

A RIGHT TO LEAVE
REFUGEES, STATES, AND INTERNATIONAL SOCIETY

by

PHILIP ORCHARD

B.A. (Double Major), The University of British Columbia, 1999
M.A., Memorial University of Newfoundland and Labrador, 2001

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ABSTRACT

This dissertation investigates regime-based efforts by states to cooperate in providing assistance and protection to refugees since 1648. It argues from a constructivist perspective that state interests and identities are shaped both by other actors in the international system - including norm entrepreneurs, non-governmental organizations, and international organizations - and by the broader normative environment. Refugees are a by-product of this environment. Fundamental institutions - including territoriality, popular sovereignty, and international law - formed a system in which exit was one of the few mechanisms of survival for those who were religiously and politically persecuted.

This led states to recognize that people who were so persecuted were different from ordinary migrants and had a right to flee their own state and seek accommodation elsewhere. States recognized this right to leave, but did not recognize a requirement that any given state had a responsibility to accept these refugees. This contradiction creates a dilemma in international relations, one which states have sought to solve through international cooperation.

The dissertation explores policy change within the United States and Great Britain at the international and domestic levels in order to understand the tensions within current refugee protection efforts. Three regimes, based in different normative understandings, have framed state cooperation. In the first, during the 19th century, refugees were granted protections under domestic and then bilateral law through extradition treaties. The second, in the interwar period, saw states taught by norm entrepreneurs that multilateral organizations could successfully assist refugees, though states remained unwilling to provide blanket assistance and be bound by international law. These issues led to the failure of states to accommodate Jewish refugees fleeing from Germany in the 1930s. The third, since the Second World War, had a greater consistency among its norms, especially recognition by states of the need for international law. Once again, this process was shaped by other actors, including the United Nations High Commissioner for Refugees (UNHCR). This regime has been challenged by increased refugee numbers and restrictions on the part of states, but its central purpose remains robust due to the actions of actors such as the UNHCR.

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LIST OF ABBREVIATIONS

| | |
|--------|---|
| CAP | United Nations Consolidated Appeals Process |
| DHS | United States Department of Homeland Security |
| DP | Displaced Person |
| ECOSOC | United Nation Economic and Social Council |
| ELV | Exceptional Leave to Remain |
| EU | European Union |
| FRUS | <u>Foreign Relations of the United States</u> |
| HCR | High Commissioner for Refugees (League of Nations) |
| ICEM | Intergovernmental Committee on Migration |
| ICRC | International Committee of the Red Cross |
| IFRC | International Federation of the Red Cross and Red Crescent Societies |
| IGCR | Intergovernmental Committee on Refugees |
| IDP | Internally Displaced Person |
| INS | United States Immigration and Naturalization Service |
| IO | International Organization |
| IRO | International Refugee Organization |
| LNA | League of Nations Archives |
| LPC | ‘likely to be a public charge’ |
| NATO | North Atlantic Treaty Organization |
| NGO | Non-Governmental Organization |
| OAU | Organization for African Unity |
| OCHA | United Nations Office for the Coordination of Humanitarian Assistance |
| POW | Prisoner of War |
| PRO FO | Public Record Office [United Kingdom] Foreign Office Records |
| UN | United Nations |
| UNHCR | United Nations High Commissioner for Refugees |
| UNRRA | United Nations Relief and Rehabilitation Administration |
| UNRWA | United Nations Relief Works Agency |
| US | United States of America |
| USEP | United States Escapee Program |
| USNARA | United States National Archives and Records Administration |
| USSR | Union of Soviet Socialist Republics |
| ROC | Republic of China |
| RRA | Refugee Relief Act, 1953 |
| SHAEF | Supreme Headquarters, Allied Expeditionary Force |
| STC | Safe Third Country |
| WRB | War Refugee Board |

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DEDICATION

This dissertation is dedicated to my mother, Dr. Carole Anne Orchard and, in memory, to my father Dr. Donald Bryce Orchard

Chapter 1: Introduction- A Right to Leave

1.1 Introduction

The protection of refugees is a long-running and enduring practice among states in international society. When thirteen states met to negotiate the 1951 Convention Relating to the Status of Refugees, they agreed on a clear definition of a refugee as:

Any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.¹

The creation of the Convention, and the associated creation of the United Nations High Commissioner for Refugees (UNHCR), reinforced the view of refugees as a problem for the international community, one which required states to commit to a cooperative solution. This was a watershed event. Yet it did not mark the beginnings of state cooperation around the issue or even first recognition of refugees as an international ‘problem.’ Rather, international cooperation can be traced back three centuries, to the Peace of Westphalia in 1648. Within this history, we can observe a fascinating mix of consistency and change in state practices, a mix that different theoretical approaches within International Relations have trouble explaining. The central goal of this dissertation is to offer an explanatory framework which can encompass variegated state behaviour towards refugees over this period.

On one hand, state practice towards refugees since the Peace of Westphalia was signed in 1648 has consistently reflected two clear principles: that refugees should be allowed to leave their own state and that they require some form of protection since they can

¹ Article 1 A. (2), Convention Relating to the Status of Refugees. It should be noted that this definition also made reference to prior international Arrangements regarding refugees negotiated under the auspices of the League of Nations, as well as limiting refugee status to individuals displaced by events prior to 1 January 1951 and states could decide whether to apply this definition only to Europe, or to Europe and elsewhere. These latter limitations were removed by the 1967 Refugee Protocol. The Arrangement system will be examined in Chapter 5, while the negotiations around the Refugee Convention and Protocol are examined in Chapter 7.

no longer count on the protection of their state and are outside of its territory. This view is readily apparent in the 1951 Convention, but also in earlier international Conventions, such as the 1933 Refugee Convention, and in domestic law, such as the 1832 French law which defined refugees as ‘unprotected persons.’²

On the other hand, state practice towards refugees since 1648 has emerged in combative and incoherent ways, with important changes occurring over time. These include which individuals or groups are considered to be refugees; 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, by voluntary organizations, or if at all.

Refugees, consequently, pose a significant puzzle for scholars of international relations: why did some practices towards refugees remain consistent over time while other practices were fluid, mutable, and contradictory? Traditional international explanations, focused on the role played by individual regimes or norms, cannot readily explain this.³ Similarly, statist explanations not only neglect the role of other domestic and international actors, but also neglect the power of the international environment to affect the behaviour, identities, interests, capabilities and even existence of actors. (Jepperson, et al. 1996: 41, Milner 1997: 244) Rather, in order to understand both the persistence of some patterns of state behaviour and significant variations over time in other patterns within this issue area, an explanation has to focus both on structures and agents.

² This is expanded on in Chapter 4.

³ Regime-based approaches to the study of the refugee issue-area have generally been limited either to the post-1951 period or to the start of the League of Nations High Commissioner for Refugees. (Skran 1988, 1995, Loescher 2001) This focus on formal international organizations neglects other normative understandings shared by states, as well as “periods of discontinuities and even breaks in the historical continuity of the refugee regime.” (Soguk 1999: 273, n. 3)

This dissertation explores the origins and evolution of contemporary practices towards refugees. Exploring this history not only sheds light on the development of international refugee policy; it is also a fascinating case for study of international relations. Refugees are not a typical issue in that the problem can not easily be solved through state collaboration or coordination. The production of refugees by states has been an on-going phenomenon, though refugee numbers, as well as who is identified as refugees, have varied significantly. In fact, as I will show in this dissertation, few other issues have as long, and complicated, a history of international cooperation. By studying state practice towards refugees, and by understanding the interplay between international norms and state policy towards refugees, we can shed light on how cooperation between states first emerges through both formal and informal mechanisms and also how cooperation can ebb and flow within a significant and contentious issue area.

Refugees are important because they are part of a small set of actors in international society that do not conveniently fit into the Westphalian system based around the primacy of territorially-based states. Today, these actors include multinational corporations, transnational terrorists, and increasingly humanitarian international and non-governmental organizations. Refugees do not represent a breakdown in the Westphalian system however. Rather, as Emma Haddad suggests, “they 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) She is not alone in placing refugees within international society. Hedley Bull, too, noted 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... (2002: 80)

While refugees may be an integral component of the international state system and of international society, they are also a problem because, as Bruce Cronin has argued, the “international system is not equipped to deal with individuals or groups who are not under the authority or protection of a state.” (2003: 152) Thus they fall within the sphere of transterritorial problems, ones which occur in non-territorial functional space and pose issues for international society. (see Ruggie 1998: 191) The solutions adopted by states to regulate this problem have varied significantly over time. And yet state practice has remained bound within a set of basic institutional practices, structural elements of the international society which emerged in the centuries following the Peace of Westphalia.

1.2 Explaining Refugee Cooperation

In this dissertation, I develop the argument that international cooperation towards refugees over this long period can only be explained through the independent influences of different sets of international structures and through the efforts of norm entrepreneurs at the international and domestic levels. States’ policies tend to be relatively stable, and vary significantly only after a crisis event occurs, defined in this case as a dramatic and sustained change in the nature or numbers of refugees fleeing their own country that causes states to question pre-existing norms and policies.

Following such an event, norm entrepreneurs can succeed in articulating and advocating alternative norms towards refugee protection. Their likelihood of success depends significantly on whether these new norms reflect pre-existing domestic understandings. These understandings are variable and over this time period have fallen within two broad rubrics: favouring humanitarianism or favouring sovereignty and restrictionist policies. Norms favouring refugee protection will be more easily internalized when a state’s domestic

understanding favours humanitarianism; while they will be much more difficult to internalize when domestic understandings favour restrictionism. Even so, these understandings can change. The strongest periods of international cooperation towards refugees have been when international norms have been framed by norm entrepreneurs in such a way that humanitarianism and sovereignty concerns are treated together and mutually reinforced.

Importantly, we can only understand state practice within the scope of the refugee issue-area by examining the interplay between three different types of structures - fundamental institutions, regimes, and norms - in creating a space in which action is possible. Equally important are the activities of international actors within this space, a category which sees states as the primary actors but also accounts for independent actions on the part of international organizations, non-governmental organizations, and norm-entrepreneurs.

1.2.1 The Role of Fundamental Institutions

In order to reach this conclusion, I develop two separate components to my argument, and these points are elaborated in the next chapter. The first component is that four fundamental institutions played a key role in framing how states responded to refugees following the Peace of Westphalia. Fundamental institutions not only provide the basic rules of the game, regulating how states relate to one another, but also serve to constitute the actors, thus also defining who the players of the game are. (Fabry 1998: 39, Holsti 2004: 113, Buzan 2004: 176, Reus-Smit 1999) Together, they create the background in which states function and they frame refugees as an international problem. These four institutions - territoriality, international law, popular sovereignty and multilateralism - served to configure political space at the domestic and international levels so that there was an incentive for

those concerned about refugees to cultivate solutions which resulted in state cooperation at first the tacit and then formal levels.

Territoriality ‘created’ the problem, by linking citizenship status to states and providing no easy way to reconcile those who sought to flee their own state with status in the international system. International law, popular sovereignty, and multilateralism all played key roles in providing a normative background in which states recognized refugees as a unique group and sought to extend to them a basic level of protection. It is within this political space that change has occurred. An account rooted in fundamental institutions explains long-term consistency. However, it cannot explain change. Fundamental institutions do not define what solution is appropriate, only providing a range within which states can operate. They provide only an indeterminate explanation for transitions and adaptations.

1.2.2 The Role of Regimes

The second component of the argument focuses on the process of change within this space, based in a constructivist explanation focused on the role played by international norms and regimes in altering and shaping states’ identities.⁴ Over time, state practices, rooted in normative beliefs, became institutionalized within a regime. A constructivist approach provides states and other actors with agency as norm entrepreneurs, enabling change within a regime, as well as the transformation or replacement of an existing regime, to be explained.

Initially, a thin normative understanding was shaped by the Peace of Westphalia in 1648 and by the reactions of states to the Revocation of the Edict of Nantes in France in

⁴ Norms are shared understandings of appropriate behaviour for actors with a given identity which isolates a single strand of behaviour. (Jepperson, et al. 1996: 52, Finnemore and Sikkink 1998: 891) I highlight the fact that they do isolate single behavioural elements to differentiate my view from broader views of norms, such as Woods’ suggestion that “constitute the international game by determining who the actors are, what rules they must follow if they wish to ensure that particular consequences follow from specific acts... can be established and transferred.” (1996: 26-7)

1685, which triggered the flight of 200,000 French Huguenots. It is through this understanding that refugees were considered as people in a unique situation who should be allowed to leave their own state. Gradually, states incorporated new understandings of refugee protection into practice. In some cases, this led to some norms - such as a right to leave and more recently, the right of non-refoulement, or to not be returned involuntarily to a state where a refugee might face persecution - acquiring a greater resonance and taking on a foundational role within state practice. These norms provided a basis for subsequent norms and for increased complexity in state behaviour. Other norms either replaced existing understandings or, alternatively, built upon this foundation.

Regimes reflect the basic understandings embodied within fundamental institutions (Reus-Smit 1999: 14-15, Buzan 2004) but also create webs of meaning by linking together individual norms. (Neufeld 1993: 43, Hasenclever, et al. 1997: 165)⁵ The regime serves to bundle together what might be otherwise disparate individual norms in order to provide a clear sense of the scope of the international behaviour and how states within international society should deal with the problem. Thus, regimes provide a mechanism through which the appropriate standards of behaviour suggested by the individual norms are linked together to create a response within the complexity of the issue area. Since a regime provides this linkage, it brings an increased regularity to state practices than would otherwise be the case.

⁵ The view elaborated here differs from the traditional definition of regimes as being 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) While International Relations has broadly eschewed the ‘regime’ term (though see Hasenclever, et al. 1997) in favour of a view of institutions as “persistent and connected sets of rules, formal and informal, that prescribe behavioural roles, constrain activity and shape expectations,” (Keohane 1990: 732) such a change removes a degree of specificity. Both regimes and fundamental institutions, while operating at different levels, are rule-based, and become subsumed under this definition. In order to unpack the differing effects that each have, I continue to rely on the terms ‘regimes’ and ‘fundamental institutions’ each of which are examples of the broader category of institutions. For a critique of these definitional approaches, see Duffield (2007).

1.2.3 The Role of Crises and a Punctured Equilibrium Model

A given regime can be challenged by crises or shocks which redefine the scope of the problem. For state cooperation towards refugees, two significant sources of crises have been either a dramatic change in the nature of refugees - such as a shift from religious to political persecution as a cause of flight - or an increase in the numbers of refugees fleeing their own state and seeking protection elsewhere. In making this argument, I draw on a punctured equilibrium model. Stephen Krasner first suggested that such a model, which draws on the work of evolutionary biologists Stephen Jay Gould and Niles Eldredge, could be applicable to political science. The model anticipates “short bursts of rapid institutional change followed by long period of stasis...” (Krasner 1984: 242, see also Goertz 2003: 51) Change does not occur incrementally. At the domestic level, “complex interactive political systems,” as Jones, Baumgartner and True note, “do not react slowly and automatically to changing perceptions or conditions; rather, it takes increasing pressure and sometime a crisis atmosphere to dislodge established ways of thinking about policies.” (Jones, et al. 1998: 2)

Such a model, Gary Goertz argues, is equally applicable to the process of institution-formation at the international level. He suggests that rapid change ends with the adoption of new norms and that stasis re-emerges as this norm is used time and again in decision-making. Institutionalization will cause the new norm to fade “into the background and relative obscurity until something provokes a re-evaluation of that process.” (2003: 51) Therefore, a key contention of this dissertation is that regimes, like norms, will remain relatively stable until crises prompt states to re-evaluate them.

Crisis events cause states to question the prevailing regime since it no longer seems to be able to provide a clear sense of the scope of the international problem and adequate

standards for states to follow. (Florini 1996: 378, Price 1998: 616, Reus-Smit 2004: 288, Legro 2005: 11-7) Therefore, crises serve to expose pre-existing or new contradictions within the regime. Faced by the perceived breakdown of the regime, states will engage in negotiations with other states and actors in an effort to find a new solution.

Once a crisis occurs, states engage in an information search in order to reconcile their normative beliefs to the changed reality of the situation. What alternatives states may accept, however, is unclear. New norms emerge within a contested environment. (Jepperson, et al. 1996) It is during this period that norm entrepreneurs at either the international or domestic levels can most effectively step forward to offer their own normative agenda. The success of their efforts depends on how receptive states are to these new beliefs, with receptiveness dependent on congruence with domestic understandings, including norms and domestic institutions. (Finnemore and Sikkink 1998: 893, Risse and Sikkink 1999, Checkel 1999)

1.2.4 The Role of Interests and Norms

For the purposes of this dissertation, I frame these views within two broad rubrics. Humanitarianism refers to the state's acceptance of humanitarian obligations and principles towards refugees. Sovereignty refers to perceptions that refugee admissions and protection might compromise the state's sovereignty and other national interests. These can be contradictory: Myron Weiner noted that there is often a moral contradiction "between the notion that emigration is widely regarded as a matter of human rights... while immigration is regarded as a matter of national sovereignty." (1996: 171) But they need not be. During the periods that have seen the most stable refugee policies, including the 19th century and the post-Second World War period, both views were framed as mutually reinforcing.

When congruence between these views and new norms exists, or when these new norms are in an area where there are no pre-existing understandings at the domestic level, new international norms will be readily adopted. (Thomas 2001: 8-15, see also Cortell and Davis 1996: 452) By contrast, where discord exists, I argue that three possible courses of action are possible. The first is that the new international norm will not be internalized. The second is that the norm is internalized, but is relatively weak. In cases where the norm's prescription contradicts domestic norms or interests, the domestic norms will be accepted and the international norm may be fatally weakened. The third is that the norm may be internalized only through active persuasion on the part of domestic norm entrepreneurs. This process succeeds only when the norm is internalized by policy-makers, the public, and institutionalized in domestic law. In particular, opposition from domestic veto players needs to be overcome,⁶ even by norm entrepreneurs within government. Therefore, it is possible though difficult for international norms which conflict with domestic interests, norms, and institutions to be adopted.

In order to understand how new norms are adopted with respect to refugees in international society, how basic understandings held by states shift, I examine changes at both the international and domestic levels. My focus is on two states that had the most widespread influence over this time period, both as norm generators and promoters and contributors to the successive regimes: the United States and Great Britain. I will also focus on other states which played key roles in developing new norms, including France and Belgium in the 19th century, but will not provide a complete examination of their refugee policies at either the international or domestic levels. As I will demonstrate in the successive

⁶ The role of veto players is discussed in more detail in Chapter 2. As Tsebelis notes, however, they vary from other domestic institutions in that they are, "individual or collective decision-makers whose agreement is required for the change of the status quo," (2000: 442, my underlining, Tsebelis 2002)

chapters, both states were crucial in shaping the initial understandings of refugees as people in need of international protection and in building the successive international regimes and formal architecture including international law and organizations. By examining the formation of domestic refugee policy in both states, I uncover why even strong rhetorical commitments to new norms and to the international regimes made by these states at the international level can be blocked or undermined.

