institutionalization of asylum (which was considered an important aspect of public policy) by the evolution of restrictions on extradition and expulsion (allowing as a by-effect the application of internal measures in lieu of expulsion). (Grahl-Madsen 1966: 281)

19th Century policies, therefore, can justifiably be seen as a tacit regime, one where state behavior was rooted in the notion that refugees needed to be offered protection in domestic and bilateral law. This is a tacit regime in that state behavior was bound by no formal organization or legal convention, but their behavior was still norm-governed.

Two factors resulted in the unraveling of this tacit regime. The first was changes in domestic immigration laws as states sought to assert sovereignty over their borders.¹⁶ The second was the enormous flows of refugees created by World War I and its associated events. The Russian revolution alone displaced 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 could not reasonably expect to return home, nor could they seek out any one single sanctuary. (Barnett 2002: 3) Even governments who were open to receiving refugees faced their own reconstruction problems, and were ill-equipped to receive refugees, especially those “whose attitudes and dubious legal status made them a political problem...” (Holborn 1975: 4-5)¹⁷

¹⁵ 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)

¹⁶ In the United States for example anti-immigration forces argued that the country was being overwhelmed by “radicals, the diseased, criminals and morally unfit immigrants and that too many Jews and Catholics were arriving.” (Reimers 1998: 22) In debating new immigration laws, proponents were quick to link immigration to sovereignty. Senator Henry Cabot Lodge, for example, declared that immigration “is perhaps the greater of fundamental sovereign rights. If a country can not say who shall come into the country, it has ceased to be a sovereign country, it has become a subject country.” [Henry Cabot Lodge (R-MA), *Congressional Record* v. 65, pt.6 (68C/1S), 14 April 1924. (cited in Skanks 2001: 41)] More fundamentally, sovereignty-based arguments in the U.S. Congress also undermined their traditional openness towards refugees. A policy of widespread acceptance of refugees “would mean that any foreign country could force a minority group upon us that they did not happen to like by persecuting or mistreating them” [Walter Newton (R-MN) CR v. 64, pt. 1 (67C/1S), 13 Dec 1922, 437. (cited in Skanks 2001: 43)]

¹⁷ Refugee flows were also not a short term issue. They continued to be produced as byproducts of the massive changes in the European state structure that had occurred with the War. (Loescher 1993: 34)

5. The Interwar Period: Formal Organization Begins

The initial state response to what was rapidly becoming a major crisis was to attempt to follow the same policies as prior to the war. Thus, assistance was provided in an ad hoc fashion by individual states.¹⁸ These states understood that this was not a viable long term solution, and so they focused on either transferring these refugees to new territories or on resettling or repatriating them, primarily by engaging in bilateral negotiations. These efforts failed, primarily because of “the unsatisfactory legal status of the refugees as prospective immigrants.” (Holborn 1975: 4, Skran 1995: 89) By 1921, states had begun to back away from the unilateral provision of assistance, even with refugees in perilous conditions and close to starvation.¹⁹ A crisis existed and the states most directly involved- France and Great Britain- could not foresee any form of long term unilateral or bilateral solution.

The obvious alternative was a multilateral solution, which would allow states to provide legal protection, assistance, and resettlement or repatriation activities to refugees in a collective fashion. Multilateral activities can bring about better outcomes in such situations, where “states are more or less indifferent in principle to the actual outcome, provided only that all accept the same outcome.” (Ruggie 1992: 576-7) While a regime can solve this cooperative dilemma, regime theory in this case does not adequately explain how states abandoned their earlier view of refugees as primarily a domestic issue, and instead embraced a new understanding focused on formal international cooperation. In fact, there was no clear multilateral solution at the time. When the League of Nations had been formed, “the problem of refugees... had not appeared clearly when the Covenant of the League of Nations was drafted in 1919. No machinery was therefore devised to deal with it.” (UNHCR 1961: 3-4)

This change occurred because of the interplay of two sets of norm entrepreneurs who successfully convinced states that institutionalization was in their interests. The first, the voluntary organizations, led by Gustave Ador, the President of the ICRC, directly lobbied the League and its membership. Ador argued that not only was League intervention vital to assist the more than 800,000 Russian refugees,²⁰ but he also framed

¹⁸ The Yugoslav and Czechoslovak governments, for example, spent twenty million gold francs on the refugees. (Marrus 2002: 82-84) Others, including the British and French governments, remained committing to assisting refugees who had been part of the allied forces, including the remnants of the White Russian armies.

