

*Refugees and the International Sovereign
State System*

The Need for a Relief Valve

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Comments Welcome and Encouraged

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“To allow a man to travel is to allow him to do something that one has no right to deny: it is a social injustice.”

Peuchat (1790), *Le Moniteur*, vol 5: 351-2 (cited in Torpey, 2000: 25)

Introduction¹

Refugees are an integral part of the international system in ways that we do not usually realize. The current international refugee regime, embodied in core legal documents such as the *Refugee Convention*, the *Refugee Protocol*, institutions such as the United Nations High Commission for Refugees and the International Organization for Migration, and prominent non-governmental organizations, represents only the most recent manifestation of what, in fact, is a fundamental institution of the international system. Refugees matter because of a substantive change in the nature of the state-citizen relationship that occurred with the creation of the European sovereign state system, which saw a mutually constitutive relationship created between states and their citizens in which states guaranteed sets of rights in exchange for legitimacy.

Such a bargain, however, can not function if citizens who are deprived of their rights have no place to go. Thus, the international state system *requires* a mechanism, a population relief valve in other words, to deal with citizens who may wish to flee, or who are forced out of, their own state.² Such a valve serves a dual nature. It allows states to deal with ‘troublesome’ populations by allowing them to leave, rather than by taking more extreme actions. Other states can then accept these refugees, condemn the

¹ My thanks to Brian L. Job, Richard M. Price, Katrina Coleman, Lesley Burns, Miki Fabry, Michael Schroeder and Karen J. Winzowski for initial comments on this work. My thanks also to the Social Sciences and Humanities Research Council of Canada for funding to attend this conference.

² My thanks to Mark W. Zacher for initially suggesting this idea.

displacing state's behavior, but importantly, avoid having to intervene in ways that would violate that state's sovereignty.

At another level, this relief valve can deal with what might otherwise be a fundamental contradiction in the state system. Citizenship is a requirement of a state system. However, when people flee a state, they are implicitly both giving up the protection of that state, but also its authority. Without an ingrained institution to deal with such individuals, these people would become stateless, and potentially rogue elements within the state system.

Hedley Bull recognized that refugees play a vital role, and 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) Hall and Ikenberry go so far as to suggest that "a state system always had an in-built escape system. This is most obviously true in human matters. The expulsion of the Jews from Spain and the Huguenots from France benefited, and was seen to benefit, other countries, and this served in the long run as a limitation on arbitrary government." (Hall and Ikenberry, 1989: 40)

This paper represents the theory and preliminary results of a much larger project, namely my PhD thesis, and consequently is more of a proposal than a finished piece of work. As such, it will not providing conclusive results on many of these questions, but

mainly suggestions as to what appears to underlie the current refugee regime. It will begin by briefly summarizing the key parts of my argument: the role played by regimes and fundamental institutions, the state-citizen relationship, and the interlinkages between this relationship and the international system and society of states. It then moves on to present a brief history of refugees over this period, from 1648 until the present day, and suggests that not only has a fundamental institution existed with respect to the right of citizens to leave their own country, but also that there has been two different refugee regimes. The first was primarily *lassiez-faire*, and emerged following the Revocation of the Edict of Nantes by Louis XIV in 1685. It functioned, off and on, until the outbreak of the First World War. The second emerged following the Second World War and a long period of transition encapsulated by the interwar period.

I. The Role of Institutions

International Relations posits the existence of a number of formal and informal mechanisms through which states achieve the ability to co-operate in an anarchic environment: formal organizations, formal³ and informal regimes,⁴ and, more broadly, institutions.⁵

³ The consensus view of regimes, proposed by Stephen Krasner, is that regimes are composed of “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, 1983: 2) Friedrich Kratochwil and John Ruggie have defined a regime more broadly as “governing arrangements constructed by states to coordinate their expectations and organize aspects of international behavior in various issue areas. They thus comprise a normative element, state practice, and organizational roles.” (Kratochwil and Ruggie, 1986: 759)

⁴ Informal regimes were initially defined by Puchala and Hopkins as 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 decision-making procedures, but, it can be summarized, rely much more heavily on norms and procedures.