This process can be reversed, with domestic norms offering prescriptions to a state, which the state then pushes at the international level as part of a normative agenda. In this case, the state itself serves as a norm entrepreneur, arguing in favour of a normative position already accepted as correct behaviour by its domestic institutions and public. Success, here, can be measured by whether other states also adopt the norm.

In summary, fundamental institutions served to initially problematize refugees and created a political space in which a cooperative solution was possible. As states internalized normative understandings concerning refugees, a process driven initially by these institutions, they created regimes which elaborated the scope of the problem and provided guides to correct behaviour. These regimes were susceptible to external shocks which can cause states to question the underlying normative understandings. During such a transition phase, the actions of norm entrepreneurs are critical not only in providing states with a clear alternative, but also to ensure that this normative alternative becomes internalized.

1.3 A Historical Overview of International Refugee Regimes

Therefore, the historical contention in this dissertation is that state cooperation with regard to refugees can be understood as occurring within three separate and successive regimes. Each of these regimes, while providing for international cooperation towards

refugees, was built around different normative understandings. Each has also been challenged by crisis events, which caused the collapse of the first two regimes and is in danger of causing the collapse of the current regime. While I briefly summarize each regime below, I build these arguments in the successive chapters.

Beginning in 1648, states began to apply a set of practices when confronted by refugee movements, practices which over time became important norms in the international system. These included recognition that refugees were a unique group, that they should be allowed to leave their own state, and that they needed some form of alternative protection rooted in domestic law. Yet as state practices these norms originated mainly at the domestic level and were applied sporadically and inconsistently. There was no regime because there was no international cooperation or clear understanding of the scope of the problem. The first true international regime occurred after the French Revolution. In this regime, which existed from 1789 until 1914, states began to apply pre-existing practices systematically; recognized political, as well as religious refugees; and began to associate the protection of refugees with legitimate practices in international society. Even so, this remained a tacit regime, a ‘laissez-faire’ regime where states had no formal constraints on their behaviour, and cooperation was marked primarily by diplomatic correspondence and bilateral negotiations rather than multilateral cooperation or negotiations of international legal instruments.

The second regime lasted from 1921 until 1939. It was marked both by extensive formal international cooperation and by attempts to internationalize the approach to the refugee problem. This significant change was triggered both due to a dramatic increase in the number of refugees, particularly due to the First World War and the Russian Revolution, but also by the introduction of significant immigration restrictions in a number of states. Due to

the efforts of norm entrepreneurs including Gustave Ador, the head of the International Committee of the Red Cross, members of the League of Nations Secretariat, and Fridthof Nansen, who became the first High Commissioner for Refugees, states decided that a multilateral solution was appropriate. This led to the creation of an international organization, the League of Nations High Commissioner for Refugees, to ensure that refugees received international legal protections and could be integrated into their host states or resettled elsewhere. And yet these new norms, which highlighted refugee protection in international law as well as a need for resettlement activities, fit in poorly with the consensus basis of the League and contradicted existing restrictionist domestic immigration. The result was that as refugee numbers grew in the 1930s, the League was poorly equipped to protect refugees until the system broke down with the advent of the Second World War.

The third regime, from 1946 to the present, built upon the norms established in the interwar period, including the acceptance that only international organizations could adequately protect refugees. The negotiations of the 1951 Refugee Convention and the creation of the UNHCR established a true multilateral basis for the regime, anchoring protection in binding international law and, in particular, the concept of non-refoulement. Moreover, the UNHCR itself played a key role as a norm entrepreneur. It first convinced states of the need to also provide assistance in a multilateral manner, rather than the ad hoc and privatized systems that had existed before. It then convinced them, with the 1967 Refugee Protocol to create a truly universal, rather than Eurocentric, regime.

This regime was strong, with a clear and consistent normative basis. Even so, as refugee numbers increased significantly since the 1970s, states in the developed world have sought to challenge these norms in several ways. While they follow the letter of the 1951

Convention definition, this is increasingly a limited definition, accepting only that state-based persecution warrants refugee protection, rather than persecution by non-state actors or flight from situations of generalized violence such as civil wars and state failure. At first individually and then multilaterally, these states have also introduced significant border controls and extraterritorial restrictions. This has meant that the primary notion of refugees as a global issue has become compromised, as the vast majority of refugees remain under the care of states in the developing world, states which increasingly are unwilling to accept this burden. Thus, while the post-Second World War regime was initially strong and effective, state policies directed at preventing the entry of refugees and other asylum seekers have fatally undermined its normative basis. The key points of this three-stage evolution are summarized in Figure 1.1 below.

Figure 1.1: Three Regimes and their Key Norms

| Emergence | First Regime: Laissez-Faire | Second Regime: Attempted International- ization | | Third Regime: Effective International- | Regime Break- down |
|--|--|--|--|---|--------------------------|
| 1648-1789 | 1789-1919 | 1921-1939 | 1939-1946 Interregnum | 1946-1989 | 1989- Present |
| 1) Refugees recognized as different from other migrants. 2) Right to leave for religious refugees recognized. 3) Basis of protections in domestic law first established. | 1) Political refugees also recognized. 2) Provision of protection through domestic, then bilateral, extradition law. 3) Accepting refugees seen as requirement of hospitality and legitimacy in international society. | 1) States accepted the need for formal international organization in order to manage refugee problem. 2) Attempt to provide protection through binding international law. | 1) Continued acceptance of international organizations. 2) States accepted need to provide protection through binding international law. 3) States accepted need to provide assistance, in addition to protection, through international organizations. 4) 1967- States accepted need for universal, rather than Eurocentric, regime. | 1) Refugee definitions seen as regional, rather than universal. 2) Increased border restrictions on the part of developed, and then developing, world. 3) Increased extra-territorial restrictions. | |

While the individual norms of each regime have varied significantly, each regime possesses three elements which are critical to the regime functioning. As understandings between states and at the domestic level have been redefined over time, different norms have provided different answers to these 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.⁷ The second element identifies how legal protection is formulated; whether protections are offered at the domestic, bilateral, or international level, and whether refugee status is clearly defined in law. An important corollary is whether refugees are protected against refoulement. The third element identifies how assistance is provided; whether states provide assistance directly on ad hoc or reciprocal basis, whether states rely on voluntary organization to provide it, or whether states choose to act through an international organization to provide it. These three elements and the different norms associated with them in each regime are detailed in Figure 1.2 below.

I identify the laissez-faire regime, given its lack of formal multilateral cooperation, as a tacit regime. The interwar regime, because of contradictions inherent in its normative understandings or normative incoherence, is identified as a weak regime. Finally, the post-Second World War regime is marked by two stages: as a strong regime through 1967, and then as undergoing breakdown due to normative incoherence since 1989. The notion of normative incoherence within a regime is elaborated in the next chapter.

⁷ Increasingly there are also suggestions of a collective responsibility to prevent widespread displacement, particularly in cases of genocide or ethnic cleansing. (see Loescher 2003, Evans and Sahnoun 2001)

Figure 1.2: The Different Regimes and their Normative Components (shading represents norms which were/are in contention)

| Norm | No Clear Regime | | Tacit Regime | Weak Regime | Strong Regime | Regime Breakdown |
|---|-----------------|------|--------------|-------------|---------------|------------------|
| | 1648 | 1685 | 1789-1914 | 1921-1939 | 1951-1967 | 1989- present |
| Refugees Possess a Right to Leave | | | | | | |
| <u>Responsibility</u> | | | | | | |
| Responsibility is Domestic | | | | | | |
| Responsibility is International | | | | | | |
| <u>Legal Protection</u> | | | | | | |
| Legal Protection is Primarily Domestic | | | | | | |
| Legal Protection is Bilateral | | | | | | |
| Legal Protection is Primarily Multilateral | | | | | | |
| Legal Protection is Regionalized | | | | | | |
| Non-Refoulement | | | | | | |
| Extraterritorial Restrictions on Asylum Seekers | | | | | | |
| <u>Assistance</u> | | | | | | |
| Assistance is a Private Responsibility | | | | | | |
| Assistance is a state Responsibility | | | | | | |

1.4 Case Selection, Evidence, and Methodology

Change within the issue area has occurred as different norms have developed, been altered, and replaced over time at the international and domestic levels. By examining the

successive regimes in historical detail, I argue that change is triggered by changes in the nature and number of refugees and that state policy towards refugees can only be explained by examining the role of norm entrepreneurs at the international and domestic levels in responding to these changes. Since these cases are chronologically successive within the same issue area, they cannot be considered independent. Even so, the methodology adopted here is similar to a number of recent constructivist works which have either focused on tracing a single norm or issue (Price 1997, Finnemore 2003) or who examine identity change within a single country, including Checkel (1997) and Klotz (1995). (see also Klotz and Lynch 2007: 20)

I make use of process-tracing in order to examine how relevant discourses have been changed and sustained at the domestic and international levels. (Klotz and Lynch 2007: 19, for an example, see Thomas 2001) Process tracing allows the use of histories, archival documents, interview transcripts, and other sources in order to see “whether the causal process a theory hypothesizes or implies in a case is in fact evident in the sequence and values of the intervening variables in that case.” (George and Bennett 2005: 6, see also Wendt 1999: 82) As George and Bennett note, process-tracing seeks to identify “the intervening causal process - the causal chain and causal mechanism - between an independent variable (or variables) and the outcome of the dependent variable.” As such, it is an “indispensable tool... not only because it generates numerous observations within a case, but because these observations must be linked in particular ways to constitute an explanation of the case.” (2005: 206-7)

I focus on tracking changes in discourse among actors at the international level, including how they conceive of refugees, how the refugee issue is framed, how these

understandings are reflected in state practice, and how states contest these understandings and seek to justify violations of these norms. I provide my own explanatory framework which argues that both international and domestic norms play roles in this process. I also engage other alternative explanations for this pattern of behaviour in each chapter including materialist and power-based explanations. Different theories offer considerable explanatory weight for different periods of times and successions of events. No alternative, however, can explain state behaviour throughout this time period as clearly as the combined ideational and structural perspective defended here.

Given the historical breadth of my analysis, my major source of evidence has been archival research. As part of this project, I undertook research at the League of Nations Archives and United Nations High Commission for Refugees Archives, both in Geneva; the British National Archives in London; the United States National Archives in Washington D.C.; the Paul Weis Papers Collection, located at the Refugee Studies Centre, University of Oxford; and the Philip Noel-Baker Papers, located at Churchill College, University of Cambridge. This research primarily spans the 1848-1967 period. To supplement this and to form the basis of research before and after this period, I used a number of published governmental sources, memoirs, and historical accounts. Undertaking such research offers a number of advantages for this type of work. In particular, by examining both the public and private views of states, international organizations, and individuals, it is easier to identify shifts in discourse. The result is that it is easier to uncover norm change and in particular to uncover active norm manipulation by actors. Secondary sources can then provide a full understanding of events.⁸

⁸ Given this work, I made the deliberate decision to not engage in supplemental interviews, as they would only have been applicable to the last two chapters.

1.5 Chapter Summary

The remainder of this dissertation is structured as follows. The next chapter lays out the two parts of my argument in detail. The first part details what fundamental institutions are and how they helped to initially problematize refugees in the international sphere and to create a political space in which cooperation was possible. I provide evidence for the role of fundamental institutions within a historical framework in the successive chapters.

The second part of the argument examines how change has occurred within this political space. I argue that crucial to this ongoing pattern of change has been interactions between regimes and international norms and that three clear regimes can be identified. The *laissez-faire* regime will be discussed in Chapter 4. The interwar regime will be discussed in Chapter 5. The post-Second World War regime will be divided into three chapters. The efforts of domestic norm entrepreneurs to alter the normative environment within the United States, with the result that American leadership led to the creation of a new international institutional framework, are discussed in Chapter 6. The creation of the UNHCR and the 1951 Refugee Convention, along with the UNHCR's important role as a norm entrepreneur at the international level as well as its increasingly problematic role in mediating states' restrictionist desires is discussed in Chapter 7. Finally, Chapter 8 focuses on how changes at the domestic level within both the United States and Britain have provoked moves by states to weaken the regime through increased border controls and extraterritorial restrictions.

Chapter 2: Structures, Agency, and Refugee Protection

2.1 Introduction

In this chapter, I develop my explanatory framework for understanding the pattern of change and consistency within states' refugee policies. I do this by theorizing about the nature of fundamental institutions, regimes, and norms in international society and on how these three differing sets of structures interrelate and function in order to produce shared understandings between states and between states and other actors. These actors, as agents, are equally important in order to understand how new structures are generated. Agents operate within an existing environment constituted by structures and while structures serve to "constitute actors as knowledgeable social agents, and they regulate behaviour" (Reus-Smit 1999: 12-13) they are in turn constituted by actors. Thus, structures and agents exist in a mutually constitutive relationship (Wendt 1987) and "cannot be reduced or collapsed into each other." (Risse 2000: 5)

As Finnemore notes, accepting both structures and agents as being constitutive represents a break with much of rationalist theorizing, which instead adopts agent-centered approaches and treats structure as "an epiphenomenon of the preferences and powers of the constituent states." This ensures that structure is not assigned an independent ontological status and is instead treated as non-generative: "It does not create and constitute actors and interests. Instead, it is constituted by them." (Finnemore 1996: 14) Instead, if both agents and structures are constitutive, as Checkel argues, then neither are "reduced to the other and made 'ontologically primitive.'" This opens up what for most theorists is the black box of interest and identity formation; state interests emerge from and are endogenous to interaction with structures."(1998: 326) Mutual constitution allows for social structures which are

constructed by agents but which in turn influence and reconstruct agents. (Finnemore 1996: 24, Thomas 2001: 14) Therefore, this chapter initially explores the effects of structures before moving on to the role played by agents.

The first section examines the role played by fundamental institutions in constituting both international society and the actors within it. Drawing on authors within both the English School tradition and the constructivist approach, I argue that without fundamental institutions providing elementary rules of practice, neither order nor cooperation would be possible. Four of these institutions – territoriality, international law, popular sovereignty, and multilateralism - have played a critical role as constituting refugees as an international problem and in creating a political space in which a cooperative solution to this problem becomes possible.

The second section reconceptualizes regimes as structures whose principal function is to link together the understandings embodied within these fundamental institutions and individual norms. Regimes thereby frame the scope of the problem and provide states guidance towards normatively appropriate solutions. Critical to this purpose, however, is the effectiveness and robustness of the regime. Weaker regimes are less able to provide effective guides and to ensure state conformation with norms.

The third section focuses on the major challenge to regime-based cooperation within the refugee issue-area: refugee crises. These can undermine regimes as states question the pre-existing normative understandings embodied within them. These shocks, however, also provide a window of opportunity for norm entrepreneurs at both the international and domestic levels to argue in favour of alternative normative understandings. Regimes which are effective and robust will be able to accommodate change; whereas weaker regimes will

likely be replaced. But replacement has its own challenges. States may attempt to preserve the status quo, to embrace humanitarian-based arguments and expand refugee protection, or to follow restrictionist and sovereignty-based arguments which weaken protection.

The fourth section provides an elaboration on this final point, explaining the role of norm entrepreneurs at both levels and detailing the obstacles they need to overcome in order to introduce new norms. In particular, when a new norm reflects pre-existing understandings at the domestic level, or an area where no understandings exist, this process will be relatively easy. However, when a new norm contradicts these understandings, internalization will be very difficult, requiring the concerted efforts of entrepreneurs at the domestic level to overcome institutional biases. I end by discussing how states which accept these new norms and internalize them can succeed in acting as norm entrepreneurs in their own right, socializing other states in international society.

2.2 Fundamental Institutions

Fundamental institutions are the “elementary rules of practice that states formulate to solve the coordination and collaboration problems associated with coexistence under anarchy.” They are “produced and reproduced by basic institutional practices.” (Reus-Smit 1999: 14-15) These institutions are critical to my argument in two senses. The first is that they create the space and provide the basic rules and understandings that allow international actors to cooperate. Equally important, however, is that by establishing how states ought to behave in international society, and by ensuring that territorially-based states are the primary actors in that society, these institutions also problematize refugees as an international issue.

To elaborate on the first point: these institutions are critical to both the functioning and constitution of international society. As practices, fundamental institutions are, as Robert Keohane argues, deeply embedded, “highly institutionalized... [and] taken for granted by participants as social facts that are not to be challenged although their implications for behaviour can be explicated...” (Keohane 1988: 384) Similarly, Wendt and Duvall note that these institutions “constitute state actors as subjects of international life in the sense that they make meaningful interaction by the latter possible.” (Wendt and Duvall 1989: 53)⁹

This shift occurs in tandem with the emergence of an international society. Bull argued that an international system forms when “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.” In international society, by contrast, states conceive themselves as bound by common rules and share in the working of common institutions. (2002: 9-13) Following this emergence, shared conceptions of interests and common values gain in importance, as does “the shared consciousness of being bound by legal and moral rules.” (Hurrell in Bull, 2002: ix-xii) States will adhere “to the rules and norms of the society of states even when these conflict with their non-vital interests” (Dunne 1998: 144)

The key reason that states follow these rules is to ensure order, particularly the preservation of international society: “Whatever the divisions among them, modern states have been united in the belief that they are the principal actors in world politics and the chief bearers of rights and duties within it.” (Bull 2002: 16) Order requires a rule-based system

⁹ The importance of fundamental institutions transcend theoretical camps - Hans Morgenthau attributed them “to the permanent interests of states to put their normal relations upon a stable basis by providing for predictable and enforceable conduct with respect to these relations.” (1940: 279) They can also play important roles at the domestic level, where they form the constitutional basis for property rights and political decision-making. (North and Thomas 1970: 10, see also North and Weingast 1996)

created as states accept that they have the duty to respect the sovereignty of other states and not to intervene in other states' internal affairs. (Bull 2002: 66)¹⁰

These rules, however, are neither immutable¹¹ nor do they exist in a vacuum. Rather, they exist within an institutional structure provided by fundamental institutions and thereby regulate the affairs of states. It is these fundamental institutions which provide states with a means "to judge each other's policies and actions and communicate that normative assessment." (Jackson 2000: 10-11) Consequently, fundamental institutions provide a mechanism to account for the prevalence of cooperation among states in international affairs in spite of the absence of either a central authority or some form of common world culture. (Cronin 2003: 17)

And yet, preserving order is only one important property of fundamental institutions. Reus-Smit follows Bull in suggesting that fundamental institutions exist as a basic framework in order to provide mechanisms through which states can "solve the coordination and collaboration problems associated with coexistence under anarchy" and transcend shifts in the balance of power. (1997: 557, see also Reus-Smit 1999: 4) Beyond this, he argues that fundamental institutions are forged through a process of communicative action between the state-members of international society as "they debate how legitimate states should, or should not, act." (Reus-Smit 1999: 27) International legitimation, as Finnemore and Sikkink note, has become a "contributor to perceptions of domestic legitimacy held by a state's own citizens." Thus it reflects back on the domestic basis of legitimation and consent, and the

¹⁰ Rules in this case echo a constructivist norm-based logic. (Björkdahl 2002: 14) Bull notes that rules can be violate from time to time. But for a rule to be effective, it "must be obeyed to some degree, and must be reckoned as a factor in the calculations of those to whom it applies, even those who elect to violate it."(2002: 52-3)

¹¹ Rules can be altered if states demonstrate "through their words or their actions, that they are withdrawing their consent from old rules and bestowing it upon new ones, and thus altering the content of custom or established practice."(Bull 2002: 70)

ability of the government to stay in power. (1998: 903) Whether states act legitimately in international society, with legitimacy being defined in part through the prism of fundamental institutions, significantly influences the state's own process of domestic legitimation.