¹⁹ A mission by the ICRC to Yugoslavia had found many of the refugees “on the verge of starvation.” Report from Brig. General C.B. Thomson, 21 April 1921 League of Nations Archive, Geneva (LNA) R1713/12381 The French also announced that they were being forced to already give less assistance and that “it would shortly be obliged to suspend it entirely.” Russian Refugees- Note by the Secretary-General. LNA R1713/15001.

²⁰ Gustave Ador to League Secretary-General Eric Drummond 20 Feb 1921, Reprinted as League Council Document 11/111/69/10598. 2

the refugee issue alongside other issues where the League had had success, including the repatriation of prisoners of war and the fight against typhus.²¹ Only an international solution would do since, in Ador's view, there were three aspects to the problem: the legal status of the Russian refugees, the need to repatriate, emigrate, or organize their employment, and the provision of relief.²² A new organization, including a Commissioner for Refugees, could deal with all these issues as well as coordinate the activities of the various private organizations.²³

The second group to lobby for change was the League of Nations secretariat itself, which actively worked to convince its member states to accept an expanded mandate. In particular, Philip Noel-Baker, assigned to deal with refugee matters, argued that "the problems connected with the refugees are insoluble except by international action" and that "the League might be able to accomplish something of real and great value if it managed to secure the international action required."²⁴ He also had concerns that the voluntary societies would be unable to work together unless there was a strong outside authority to coordinate their efforts, a role that he saw the League able to perform.²⁵

These suggestions presented states with a new set of policy options, based on a modification of their common normative understanding. The refugee issue could be dealt with in a more effective manner if states were willing to surrender a degree of their sovereignty to a formal IO. Presented with this novel option, states leapt at it. The French, for example, noted that: "In this way the support of all civilized peoples would be gained for this humanitarian work, and their unanimity would be a proof that no private political aim was being pursued."²⁶ The British government welcomed the proposal, given their fears that the French would otherwise abandon direct assistance to refugees, and that it consequently needed to be settled by international methods.²⁷ Only the Swedish government argued against it, suggesting simply instead that the voluntary international organizations were the best method of helping refugees.²⁸

These actions had brought about a simple yet effective normative change. No longer would individual states be completely responsible for refugees. Rather, they would coordinate their actions through an IO. While states may have been convinced to create a formal IO, however, they had not yet altered their other normative understandings. At a

²¹ Gustave Ador to Eric Drummond 17 March 1921, Reprinted as Council Document T6 11/11363/10598

²² Letter from Gustave Ador to the President of the Council of the League of Nations, 15 June 1921. LNA R1713/13314 (Dossier 12319)

²³ Gustave Ador to Eric Drummond 20 Feb 1921, Reprinted as Council Document 11/111/69/10598.4

²⁴ Noel-Baker Archives (NBKR) 4.450 "Memorandum on the Possible Action of the League in Connection with Russian Refugees" 3-4

²⁵ Letter from Baker to Lodge, 17 August 1921 NBKR 4/450

²⁶ Jean Gout to Drummond 11 April 1921. Reprinted in C. 126.M.72.1921 VII. 3 The French position was formed in part through substantial lobbying from the ICRC. See Rapport de M. Slavic concenant son activité a Paris du 1 au 8 Mai 1921. LNA R1713/12606

²⁷ 17 May 1921. United Kingdom Public Records Office, FO371 6867/N5827/38/38.

²⁸ Wrangel to Drummond, 17 June 1921. C. 126.M.72.1921 VII. 29

fundamental level, therefore, there was normative incoherence within the regime as states would not commit to binding international legal norms nor to the provision of large-scale assistance. In spite of efforts by the new HCR, Fridthof Nansen, and his successors, these issues would lessen the impact of the regime and the League's efforts to promote cooperation and lead to the unraveling of the regime.

Nansen did create a distinct legal formulation for the protection of refugees.²⁹ The first Arrangement was negotiated among states in August 1921, and ended with a recommendation that the provision of passports or equivalent identity papers be undertaken for refugees. (League of Nations 1930: 269) These 'Nansen Passports' marked the beginning of international refugee law. (Torpey 2000: 129, Beck 1999: 603) Fifty-one states agreed to recognize these passports; however, it did not ensure that a foreign government would actually grant them entry visas. Moreover, the Conference had recognized only Russian refugees. New Arrangements had to be negotiated for additional refugee groups, including Armenians (1924), and Assyrians, Assyro-Chaldeans, and Turks (1928).