⁵ Robert Keohane, in his seminal 1988 article, offered a redefinition of international practice such that formal and informal regimes were instead both positioned under the rubric of institutions. He suggested that

Formal regimes may emerge in a given issue area. Informal regimes, by contrast, may be extremely diffuse. Thus it can easily be argued that “multilateral formal organizations...constitute only one small part of a broader universe of international institutional forms...” (Ruggie, 1992: 566) John Ruggie argues that some institutional forms take on a even deeper understanding within the international system. 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)

Christian Reus-Smit has built on Ruggie’s work, to suggest that multilateralism is only one of several ‘fundamental institutions, which are “ ‘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.” This suggests, therefore, that they are extremely long-lived. (Reus-Smit, 1999: 4)

He conceptualizes institutions operating at three levels of modern international society:

[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)

institution “may refer to a *general pattern or categorization* of activity or to a *particular* human-constructed arrangement, formally or informally organized.” (Keohane, 1988: 383, his italics) Thus, institutions can be considered to encompass both formal, specific institutions, but also elements of practice.

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) For him, fundamental institutions in the modern state system include contractual law and multilateralism.(Reus-Smit, 1997: 555)

Ruggie suggests three key generalizations can shed light on the character of the form of multilateral institutions. The first is that the strategic task environment has an impact on the form agreements will take. The second is that successful examples of multilateralism exhibit diffuse reciprocity, in that states come to believe that current sacrifices will yield a long-run return. The third is that prior to the twentieth century, few instances of multilateralism generated formal organizations. (Ruggie, 1992: 583)

This latter point needs to be expanded on. 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)

Finally, 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) The historical record indicates that there has not been a single regime over the period, but rather two distinct regimes with differing norms, and three transitional periods. The first transition period, between 1648 and 1685, ended with the emergence of the first refugee regime, primarily a *lassiez-faire* framework with no clear cooperation among states beyond tacit understandings that states might accept one another’s refugees, nor did it clearly define what a refugee was beyond differentiating them from ordinary migrants. Consequently it met few of the features that one would surmise a refugee regime should have.

The second period, between 1918 and 1951, saw this regime breakdown and collapse with catastrophic results and ended with the emergence of a new, internationalized, refugee regime. This regime, based on the 1951 *Refugee Convention*, defines precisely what a refugee is and establishes clear norms against the forcible removal of refugees,⁶ and against prosecution for crossing international boundaries in order to claim asylum. However, this regime has also come under fire, because of increased number of refugees but also because of an acceptance into the international system of states which have not been forced to make bargains with their own citizens.

Thus a third transition, which began in the early 1980s, appears to be occurring. This time, however, a dramatic increase in the number of refugees is coupled with a long-term structural change in the international system itself, caused by the expansion of the system from Europe to encompass the world, but also in the expansion to include states which do not possess internal legitimacy in the eyes of their own citizens. It was a

⁶ Though it should be noted that increasingly states make use of ‘safe third country’ legislation, whereby refugees can be returned to countries that they previously resided in, provided that they are not at risk of harm.

systemic structural change that caused the emergence of the population relief valve to begin with. History provides us with two paths that the relief valve institution may take: a transition to another, third, regime, with new norms; or a complete breakdown of the institution itself.

II. The State and the Citizen

Refugees matter due to a substantive change in the nature of the state-citizen, or state-individual, relationship caused by the emergence of sovereign states. The definition of the state most relied on is Max Weber's argument that the state is "a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory. Note that territory is one of the characteristics of the state... the right to use physical force is ascribed to other institutions or to individuals to the extent that the state permits it. The state is considered the sole source of the 'right' to use violence." (Weber, Gerth, and Mills, 1958: 78)