The third role that fundamental institutions play is to define the cognitive horizons of institutional architects and structure the process of communicative action that creates and reproduces fundamental institutions. Thus, they can shape the universe of possible institutional choice, "licensing some institutional solutions over others," which results in the reproduction of basic institutional practices. States that wish to engage in stable interactions "encounter strong incentives to employ existing practices." (Reus-Smit 1999: 34, 36) As Young notes, states "face a rather limited menu of available practices among which to choose. A 'new' state, for example, has little choice but to join the basic institutional arrangements of the states system." (1986: 120)

Beyond providing order, fundamental institutions are part of a social framework which constitutes actors and ensures these actors accept basic rules as valid. (Ruggie 1998: 20-21, 34) Fundamental institutions, therefore, are an example of institutional facts, and, as Searle notes, are based around collective intentionality, the sharing of intentional attributes including beliefs, desires, and intentions. Brute facts exist independently of human institutions, while social and institutional facts can only exist within human institutions: "Institutional facts... require special human institutions for the very existence. Language is one such institution..." And institutional facts can exist only within systems of constitutive rules, which create the possibility of such facts. (Searle 1995: 23-28, quote on 27)

In other words, institutional facts are agentive functions, imposed by collective intentionality on a brute fact "that cannot perform that function in virtue of its structure

alone.”(Rust 2006: 14-15) Thus, the collective intentionality “which underlies institutional facts enables cooperative behaviour but, in the case of institutional facts, is a condition for the norms and standards to which participants are subject.” (Rust 2006: 11) These facts, moreover, are iterative (Rust 2006: 12) and self-perpetuating: “each use of the institution is a renewed expression of the commitment of the users to the institution.” (Searle 1995: 57) These practices are not necessarily reproduced by explicit consent, but rather “through habitual use and compliance.” (Reus-Smit 1999: 17) Thus, some practices may be so “deeply sedimented or reified that actors no longer think of them as rules at all. But their durability remains based in collective intentionality, even if they started with a brute physical act such as seizing a piece of land.” (Ruggie 1998: 873)

In sum, fundamental institutions have three critical effects on states: 1) they provide rules to govern state behaviour and cooperation in international society, which allows states to generate shared expectations and interests; 2) they provide international sources of legitimation that reflect back on to the state’s domestic audience; and 3) they assist in constituting actors’ identities at the international level, and establish who is and is not recognized as an actor at the international level.

It is possible to violate the principles embodied by fundamental institutions. But doing so may cause the state’s legitimacy to be questioned at both the international and domestic level. While some states can survive such negative feedback and reputational effects as well as the costs of being labelled a ‘rogue state,’ most will seek to conform. (Finnemore and Sikkink 1998: 903)

Given their self-perpetuating nature, the identification of fundamental institutions can prove difficult. Authors within the English School tradition, focusing on order, argue in

favour of a few core institutions based around law, diplomacy, and conflict. Thus, Bull points to the balance of power, international law, the diplomatic mechanism, the managerial system of the great powers, and war as serving the role of fundamental institution. (Bull 2002: 71, see also Bull 1966: 48)¹² Other English Schools authors provide similar arguments.¹³

Authors within the constructivist approach, by contrast, focus on the constitutive role of these institutions and their role in creating a cooperative environment. John Ruggie argues in favour of two institutions assuming such a role. He suggests that multilateralism qualifies as a fundamental institution since without it basic institutional arrangements such as international property rights would not be defined or stabilized and that it is a generic institutional form present from the start. (Ruggie 1992: 567, Reus-Smit 1999: 3) He also focuses on territoriality because the “most generic attribute of any system of rule is comprising legitimate dominion over a spatial extension.” The most distinctive feature of the modern system, he therefore suggests, “is that it has differentiated its subject collectivity into territorially defined, fixed, and mutually exclusive enclaves of legitimate dominion.” (Ruggie 1993: 151) The importance of territoriality as a fundamental institution in current international society is echoed by Barry Buzan (2004: 176-84) and K. J. Holsti (2004: 25)

¹² Holsti suggests Bull was divided on the role of the great powers. (Holsti 2004: 26) War seems odd to be a fundamental institution prompting order, but Bull argues that war “does not indicate the absence of international society, or its break-down, but can occur as a part of its functioning.” (1966: 43)

¹³ Martin Wight suggests diplomacy and trade are vital. Herbert Butterfield points to international law, diplomacy and the system of balance of power as key institutions. (Butterfield and Wight 1966) Adam Watson points to the balance of power, international law, diplomatic dialogue and the Congress system (akin to Bull’s management by the great powers). (1984: 24-25) For Alan James, diplomacy and international law both point to the existence of international society, though sovereignty is the crucial intersubjective and constitutive principle of interstate relations.” (1999: 468, 1986: 7-8, 24) James Mayall accords an important role to diplomacy, international law and nationalism (2000: 11-12). Terry Nardin suggests that international society is constituted by international law. It exists only to the extent that states understand themselves to be related to one another as subjects of common rules - a common law - defining the terms of their coexistence.” (Nardin 1998: 20-22) Barry Buzan similarly suggests that ‘primary institutions’ play a constitutive role both in terms of the actors involved and the rules of the game. (Buzan 2004: 176-84)

International law is also an area of focus. For Friedrich Kratochwil, international law matters because legal institutions can remove incentives for states to lie. Thus, for him critical norms include those “against lying (protecting the veracity of factual information), norms against the resort to violence (bounding of conflict), and norms against the breaking of promises (pacta sunt servanda), as well as norms settling the orderly acquisition and transfer of ‘property’” (1989: 71, see also Ruggie 1998: 872-3) These norms, because they are constitutive of society, “are held to be natural in the sense of being fundamental.” (Kratochwil 1989: 71) Neta Crawford echoes this, pointing to a set of ‘metanorms,’ including the promotion of truth-telling, promise-keeping, treating like case alike, and following legitimate rules. They are important because they provide prescriptions to guide norm following in general as well as to help “create an intersubjective expectation that normative prescriptions will be followed because it is good to do so.” (Crawford 2002: 92, see also Klotz 1995: 21, Axelrod 1986: 1101)

To summarize, while both the authors within the English School and the constructivist approach consider fundamental institutions as critical to international society, they argue that this is the case for different reasons. For the English School, the reason is order and these institutions include international law and diplomacy as well as the balance of power and conflict. Constructivists, interested in these institutions as constituting actors and providing for cooperation, focus instead on institutions which serve these purposes. These include (once again) international law, as well as multilateralism and territoriality. Both aspects are important. Order and stability are recurring goals in international society, but so too are basic rules to establish patterns of cooperation. As I will demonstrate below, within

the refugee issue area these institutions have played both roles. The importance of these institutions can not be underestimated. As Reus-Smit notes, they provide the:

basic institutional framework for interstate cooperation... Without these basic institutional practices the plethora of international regimes that structure international relations in diverse issue-areas would simply not exist, and modern international society would function very differently. (1999: 3)

A drawback within this literature has been a lack of focus on how these fundamental institutions provide guidance to states within individual issue areas. In particular, which fundamental institutions provide basic rules for state cooperation within the refugee issue area, and how are potential contradictions within these rules mediated? With regard to refugees, I suggest that the basic understandings between states embodied within fundamental institutions served to constitute refugees as an international problem and have created and recreated the space for a cooperative solution. Therefore, along with the emergence of European international society in the 17th Century, refugees were first treated as an issue of international scope and changes in the nature of refugee flows over the subsequent centuries are also linked to changes within fundamental institutions.

Four fundamental institutions have been part of this process. It is easier to understand this process within a historical context, a project undertaken in the next two chapters. To summarize the argument in brief, however, territoriality served to constitute refugees as an international problem. By establishing a space within which the state was supreme and sovereign, territoriality also creates an exclusionary space. Those outside of that space, who flee the state's jurisdiction, no longer fit within the state-centric paradigm and need to be dealt with in some other way. That such individuals were identified as 'refugees,' that states accepted that these refugees should be allowed to leave their own states, and that they should be provided with some alternative form of protection reflected the basic rules embodied in international law, in popular sovereignty, and in multilateralism. Whereas territoriality and

sovereignty create refugees, these other institutions provided a humanitarian foundation, though often challenged, from which states could cooperate to protect them. Institutions, in other words, served to frame legitimate state behaviour and create a set of shared interests between states with regard to refugees.

These institutions are not immutable. Not only are they subject to change and reinterpretation over time, but reproduction of these constitutive practices at the international level also depends on the reproduction of practices by domestic actors. (Koslowski and Kratochwil 1994: 216) Change, however, has been limited and occurs over long periods of time. While Kal Holsti has suggested fundamental institutions can be subject to four types of change - replacement, addition or subtraction, increased or decreased complexity, and transformation as new forms of practice derive from old practices (2004: 12-16) – in almost all cases change has occurred through added complexity. (Holsti 2004: 300)

That these institutions have been subject to change should not be surprising. The initial European-based international society that emerged in the 17th century was far narrower than today's international society. It was based on each state's recognition of the territorial sovereignty of the others, thus creating a basis for order and cooperation. At the same time, as Keene notes, different principles applied outside of this system:

The fundamental normative principle of the colonial and imperial systems beyond Europe, by contrast, was that sovereignty should be divided across national and territorial borders as required to develop commerce and what Europeans and Americans saw as good government... This arrangement was inevitably more centralized and more hierarchical than the Westphalian system... Beyond Europe, however, international order was dedicated to... the promotion of civilization. (2002: 98, his emphasis, see also Raustiala 2006: 222, Gong 1984)

Territoriality itself is undergoing a steady redefinition. On the one hand, there are suggestions that aspects of territorial practices which have in the past been readily violated (Krasner 1999: 55) have become increasingly inviolable norms such as the use of force to alter interstate boundaries, driven in part by the linking together of people and territory

brought about through the emergence of popular sovereignty. (Zacher 2001: 216, Holsti 2004: 101)¹⁴ Even as one aspect of territoriality – borders – has become inviolable, other practices, notably the growth of extraterritorial practices, point to a clear transformation of how states relate to one another. This change is driven in part by globalization. As activities become increasingly cross-border, as Hudson notes, “issues of extraterritoriality or disputes of jurisdictional authority inevitably come to the fore as spaces and the rules which govern them are contested.” (1998: 89, see also Taylor 2003) Extraterritorial practices in themselves are not new. Ruggie notes they were crucial to the development of modern diplomacy. (1993: 149, see also Mattingly 1988) Raustiala points to the use of extraterritorial courts in ‘uncivilized’ nations in the 19th century, though this was a practice that denoted the outside status of these other nations:

the practice of extraterritorial jurisdiction reinforced the centrality of territory to the Westphalian conception of sovereignty... Sovereign states, of course, did not permit extraterritorial courts on their territories. Thus extraterritorial courts reinforced the norm that strict territoriality prevailed among juridical equals. (2006: 223)

And yet extraterritoriality is once again growing in this space, as international treaties increasingly allow for extraterritorial or universal jurisdiction based on the nature of certain crimes, rather than the nationality of either the alleged perpetrator or victim, (Hawkins 2004: 782-3, Powell 2004) and as states seek to regulate activities beyond their territorial borders which may constitute a threat to the security of the state. (Hudson 1998: 96) Increasingly, too, as I will show in Chapter 8, states are using extraterritorial innovations to grapple with the supposed threat of immigrants, asylum seekers, and refugees. A shift within how states approach the fundamental institution of territoriality has therefore also directly affected how these states approach refugee protection.

¹⁴ Though this may have exacerbated state weakness and hence other forms of conflict. (Atzili 2007) However, see also Lake and O’Mahony (2006)

Multilateralism, too, has evolved as a fundamental institution. As Ruggie notes, multilateralism is a generic institutional form of international life that coordinates relations among three or more states in accordance with generalized principles of conduct. (1993: 7-8) But while Ruggie points to a history of multilateral arrangements within international society, formal multilateral institutions were few before the 20th century, “a completely novel form was added to the institutional repertoire of states in 1919: the multipurpose, universal membership organization... here were organizations based on little more than shared aspirations, with broad agendas in which large and small had a constitutionally mandated voice.” (1993: 23) With this shift, multilateralism not only embodied “a procedural norm in its own right” but it also carried with it “an international legitimacy.” (Ruggie 1993: 23)

This shift in the period after the First World War not only led to a novel approach by which states could provide refugee protection – through such a multilateral organization – but it also provided an important basis for these organizations to develop their own independent authority. At a deeper level, it also re-constituted how states approached the refugee problem. Prior to this shift, while states did accept a normative obligation to protect refugees, governments had no sense that this was a collective responsibility: rather, individual states sought to protect refugees within their territory in different ways. With the creation of multilateral organizations, a point discussed in Chapter 5, states increasingly accepted that states did bear a collective responsibility to protect refugees.

Finally, the process by which popular sovereignty emerged through the steady development of state-based conceptions of sovereignty in the 18th and 19th centuries not only helped to simultaneously legitimate and de-legitimate different states within international society but also helped to structure how states and their populations responded to refugees,

creating a novel form of practice. The emergence of popular sovereignty served to undermine the “ideological and material foundations of dynastic rule.” Instead, legitimate state action became tied to the “augmentation of individuals’ purposes and potentialities.” (Reus-Smit 1999: 122) The state system, in turn, began to be “built around the popular principle, deriving both its domestic and international legitimacy from the claims and consent of the governed.” (Haddad 2003: 304, see also Zolberg, et al. 1989: 9)

With regard to refugees, popular sovereignty provided an important underpinning to an international legal discourse which argued in favour of refugees being allowed to leave their own state as well as the sovereign’s prerogative to allow them entry. It did so by redefining the state-citizen relationship within the guise of a bargain in which citizens perceived their governments as legitimate in exchange for a bundle of rights which increased over time. States which did not pursue this bargain in good faith, which persecuted their own citizens and forced them to flee, were increasingly perceived as illegitimate in international society. This provided an onus to ‘legitimate’ states, often driven by their domestic publics, to accept in the ‘wayward souls’ who had been driven out.

This also suggests a mechanism in which citizenship rights have important effects on international society. This is not uncontentious - Holsti argues that citizenship provides rights “only within the territorial bounds of the state...” (Holsti 2004: 89) A contrasting view, however, is offered by James Mayall who argues that nationalism triggered both a domestic shift (from dynastic sovereignty to popular sovereignty) but also an international shift through the development of human rights. Thus, popular sovereignty plays a key legitimating role at both levels: “the people, in other words, are the final source of state legitimacy.” (1990: 2, see also Mayall 2000: 42-9, 59, Buzan 2004: 243-7) The process by which popular

sovereignty emerged through the steady development of state-based conceptions of sovereignty in the 18th and 19th centuries not only helped to legitimate and de-legitimate states within international society but also helped to structure how states and their populations responded to refugees, creating a novel form of practice.

Prior to decolonization, however, this was a society based around a principle of sovereign inequality. (Buzan 2004: 215, Keene 2002) Following the Second World War, this changed towards a “non-racial and non-ethnic concept of self-determination as a right of ‘peoples’ rather than ‘nations’ emerg[ing]” (Rae 2002: 232, Crawford 2002) With this shift, decolonization not only triggered a substantial reinterpretation of state sovereignty, but also ushered in dramatic growth in the number of states so recognized – as Holsti notes, between 1945 and 1975 more than one hundred independent states were created, the vast majority former colonies. (2004: 263) Thus the final change in a fundamental institution, one I return to in Chapter 7, has been the shift to equal sovereignty, driven by the progressive expansion of popular sovereignty and doctrines of human rights across the globe.

To summarize, fundamental institutions are historical artifacts created and replicated by states through practice. They are created initially to serve states’ interests, but these interests included a mixture of countervailing viewpoints - among them national ones, humanitarian and moral ones, and transcendental (or systemic) ones¹⁵- with the most important of these latter being the preservation of international society and of order. Thus, this is not a systemic account. These institutions emerged out of individual state identities, through state practices, and through formal negotiations. As time passed, these

¹⁵ Transcendental interests are defined as those “which are not a matter of choice to actors because they must pursue them so long as they (want to be able to) pursue any interests at all.” (Hasenclever, et al. 1997: 14)

understandings were legitimated in international society because they formed a set of rules which enabled cooperation to occur and which allowed for order to be preserved.

2.3 Regimes

The environment constituted by fundamental institutions creates a space within which states can respond to refugees. However, the actual result is indeterminate - in order to understand what solution is reached at a given point in time, other structures and the role of actors also needs to be examined. In particular, Reus-Smit hypothesizes that regimes are directly linked to fundamental institutions by enacting these “basic institutional practices in particular realms of interstate relations” within a given issue area, though he does not further elaborate these mechanisms. (Reus-Smit 1999: 14, see also Muller 2004: 420, Hasenclever, et al. 1997) Regimes therefore reflect the understandings embodied within various fundamental institutions as applied to a single issue area.

Regimes within a constructivist approach play a second important role by providing a web of meaning in which individual issue-specific norms can interact and become linked together in order to provide a basis for common cooperation and create a coherent response. (Neufeld 1993: 43, Hasenclever, et al. 1997: 165) Regimes frame the scope of the problem and, by linking together norms, suggest how states should deal with the problem.

These two roles for regimes mark a fairly dramatic departure from the neo-liberal account of regimes that they are arrangements deliberately created by states in order to improve their welfare by solving cooperation dilemmas. (Keohane 1984: 80, see also Stein 1993) But this shift has four advantages: 1) it allows for a space in which regimes operate which is broader than that of most neo-liberal perspectives, incorporating informal as well as formal regimes; 2) it allows us to discard the overlapping elements of the consensus regime

definition to focus directly on norms; 3) it allows for an endogenous theory of interest change; and 4) it allows a novel theory of regime formation, change, and collapse by focusing on the regime's (in)ability to weather crises. This section elaborates these points. The next section focuses on why crises are critical to regime change. The last section explains regime formation, through changes and replacement in key norms, by examining the activities of norm entrepreneurs at both the domestic and the international level.