These Arrangements also did little to bind states. States continued to have the prerogative of granting or denying admission to refugees, "and even those that granted asylum did not necessarily acknowledge any legal obligation to do so" (Loescher, 1993: 38-9). Similarly, the passports offered their bearers "no guarantee of (re) admission to the country that had issued the document." (Torpey 2000: 128).

The 1933 *Refugee Convention* broke this pattern. Earlier attempts to create a binding Convention had failed.³⁰ The 1933 *Convention* was an important step in formulating a guaranteed set of refugees' rights in international law. It was not only was the "first binding multilateral instrument to afford refugees legal protection" but it was also the first agreement to "articulate the principle that refugees should not be returned involuntarily to their country of origin." (Beck 1999: 603) The *Convention*, consequently, formalized a clear understanding of the principle of non-refoulement.³¹ (Grahl-Madsen

²⁹ This differed considerably from the subsequent understandings developed in the post World War II period. In particular, as Goodwin-Gill has noted, the League's understanding was focused on a group or categorical approach, that someone was outside of their country of origin and was without the protection of their own government, was enough to receive refugee status. (1983: 2, see also Weis 1954: 194) Thus the League focus was solely to "facilitate the international movement of persons who find themselves abroad and unable to migrate because no nation is prepared to assume responsibility for them." (Hathaway 1984: 349) It was only in the late 1930s, and particularly in the post- World War II period, that the legal understanding of a refugee evolved to focus on the relationship between a particular individual and their own state. (Hathaway 1984: 370)

³⁰ In 1928, for example, negotiations had been convened but "the majority of participating States proved unwilling to contract formal obligations on behalf of these refugees." (Beck 1999: 604, Hathaway 1984: 357)

³¹ Such an understanding had emerged within the deliberations of the League, and the 1933 *Convention* represented an important step in the progression of a new normative understanding within the body. In 1932, for example, the thirteenth Assembly urged "Governments not to proceed to the expulsion of a refugee unless he has obtained permission to enter an adjoining country." States, however, were not as

1966) Even so, this Convention, like the previous Arrangements, had significant limitations. In the first place, it applied only to groups of refugees who already had League of Nations protection. Moreover, only sixteen states would ultimately become a party to the treaty or adhere to it and a number of states set strict reservations. (Beck 1999)³² Finally, as the flight of refugees from Nazi Germany grew in scope, states were unwilling to extend this legal formulation and consequently the League only slowly provided any protections.³³

The legal efforts throughout this period remained rudimentary, covering only the main elements of refugees' status and ratified by few states. (Weis 1954: 154) Hope-Simpson critiqued all the efforts for missing the essential characteristic, that refugees had sought asylum "as a result of political events which rendered his continued residence in his former territory impossible or intolerable." (Simpson 1940) Even so, these efforts did mark a slowly evolving norm-governed consensus among states of the need to create a formal international framework and marks an effective negotiation strategy. (Skran 1995: 111) Beck points to the critical role played by refugee advocates in introducing the Arrangement system: "The use of explicitly non-binding agreements and declarations to promote the international protection of national and other groups would come to be employed fairly regularly..."(Beck 1999: 622)

5. The Failure and Rebirth of an Institutionalized Approach

In spite of how effective the HCR dealt with refugees, it remained an unpopular institution. In part, this simply reflected the fact that the HCR had not been granted overt legal status within the Covenant. States, however, were also wary of it. Many refugee-hosting states felt that the HCR gave them less support than it could, while other states opposed it for fears that the HCR would challenge efforts to curtail immigration. "In these circumstances", as Walters notes, "it was not surprising that no efficient and well-

quick to adopt this understanding. As a report the following year noted, "in spite of the earnest resolution adopted by the last Assembly...this unfortunate practice [expulsion of refugees] has increased in certain European countries during the past year." League of Nations Nansen International Office for Refugees. A.19.1933 *Report of the Governing Body*. 1, 5 This right was also included in the 1938 *Convention on Refugees Coming From Germany*, however only six countries would sign that document. (Skran 1995: 137)

³² The low number of adherents may reflect states' unwillingness to be bound by an international convention, but by the same token, some states were not clear on what the *Convention* entailed. Beck found, for example, that that Britain had failed to sign due to an erroneous translation- An unofficial translation used by Britain "misleadingly suggested that States parties undertook 'not to refuse entry to refugees at the frontiers of their countries of origin.' In fact, the word 'refouler' does not mean to 'refuse entry,' but to return or reconduct, in other words: 'to send back.'"(Beck 1999: 621) Thus Britain assumed the treaty implied a right of asylum.