Legitimacy is an idea that has been tied to the modern state, and this is implicit within Weber's definition. The argument is that a state must seek legitimacy from citizens, and this is a bond that must be constantly renewed through support by the people, based on a government pursuing 'higher' and 'nobler' purposes, through binding rules, or through fear.(Dahl, 1982: 16, 52) Similarly, a state that possesses legitimacy must "successfully [uphold] a claim to the exclusive regulation of the legitimate use of physical force in ensuring its rules within a given territorial area." (Dahl, 1982: 17) An existing state that loses this legitimacy may also lose its identity. When "large numbers of people begin to doubt or deny the claim of government to regulate force, then the existing state is in peril of dissolution." (Dahl, 1982: 18) A claim of legitimacy may be accepted

even when it is not imposed universally. In fact, in most cases “the order is actually imposed upon the minority; in this frequent case the order in a given group depends on the acquiescence of those who hold different opinions.” (Roth and Wittich, 1968: 37)

However, legitimacy has become a controversial topic, in that the state does not exist solely through this belief in its legitimacy. Some regimes can afford to drop the pretence of a claim to legitimacy and rule solely through coercive force or through privileges and favours. (Roth and Wittich, 1968: 32, 214) By the same token, it can be interpreted that some states which lose their pretense to legitimacy are thereby *forced* to rule solely through methods of coercion. (Bensman, 1979: 21)

Thus Thomson, for example, notes that more recent definitions of the state do not include legitimacy “presumably because of its normative implications. The obvious question is: Legitimate for whom? Early state-builders’ use of violence was not viewed as legitimate by the majority of the people who for centuries resisted their drive for control.” (Thomson, 1994: 7) Patricia Marchak similarly argued that the term legitimacy “is extremely flexible: what is regarded as legitimate in one context may be entirely unacceptable in another, even by the same population.” (Marchak, 2003: 7) For her, if a government finds itself in the position that it has to rule by force on more than an occasional basis, it is admitting to a loss of legitimacy. Therefore, while legitimacy forms important links between the citizen and the state, it is not a prerequisite for the state to exist- particularly not if legitimacy is thought to encompass the entire population. While the Lockean view would argue that these citizens could overthrow the state, in practice the power dynamic in many states means that citizens must either put up with state’s policies, or leave.

Legitimacy, however, can be rehabilitated as a concept if we instead view it as a fundamental component of citizenship, rather than solely of the state. Charles 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 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. Elsewhere, Tilly has argued that modern citizenship can be taken 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) Therefore, “citizenship designates a set of actors- citizens- distinguished by their shared privileged positions *vis a vis* a particular state.” (Tilly, 1996: 8)⁷ This suggests that citizenship evolved over time, as states matured.

However, citizenship can also be deemed to be mutually constitutive with the state formation process itself. This is suggested in the language of the ‘bargain’ that Tilly suggests, and is also reflected in the work of Mervyn Frost. An added advantage is that Frost clearly positions legitimacy within this debate. Frost argues that settled norms can occur within the international system, and a norm reaches this point when it is generally recognized that any argument denying the norm or which appears to override the norm requires special justification.(Frost, 1996: 105)⁸ There continues to be a basic tension, he

⁷ For a rationalist account of such bargains, see (North and Weingast, 1989)

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

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. Frost argues, following Hegel, 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)

What we see, therefore, is Frost arguing that in order for the existence of free people, we must reside in good, or legitimate, states: “Patently such individual freedom is not constituted by just any kind of state. In some kinds of state there is no provision made for private willing, private judgment and private conscience... In the fully developed state the citizens perceive a coincidence between what the state requires of them and what they require in order to be free.”(Frost, 1996: 149-150)

Frost can move this argument to the international level when he notes that “at the level of international affairs the state is an individual *vis-à-vis* other states and its

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)

individuality is reciprocally bound up with the individuality of its citizens... The point here is that within the autonomous state all individuals are constituted as free citizens, but for their citizenship to be fully actualized their state needs to be recognized by other states as autonomous.” (Frost, 1996: 151)

An international system, Bull argued, “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.” (1977: 10) It is possible to move beyond this stage to one of international society, but this occurs only when there “exists 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.” (1977: 13)

Therefore, the picture that emerges is of an international society populated by states which possess internal legitimacy, forged through a series of bargains between the state and its citizens. John Ruggie points to this, in the fact that “the chief characteristic of the modern system of territorial rule is the consolidation of all parcelized and personalized authority into one public realm. This consolidation entailed two fundamental spatial demarcations: between public and private realms and between internal and external realms.” (Ruggie, 1993: 151) Moreover, given the domestic nature of this bargain, a norm of non-intervention is implicit within the international system. As Stephen Krasner has argued, “the fundamental norm... is that states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate

behavior.” (Krasner, 1999: 20) Thus, the state emerges as the sole, and inviolable, legitimate claimant to an individual’s loyalty and support.