Neo-liberal regime theory argues that regimes are arrangements created by states in order to improve their welfare by solving cooperation dilemmas. (Keohane 1984: 80, see also Stein 1993) The formation of regimes are responses to coordination problems in which the "pursuit of interests defined in narrow individual terms characteristically leads to socially undesirable outcomes." (Young 1982: 281) Regimes provide these benefits by breaking patterns of uncertainty by providing information, by reducing the costs of gaining information, or by providing monitoring activities which increase the likelihood of catching cheaters. In addition, regimes can be linked or nested together. This not only increases the costs of abandoning the regime, but also makes it easier for actors to arrange side-payments. (Hasenclever, et al. 1997: 33-37, Axelrod and Keohane 1985: 232-4, Keohane 1984: 6) As Keohane notes, without regimes linking together clusters of issues, side-payments and linkages would be difficult to arrange and "institutional barriers would hinder the construction of mutually beneficial bargains." (1984: 91)

This view, however, has remained focused on formal rather than informal regimes, with suggestions that "focusing on 'implicit regimes' captures the convergence of actor expectations and may help us to summarize a complex pattern of behaviour. But it begs the question of the extent to which state behaviour is, in fact, rule-governed." (Haggard and

Simmons 1987: 494, see also Keohane 1993: 27)¹⁶ Even so, the regime concept is broad; with individual regimes varying along a number of dimensions, including their functional scope, geographic domain, and membership. (Young 1999) A focus which exclusively depends on explicit rules or injunctions may lead to the over-identification of many ‘dead letter regimes’ where rules in practice had little suasion and the under-identification of tacit regimes based on regular but implicit references to informal rules. (Levy, et al. 1995: 271-2, Lipson 1991)

In addition, regimes, as Oran Young suggests, may emerge in a spontaneous fashion, as opposed to solely through negotiations. Regimes of this type may not even involve conscious coordination among their participants. (1980: 348-52, see also Young 1982: 282-3) Such tacit regimes, Puchala and Hopkins argue, can be created simply by a convergence or consensus in objectives among their participants, behaviour then reinforced by mutual self-interest and monitoring. (1982: 249, Lipson 1991: 498) Ignoring informal regimes therefore substantially limits the scope of regime theory to only formal rule-based orders, which also limits the historical scope available for study.

By the same token, if regimes are “social institutions,” as Levy, Young and Zurn (1995: 274, see also Ruggie 1982: 380) suggest, then there is an alternative explanation for tacit regimes having suasion: shared understandings held by states and embodied in international norms. A state which adopts a new norm not only alters its behaviour to conform to that norm, but also changes its normative expectations with regard to other states. It expects them to conform to the norm, particularly when that norm is seen to represent a

¹⁶ The rational design approach, which argues that that institutional design is the result of “rational, purposive interactions among states and other actors to solve specific problems,” (Koremenos, et al. 2001: 762-3) has been similarly criticized for ignoring informal understandings and being limited to explicit arrangements. (Duffield 2003: 419, 23)

pattern of behaviour that legitimate states ought to follow. In this sense, regimes “represent a concrete manifestation of the internationalization of political authority.” Authority thereby combines a degree of power with legitimate social purpose. (Ruggie 1982: 380-2, Cronin and Hurd 2008: 6) Therefore, a tacit regime can also emerge and function as states - in isolation from one another - adopt new and similar normative understandings. Such a pattern may seem unlikely. However, as I show in chapter 4, that is precisely how an international regime emerged within European society in the 19th century, as a set of core states independently adopted new domestic norms with respect to how refugees should be protected. This normative change was triggered by states reconciling their practices towards refugees with the basic rules for cooperation established through fundamental institutions.

Therefore, regimes can be either formal or tacit. They are also composed of bundles of norms. This counters the ‘consensus’ view of regimes, as defined by Stephen Krasner, which offers four different components for a regime: “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) Krasner’s definition does have the advantage of offering two clear and different forms of change. Change which alters the rules and decision-making procedures of any regime alters the regime. If the norms and principles are abandoned, the regime either disappears or is transformed into a new regime. (Krasner 1982: 187-88) However, this definition has been criticized for having indistinguishable components as well as being too vague since it does not define the boundaries of the universe of cases. (see Levy, et al. 1995: 270, Young 1986: 106)

Instead, I follow Gary Goertz’s minimalist concept that “an institution (or equivalently a regime) is a structure of norms and rules,” with norms and rules being

counterparts for most purposes. (2003: 15) He argues that this creates a core notion for both regimes and institutions which removes the additional components because “for many purposes, norms, principles, decision-making procedures, and rules can be considered as synonymous” (Goertz 2003: 19) as their logical form is identical:

Hence from a formal point of view they do not constitute different types of norms. For example, decision-making rules concern a different substantive type of norm, since they do not directly result in an action but define procedure... but nevertheless they use the logical structure of other rules, norms, and principles. (Goertz 2003: 38)¹⁷

This view fits within a constructivist approach. Finnemore and Sikkink note that norms reflect single standards of behaviour, whereas regimes and institutions “emphasize the way in which behavioural rules are structured together and interrelate.” (1998: 891) Similarly, Bernstein (2000) refers to a ‘norm complex’ as a set of norms which govern practices in a given issue-area, with change occurring as norms are redefined or new norms introduced.

Therefore, regimes, since they are made up of norms, can have the same behaviour-altering properties as norms. They can “limit the discretion of their constituent units to decide and act on issues that fall within the regime’s domain” (Ruggie 1982: 380) and as Müller notes: “Regimes exert pressure on governments, even on those with reservations about the regime. Not only are regimes powerful behaviour-guides because it is so costly to construct alternatives: the sheer existence of regimes puts an ‘extra’ burden of proof on regime opponents.” (1993: 383) Thus by reconceptualizing regimes in this way, we can provide for endogenous interest change among states.

One of the major criticisms constructivists have of neo-liberal regime theory is that by both assuming the state is the crucial actor and that interests should be treated

¹⁷ He argues this using deontological logic, based in a major and minor premise [All A are B (major premise); X is an A (minor premise); therefore X is B (conclusion)], which describes our beliefs about the world: “It is a tool for making decisions about the character of the natural and social environment.” (Goertz 2003: 35-36)

exogenously, mutual understandings and transformation of identity and interests are ignored: “Regimes cannot change identities and interests if the latter are taken as given.” (Wendt 1992: 393) These identities play an important role in shaping states’ objectives, including the role of preferences and domestic interests. Not only is a significant source of variation in international behaviour ignored and trivialized (Hasenclever, Mayer, and Rittberger 1997: 136), but this neglect causes regime theory to instead search for a supplementary theoretical account of interest formation driven exclusively by domestic politics. (Klotz 1995: 18-19, Wendt 1994: 384, Price 1998: 614, Cronin 2003: 9)¹⁸ By focusing on a regime as a structure of norms embodying shared ideational understandings, the ability of a regime to alter a state’s identity and interests becomes readily apparent. This also enables a two-level approach to interest formation, one focused on the role played by new norms in altering states’ interests at both the international and domestic level.

Reconceptualizing regimes in this manner also allows for an improved explanation of regime durability by focusing on the role played by shared understandings and linkages between different structures as an explanation for regime durability. Neo-liberalism has offered an explanation for durability based around effectiveness and robustness. A regime is effective to the “extent that its members abide by its norms and rules” and to the “extent that it achieves certain objectives or fulfills certain purposes,” such as facilitating state cooperation. (Hasenclever, et al. 1997: 2, Milner 1992: 475) Keohane similarly suggests that a regime may be described as ‘strong,’ or effective, when its rules are dense, specific, and cover a broad range of activities (1993: 41-3), though a dense set of rules may actually

¹⁸ As Wendt comments, this focus could be because “state interests really are determined by domestic politics, but it may also be because Neoliberals have so internalized a rationalist view of the international system that they automatically assume that the causes of state interests must be exogenous to the system.” (1999: 35)

increase compliance problems in the short run. (Levy, et al. 1995: 277) Therefore, as long as members abide by a regime's norms and it continues to fulfill its objectives, it is effective.

This means that the normative content of a regime is important to its effectiveness in two senses. First is how the regime can respond to changes in its norms. A regime will be less effective if it is threatened by alternative norms which undermine its collective purpose, by the redefinition of its individual component norms, or by the introduction of new norms. (see Bernstein 2000, Donnelly 1986: 605)

Second is how coherent and internally consistent a regime's norms are. Franck notes that coherence serves to legitimate any rule, principle, or institution, because it can provide a connection between the rule and its own principled purpose and to other principles used to previously solve other similar problems. A rule can be either internally and externally coherent or incoherent. Internal coherency refers to how different parts and purposes of a rule connect together, and therefore is higher if the rule is precise and transparent. External coherency refers to how the rule connects with other rules through shared principles. (Franck 1990: 163-80, see also Thomas 2001: 15, Legro 1997: 34) Therefore, if the normative components of the regime are themselves internally inconsistent or are incoherent or inconsistent when connected together a regime will be less effective. In summary, if a regime suffers from normative incoherency or is threatened by alternative norms, it is less effective and its members are less likely to abide by its norms.

Robustness focuses on two differing attributes. It refers "to the 'staying power' of international institutions in the face of exogenous challenges and to the extent to which prior institutional choices constrain collective decisions and behaviour in later periods." (Hasenclever, et al. 1997: 2, see also Powell 1994: 340-1) This first point, as Young notes,

means that regime robustness depends on the capacity of regimes “to survive disturbances or to adapt to changing circumstances without losing their essential or constitutive characteristics.” (1999: 133)¹⁹ As Hasenclever et al note, effectiveness and robustness are conceptually independent: “a regime’s robustness cannot be inferred from its effectiveness nor vice versa.” (1997: 3)

Robustness was a key point of distinction between realist and neo-liberal explanations of regime durability - hegemonic stability theory, coming from the realist tradition, suggests that regimes will decline as hegemons decline, (Keohane 1980: 132, Gilpin 1981) while neo-liberalism suggests that regimes can persevere long after their creators. Consequently, regimes do not shift with changes in power or interests nor are they based solely on short terms calculations of interests. (Keohane 1984, Krasner 1982: 186-87) The neo-liberal explanation for this is relatively straight-forward. First, creating a regime is difficult and entails costs; therefore regimes are often easier to preserve than to construct anew. As regimes persist, and prove themselves, “the value of the functions they perform increases.” (Keohane 1984: 102, see also Hasenclever, et al. 1997: 38-9, and Stein 1993)²⁰ Second, the nesting of individual agreements within broader regimes facilitates linkages which would otherwise be difficult to create and therefore lower the costs of transactions. (Keohane 1984: 91-2)

Third, regimes can generate reputational effects:

International regimes help to assess others' reputations by providing standards of behaviour against which performance can be measured, by linking these standards to specific issues, and by providing

¹⁹ A similar measure of robustness, as Legro has argued, can be applied to individual norms. His criteria include how long a norm has been in effect and how it weathers challenges to its prohibitions, as well as how specific the norm is and how concordant or widely accepted it is in diplomatic discussions and treaties. (1997: 34-5)

²⁰ Keohane also suggests that since regimes are difficult to construct, “it may be rational to obey their rules if the alternative is their breakdown.” (Keohane 1984: 100)

forums, often through international organizations, in which these evaluations can be made. (Keohane 1984: 94)²¹

Reputation raises the costs of non-compliance and makes cooperation more likely. But Keohane and Nye push this point further, suggesting that as time passes, governments may begin to “define their own self-interest in directions that conform to the rules of the regimes” (1989: 259) and “the principles and norms of the regime may be internalized by important groups and thus become part of the belief systems which filter information.” (1989: 266) Regimes can change interests. Krasner suggests that regimes can create a feedback and self-reinforcing loop. But he limits their effect to altering the distribution of power. Thus, they “may change assessments of interest. Regimes may become interactive, not simply intervening, variables.” (Krasner 1982: 500)

However, as Keohane and Nye suggest, since regimes also alter belief systems, a more fundamental change is occurring. As Sterling-Folker notes, “once cooperating is associated with efficient interest maximization, the incentive to continue cooperating is reinforced.” As participation in regimes continue “iterated acts of cooperation can lead to an internalized commitment to the social practice of cooperation itself.” (2000: 112) Regimes, therefore, can be robust because they are linked to fundamental institutions but also because they alter not only a state’s perceptions of its interests, but also its core belief systems.

In this sense, shaping interests is directly linked to the second attribute of regime robustness: that prior institutional choice can constrain behaviour in the present. As Barnett notes, all manner of institutions, including regimes and norms, “might not be the product of conscious design but rather emerge out of patterned interactions that become routinized and

²¹ Hasenclever et al suggest that in emphasizing reputational effects, Keohane deemphasizes other properties of regime, including monitoring capacities and the ability to retaliate because “he is well aware that such rules would not be any more self-enforcing than the rules the respect for which they are intended to improve. The sanctioning problem involves a problem of collective action itself.” (Hasenclever, et al. 1997: 35)

institutionalized...” (1996: 159) Consequently, regimes have path dependent properties. Once a historical path has been chosen, new institutional developments may depend increasingly on that choice, rather than just on current conditions. (Sterling-Folker 2000: 98) As Keohane notes, “accumulated random variations can lead an institution into a state that could not have been predicted in advance.” (1988: 389, see also March and Olsen 1998: 958)²² Different outcomes remain possible, but increasingly they depend on “the particular sequence in which events unfold.” (Pierson 2004: 20) Sequence may determine subsequent events, and, as Levi notes, “the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice.” (Levi 1997: 28) Such a view, Pierson goes on to note, can help to also problematize functionalist explanations: “rather than assuming relative efficiency as an explanation, we have to go back and look.” (Pierson 2004: 11, 47)

Constructivists accept that prior institutionalized understandings can have power. As Wendt notes, once new identities and interests are created, they are sustained through interaction. (1999: 331) Consequently, “social systems can get ‘locked in’ to certain patterns by the logic of shared knowledge, adding a source of social inertia or glue that would not exist in a system without culture.” (Wendt 1999: 188)²³ As Crawford notes, this may mean that there are no good ethical or practical reasons for a norm, and yet:

for some accidental reason, the practice is accepted and expected. In this situation, no one seems to have what might be recognized as an ethical or logical argument to justify the practice, though post-hoc rationalizations for the practice might spring to mind if practitioners are pressed. (2002: 88)

Linkages can also apply between a regime and other existing structures. This leads to a crucial point: new regimes are affected by the existing normative environment they enter

²² In *After Hegemony*, Keohane also argued that the creation of new regimes “may be facilitated by the mutual confidence created by old ones. Regimes rarely emerge from chaos... they are built on one another.” (1984: 79)

²³ Wendt has criticized the rational design approach for neglecting the possibility that through feedback institutions change designers’ identities or interests or change environmental beliefs. (Wendt 2001: 1033-34)

into, particularly the adjacency, precedent, and fit of existing social institutions. Regimes which are embedded within the deeper structures of international society (Hasenclever, et al. 1997: 16, Ruggie 1982) or which complement social institutions at the domestic level are also more robust. (Young 1999: 15) To phrase this differently, states are more likely to abide by the norms of a regime when the regime reflects other mutually shared understandings, including those embodied in other norms, regimes, and fundamental institutions, and if it reflects ideationally-derived domestic interests, norms, institutions and understandings.

In summary, a regime's durability will be affected by two attributes. Its effectiveness depends on whether its norms are internally and externally coherent and whether the regime continues to fulfill its objectives or purpose. Its robustness depends on three criteria: 1) Its ability to weather crises; 2) Its ability to create shared understandings and interests between actors who are part of the regime; and 3) Its linkages to other structures in international society and to domestic structures. In this sense, a regime's robustness is in part due to its ability to successfully redefine actors' interests and create new linkages. This means that it is possible for regimes to survive not only changes in states' material interests and power but also the decline of hegemons. Even a robust regime, however, can be challenged by changes within and outside of its purview. A regime's effectiveness is most directly challenged by alternative norms which cause its central purpose to be reinterpreted or undermined. Its robustness is most directly challenged by crises and by failures to create or reinforce shared understandings between the actors that are part of the regime. As noted above a punctured equilibrium model argues that crises can be one of the most important triggers for change within and between regimes. In particular, crises acts as shocks which may cause actors to

re-evaluate a regime's purpose, triggering possible norm change. Therefore, these two categories are independent but linked.

2.4 Crises

Crises can undermine or weaken regimes and bring about their replacement. (Arts 2000: 517) This is because such shocks, manifesting as political crises, can disrupt policy stasis within governments. (Milner and Keohane 1996: 16, see also Goldstein 1989: 32) They point to the failure of pre-existing norm-governed understandings 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, Björkdahl 2002: 18) A crisis creates a window of opportunity during which societal attributes become more malleable. (Berger 1996: 331, Price 1998: 622) As established operating procedures within states break down, outsiders with knowledge have an opportunity to directly influence the decision-making apparatus. (Hass 1992, Simmons, et al. 2006: 789) In short, as Checkel notes, “under conditions of high international uncertainty or foreign policy crisis, decision makers engage in an information search and are thus more receptive to new ideas. Their foreign policy preferences, in other words, are in flux.”(1997: 7) Thus, in a crisis norm entrepreneurs can exploit these open policy windows in order to empower new ideas. (Checkel 1997: 125)

What constitutes a crisis within the refugee issue area?²⁴ I define a crisis as: a dramatic and sustained change in the nature and/or numbers of refugees which is significant enough that 1) state refugee policies will be unsustainable in the long run without alteration

²⁴ In providing this definition and detailing these three possible forms of response, I seek to respond to a major concern raised by Jeffrey Legro that too often, crises and shocks are simply used as a default explanation: “while crises are often related to change, exogenous shock remains an indeterminate explanation. Similar shocks seem to have different effects: some lead to change, some do not... We have poor answers to this question in part because we tend to look only at shocks that cause change... The point is not that shocks are irrelevant but that their effects depend on pre-existing structures.” (2005: 15, 28, see also Price and Reus-Smit 1998: 282) My thanks also to Jeffrey Checkel for making this point.

or replacement; and 2) it leads to states questioning pre-existing normative understandings and the purpose of the regime, thereby undermining the regime's effectiveness and robustness.

By nature of refugees I refer to new types of refugee flows: initially refugees were fleeing religious persecution; then in addition political persecution; then situations of generalized violence. By number, I refer to significant refugee flows, large enough that the state may be (or may perceive itself to be) overwhelmed. These are not mutually exclusive criteria; rather often both occur in tandem.