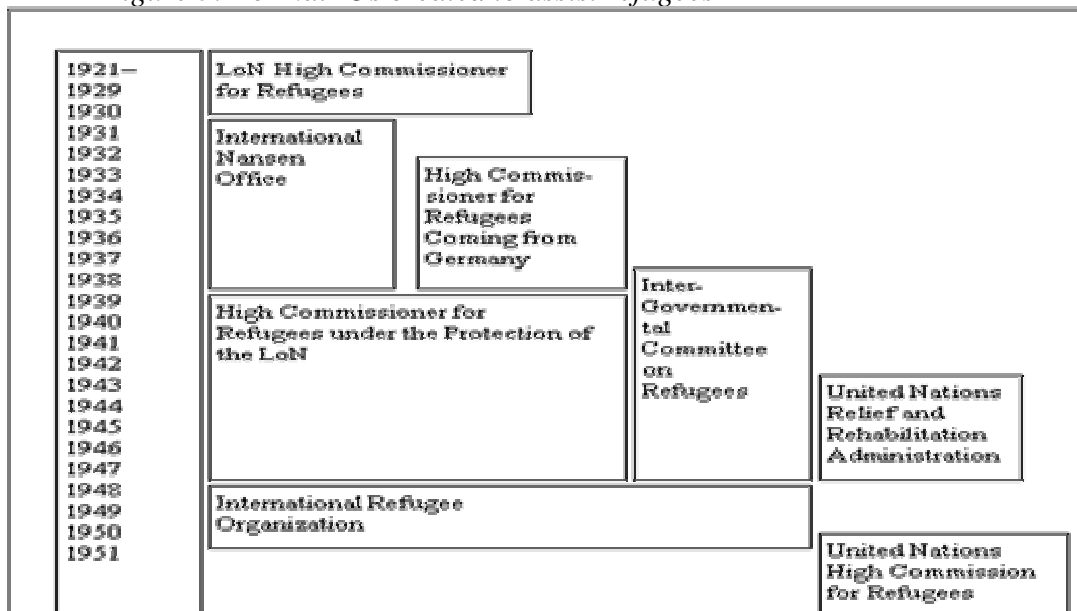
³³ The first step taken was to include refugees from the Saar within the Nansen passport framework in 1935. The next year, a new provisional arrangement was created, providing a clear definition of who were 'German' refugees. It was still limited, however, in that it required the refugees to have already immigrated and to be able to prove they no longer enjoyed the protection of the German government. It was also applied exclusively to the Germans- even the stateless were excluded, an oversight corrected in the 1938 *Convention*. (Hathaway 1984: 363-4) League of Nations, A.19.1936.XII *Refugees Coming from Germany*. 3-4; League of Nations, A.25.1938.XII *Refugees Coming from Germany*. 1-2

defined organization was ever built up.” (Walters 1960: 188-89, see also Marrus 2002: 110-12) The HCR, therefore, was always starved for resources.

Legal advances were being made. Institutional changes however, were more problematic, as was the continued issue of who should provide assistance. Following Nansen’s death in 1930, the League’s refugee machinery began to break apart. To begin with, rather than appoint a new High Commissioner, the League simply created the autonomous Nansen International Office for Refugees. This new body had a limited mandate to deal with the humanitarian aspects of refugee assistance. The League Secretariat was supposed to deal with legal issues, however this division which proved impractical and was rapidly discarded. (Holborn 1939: 132) The Office, however, was created as a temporary organization set to expire in 1938 (Grahl-Madsen 1983: 362-3) and the League Council reserved for itself all final policy-making authority. (Stoessinger, 1957: 30). The Office also suffered from a lack of resources, receiving funds only for administrative expenses.