An understanding developed with the Peace of Westphalia, and the post-Westphalian era, that if states violate the bargains that the state makes with its citizens, and undermines its legitimacy, citizens should have at least some form of right to leave such a state. This understanding was what resulted in the rather strange behavior of states and other actors at the time of the *Revocation of the Edict of Nantes*, and conditioned the realization of the major states in the system, post World War II, that an international entrenchment of this system was necessary to prevent catastrophes such as the Holocaust from occurring again.

III. Changes Within the International System

Two elements, therefore, were functioning in order to explain the relief valve. The first was the series of state-citizen bargains occurring within each state in the international system in which states were recognized as the sole source of authority in exchange for citizens receiving rights, which have evolved over time. The second was that citizens who fled states that were unwilling or unable to uphold these bargains were generally accepted by other states as refugees. Such bargains can be recast in the terminology of legitimacy, and consequently these two elements meant that states in the system needed both internal legitimacy, effectiveness, or internal sovereignty, as Bull refers to it, “which means supremacy over all other authorities within that territory and population,” (Bull, 1977: 7) and external sovereignty, referring not to “supremacy but independence of outside authorities.” (Bull, 1977:8)

Decolonization fundamentally altered the balance by removing the need for all states to possess internal sovereignty. Robert Jackson notes that decolonization fundamentally increased inequality “by bringing into existence a large number of sovereign governments which are limited in their capacity or desire to provide civil and socioeconomic goods for their populations. They are supported by international society like all others, however. The actual outcome in such cases is therefore a reversal of the postulated traditional relationship... whereby international relations serves the ultimate purpose of protecting the political goods of sovereign states.” (Jackson, 1990: 8)

The role of external sovereignty, while it had existed for centuries, was codified in the Montevideo Convention of 1933, which included four criteria for recognition: “the entity aspiring to be regarded as a state must possess a permanent population; it must occupy a clearly defined territory; over its extent must operate an effective government; and it must display a capacity to engage in international relations- such capacity including ability to fulfill international treaty obligations...at the crux of the Montevideo criteria lay the concepts of effectiveness and territoriality.”(Grant, 1999: 5-6)

However, with decolonization came a decline in the importance that was attributed to internal sovereignty and to operation of effective government. External recognition was sufficient, and ensured that domestic structures of government were not only insulated from international scrutiny but Cold War politics often assured that these structures did not need domestic support. The result of this was that leaders sought any possible outside support to maintain their rule and acquiescence of the major sources of power within the state. (Clapham, 1996) This meant that many of these new states had no

need to make any effective bargains with their own populations and could instead rule through repression, mistrust, and naked coercion.

Why did this occur? With an international system, or international society, comes a requirement to both ignore unlike units and accept like units. Hendrik Spruyt has noted that “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: 17) Consequently, decolonization led to weak states, those which lack internal legitimacy or sovereignty, being accepted into the system, simply because there was no other way of accommodating them.

Hedley Bull saw that the weakness of particular states could adversely affect the international system. As Alderson and Hurrell have noted, Bull saw the traditional foundations of international society being undermined, not just by the Cold War, but also because of the “erosion of states and of state capacity. As the international society expanded through the process of European expansion and decolonization, and as the state became the dominant form of political organization, so the problem of weak and fragile states became more important.” (Bull, Alderson, and Hurrell, 2000: 12) Thus Bull noted that these states are “governments or regimes, and exercise power over persons and control over territory, but they do not possess authority, as distinct from mere power.”(Bull and Watson, 1984: 430)

This renders these states categorically different from most modern, developed states, and results in two fundamental changes in the nature of the international system.