This definition points to six crises or shocks within the refugee issue's history, each detailed in the chapters ahead:

- 1) The Huguenot flight from France precipitated by the Revocation of the Edict of Nantes (1685, detailed in Chapter 3) was a shock due to a change in the nature and numbers of refugees. While religious refugees had been common prior to this period, the Revocation challenged key norms reflecting the right of refugees to leave their own state and also created over 200,000 refugees.
- 2) The flight of the émigrés from France during the Revolution (1789-1815, detailed in Chapter 4) was a shock due to a change in the nature of refugees. For the first time, states were faced with those fleeing political, rather than solely religious persecution.
- 3) The flight of Russians from the Russian Revolution (1917, with effects to 1921, detailed in Chapter 5) was a shock due to both a change in the nature and numbers of refugees. For the first time, refugees who fled a state also had their citizenship stripped, rendering them non-persons in then-existing international law.

4) German Jews fleeing the Nazis (1933-1939, detailed in Chapter 5) was a shock due to their numbers and due to the inability of states to successfully coordinate policies, after European states had spent a decade becoming accustomed to relatively few new refugees.

5) The displaced persons following World War II (1946, detailed in Chapter 6) were a shock due to their numbers, their inability and unwillingness to return to their countries of origin, and their possibility of destabilizing post-war Europe.

6) Post-Cold War flight (starting in the 1980s, detailed in Chapters 7 and 8) has been a shock due to nature and numbers. Refugees in this period often constituted a new type- those fleeing situations of generalized violence and persecution by non-state actors, rather than from only state-based persecution- which does not fit in with the existing legal framework. They have also, due to an increasing ability to migrate, been perceived as a potential threat by states in the developed world.

A crisis, therefore, triggers a change within the regime. Based on the historical record, three forms of state response to such crises are possible.

1) The state attempts to preserve the status quo, even though this is no longer sustainable. This is most clearly demonstrated by the 1918-1921 period, and occurs when states have no clearly articulated alternative view that fits with existing normative understandings at the domestic and international levels.

2) The state attempts to follow humanitarian-based arguments by expanding or deepening the refugee protection it offers at the domestic level and supports norms reflecting this at the international level. This may or may not be a significant alteration of state policy.

This is most clearly demonstrated by state practice in the early 19th century and following the Second World War.

3) The state attempts to follow restrictionist and sovereignty-based arguments by narrowing refugee protection or increasing restrictionist policies and methods at the domestic level and by supporting norms reflecting this at the international level. This may or may not be a significant alteration of state policy. This is most clearly demonstrated by state practice in the late 1920s and 1930s, and since the end of the Cold War.

The role played by norm entrepreneurs at the international and domestic levels can be critical during these periods, as the state response often depends on the existence of a clear alternative. Thus, their efforts will indirectly contribute to whether a regime which is confronted with a crisis will collapse, be transformed, or replaced.

In summary, crises are crucial to regime creation, transformation, and replacement because they cause states to question the norms and principles associated with the existing regime. This questioning causes policy windows to open, during which norm entrepreneurs may be more successful at arguing in favour of alternative normative understandings at both the domestic and international level. The next two sections therefore focus on how norms diffuse at the international and domestic levels, and then on the role played by norm entrepreneurs.

2.5 Norm Emergence, Norm Entrepreneurs, and Domestic Structures

New norms emerge in a contested environment and they must compete with other existing and perhaps countervailing norms. (Jepperson, et al. 1996: 56) These new norms are actively built by agents, norm entrepreneurs, who have “strong notions about appropriate or desirable behaviour...” They are critical to this process because “they call attention to issues

or even ‘create’ issues by using language that names, interprets and dramatizes them.” (Finnemore and Sikkink 1998: 896-7) Norm entrepreneurs act at both the international and domestic level, and these entrepreneurs can be a variety of actors, including transnational advocacy networks (Klotz 2002: 56, Risse 1999), epistemic communities (Haas 1992), individuals, and IOs.²⁵ Crises, as noted above, can be critical to their activities not only because they point to the failure of pre-existing norms but also because within governments they disrupt policy stasis and create new spaces for entrepreneurs to operate.

One of the major techniques used by these entrepreneurs is framing, “the conscious strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action.” (McAdam, et al. 1996: 6) Framing the new norm correctly can be crucial because when it is successful “the new frames resonate with broader public understandings and are adopted as new ways of talking about and understanding issues.” (Finnemore and Sikkink 1998: 897) Linking new norms to already established normative understandings in such a way can help boost the legitimacy of the new practices. (Crawford 2002: 102) But frames also help as a strategy for relatively weaker actors to be “able to exercise influence and induce states to embrace new policy commitments inspired by norms.” (Busby 2007: 251)

At the international level, Finnemore and Sikkink (1998) have proposed a broadly accepted three stage norm ‘life cycle’ to explain how norms gain influence. The first stage, norm emergence, occurs when norms are actively created or built by norm entrepreneurs. As norm entrepreneurs succeed in generating a critical mass of support from states interested in adopting the new norm, it reaches a threshold or tipping point, which initiates the second

²⁵ Following Barnett and Finnemore (2004: 177), I use “international organization” (or IO) to refer to intergovernmental organizations. Non-governmental organizations will be referred to by that term or as an NGO.

stage known as norm cascade. The final stage of the life cycle occurs when an international or regional demonstration effect occurs, whereby “international and transnational norm influences become more important than domestic politics for effecting norm change.” (Finnemore and Sikkink 1998: 902) At this stage, norms are so widely accepted that they “are internalized by actors and achieve a ‘taken-for-granted’ quality that make conformance with the norm almost automatic.” (Risse and Sikkink 1999: 15)

State receptiveness to these efforts varies because international norms “must always work their influence through the filter of domestic structures and domestic norms...” (Finnemore and Sikkink 1998: 893, see also Checkel 1999: 85) These structures and norms can consequently temper whether states accept or reject new norms. (Busby 2007: 250, Risse-Kappen 1994: 209) Differences in domestic structures will vary the impact of international norms since they ensure different channels into the political system and different mechanisms to form ‘winning’ coalitions (Risse-Kappen 1995: 16, Risse-Kappen 1994: 187, Risse-Kappen 1991: 484) and they can condition access to policy-making as well as privilege certain actors. (Cortell and Davis 2000: 66)²⁶ I suggest that prior normative understandings at the international and domestic levels, domestic institutions, and finally ideationally-defined notions of national interests all play important roles in determining how states respond to new norms.

Norms generally diffuse to the domestic level through two differing mechanisms. The first is bottom up, the second top-down. (Checkel 1999: 88, Gurowitz 2006: 308) The bottom-up approach suggests that some governments, particularly those concerned for their

²⁶ Another possibility that Cortell and Davis suggest is that domestic actors may manipulate international norms to further their own interests. Thus, institutionalization of international norms can have “both positive and negative effects for compliance.” (1996: 452) In this regard, it is important to note that those favouring parochial norms such as restrictionist immigration policies are just as much norm entrepreneurs as those championing humanitarianism.

international reputations, are more vulnerable to moral pressures than other governments and to the actions of transnational advocacy organizations who are able to pressure governments by invoking international norms, whether by themselves or in conjunction with other international actors. (Risse and Sikkink 1999, Keck and Sikkink 1998, Sikkink 2004) Top down diffusion instead sees elite decision-makers engage in social learning which in turn leads them “to adopt prescriptions embodied in international norms.” Through this process, the norms “become internalized and constitute a set of shared understandings that make behavioural claims.” (Checkel 1999: 88) Checkel suggests that in liberal polities, the bottom-up process will tend to dominate (1999: 90) while diffusion by elite learning is more common in highly centralized states. (1997: 125, Checkel 1999: 90, see also Risse-Kappen 1994) As I will show, both methods affected processes by which new international norms regarding refugee protection were internalized by Great Britain and the US.

The resonance of a new international norm depends on existing domestic norms and, more broadly, a cultural match, i.e. the degree to which “the prescriptions embodied in an international norm are convergent with domestic norms, as reflected in discourse, the legal system (constitutions, judicial codes, laws), and bureaucratic agencies (organizational ethos and administrative procedures).” (Checkel 1999: 87, see also Cortell and Davis 2000: 73) Norms are more likely to be implemented and complied with if, as Risse and Sikkink note, they “resonate or fit with existing collective understandings embedded in domestic institutions and political cultures.” (1999: 271, see also Sundstrom 2005: 420-24, Checkel 1999) Norms that reflect either already existing universal (Sundstrom 2005: 241) or regional understandings are more likely to be internalized, though, as Acharya notes, this depends significantly on localization, whereby norm-takers “build congruence between transnational

norms (including norms previously institutionalized in a region) and local beliefs and practices.” (2004: 241) New norms can also be more easily internalized if there are no pre-existing understandings. Without these, states can not make adequate “appraisals of appropriate behaviour in a particular issue area.” States will thus be receptive towards new norms which fill this gap. (Cortell and Davis 2005: 3)

Even so, these efforts are less likely to be successful without a congruence with domestic society (Sundstrom 2005: 420) and without becoming involved in domestic coalition politics. As Kaufman and Pape argue, “even when an international moral cause enjoys strong support, its chances of being enacted as state policy may often depend on whether the domestic balance of political power forces one of the mainstream factions into a ‘saintly logroll’ with the moral activists.” (2003: 632) This holds true especially when the change bears a significant cost. Thus, for norm internalization to occur, norm entrepreneurs need to be empowered in the national arena by shifting the interests and preferences of a domestic agent, whether individual, group, or government. (Checkel 1999: 88-9)

As Harold Koh notes, there are three possible paths towards internalization: political internalization, “when it is adopted as a matter of government policy;” legal internalization, when an international norm “is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three;” and finally social internalization, when “a norm acquires so much public legitimacy that there is widespread general obedience to it.” (1997: 2656-7, see also Finnemore 1996: 2)

Internalization is greatly assisted if proposed norms are accepted by domestic institutions which, as Koh notes, will adopt “symbolic structures, standard operating procedures, and other internal mechanisms to maintain habitual compliance.” Once this has

occurred, decision-makers outside the institution may be forced to shift their own views to avoid friction “from a policy of violation to one of compliance” (Koh 1997: 2653-5, Alderson 2001: 418) Thus, changes in domestic institutions, particularly replacement or formal alteration, provides an indication that a new norm has “achieved more than nominal domestic salience.”(Cortell and Davis 2000: 70)²⁷

A domestic institution can have two independent forms of influence: The institution collectively or its individual members can block change as ‘veto players’; and it can influence the ability of norm entrepreneurs to access government. With regard to the first point, as Milner and Keohane note, domestic institutions can “freeze coalitions and policies into place by making the costs of changing these coalitions and policies very high...” (1996: 21) These institutions can play the role of policy gatekeepers if they have “sufficient power to block or at least delay policy change.” (Busby 2007: 254) Thus veto players, “individual or collective decision-makers whose agreement is required for the change of the status quo,” need to agree with proposed changes. (Tsebelis 2000: 442, Tsebelis 2002) The number of veto players varies depending on the government system,²⁸ which means that the ability of different domestic institutions to block international norms will be variable.

This marks an important level of variation between the two countries I focus on: the United States and Great Britain. Britain, with a fused executive and legislature, has a single

²⁷ These processes do vary according to government type. As Checkel notes, in: “centralized states, there are fewer pathways by which ideas can reach elites; their initial adoption is thus more difficult. Once adopted, however, such ideas stand a greater chance of being implemented and thus of altering state behaviour... In less centralized states, there are a greater number of pathways by which new ideas can reach elites; their initial adoption is thus less problematic. Once adopted, however, such ideas are less likely to be implemented in a way that has a lasting effect on behaviour.” (1997: 124)

²⁸ Veto players have a formal role, usually specified in a country’s constitution or political system. In presidential systems, the legislature (including one or two chambers) and an independent executive are veto players. In a parliamentary system, agreement may be required of one (in Westminster systems) or more (in coalition governments) parties for change. Thus, each party can constitute a veto player. (Tsebelis 2000: 447)

institutional veto player, while the United States has many. (Tsebelis 2002) As Busby notes, in Britain the influence and views of a few individuals will be crucial in adopting or rejecting new international norms. (2007: 254) In the United States a number of veto players with widely differing interests will need to be convinced. (Kingdon 1995)²⁹ I anticipate that the receptiveness of each country to new norms and to subsequent shifts in refugee policy will vary, with American policy more prone to stasis and to supporting the status quo. While members of the executive branch have played important roles as entrepreneurs, their efforts had to deal with other veto players, while a similar situation does not exist in Great Britain.

In addition the policy processes of the two countries vary due to the number of access points. The United States, as King notes, has both:

vertical access points (such as the states) and horizontal access points (such as interest groups lobbying in Congress). The difficulties of forming coalitions with a shared consensus favours proposals compatible with existing ideology and assumptions. Furthermore, policies with a small congressional coalition are vulnerable to presidential vetoes. (1992: 219-20, see also Risse-Kappen 1994: 210-11)³⁰

In Britain, by contrast, “the centralized state limits channels of access but accords a greater importance to agents of change and promoters of ideas if they succeed in influencing the government.”(King 1992: 220) Thus, in the United States policy is initiated by the president and Congress working together, though cooperation may be strained, while in Britain governments can “legislate on the basis of their parliamentary majority.”(King 1992: 220)

Both of these arguments lead to a similar prediction: all other things being equal, the executive in Britain will be able to implement or block new international norms more easily

²⁹ Milner notes that the executive and legislature represent different constituencies, with the executive generally concerned about a national constituency, the legislature with the local. (Milner 1997: 35-6) Shugart and Carey suggest that “a typical democratic assembly is elected for the purpose of giving voice to the interests of localities or to the diversity of ideological or other partisan divisions... assemblies are ordinarily expected to be parochial in nature. Executives, on the other hand, are charged with acting to address policy questions that affect the broader interests of the nation, as well as to articulate national goals.” (1992: 3-4)

³⁰ I am primarily focused on how new norms are internalized at the domestic level. Therefore, I focus primarily on norm entrepreneurs outside and inside of government seeking to influence it. While societal forces are always important, they generally rest outside of the scope of this study.

than in the United States. In the United States the adoption of new norms which trigger policy change will be more difficult, in part because of the role of the American Congress. Congress can be expected to play a gatekeeper role, potentially blocking new international norms. However, it may also take an independent leadership role by embracing new international norms. It has forced the executive branch to act in a number of cases, including against apartheid South Africa (Klotz 1995: 109-10) and in promoting human rights. (Weiss 2002: 76-78) Thus, in the US the adoption of new norms will be more contested due to two independent institutions- the executive and Congress - having direct influence over the process.³¹ Once norms are internalized in domestic law, the judiciary may also play a role in preventing backsliding.

To foreshadow the argument that will be developed below with regard to the role of domestic institutions and refugee policy, Congress played two key roles in the post-World War I period. The first of these was that, by ensuring no new formal legal understanding could be introduced, it framed the American response to a growing refugee problem from Nazi Germany within strict immigration limitations. Thus efforts to alter the international response were unsuccessful due to the inability to alter policies at the domestic level. In addition, Congress indirectly ensured that norm entrepreneurs within the government were limited to a constrained set of policy options and implicitly gave license to other government departments, particularly the Department of State, to adopt standard operating procedures that ran counter to international norms. However, Congress could not continue this role indefinitely. When Franklin D. Roosevelt became actively involved in 1938, and Harry S. Truman after 1946, these new norms permeated executive branch departments. Thus,

³¹ This is not to diminish the fact that within the executives of both countries, there may also be tensions and infighting (Risse-Kappen 1991: 487) which may diminish the efficacy of norm entrepreneurs.

Congress was only able to play the role of a norm blocker when the President was not actively challenging its views. Further, the President, playing the role of an active norm entrepreneur, can even influence other domestic institutions to adopt new normative understandings, as Truman influenced Congress by reframing U.S. refugee policy within the context of the emerging Cold War. The domestic environment, therefore, can dramatically affect a state's receptiveness to new international norms.

2.5.1 Domestic Norm Entrepreneurs and National Interests

It is possible for norm entrepreneurs to successfully overcome domestic institutional resistance. Domestic norm entrepreneurs can transform the stances taken by these institutions by, as Cortell and Davis suggest, framing their arguments in what “at first may be self-interested appeals to international norms in terms of a broader national interest.” These entrepreneurs therefore must “discursively link the new norm to an encompassing conception of the national interest.” (Cortell and Davis 2005: 22-3)³² However, efforts are conditioned by how accessible these domestic institutions are. If they “do not provide for the participation of norm entrepreneurs in decision-making debates, then the efforts of these actors to effect normative change are likely to fail.” (Cortell and Davis 2005: 22-3)

These interests are ideationally-derived (Wendt 1999: 96-7) and, as Andrew Shacknove (1998) has noted, national interests have had important effects on shaping how the notion of asylum is viewed through prisms of political stability, economic stability, and foreign policy concerns. These interests, however, are tempered by both international norms and morality. (Steiner 2003: 181) Consequently, refugee policy, as Gil Loescher notes, often “involves a complex interplay of domestic and international factors at the policy-making

³² In some cases this may be due to a schema shift on the part of a key leader, in others a cynical advancement of an international norm for short term gain. Even such tactical ploys, however, can contribute to internalization through institutionalization of the new belief. (Alderson 2001: 420)

level and illustrates the conflict between international humanitarian norms and the sometimes narrow self-interest calculations of sovereign nation states.” (1989: 8)

States balance two ideational frameworks (Wendt 1999: 96-7)³³: one based on humanitarian principles; the other based on sovereignty, restrictionism, and arguments around the national interests. National interests include such requirements for the states as physical survival, autonomy, economic well-being, and collective self-esteem. (Wendt 1999: 235, George and Keohane 1980) National interests may affect a state’s refugee policy in a number of ways. Refugees may be seen as challenging the state’s autonomy – debates over immigration law in the United States in the 1920s cited refugee and migrant admissions as allowing other countries to violate the US’s sovereignty. And yet humanitarian principles and national interests need not be opposed. They may also be reinforcing, such as in the late 1940s and early 1950s as refugee admissions were framed within the United States as being a vital element of Cold War strategy and hence state preservation. Thus these two ideational frameworks can successfully function in tandem. Domestic norm entrepreneurs,³⁴ consequently, need to be able to frame new norms within prevailing views of the national interest, and have access to domestic institutions. Thus, they either need to be in government or be able to influence those in government.

³³ Wendt argues that material causes, power, and the content of interests are largely a function of ideas. He notes that there are brute material factors - ideas do not go all the way down. (1999: 235, see also Abdelal 2005) Geography, for example, plays a pivotal role in structuring how states may respond to refugees - a state far removed from major refugee flows may have a greater set of policy options available to it than one next door to a major refugee-producing country. Similarly, there have been suggestions that the proximity of states to refugee-producing countries may be a factor in an increased propensity to conflict. (Salehyan and Gleditsch 2006)

³⁴ This term is used deliberately for two reasons. The first is to differentiate these individuals from international norm entrepreneurs, who may seek to influence domestic institutions, but have their base of authority (or ability to persuade) rooted at the international level. The second is to focus on the normatively and ideational-held nature of their beliefs - these individuals may be agnostic in terms of the ways in which they frame the issue and towards the eventual policy outcome, provided it fits these beliefs. Thus, President Truman was focused on creating a more liberal refugee policy, and tried a series of frames before successfully treating the refugee problem as a Cold War issue.