This machinery, and the League more broadly, could not deal with the rise of Nazism. The League at first was even unwilling to consider German Jews as refugees. After considerably lobbying by the various voluntary organizations, the League decided to deal with the question not by expanding the mandate of the Nansen office, but rather by appointing an independent and unaffiliated “High Commissioner for Refugees Coming from Germany,” James G. McDonald. (Skran 1988: 289, Stewart 1982: 91-99) McDonald reported not to the League’s Assembly, but rather to a new Governing Body, which only had powers to forward reports to individual states which they thought might be able to provide assistance. (Simpson 1939: 216, Stewart 1982: 99)

Figure 3: Formal IOs created to assist refugees



McDonald, moreover, was stymied by a lack of resources. He was provided with only a tiny organization and budget, and yet a huge two-fold task: to co-ordinate relief and settlement efforts; and to negotiate with governments to facilitate travel and

resettlement. He did have substantial support from the voluntary organizations, which became the main source of funds. The High Commission also had little authority to negotiate with governments, and McDonald advocated for a complete reorganization of refugee work under a central organization but to no avail. By the end of 1935, frustrated with the lack of progress in both negotiations and institutional development, he resigned, writing a three thousand word letter of resignation calling for an intervention within Germany to stop the violations of human rights.(McDonald 1936) As Skran notes, “McDonald’s resignation both shocked the League and shamed it into continuing the Nansen tradition of humanitarian assistance.”(Skran 1988: 292-3, Marrus 2002: 161-66) Even so, this marked the end of the effectiveness of the League as a coordinating body to ensure the protection of refugees.³⁴

As League efforts at cooperation failed along with its declining prestige (Skran 1995: 207, see also Walters 1960), other institutional outlets emerged as the United States became involved with the issue for the first time.³⁵ The U.S. organized the 1938 Evian Conference to search for a solution, but made it clear to the states invited that “any financing of the emergency emigration referred to would be undertaken by private organizations...” and that “no country would be expected or asked to receive a greater number of immigrants than is permitted by its existing legislation.”³⁶

The sole outcome of the Conference was the creation of the Intergovernmental Committee on Refugees (IGCR). This body, once again, would be given no resources, no clear protection mandate, and only a limited ability to negotiate with the German government in an effort to stop the expulsions and to allow refugees to take some property with them- negotiations which would prove fruitless. (Breitman and Kraut 1987: 60-61, Feingold 1970: 30, Marrus 2002: 182) The Evian Conference also represented the last real effort in the interwar period to change the institutional structure which would assist refugees. Its outcome- the IGCR- was once again given too limited a mandate to

³⁴ While the next High Commissioner, Sir Neill Malcolm, did report to the League, it would take two more years to consolidate the League machinery into a single organization due to Soviet opposition. Even so, this new High Commissioner for Refugees, Sir Herbert Emerson, had his authority and powers “even more rigidly limited than had been the case in the past. He was denied the power to enter into any legal commitment whatsoever on behalf of the League of Nations, and the League assumed no responsibility, legal or financial, for his activities.” (Loescher 2001: 32) In so doing, the League also avoided having to consider the issue of assistance and burden-sharing, which a 1935 Report had pointed to as the core problem within the League. [Report to the Council- Committee on International Assistance to Refugees (C.A.I.R. 67) 6 Dec 1935. LNA R5633 20A/21365/20038. 23-24]

³⁵ This move was driven almost exclusively by President Roosevelt, who noted that “For centuries this country has always been the traditional haven of refuge for countless victims of religious and political persecution in other lands... It was quite fitting, therefore, that the United States government should follow its traditional role and take the lead in calling and conducting the Evian meeting. (Roosevelt 1941: 170) In his decision, Roosevelt appears to have been influenced both by the steady flow of prominent refugees as well as a timely article by Dorothy Thompson in *Foreign Affairs* which called for the creation of a broad-based international body with outstanding leadership. (Feingold 1970: 23, Stewart 1982: 272)

³⁶ Department of State Press Release No. 142, 24 March 1938. NARA 840.48 Refugees/61

effectively undertake this task. Like the League High Commission, it had little success in directly helping refugees to find accommodation.

On the eve of the Second World War, international cooperation to help refugees had virtually ceased. States had accepted the institutionalization of the problem, and had accepted a limited basis for protection in international law. They were unwilling, however, to go farther due to concerns over their domestic constituencies and sovereignty. Following Nansen's death, the League had no champion for refugees. The other actors involved, particularly the voluntary organizations and increasingly Jewish organizations, did not have the power to overcome a discourse rooted in sovereignty, immigration restrictions, and, at times, anti-Semitism.