To begin with, Alderson and Hurrell have noted that “for a state-centered conception of international order, it is clearly of immense importance if weak states are no longer able to provide localized order; if their own weakness, lack of legitimacy and inability to provide security or to satisfy demands for economic development constantly threaten internal instability which, in turn, may spill over into the international arena; and if they are unable to cooperate effectively in pursuit of broader common purposes.”(Bull, Alderson, and Hurrell, 2000: 13) The consequence of this is that regimes that may have functioned well before hand, such as the international refugee regime, may be overwhelmed by new demands placed on them because of these states.

The second consequence of this is that without legitimacy, not only has the state been forced to bargain with its citizens, but the state also feels no real emotive or empathetic connection to its own population, nor does it require it in order to exist. Thus these states may allow or force their own populations to leave or take more extreme action against them.

Therefore, currently there are in fact two types of states in the international system, both of whom deal with refugees in different ways. The first type is the traditional, or ‘strong’ state, which possesses both internal and external sovereignty, and thus a high degree of internal legitimacy. These states create few refugees.⁹ These states, further, have generally abided by the terms of the refugee institution throughout its history. However, during transition periods, these states often back away from its precepts. Thus, in the interwar period, more and more rigid barriers were set in place to prevent refugees from being able to enter these states. Today, these states have begun to

⁹ It can also be suggested that these states now have little need of the refugee regime themselves, which may be one reason they show little compunction in undermining the regime.

similarly challenge the existing refugee regime at its margins, though no strong state has out and out refused to follow the *Refugee Convention*.

Weak states, by contrast, are those who possess external sovereignty, in that they are recognized as states in the international system, but lack internal legitimacy and other manifestations of ‘stateness’ such as institutional capacity and rule of law. These states in general are more repressive, and are therefore more prone to produce refugees.¹⁰ Further, because of the lack of other institutional capacities, they are more prone to react against undesirables with coercive force. Thus, these states may produce refugees who flee the states, or who are pushed out. Finally, because of their proximity to other weak states, these states, all of whom are in the developing world, host the vast majority of the world’s refugee population. These states host these refugees either because they feel a moral obligation to do so, can benefit from doing so, or can not control their borders.

The emergence of these weak states since the 1960s, particularly in such numbers, has dealt a substantial challenge to the refugee institution. However, does this mean that the relief valve for sovereignty has been undermined, or is it merely transitioning into another form, something that occurred with its creation after the Peace of Westphalia, then again in the interwar period and after World War II? As the above discussion has illustrated, these transitions took a great deal of time- decades in both cases- and therefore are difficult to easily highlight.

The regime today is undergoing a third transition, however, the major question is whether it is undergoing purposive or configurative change. For Reus-Smit, a purposive change is a redefinition of the moral purpose of the state, leading to shifts in the meaning

¹⁰ There is, of course, substantial differences between the state and the governing regime. Thus, it is possible to have a state with a strong governing regime, such as North Korea or Burma, yet which is a weak state by this definition.

of sovereignty and procedural justice. The transition from the absolutist to the modern systems was just such a systems change.” Configurative change “entails not only a shift in the moral purpose undergirding a system of rule, but also a change in the organizing principle that governs the distribution of authority. The shift from feudalism to absolutism was this type of systems change.”(Reus-Smit, 1999: 164) A purposive change within the international refugee regime would be a shift in the meaning of the regime, demonstrated through a change in the application of such items like the refugee regime. There is no question that this is occurring today. Such a change would be exemplified by a change in the nature of the regime, and perhaps its demise and replacement with a third, and new, regime. The deeper question, however, is whether a configurative change is occurring? Such a change would actually alter a fundamental institution of the sovereign state system, potentially causing reverberations throughout the system itself.

The international system has already been compromised to a degree by the fact that two different types of states co-exist within it. However, it is also host to a number of different actors beyond the states themselves who appear to have positive reinforcing skills within the international refugee regime, in particular intergovernmental organizations such as UNHCR and non-governmental organizations.