Refugee policy at the domestic level, not surprisingly, has been shaped by a number of norm entrepreneurs. In Great Britain, the executive, and in particular the Foreign Office, generally had the power to determine the country's approach to individual refugee flows as well as to the broader normative understandings of the refugee regime. In the United States, by contrast, refugee policy has changed only sporadically and usually only through long-term efforts. This has not been due to a lack of norm entrepreneurs. Rather, at times their activities have been blocked within the executive branch - the State Department played such a role throughout the interwar period - and by Congress. When American policies towards refugees were successfully framed within the national interest, by contrast, and in particular when the President assumed a norm entrepreneur role (see Gerhardt 2001), Congress has been more consistently supportive of new norms. By the same token, Congress has also played a role in ensuring that the executive branch continues to abide by accepted norms, particularly after the enactment of the 1980 Refugee Act.

2.5.2 International Organizations

International organizations (IOs) have played important roles within the refugee regime since 1921. An IO, as Finnemore and Barnett note, is "an organization that has representatives from three or more states supporting a permanent secretariat to perform ongoing tasks related to a common purpose." (2004: 177) Katharina Coleman adds that they are created by an international charter and sustained by regular meetings of member states. (2007: 6) As norm entrepreneurs, these organizations can be expected to have both agency and autonomous effects on state policy. Such a view remains contentious. Often, the independent actions of IOs are considered to be highly constrained: "member states, especially the powerful, can limit the autonomy of IOs, interfere with their operations, ignore

their dictates, or restructure and dissolve them.” (Abbott and Snidal 1998: 5) An alternative view sees IOs as norm diffusers, who become socialized to new norms by non-state actors. Norms that are organizationally unproblematic are simply promoted or diffused, while those which are problematic require an identity shift which alters the organization’s culture and interests. (Park 2006: 352-3) In both views, while IOs may be independent, they are constrained. They do not create new normative understandings themselves.

And yet these views are contradicted by the IOs created within the refugee regime. As Gil Loescher notes, the UNHCR for most of its history “has acted as a ‘teacher’ of refugee norms.” It has used a number of tactics, including “persuasion and socialization in order to hold states accountable to their previously stated policies or principles... Because the UNHCR possesses specialized knowledge and expertise about refugee law, states often deferred to the Office on asylum matters.” (Loescher 2001: 5)

Part of the role of IOs in norm creation in the refugee regime does point back to the role of individuals. Fridthof Nansen, the first League High Commissioner for Refugees, played a larger than life role due not only to his organizational support, but also his diplomatic role within the League and due to his professional and personal reputation. A number of the UNHCR’s High Commissioners have played similar roles, with several having to challenge the organization’s own internal norms.

Beyond this, IOs also have authority because they pursue liberal social goals that are desirable and legitimate (Barnett and Finnemore 2005: 162) and as bureaucracies with hierarchical, continuous, impersonal, and expert systems in place. (Barnett and Finnemore 2004: 17-8) This means, as Barnett and Finnemore argue, that the power of IOs “goes beyond regulation. IOs can also constitute the world as they define new categories of

problems to be governed and create new norms, interests, actors, and shared social tasks.” (2004: 17) IOs as bureaucracies possess delegated authority from states to undertake tasks. Equally important are IOs’ own sources of authority, including rational-legal authority which gives them form and empowers them to act; moral authority based in their need to embody, serve, or protect a widely shared set of principles; and finally expert authority due to their detailed, specialized knowledge. (Barnett and Finnemore 2004: 20-4)³⁵ With this authority, IOs have the ability to deploy “discursive and institutional resources in order to get actors to defer judgement to them.” (Barnett and Finnemore 2005: 169) These different types of authority contribute to an IO’s ability to legitimate itself as an international actor. (Barnett and Finnemore 2004: 159-60)

Yet, while legitimacy may be based both in whether an IO’s procedures are proper and correct and that their goals are consistent with the values of the broader community (Barnett and Finnemore 2004: 166), automatic legitimation does not occur forever. Rather, the (in)ability of the IO to achieve its goals, to serve interests and to satisfactorily achieve the community’s purposes all matter. (Barnett and Finnemore 2004: 168, Sandholtz 2008: 140) Moreover, different political constituencies may not agree on what is a substantive success. (Barnett and Finnemore 2005: 183)

The UNHCR fits this model. Its sources of authority include authorities delegated to it by states as a consequence of its Statute and the 1951 Refugee Convention, the 1967 Refugee Protocol, and a series of UN General Assembly resolutions. It also has powerful moral authority, derived “from its mission to help protect refugees and from its standing as a humanitarian agency that acted in an impartial manner. Its authority and influence were in no

³⁵ Importantly, they note that IOs can also engage in pathological behaviours which violate the “self-understood core goals of the organization.” (Barnett and Finnemore 2004: 38-41)

small measure due to its image as an advocate for the powerless.” (Barnett and Finnemore 2004: 73-74, see also Barnett 2001) Finally the UNHCR has expert authority through its role as a ‘teacher’ of refugee norms. (Loescher 2001: 5, see also Barnett and Finnemore 2004: 73, and Hartigan 1992) Even so, much of this authority is based on the prior development of key norms reflecting how states should protect refugees. Thus, the UNHCR’s success, while important, also reflects a historical process of gradual norm development and accumulation.

Not all IOs are created equal, however. An important level of variation occurs between the UNHCR and previous IOs created to protect refugees, a long list that begins with the League of Nations High Commission for Refugees in 1921. Each of these had such nexi of independent authority, though they varied significantly. And yet the institutional record prior to the UNHCR was decidedly mixed; most notably in the failure of IOs both inside and outside of the League of Nations to protect refugees fleeing Nazi Germany. In the post-Second World War period, while Western states were committed to the need for a formal IO to protect refugees, they disagreed on the form that protection should take.

2.5.3 States, Diffusion, and Power

The final question is how new norms which are internalized by a few states diffuse across international society. On one level, diffusion reflects that “national policy choices are interdependent - that governments adopt new policies not in isolation but in response to what their counterparts in other countries are doing.” (Simmons, et al. 2006: 782) On a deeper level, norms have important contagion effects, and as new norms are adopted by more and more states, a socialization process helps to foster norm-governed behaviour. Thus, beyond a critical threshold or tipping point, international and transnational influences become equally or even more important than domestic politics. A mark of a normative cascade should be its

ability to overcome non-congruence with domestic interests and norms and the efforts of veto-playing institutions to block internalization. (Finnemore and Sikkink 1998: 901-2) Shaming, too, can be a factor, as states become concerned over their international reputation should they not follow a new norm. (Price 1998: 635, Johnstone 2005: 187)³⁶

Does state power play a role in this process? Certainly, diffusion raises the spectre of coercion in the adoption of new norms. For this dissertation, this is an issue due to the states I focus on as norm generators, all of whom can be considered Great Powers: Great Britain, the United States, and to a lesser extent, France. From a realist perspective, the use of coercion as well as material incentives is common in order to alter the positions of other states. Within the rationalist literature on policy diffusion, for example, it is suggested that powerful countries, using coercion, can explicitly or implicitly influence weaker states' policy adoption by "manipulating the opportunities and constraints encountered by target countries, either directly or through the international and non-governmental organization (NGOs) they influence." (Simmons, et al. 2006: 790) As Ikenberry and Kupchan note, one way hegemonic states can exercise power is through material incentives, such as threats of punishment or promises of reward, in order to alter the political or economic incentives of other states. Even so, socialization provides an alternative, more diffuse form of power, as the hegemon alters the substantive beliefs of leaders in other states. From this process, "acquiescence emerges from the diffusion of a set of normative ideals." (1990: 284, see also Ikenberry 2001)³⁷

³⁶ Price notes that even rhetorical support can be helpful. He notes that "such discursive dynamics are not insignificant, because embracing ideas even through mere lip service can, over time, have a meaningful effect as contesting policies and discourses becomes increasingly unacceptable." (1998: 636)

³⁷ Self-interest is still crucial: socialization makes hegemony more durable and less costly than coercion alone. (Ikenberry and Kupchan 1990) This view is limited, as Wendt notes, because socialization is seen only as an "elite strategy to induce value change in others, rather than as a ubiquitous feature of interaction in terms of which all identities and interests get produced and reproduced." (1992: 403)

Generally, constructivists understand socialization as a process in which actors' attitudes are changed without either material or mental coercion.³⁸ (Flockhart 2006: 97, Johnston 2001) As Checkel notes, socialization is "a process of inducting actors into the norms and rules of a given community. Its outcome is sustained compliance based on the internalization of these new rules." (2005: 804)

Material incentives may assist the initial socialization process. (Checkel 2005: 809) However, their long term use may denote problems. As Reus-Smit notes, when states have to resort either to coercion or to the provision of tangible benefits, regimes can be considered to be suffering from either decay or a crisis, and the actor or institution "must either adapt (by reconstituting the social bases of its legitimacy, or by investing more heavily in material practices of coercion or bribery) or face disempowerment." (2007: 158, see also Price 2007: 235) The costs associated with the latter step are such that it cannot be continued indefinitely.

It is through socialization rather than coercion or benefits that states brought about normative change concerning refugees at the international level. Coercive actions or threats were seldom used to gain adherence to new understandings, and never after the 1830s.³⁹ In fact, a more frequent issue was threats of war being levelled against the states advocating new norms due to perceptions that their refugee policies were too lenient.⁴⁰ Similarly, the

³⁸ Force alone is unlikely to succeed. As Finnemore notes, force "may be good at constraining states from acting contrary to (or in accordance with) some social purpose that the coercer holds, but, without the support of other kinds of mechanisms, it cannot itself change the underlying purposes states pursue." (2003: 147)

³⁹ As is discussed in the fourth chapter, in the early 19th century, there was the prospect of war over these policies, but between Great Britain and the United States, (Pyle 2001) who held similar normative viewpoints. In 1829, France threatened Naples with war over their treatment of an extradited political refugee, but this led to a change in France's domestic policies, in order to bring legislation in line with normative understandings.

⁴⁰ This occurred with Great Britain and various continental powers several times after the 1848 Revolutions. These included countries which had not yet adopted the notion that political refugees should not be returned to their own country. France also threatened Great Britain with war, but argued that the 1848 Revolutionaries were distinct from other political refugees in that they directly threatened the international order. By the 20th century, as these normative understandings became more broad-based, such threats virtually disappeared. Today, the

states advocating new normative understandings were often willing to provide economic incentives by providing the majority of contributions to international organizations. But this also can not offer a complete explanation because these efforts were generally short-lived and associated directly with the state taking on a norm-leadership role, with direct financial support declining as states became socialized to new norms.

In summary, three separate types of norm entrepreneurs are influential in the norm emergence process: individuals and transnational advocacy organizations; international organizations; and states. Within the state, it is important to consider the different roles which might be played by entrepreneurs within and outside of government who may face distinctly different access problems and constraints. Within the ensuing case studies, I deal with these different sets of actors in turn. Figure 2.1, below, summarize the important norm entrepreneurs at the international and domestic levels.

2.6 Conclusions

The aim of this chapter was to establish the explanatory framework I use to explain continuity and change in states' refugee policies. This requires detailing the roles of both structures and agents. The first part of the chapter dealt with the role of fundamental institutions in both constituting states as actors in international society and problematizing refugees and creating a space in which a cooperative solution is possible. I then elaborated a view of regimes which focused on their linking ability between these institutions and individual norms. I suggested that regimes are important because they frame the scope of the problem and provide a guide to states as to what constitutes normatively correct behaviour within the issue area.

main issue is with militarized refugee groups, which, as discussed in the seventh chapter, generally violate key norms associated with the refugee regime.

Figure 2.1: Two Levels of Norm Entrepreneurs

| International |
|---|
| <ul style="list-style-type: none">• States• Individuals• International Organizations• Transnational Advocacy Networks |
| Domestic |
| <ul style="list-style-type: none">• Non-government/Extra-government Organizations• Governmental Actors<ul style="list-style-type: none">○ Elite decision-makers○ Judicial actors○ Institutions (as veto players) |

Regimes, while fairly stable, will be challenged by crises, in particular changes in the nature and numbers of refugees. Once such a shock occurs, states question the properties of the regime and, depending on how effective and robust the regime is, it may collapse. The shock also causes states to seek alternative norms for guidance, and their policies following a shock will either follow an attempt to preserve the status quo, to increase restrictionist policies, or to increase humanitarian policies.

In the last section, I argued that norm entrepreneurs play a critical role as agents in introducing new norms and gaining their widespread acceptance. If these norms challenge pre-existing understandings, however, they are unlikely to be internalized without the concerted efforts of domestic entrepreneurs to overcome institutional biases. Once states have accepted the new norm, however, I noted that they can succeed in acting as norm entrepreneurs in their own right, socializing other states in international society.

This model will be fleshed out in the next five chapters. The third chapter points to the role of fundamental institutions in structuring the state response to a major refugee crisis - the flight of the Huguenots from France - and the decision of a number of states to provide protection to these refugees through domestic law. The fourth chapter traces out how this

initial response to the Huguenots formed the basis for a tacit regime in the 19th Century, one that conceived of refugees as a state responsibility, but ensured their protection through the mechanisms of domestic and bilateral law. In particular, it will argue that extradition law and state practice, particularly the practices of Great Britain, France and the United States, played important roles in creating a set of consistent norms which were transmitted across international society. The fifth chapter explores the transfer of refugee protection to the international level through the creation of international organizations and international law. It argues, however, that the efforts of these IOs to introduce new normative understandings failed in part due to a lack of congruence with domestic norms in both Great Britain and the United States.

The sixth chapter focuses on refugee protection during the Second World War and the post-war period. It argues that the United States took the lead in creating a new, consistent, refugee regime based in its own domestically held norms and in the moral beliefs of President Harry Truman. As the Cold War deepened, however, and the United States drew away from multilateral solutions, the UNHCR increasingly became an important norm entrepreneur in its own right, a change highlighted in the seventh chapter. The UNHCR ensured not only that states adopted a number of important legal norms to protect refugees- most notably that of non-refoulement- but also ensured that the regime could be moved from a Eurocentric to a global perspective. Finally, however, as refugee numbers began to increase anew in the 1980s, states have sought to limit their own obligations by limiting the role that the UNHCR can play and also by adopting restrictive policies vis-à-vis refugees. This is a change examined in the eighth chapter.

Chapter 3: Refugees and the Emergence of International Society

3.1 Introduction

Prior to 1648, territorial asylum was not common in Europe. As a practice, it had emerged in the Greek city states, but atrophied under the Roman Empire. In the middle of the 17th century, territorial asylum re-emerged for two important reasons. The first was that the Peace of Westphalia legally recognized an emerging norm of jus emigrandi, the right of individuals who faced religious persecution to leave their own state and seek sanctuary elsewhere. This norm is crucial, and has evolved into the present-day normative conception that refugees should be allowed to leave their own state.

This norm was underdeveloped until it was directly challenged by a state. This second event was the Revocation of the Edict of Nantes by Louis XIV of France. The Edict had guaranteed tolerance of the French Huguenot, or Protestant, population. The Revocation, accompanied by laws prohibiting the departure of the Huguenots, not only caused the flight of some 200,000 Huguenots, but also triggered a crisis for other European states. These other states, led by Brandenburg, reacted to this crisis by creating a novel form of state practice: these refugees were accorded domestic legal protections based on their status as refugees. This change was a watershed event – since that time, refugee protection has always been based in some form of legal protection. This shift, however, would not have occurred without the clear development of doctrines of international law which had developed in the 17th century. Thus, this is also an important example of sequencing at work. (see Pierson 2004)

The focus of this chapter is this shift. I begin by briefly examining asylum prior to this period. The cause of this shift, I then argue, was the emergence of a European-based international society anchored in doctrines of territoriality, international law, and

mercantilism. Territoriality caused refugees to be framed as an international problem. The international legal theories of the day and the doctrines of mercantilism provided a ready response to this problem, focused on individual states granting refugees entrance and offering them domestic protections. The test for this system was the flight of the Huguenots. It was here that other states put these conceptions into practice, accepting that France was wrong to prohibit exit, offering the Huguenots sanctuary for a mix of religious and economic reasons. and providing them an assortment of legal protections. As evidence that this was not a single incident, I examine other refugee flows over the late 17th and 18th centuries and argue that these also conform to this pattern, summarized in the table below.

State practices over this period, however, demonstrate the difference between states independently following a norm-governed understanding or cooperating within a regime. States accepted that refugees had a right to leave, a normative understanding which

Table 3.1: Refugees Movements 1648- 1755

| Year | Group | Refugee Numbers | Source Country | Host Country | Fled Religious Persecution | Denied Exit | Expe- lled | Protection in Domestic Law |
|------|---------------|-----------------|----------------|--|----------------------------|-------------|------------|----------------------------|
| 1685 | Huguenots | 200,000 | France | Brandenburg, other German states, Netherlands, England | Yes | Yes | No | Yes |
| 1686 | Waldensians * | 3,000 | Pied-mont | Switzerland | Yes | No | Yes | No |
| 1709 | Palatines | 12,000 | Palatine | England | Yes | Yes | No | No |
| 1731 | Salzburgers | 20,000 | Austria | Prussia | Yes | No | Yes | No |
| 1744 | Jews | 20,000 | Austria | Allowed to Return | Yes | No | Yes | No |
| 1755 | Acadians | 12,000 | Nova Scotia | Within British Empire | No | No | Yes | No |

*Note: Many Waldensians died in flight, and were only allowed to leave the country after extensive negotiations

Sources: Norwood (1969: 52, 102-34); Scoville (1952: 296-8); Weiss (1854: 80); Clark (1998: 1277-9) Dickinson (1967: 465-6); Knittle (1965); Walker (1992); De Zayas (1988: 16); O'Brien (1969: 13); Faragher (2005: 374)

influenced their practice. Beyond this, however, states saw no corresponding normative obligation to accept refugees. Refugees were welcomed, but throughout this period it was usually for religious or economic reasons and depended greatly on the demographics of the group and domestic pressures within the receiving state. As such, refugee groups were treated in an ad hoc manner with states favouring their acceptance for instrumental rather than normative reasons. This practice was significantly different, as I argue in the next chapter, than state practices in the 19th century in which liberal conceptions of popular sovereignty provided a basis for a regime.