This discourse would change substantially following World War II. States became more attenuated to the plight of the refugee population, to the entails of the voluntary organizations, and to the concerns of their own population. In creating a new regime, these factors would dominate. Holborn, for example, noted that in creating an institutional architecture to help refugees, "western countries...considered it necessary to put human considerations above political ones" (Holborn 1956: 32) and that the governments involved were "motivated primarily by humanitarian and political ideals." (Holborn 1956: 365)

States had never abandoned formal IOs. In 1943, the IGCR saw its mandate expanded at the Bermuda Conference in response to public opinion.³⁷ As well, as early as 1941, the Allies had realized that they would be confronted with a massive displaced population in Europe and had created the United Nations Relief and Rehabilitation Administration (UNRRA). It was designed to provide assistance and repatriate the displaced population of Europe, (Woodbridge 1950: 471) but had no mandate for resettlement. Neither of these organizations would be effective in their roles, particularly in providing for the resettlement of refugees: "UNRRA was not equipped under its mandate to provide a solution; the IGCR, whose job was supposed to promote resettlement, lacked the money and competence." (Karatani 2005: 528)

The end of the war also brought about a new clear normative shift, that of an emerging prohibition against refoulement. During the war, refoulement was commonplace. The allies at the Yalta Conference in 1945 had gone so far as to approve the forcible return of over 2 million Soviet citizens- prisoners of war and civilians as well

³⁷ British Embassy to the Department of State "Aide Memoire: Refugees from Nazi-Occupied Territory" January 20 1943. *Foreign Relations of the United States*, 1943, Vol. 1. 134. In particular, Foreign Minister Anthony Eden had been receiving many complaints about the inadequate government response, and a Jewish delegation had approached him about seeking out the assistance of " the Red Cross and the Vatican to admit Jewish refugees to every Allied and Neutral country, especially Palestine." (Breitman and Kraut 1987: 174)

as those who had fought for the Germans, a decision which ended up being opposed both by the American military but also senior policy-makers within the US administration. (Proudfoot 1957: 215-17, Elliott 1982: , Saloman 1991: 41-42) The unpopularity of this shifted American opinion on the issue so much that the United States government supported a clear statement against refoulement in the 1951 Convention, and George Marshall, then Secretary of State, noted in 1947 that “any coercion of displaced persons under our jurisdiction would not be tolerated.” (Marshall 1947) This change meant that any new IO would have to include a clear protection mandate and focus both on resettlement as well as repatriation. Forcible repatriation would be banned. In this sense, a social norm emerged before the clear legal prohibition in the 1951 *Convention*.

The final steps were to create IOs which reflected this new sensibility- the International Refugee Organization (IRO) in 1947, and UNHCR in 1950, as well as to entrench this understanding in international law. The Constitution of the IRO had started this process. The creation of UNHCR in 1950, and the Refugee Convention in 1951, not only served to solidify the normative understandings that had emerged twenty years earlier.

7. Conclusions

Refugees have been an issue for international society since the seventeenth century. State policy towards refugees throughout this period, however, has reflected broad norm-based understandings of cooperation. Consequently, we can see a pattern of regime construction and normative evolution throughout this period. States have perceived each successive regime in terms of four key norms, including whether responsibility and the legal basis for refugee protection rest at the domestic or international levels, who shall provide assistance, and a prohibition against non-refoulement. As we have seen, important roles in creating these understandings have been played not only by states, but also by international organizations and advocates of refugee policy. These latter actors have the ability to create and alter basic state understandings and consequently their interests and identities.

This is not to say that the historical record is positive. The laissez-faire regime, which was based around principles of tacit cooperation among states, provided refugee protection at the expense of the poor. Similarly, the interwar period was a time of substantial normative and institutional development in order to respond to the refugee problem. However, key norms contradicted each other, and other norms, particularly that of non-refoulement, were ignored. This regime provides clear evidence of norms that were rapidly internalized- most notably, that refugees should be dealt with in a multilateral manner, and that there was a need for an international legal framework- and norms that remained in contestation throughout the period, including how states should respond to new refugee problems; who should provide the bulk of resources to assist refugees; and whether refugees were protected from non-refoulement.

The crucial element in the history of state cooperation towards refugees has been, not surprisingly, sovereignty. At key moments over this period, norm entrepreneurs and normative understandings prompted state behaviour which protected refugees. But when such entrepreneurs were missing and such understandings were contradictory, sovereignty and domestic motivations would triumph. Norms alone do not mean that state behaviour will be consistent, or that a state's identity will be shaped in a positive manner. For this to occur, rather, we *require* norm entrepreneurs who can serve as champions.

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