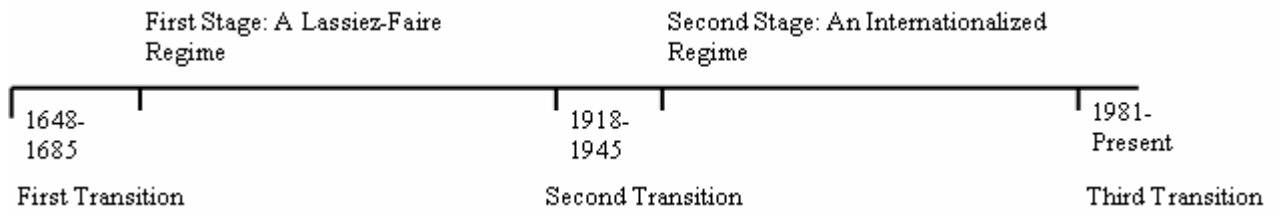
IV. A Brief History of Refugees

Does this theoretical framework fit the actual history of the refugee institution? The phenomenon of people forced to flee their homes has always existed, and rights of asylum can be traced back to the Ancient Greeks.(Schuster, 2002: 41)¹¹ Refugees, however, have only emerged in the period after the Peace of Westphalia, in conjunction

¹¹ 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)

with the emergence of the modern state system. As noted above, this institution or relief valve has also gone through, in effect, three transitions and two stages of existence. These two stages, I suggest, constitute in effect different regimes which had different principles, rules and norms.

Figure 1: The Three Transitions of the Refugee Institution



i. The First Transition: Emergence of the Institution and the Laissez-Faire Regime

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 the Peace, few international norms existed. She notes that when the expulsion of the Jews from Spain occurred in the late 15th Century, “the most basic reciprocal international norm was the right of sovereigns to make war. Beyond this, no other shared norms existed.” (Rae, 2002: 301) 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. 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)¹²

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 foundation¹³ by arguing the right of *jus emigrandi*- the right to emigrate with one’s personal property. (Golden, 1988: 17)

¹² 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) For him, the transition to the modern state system occurred only with the Age of Revolutions, from 1776 until 1848, when “a liberal-constitutionalist standard of civilization emerged as the dominant measure of legitimate statehood...” (Reus-Smit, 1999: 153)

¹³ 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)

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 following the Revocation of the Edict of Nantes by Louis XIV. The Revocation was the final step in a series of events, and this 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) 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)

It is extraordinary interesting that 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)

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.

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)

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 Laura 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)¹⁴

¹⁴ 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)

Similarly, Barnett and Finnemore have argued that “prior to the twentieth century, decisions by governments to grant asylum were usually ad hoc and based on their attitude toward those seeking asylum. There was no standardized procedure for determining who was and was not to be given asylum.” (2004: 76)¹⁵

ii. The Second Transition and the Internationalization of the Regime

The *lassiez-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)¹⁶ 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

¹⁵ They base their argument in part on the fact that “that until the twentieth century states did not intensively regulate population flows.” (2004: 76) John Torpey suggests, however, that states had been interested in controlling their populations long before this, and points to laws barring citizens from leaving Great Britain, Germany, and France from the 16th and 17th centuries. He suggests, rather, that during the 18th century that was a considerable relaxation of such policies, which increased again only with the end of the period of open migration during the early years of the 20th century. (Torpey, 2000) I suggest that this pattern represents a key indicator of the existence of a recognized fundamental regime whereby states in international society accepted that citizens should be allowed to leave.

¹⁶ 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)

creation of the League of Nations High Commissioner for Refugees (HCR), under direction of Fridthof Nansen. (Barnett, 2002: 4)

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 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)

These 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)

The *Convention* created two major norms. The norm of non-refoulement 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-refoulement 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)

iii. The Third Transition

The refugee regime has been challenged by decolonization and the end of the Cold War, which has resulted in the humanitarian response evolving “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)

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 are 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)

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 Sührke, 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-refoulement 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)

The puzzle is, quite simply, why does this regime continue to persevere? Hans and Sührke, for example, have noted that to begin with, states are unlikely to cooperate to create a refugee regime, as opposed to other regimes:

The requirements for sharing of a more genuine kind can be deduced by juxtaposing the present international refugee regime with regimes established to deal with unregulated transborder flows of other kinds, i.e. relating to the environment. International environmental regimes are based on a

specific commonality of interest. States participate because they cannot insulate themselves from the consequences of a given problem. As a result, a beggar-thy-neighbour policy tactic, familiar from trade and refugee regimes, is not possible. States cannot close their borders against acid rain, for instance, thereby shifting the costs to their neighbours. Under these circumstances, cooperation promises 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, one that can be explained by analyzing the bonds between the state and the citizen.