3.2 Asylum in History

Rights of asylum have a long history, but emerge out of two differing roots: religious and political. Thus, most religions provide a basis for providing protection to whomever requires it, regardless of their religion. In the Old Testament of the Bible, we can find, as W. Gunther Plaut argues, “a principle of non-refoulement in the case of slaves,” including those from outside of Israel. (Plaut 1995: 18) He notes that other religious texts offer similar protections. The Qu’ran provides protections to strangers and even idolaters. Buddhism and Hinduism also accept the notion of refuge and the acceptance of others. (Plaut 1995: 21-22) Religious doctrines of asylum were important by limiting the damage of blood feuds and allowing time for crimes to be investigated. As Liza Schuster notes, “temple asylum had a political role to play.” (2003: 65) Where the system of laws was weak, she argues, “asylum developed as a necessary counter-balance to what might otherwise have become a cycle of escalating violence, feud, and vendetta.” (Schuster 2002: 41)

Religious asylum predates political asylum, which required pre-requisites including “distinct jurisdictions, parity of power between different states or powers and, most

importantly, an advantage to the wider society, latterly the state.” (Schuster 2002: 41) Within Greek political asylum,⁴¹ its religious roots remained evident, referring originally to objects which could not be seized and spaces such as temples which were sacred or magical. By going to such spaces, individuals placed themselves under the protection of the gods and out of secular control.

Within the Greek city-states, political asylum was a rule-ordered practice, with cities accepting that political refugees, as well as exiles who had been banished,⁴² could be given asylum. Common criminals, by contrast, were excluded from the practice. Importantly, though, sanctuary was a right granted by the city. It was not automatic, “something that has remained a feature of asylum ever since.” (Schuster 2002: 41-2, Schuster 2003: 66-7)

By contrast, political asylum was not practiced within the Roman Empire. In part, this was triggered by the emergence of an effective legal system which lessened vendetta-based violence. The major reason for the change, however, was that the Roman Empire did not accept a clear demarcation of its jurisdiction. There was no alternative to flee to:

Asylum, as an expression of territorial sovereignty - territorial asylum - was suspended during the lifetime of the Roman Empire... because it served no purpose for the state, because there were no separately recognized jurisdictions, and because the Emperor provided an overarching authority within his domain.(Schuster 2003: 68)

Religious asylum, not subject to the same issue, prospered. In 347, the Emperor Constantine, following his conversion to Christianity, established legally that the Church was entitled to grant refuge to those who sought its protection. (Schuster, 2002:42)

⁴¹ Earlier examples of political asylum do exist, going back to 1280 BCE, when the Egyptians and Hittites agreed to a pact that while it provided for return of individuals who had fled to the other jurisdiction, the returnee was “not be punished in his homeland.” (Plaut 1995: 36)

⁴² Banishment, or its modern form deportation, remains an often-used state strategy. (see Walters 2002, Kedar 1996) With the Ancient Greeks, banishment was often inflicted, usually for political views. (Schuster 2003: 67) Enough movement occurred that the right of citizenship was not very guarded, “if you did not like what the strongest party was doing in your own city, you could always try another city likely to grant citizenship...” (McClelland 1996: 74) Prominent exiles included Thucydides, who wrote the majority of his work in exile.

The pattern here is that territorial asylum requires a system of autonomous territorially-defined 'states', such as in Ancient Greece. Hierarchical systems, such as the Roman Empire, do not recognize it because they do not recognize the existence of independent jurisdictions. This pattern also continues through the Middle Ages. Throughout this time, the primary issue was the contested hierarchy between the Catholic Church and the state. With no clear separation between them, territorial-based conceptions of asylum remained in abeyance, since the Church could reach over state authority:

... at one and the same time, the church was both the primary protector and persecutor... Within the [Holy Roman] empire, the conditions for granting 'territorial' asylum as granted by the modern state did not exist, nor could they do so until the development of territorial states. (Schuster 2002: 42-43)

For the re-emergence of a territorial-based conception of asylum, there needed to be a shift away from the decentralized and Church-dominated international structure of the Middle Ages towards a system of autonomous territorial states. Equally crucial to the process, however, was a clear doctrine which recognized the rights of individuals to flee and be granted protection, a doctrine formed through the development of international law.

3.3 Refugees and the Emergence of a New State System

By the 17th century, displacement was commonplace in Europe, with refugees fleeing religious persecution and wars. Estimates suggest there may have been over one million refugees in Europe during this period, (Sassen 1999: 11) compared with a total population of some 80 million. (Parker 2001: 6)⁴³ In many cases, as Henry Kamen notes, the motivations

⁴³ While none of these people were identified as refugees, Kamen provides a retrospective estimate of emigration over this period. Major flows included people fleeing France throughout the 16th Century due to religious repression, peaking after the St. Bartholomew's Day massacre of several thousand Huguenots in Paris in 1572. One of the chief centers of refuge for this period was Geneva. Between 1549 and 1587, up to as many as 12,000 French refugees found sanctuary there. In England, following the Catholic restoration in 1555, some 800 refugees fled to the Continent. Another refugee flow was created due to the revolt against Spanish rule in the Netherlands. Kamen finds that as many as 100,000 people moved from the southern Netherlands to the north to escape the fighting, and substantial flows also went to London and to the German states, principally Frankfurt (where by the late 1580s, Netherlands refugees made up nearly a third of the population). There was also substantial emigration from the Celtic nations of Britain - between 1600 and 1700 up to 240,000 Scots

for flight were complex, “for many moved not simply to escape repression but also to continue their lives in a better environment.” (Kamen 2000: 47) Sizable numbers of refugees were also expelled from a number of European states over this period as sovereigns sought to create homogenous nations by expelling minorities. (Rae 2002: 3)

Yet sovereigns during this period were seldom concerned with refugees. Governments which did offer succour to them had little protection against invasion. One case of this was the Protestant Duchy of Württemberg, which harboured French Huguenot refugees following the St. Bartholomew’s Day massacre in 1572. The ruler, Count Frederick, argued that in accepting these refugees he “was only doing his Christian duty, that his compassion accorded with God’s command to love and to treat others as we should wish to be treated if we were afflicted for our sins with exile.” (Raitt 1983: 153) His hospitality, however, was met by invasion in December 1587 led by the Duke of Lorraine and supported by Henry III of France. The Duke justified this action by insisting the invasion was to punish Montbéliard, a French part of Württemberg, for supporting the French exiles, who had been engaged in armed raids into Lorraine. However, Count Frederick was also supporting Henry of Navarre, the Huguenot challenger to the throne, and had tried to negotiate with Henry III to protect the exiles. (Raitt 1983: 155) This incident is remarkable not because the refugees failed to receive protection – this was often the case in this time - but rather because within a century such actions would be considered unconscionable, with European states prepared to risk war in order to ensure that refugees did receive protection.

emigrated through expulsion or by choice. Ireland was similarly affected; with up to a half million people choosing to move abroad or being expelled. The Thirty Years War was also responsible for substantial migrations, particularly as a result of the end of Czech independence following the battle of White Mountain in 1620 - in 1627 alone about 36,000 families fled from Bohemia. (Kamen 2000: 48-50)

How refugees were viewed changed remarkably during this period, triggered by a fundamental reorientation in how states perceived their relations with one another. The Middle Ages and the Renaissance, while marked by political relations between states, remained rooted in traditional practices. These included forming alliances through royal marriages and going to war over successions, on behalf of religions, or on crusade. Europe was, as E. N. Williams comments, “a collection of communities arranged vertically in a hierarchy, at the head of which reigned the temporal power of the Emperor and the spiritual power of the Pope.” (Williams 1970: 3) It was also a system that lacked differentiation between private and public authority. (Spruyt 1994: 15-16)

By contrast, the modern system of territorial rule is marked by the consolidation of “parcelized and personalized authority into one public realm” which allows for “two fundamental spatial demarcations: between public and private realms and between internal and external realms.” (Ruggie 1993: 151) Thus, the state’s legal reach becomes “coterminous with certain spatial boundaries.” (Caporaso 2000: 10)

This reorientation was brought about through two mechanisms. The first was changes within European states beginning in the Middle Ages which ended with the creation of a single point of authority which was independent from external forces. (Philpott 1997: 29, Strayer 1970) Critical to this were changes at the domestic level, including the creation of domestic institutions which allowed for governments outside of the person of the sovereign. With these changes, the state could acquire the “moral authority to back up its institutional structure and its theoretical legal supremacy.” (Strayer 1970: 9, see also Ertman 1997)⁴⁴

⁴⁴ The point in time when this transition happened is much divided, with some suggesting the 1300s, (Strayer 1970: 33, Philpott 1997: 29), and others focusing on the period after 1400 as revolutions in military technology contributed to the emergence of the state as a war-fighting enterprise. (Tilly 1992:15) This is not to say all states followed the same blueprint, but at a basic level the increasing scale of war and the gradual emergence of

The second was the emergence of a new European-based international society. This shift, as Hendrik Spruyt argues, is linked to internal changes within states. Initially, those organizations best adapted to the post-feudal environment, states like Britain and France, gradually grew dominant. As the success of this structure became apparent, the international system became a mechanism of mutual empowerment. New states engaged in deliberate mimicry, as political elites copied and emulated institutional forms that they perceived as successful. (Spruyt 1994: 158, see also Hall and Ikenberry 1989: 39, Meyer 1980)

Through this process of state-emergence, a nascent international system developed, based, as Krasner notes, in four components of the state:

...territory, mutual recognition, autonomy, and control. Territoriality means that political authority is exercised over a defined geographic space rather than, for instance, over people... Autonomy means that no external actor enjoys authority within the borders of the state. Mutual recognition means that juridically independent territorial entities recognize each other as being competent to enter into contractual arrangements, typically treaties. Control means that there is an expectation not only that sovereign states have the authority to act but also that they can effectively regulate movements across their borders and within them. (2001: 18)⁴⁵

The Peace of Westphalia is often held as a marker of the end of this transition from the medieval to the modern. It is seen as the point where states recognized each other as sovereign powers within their own boundaries and forever ended church claims to transnational political authority (Zacher 1992: 59, Lyons and Mastanduno 1995: 5) and when public international law was divorced from a religious background. (Gross 1948: 20, Hinsley 1967: 168)⁴⁶

a state system both supported the state-model. (Tilly 1992) Spruyt suggests that war making can not explain this shift, since weak kings were not the logical providers of protection. Rather, he argues that the state succeeded because its internal organization had less deficiencies and because of the effectiveness of sovereignty in regulating inter-unit behaviour and delegitimizing un-like actors. (Spruyt 1994: 28-31)

⁴⁵ In these attributes, the Westphalian system differs from other state systems in which recognition was not a developed institution. (Strang 1996: 23)

⁴⁶ This view has been subject to substantial critiques, including whether the Peace merely enshrined an absolutist and pre-modern society of states (Reus-Smit 1999: 88, see also Teschke 2003: 6) or that the Peace did nothing to frame the fundamental norm of the system - that governments were the sole arbiters of legitimate

Rather than a clean break, however, the Peace served as a bridge between these two periods, helping instead to clarify the positions of states and the Papacy. As Andreas Osiander notes, the negotiators at Westphalia could:

protect existing structures, but could not shape the system in their own right, reflect[ing] the fact that the international system was largely the product of historical contingencies. The international system was a transitional set of structures on the threshold between the defunct medieval system and the new 'classical' European state system. (1994: 72)

Substantial change occurred only as states gradually replaced custom with a programmatic consensus agenda linked to common goals. (Osiander 1994: 72-73) It is this gradual shift to a common set of goals and rules that would mark the steady emergence of international society over the next two centuries. (Jackson 2000: 11) But the Peace also contributed directly to redefining how states perceived refugees, and it is to this point that I now turn.

3.3.1 The Peace of Westphalia and the Right of Jus Emigrandi

The Peace is critical because it also marked the emergence of a new thin normative order providing some boundaries on how states could treat their own populations. As Rae notes, Spain was able to expel its Jewish population in the late 15th century with no international repercussions because there were no norms governing expulsions. (Rae, 2002: 301) By the middle of the 17th century, by contrast, states had begun to tread lightly in matters of religion, even when dealing with their own populations. The main reason for this, as Stephen Toulmin has argued, was that no European state wanted “to see a general reopening of hostilities, but the earlier convulsions still produced aftershocks” (1990: 91) after Westphalia. Rather, these states accepted as guiding principles “stability in and among

behaviour within their own territories - which was not fully articulated until the 18th Century. (Krasner 1999: 20) Even among the authors who consider the Peace to be crucial, few suggest the Peace itself is a momentous change. Gross notes that the provisions have “undergone more than one substantial change in the course of time.” (1948: 21)

the different sovereign nation-states, and hierarchy within the social structures of each individual state.” (Toulmin 1990: 128, his emphasis) With these views, Rae argues, came the beginnings of a society of states resting on shared norms:

Though by no means uncontested, the effort to articulate minimum standards of coexistence extending to internal behaviour distinguish this period from the lack of such standards in the late fifteenth century when the system was taking shape. (Rae, 2002: 219)

One of the core principles embodied within Westphalia and contributing to this stability was a simple mechanism to ensure orderly population movements between states of different religions: the notion of jus emigrandi or the right to leave one’s own state with their property.

Westphalia was not the first attempt at this. A century before, the Peace of Augsburg (1555)⁴⁷ had established the formula of cuius regio, eius religio (‘whose the region, his the religion’) in order to prevent religious warfare. This precedent allowed rulers in Germany to determine whether their states would be either Lutheran or Catholic. (Golden 1988: 8) It also included as a corollary a principle of non-interference, though this was not always observed in practice. (Watson 1984: 15) Allowing princes to choose their religion of their state failed to provide a solution to those subjects whose religion might then differ from that of the prince. Therefore, Augsburg also introduced in article 24 a formal right of jus emigrandi within the German states for Lutherans and Catholics alike (Golden 1988: 17, see also Cavallar 2002: 205):

In case our subjects whether belonging to the old religion or the Augsburg confession should intend leaving their homes with their wives and children in order to settle in another, they shall be hindered neither in the sale of their estates after due payment of the local taxes nor injured in their honour. (Reich 1905 [2004]: 232)⁴⁸

⁴⁷ For a detailed account of the negotiations leading to the Peace of Augsburg, see Spitz (1956).

⁴⁸ Elector Frederick of the Palatinate argued for this view. As Spitz notes, Frederick “had the problem of Episcopal territories extending into his domain. He therefore held that the territorial government should control the actual worship but that no one should be forced to a particular confession against his will. Thus he demanded freedom of worship for the estates and freedom of conscience for all subjects, assured by the right to emigrate,” a view favoured by other participants and a solution recommended years before by Luther himself. (1956: 120-1)

A right of emigration, Spitz argues, was an important step forward: “The medieval heresy laws whereby the dissenter lost life and goods yielded to a new principle, the first fruits of toleration, however unripe.” (1956: 120) It also resulted in extensive population transfers within Germany. (Watson 1992: 173)

Augsburg was not a perfect system. In particular, it deliberately excluded all of the Reformed Churches, recognizing only Catholicism and Lutheranism, and this contributed to the outbreak of the Thirty Years’ War. Even so, under Augsburg, “central Europe experienced more than sixty almost unbroken years of peace...” (MacCulloch 2003: 275)

The Peace of Westphalia built upon this foundation.⁴⁹ In particular, the Treaty of Osnabrück (which, along with the Treaty of Münster, made up the Peace) further articulated the right. It allowed for liberty of conscience and the right of minorities to practice their religion, educate children in schools of their religion, be free from discrimination, and have equal access to hospitals and alms houses, “so that in these and all other the like things they shall be treated in the same manner as Brethren and Sisters, with equal Justice and Protection” (Article V 28 in Parry 1969: 228-9, see also Rae 2002: 216-7, Holsti 1991: 34)⁵⁰

⁴⁹ There is some dispute as to whether the *cuius regio, eius religio* formula was 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.” (1994: 12, see also Krasner 1999: 79-80) He argues that the Peace agreed “that every territory was to retain in perpetuity the official faith that it had had on 1 January 1624. If any ruler changed his personal faith after that date, as happened on a number of occasions, this could no longer affect the official faith of his dominions.” (Osiander, 1994:40) The Peace itself contributes to this confusion, noting that the Peace of Augsburg “shall be maintained in its Force and Vigour,” (Article V. 1, in Parry 1969: 214) but also allowing that while a Prince who changed his religion could have private preachers, “that this may be no Charge or Prejudice to his Subjects: But it shall not be lawful to change the Exercise of Religion, or the Ecclesiastical Laws and Customs which shall have been received formerly...” (Article VII, in Parry 1969: 240)

⁵⁰ These rights, however, only applied in the German states. Austria specifically excluded itself during the negotiations from having to accord similar rights to its own Protestant population. (Ward 1906: 412-3)

But the drafters realized that would not be enough. In addition to toleration, they articulated a clear right to leave for those whose religion differed from that of the state. Thus, a member of a minority had the right to change their abode and preserve their property:

That if any Subject, who had not the publick or private Exercise of his Religion in the year 1624 or who, after the Publication of the Peace, shall have a mind to change his Religion, or be willing to change his Abode or be order'd by the Lord of the Mannor to remove, he shall be at liberty to do it, to keep or sell his Goods, and have them administer'd by his Relations, to visit them with all Freedom, and without any Letters of Passport, and to prosecute his Affairs, and make payment of his Debts, as often as shall be requifite. (Article V 29, in Parry 1969: 229)

People who wished to leave were given five years to do so, or three years if they chose to change their religion after the peace, and they could not be hindered in any way:

It has likewise been agreed, that the Lord of the Territory shall allow a space of time, not less than five years, for his Subjects to remove, who had not the publick or private Exercise of their Religion in the said year, and who at the time of the Publication of the said Peace shall have their Abode in the immediate States of the one or the other Religion; among whom shall also be comprehended those, who in order to avoid the Miseries of War, and out of an Inclination to change their Habitation, have retir'd any where, and have a mind after the Peace to return to their own Country. And as for those who shall change their Religion after the Publication of the Peace, there shall be a Term allow'd them, not less than three years, to withdraw themselves and remove, if they cannot obtain a longer; and whether they remove voluntarily, or by Constrain, Certificates of their Birth, Parentage, Freedom, Trade and morals shall be granted them without difficulty or scruple; not shall they be oppress'd with unusual Reversals, or Decimation of the Goods they shall carry with them, above what is just and equitable; and far less shall any Stop or Hindrance be made, upon pretext of Servitude, or any other whatsoever to those who shall remove voluntarily. (Article V 30, in Parry 1969: 229-30, see also Rae 2002: 217, Krasner 1999: 80, Ward 1906: 412)⁵¹

These were not uncontested rights. As Gross notes, “the principle of liberty of conscience was applied only incompletely and without reciprocity,” with the provisions included insufficient to ensure it. Even so, religious equality was part of the Peace as “an international guarantee.” (Gross 1948: 22, Ward 1906: 416)⁵²

In this period, as Bainton argues, the division in Christendom meant that while there was no longer one universal religion, it was possible, however problematically, to attempt to conserve religious unity “in many miniatures.” Dissenters could be banished:

⁵¹ Ward notes that there was some ambiguity present. One passage provided for toleration “but another seems to imply that, exceptions apart, the ruler may oblige such subjects to emigrate...” (1906: 412)

⁵² Such guarantees became common place in subsequent treaties. (Gross 1948: 22-4, Krasner 1999: 77)

The system of the union of church and state, of the fusion of religion and the community, was thus conserved by an exchange of populations, and that was the point at which the system of cuius regio enshrined liberty of a sort. Extermination was displaced by emigration. (Bainton 1941: 115)

A right of emigration, in other words, served to stabilize the nascent European state system and to avoid the cataclysmic wars of religion that had dominated Europe for the previous century and a half. This critical change occurred because of how, by the mid-17th century, European states viewed their world and their relations with each other. How this problem was identified and how a solution rooted in international law was reached first needs an examination of the roles played by individual fundamental institutions, including territoriality, international law, and mercantilism.