Additionally, this transition has been marked by the addition of two new sets of independent actors: international organizations, such as the UNHCR; and international non-governmental organizations. Barnett and Finnemore have argued that international organizations can play unique, independent roles from states in the international system, and more importantly that they possess both regulative and constitutive power:

With their constitutive power, IOs [international organizations] can reconfigure social space. When IOs create and extend new categories, they can draw connections and establish networks between previously disconnected actors, establish new forms of horizontal and vertical lineages, and create new categories of action that shape new kinds of actors and establish new sorts of

activities...Constitutive power also enables IOs to define new interests and new tasks. In this way they create new interlocutors and new constituencies, both for themselves and for other actors, notably states. Finally constitutive power allows IOs to persuade other states and other actors to accept new preferences and value new policy goals.(Barnett and Finnemore, 2004: 164)

They argue that UNHCR, for example, effectively built up authority independent of states, and that it used this authority “to both define the category of refugees and expand the organization’s geographical scope and orbit of responsibilities... the power of UNHCR was both constitutive and regulative: it involved defining the category of refugees so that it applied to more people in more places, and it allowed the organization to help regulate how states dealt with refugees and to provide protection in a fuller sense to displaced populations.” (Barnett and Finnemore, 2004: 74) As the international community becomes increasingly unwilling to accept refugees, UNHCR and other institutions have sought to continue to provide assistance to refugees, while also seeking to a degree to prevent refugee flows in order to satisfy requirements thrust on them by strong states. This has, in some cases, led to policies of intervention.

Barnett and Finnemore’s work supports that of a number of writers who point to the independent effects that transnational civil society, such as NGOs, can play in altering state practice and policy. Richard Price has defined transnational civil society as “an umbrella term...It refers to self-organized advocacy groups that undertake voluntary collective action across state borders in pursuit of what they deem the wider public interest.”(Price, 2003: 580) Therefore, these actors all play important independent roles with regards to refugees, both in providing assistance directly to them (NGOs now provide the bulk of assistance, and in many cases are the conduits through which UNHCR and governmental aid agencies provide assistance) as well as advocating on behalf of refugees. While these roles are not unique to this period in history –after all, the

International Committee of the Red Cross existed during the interwar period, and the Roman Catholic Church played a substantial independent role in the years following the Peace of Westphalia- these other organizations have had substantial, independent effects on the nature of the existing regime.

Thus, this transition is marked by two independent sets of actors attempting to alter the regime. The states in the international system, particularly strong states, are striving to limit the regime and to restore a pattern of differentiation whereby they need only accommodate refugees displaced by state violence and who, in most cases, remain in the developing world. The transnational civil society community, by contrast, seeks to expand the conception of refugees beyond the definition enshrined in the 1951 *Refugee Convention* to include all those who have been displaced by violence, regardless of its origin.

V. Conclusions

The existence of a fundamental institution with respect to displacement suggests that not only are refugees not a problem solely of recent times, but that they are also an integral part of the society of states. By accepting that individuals had a right to leave their own state, states in the system provided an early form of human rights, but also enshrined the existence of a relief valve in the international system. This limited violence and thereby assisted states' goals of preserving order. However, over the long term, this fundamental institution played an integral part as a mutually constitutive part of state's identities- over time, this became part of state's common identities, and in particular was seen as a integral part of the way legitimate states should act.

The introduction of dislike units into this system through the process of decolonization undermined this common identity, and undermined the existing refugee regime. Evolving conceptions of state sovereignty and human rights, however, has ensured that at least to a degree states continue to recognize the importance of the right to be able to leave one's own state.

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