3.3.2 The State System and Territoriality as a Fundamental Institution

As Max Weber famously argued, the state is “a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.” (Weber, et al. 1958: 78) Territoriality provides for a literal view of the state, “as an expanse of territory encircled for its identification and its defence by a ‘hard shell’ of fortifications. In this lies... the ‘territoriality,’ of the modern state.” (Herz 1957: 474) It also provides the mechanism by which the state can undertake a role as a gatekeeper between intra and extrasocietal flows of action. (Nettl 1968: 562-64) Territorial control extends to “ingress and egress... No one contests that right today, nor do they deny that governments can withhold consent at any time... But they have not given up the right to control them. Nor have governments ceded control over permanent population movements.” (Holsti 2004: 94)⁵³

In this sense, sovereignty, the ability of a political entity to exercise final authority over its affairs, and territoriality, which creates the state as a geographically-contained

⁵³ Absolute territoriality, however, is unsustainable since there is no extraterritorial space for trade and diplomacy. The creation of these spaces “has become a generic contrivance used by states to attenuate the paradox of absolute individualism.”(Ruggie 1993: 165)

structure in which this entity can exercise authority, are inexorably linked. (Biersteker and Weber 1996: 2-4)⁵⁴ Territoriality, therefore, provides a basis for pivotal principles of the sovereign state system: non-interference and state integrity. Borders are “crucial to basic goals of system perpetuation, state independence, limits on violence, sanctity of agreement, and stability of possession. These contribute to maintaining order and preventing challenges to the system such as a successful drive to universal empire.” (Williams 2002: 739-40)

But territoriality is also extremely problematic. (Agnew and Corbridge 1995) In an ideal system, as Keely notes, “of formally equal states, with mutually exclusive territories, everyone belongs somewhere - all territory is ruled by states representing the collective interests of a constituting people or nation... but this does not accurately describe the real world.” (1996: 1052) Instead, we are faced with a fundamental disconnect between the rights of the individual within the state and how to protect those outside of their state. As Hannah Arendt wrote, refugees and the stateless are a unique class:

To be a slave was after all to have a distinctive character, a place in society - more than the abstract nakedness of being human and nothing but human. Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity. (1966: 297)

Westphalia ensured the “collection of people over whom the holder of sovereignty rules is defined by virtue of its location within borders.” And yet, as Philpott notes, “the people within these borders may not necessarily conceive of themselves as a ‘people’ with a

⁵⁴ This is a linkage. Territoriality is not a requirement for human organization or for international relations. Ruggie, for example, has argued that “systems of rule need not be territorial at all...[or] territorially fixed. (1993: 149, see also Holsti 2004: 26, Spruyt 1994: 73-4, Herbst 2000)

common identity; in the century of Westphalia, they rarely did. But their location within boundaries requires their allegiance to their sovereign.” (Philpott 1999: 570)⁵⁵

Barry Hindess suggests that much of what we perceive as citizenship, which will be discussed in more detail in Chapter 4, is an internalist conception, one rooted in the relationship between an individual, their state, and the international system. Thus, he suggests that the Westphalian system:

can be seen not only as regulating the conduct of states and indeed as constituting them but also as a dispersed regime of governance covering the overall population of the states concerned...Such discrimination, in other words, is not only the result of decisions made by or on behalf of their own citizens but also a structural requirement of the modern state system. (Hindess 2000: 1494)

For him, once a system of governance is created that “partitions the world into discrete, territorially based national populations,” the system then requires “regulation of movement from one national territory to another.” (Hindess 2000: 1494, see also Joppke 1998: 5-9, Malkki 1992) The rights of the citizen thereby contrasts with the outsider who “possesses rights only in the abstract and has no state to uphold them.” (Haddad 2003: 302)

Territoriality creates an exclusionary space in which outsiders are dispossessed of rights. Without this division, as Robyn Liu notes, refugees would not exist. They are a problem because “they are outside the state-citizen order of things.” (2002, see also Skran 1995: 3) Emma Haddad argues that sovereignty attempts to place all individuals within homogenous territorial spaces, and yet this effort:

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

⁵⁵ Zolberg suggests that it was around the middle of the 15th century that global migration emerged as a distinctive phenomenon, since it “is predicated on the organization of global space into territories controlled by sovereign states that have the right to control the movement of people across their borders.” (2006: 112)

Territoriality creates refugees as a category of actor in the international system. Yet, refugees are not “forgotten people.” (Mills 1996: 77) Rather, Liu suggests that cooperation towards refugees reflects a state interest in the policing of non-citizens and thus is aimed at the international government of populations. (2002)

Since the emergence of the modern state system, territoriality has created spaces within which sovereign states have control. Citizens possess rights within this space. But those outside of this space - those who either flee or who are expelled - lack these basic rights and basic levels of protection. This is a contradiction that can be reconciled through international cooperation: most notably when states by themselves or through formal mechanisms seek to provide an alternative form of protection. Critical to such a process, however, is first the formation of a common view towards refugees. This view was also influenced by international law and the economic doctrines of the day.

3.3.3 International Law

International law was crucial in the formative days of this European society in framing the individual's role towards the state and towards international society. Human beings are at the center of Grotius' legal conceptions and Pufendorf emphasizes the binding character of international law on both states and individuals. (Korowicz 1956: 534, see also Krenz 1966: 96) Thus individual rights at the international level date back to the genesis of international law. (Burgess and Friedman 2005) The international legal theorists of the time dealt considerably with the role of the individual in the international system, in particular as an emigrant. Through their works, the need for refugees to receive protection in some other form was first clearly articulated.

Hugo Grotius (1583-1645) was critical to this process in several respects. The first is that he introduced the idea of international society, of a “community of those participating in the international legal order, whose fabric was interwoven with international law.” (Koh 1997: 2606, see also Cavallar 2002: 150)⁵⁶ By the 17th century a multitude of independent states had been established and:

Many interests and aims knitted these States together into a community of States. International lawlessness was henceforth an impossibility. This was the reason for the fact that Grotius’s work... won the ear of the different States, their rulers, and their writers on matters international. (Oppenheim and Roxburgh 1920: 63)

The second is that while Grotius accepted that the sovereign had the right to exclude foreigners, “the granting of asylum was the mark of a civilized polity - only barbarians would expel those who sought refuge in their territories.” (Schuster 2003: 76) Even so, the state still possessed a right of expulsion, particularly for those who violated the state’s hospitality. Thus refugees were expected to abide by the laws of the Kingdom.⁵⁷

In framing his argument, Grotius drew on classical thought, quoting both Tryphoninus (who stated that “each has the unrestricted right to choose his own state”) and Cicero (who praised the law that “no one is forced to remain in a state against his will”) and

⁵⁶ Bull notes that while Grotius may have introduced this, his position “is one of hesitancy between the domestic model and the international one... he recognizes such institutions as the laws of war, neutrality, alliances and non-intervention, but at the same time seeks to circumscribe their operation...” and his work “may be seen as a medieval residue... What is noteworthy is rather that he recognized these notions at all, at a time when their position had not yet become assured.” (2000: 110) Carter argues that Grotius suggests a right of intervention: “that when a ruler inflicts upon ‘his subjects such treatment as no one is warranted in inflicting,’ the right of intervention is ‘vested in human society’ as a whole, although he recognized the danger of states using this right as a smoke screen for pursuing their own interests.” (Carter 2001: 26)

⁵⁷ As Benjamin Kedar records, from the 14th century onward, there was legal support for expulsion being “legitimate whenever expellees were deemed guilty of infringing the terms under which they had been allowed to live in the lands of Christendom... The notion that a ruler is entitled to expel undesirable, subversive elements became so widespread that when Pope Clement XIII in 1767 condemned the expulsion of the Jesuits from the kingdom of Naples, Bernardo Tanucci, the Neapolitan minister, could retort that ‘exile is the most ancient custom of all nations’ and that by expelling the Jesuits the king of Naples had ‘made use, for the well-being of the state, of that right which all sovereigns, all magistrates, all ages have employed.’” (1996: 172, Walters 2002) As well, while Westphalia may have enshrined a right to leave, it did nothing to affect the power of the state to expel.

argues that “it is believed that people consent to the free withdrawal of their nationals, because from granting such liberty they may experience no less advantage than other countries... Thus the state has no legal claim against exiles.” (Grotius and Kelsey 1925: 254, Carter 2001: 29)⁵⁸

Samuel Pufendorf (1632-94) argued that by standards of reciprocity, “it would be inconsistent to exclude foreigners while demanding hospitality rights for one’s own citizens” (Cavallar 2002: 202) except in cases of extreme necessity such as famine. (Pufendorf 1749: 253) Thus reciprocity should allow entrance. But he suggested common humanity also plays an important role, creating an obligation of accepting foreigners who have been expelled from their homes, as do the interests of the state:⁵⁹

Humanity, it is true, engages us to receive a small number of men expelled [sic] their home, not for their own demerit and crime, especially if they are eminent for wealth or industry, and not likely to disturb our religion, or our constitution. And thus we see many states to have risen to a great a flourishing height, chiefly by granting license to foreigners to come and settle amongst them; whereas others have been reduced to a low condition, by refuting this method of improvement... If on the whole, it appears that the persons deserve our favour and pity, and that no restraint lies on us from good reasons of state, it will be an act of humanity to confer such a benefit on them. (Pufendorf 1749: 253)

Thus, Pufendorf saw no problem in linking together state interest and common humanity in arguing for the acceptance of refugees, though he qualified his argument by suggesting it applied to small numbers and especially those who could financially contribute to society.

But this creates an obligation for the state. Once a foreigner has been accepted and acts according to domestic law, “the Government tacitly engages to grant him security and

⁵⁸ This is a right that can be limited, he suggests, if it is contrary to the interests of society (and thus large numbers can not leave at once), if the individual has debts, or due to war. (Grotius and Kelsey 1925: 253-4) Even so, Grahl-Madsen suggests that Grotius here established a clear doctrine of granting asylum to exiles. (1966: 278)

⁵⁹ Pufendorf echoes the logic of mercantilism. While the clearest case of the benefits of a refugee flight were the Huguenots, Cavallar notes that this was not the case Pufendorf had in mind: “Pufendorf’s major work was published some years earlier, in 1672, and there is another, more plausible example he might have referred to. In the 1580s, over 100,000 refugees from the Catholic south Netherlands emigrated to the north, contributing to what has been called the economic ‘miracle’ at the onset of the Golden Age.” (Cavallar 2002: 205)

protection, and the benefits of public justice.” (Pufendorf 1749: 274) If they are expelled, Pufendorf, as Sibley and Elias note, argued that “having once admitted strangers and foreign guests, to turn them out again, unless upon good reason, is usually censured as some degree at least of inhumanity.” (1906: 4-5)

For both Grotius and Pufendorf, therefore, common understandings of international society lead states to accept refugees (except in extreme cases) and to not expel them.⁶⁰ Both authors articulate norms of legitimate behaviour for states, norms which included allowing people who faced persecution to leave their own state, with this state having no legal claim for their return, and that other states had a duty, through common humanity, to allow these refugees in and offer them some level of protection. Even so, April Carter notes that this was in no sense an “absolute obligation to grant asylum,” rather, it was an obligation tempered by prudence: “A ruler needed to consider whether admitting refugees - particularly in great numbers - would strain national resources or disrupt society” (2001: 44) or if it might benefit the society, as the Huguenots did.

Such a view extends into the Age of Enlightenment. Emer de Vattel (1714-1764) argues that the state has the right to refuse entry for legitimate reasons such as diseases, possible corruption of morals, and public disorder; but that once people are admitted, the sovereign has a duty to protect them. (1852: 173, 83, see also Cavallar 2002: 314) However, he (alone of these authors) also argues that there exists a natural right to emigrate for three reasons: 1) if it becomes impossible for a citizen to gain subsistence in the country; 2) if society fails to discharge its obligations towards the citizen; or 3) “if the major part of the nation, or the sovereign who represents it, attempt to enact laws relative to matters in which

⁶⁰ Sir Leoline Jenkins countered Grotius’ argument by suggesting there is a *Droit du Renvoi*, a “Right of State to dismiss foreigners commorant [ordinarily residing] in her territories...” However, Sibley and Elias note that this right had been exercised by Queen Elizabeth but had gone into disuse by 1674. (Sibley and Elias 1906: 4)

the social compact cannot oblige every citizen to submission, those who are averse to these laws have a right to quit the society, and go settle elsewhere.” (1852: 180-1, see also Whelan 1981: 649) Critically, Vattel notes that émigrés may require protection from another sovereign against their own:

If the sovereign attempts to molest those who have a right to emigrate, he does them an injury; and the injured individuals may lawfully implore the protection of the power who is willing to receive them. Thus we have seen Frederic William, king of Prussia, grant his protection to the emigrant Protestants of Saltzburgh [sic].(Vattel 1852: 182)

In these works, we see the struggle between the particular interests of states and a universal humanitarian imperative involving who is entitled to asylum. As Schuster notes, a consensus is apparent: “refuge is to be offered to those in need and those who deserve it. Since the decision on who is deserving rests with the sovereign, the sovereign is naturally in a position to take account of the interests of his state when making this decision.” (Schuster 2003: 76)⁶¹ In the views of all three authors, the state did have the power to decide who to admit. There was no right of asylum, but reasons for restrictions are generally limited. Exclusion, as James Nafziger has argued, is seen today as an attribute of sovereignty and territoriality, one that is “defended as an inherent power necessary for the self-preservation of the state.” Such a view was upheld by the U.S. Supreme Court in a 1972 opinion which referred to “ancient principles of the international law of states.” (1983: 804, 08) Such a view, however, has little historical backing. If principles suggested anything during the 17th and 18th centuries, it was towards a practice of free movement, with “a qualified duty to

⁶¹ Such views also transcended legal theorists. Thus, Immanuel Kant (1724-1804) introduces the ‘right of hospitality’ whereby a stranger can be refused (if it can be done without causing his destruction) but once accepted and “so long as he peacefully occupies his place, one may not treat him with hostility... They have it by virtue of their common possession... of the surface of the earth...” (Kant, cited in Benhabib 2005: 11) He also suggested that “the state cannot treat a man like a piece of property and hold him back, and the migrant has the right to take his ‘mobile belongings with him.’” (Carter 2001: 43) As Seyla Benhabib argues, Kant’s view of hospitality “entails a moral claim with potential legal consequences in that the obligation of the receiving states to grant temporary residency to foreigners is anchored in a republican cosmopolitan order.” (2005: 11-2) Even so, Cavallar suggests that “Kant supports immigration only in those grave cases when the refugees would face certain destruction on returning to their own country.” (2002: 366)

admit aliens when they pose no danger to the public safety, security, general welfare, or essential institutions of a recipient state.” (Nafziger 1983: 805, see also Cavallar 2002: 10) As I will demonstrate below, these legal doctrines did serve to influence states in their willingness to allow entrance and offer protection as well as in recognizing a clear right to leave for persecuted refugees.

3.3.4 Mercantilism and Immigration as an Economic Doctrine

Finally, as Pufendorf noted, economic doctrines of the time also helped to increase state receptiveness to refugees. This was driven by the slow emergence of market economies and, during this period, specifically by mercantilism. As an economic ideology, mercantilism subordinated the private realm to that of the state and consequently called for active state intervention in the economy and the development of bureaucratic capacity in order to generate increased tax revenues. Positive balances of trade would benefit the state as well as specie, particular gold and silver, were accumulated. (Landes 1999: 31-2, Holsti 2004: 216)

Mercantilism also created a space for refugee acceptance by calling for state intervention into the sphere of migration by accepting immigrants while imposing strict limitations on emigration. (Zolberg, et al. 1989: 5, Keely 1996)⁶² As Saskia Sassen notes, this doctrine “considered in-migration of people a positive matter, an addition of resources. In-migration compensated, again, for the high mortality rates, short life expectancy, famines,

⁶² Daniel Statt (1991: 297) notes that “one of the few consistent principles of mercantilist theory and policy was the insistence that a nation had to be populous to be economically powerful, and arguments for the increase of population can be found in the early economic literature of most European nations as well as in the government policy of most early modern state.” Restrictions on emigration were considered to strengthen the state’s position in the world. By the end of the 18th century, however, Adam Smith’s theories of laissez-faire economics had limited support for mercantilism to only a few more specialized forms of protectionism. (Whelan 1981) Smith also argued that regulations prohibiting long term emigration, and laws which included forfeiture of property in such cases, were contrary “to the boasted liberty of the subject, of which we affect to be so very jealous; but which, in this case, is so plainly sacrificed to the futile interests of our merchants and manufacturers.” (Smith 1776: 245) Refugees, generally, appeared to be considered outside of these restrictions, however little research has focused on how states reconciled these two divergent views.

and multiple wars which decimated the European population...”(1999: 11, see also Torpey 2000: 18-20) Therefore, in addition to the political space provided by the fundamental institutions of territoriality and international law, mercantilism provided an additional reason for states to accept in refugees: it benefited them economically.⁶³

In summary, the fundamental institutions of international society played important roles in framing how states responded to refugees. 1) A territorial-centered state system ensured that states have sovereign power over an area of space and the population within it, but not over people (even if citizens) outside that territory. Thus, notions of territorial control in this period served to create refugees as political actors outside the state system, a difficult position in a time when states perceived themselves as the only crucial actors in international society. 2) The international legal theorists of the time provided a justification for states to accept refugees for reasons of common humanity and because it was in their interests. 3) In addition, mercantilist theories of the time buttressed this view by providing an economic rationale for accepting refugees.

Territoriality and international law also provided the underlying justification for the creation of two norms. The first was the jus emigrandi negotiated by states in the Peace of Augsburg in 1555 and in the Peace of Westphalia itself in 1648. A right to leave, however, was ineffective without state willingness to accept and protect refugees. This was the core of Grotius', Pufendorf's, and Vattel's arguments. This became state policy, however, only when

⁶³ There is some debate as to whether mercantilism qualified as a fundamental institution of the period in its own right. Gilpin suggested that it can be accorded a degree of legitimate social purpose as variants did seek to reinforce domestic society (1987: 404, Ruggie 1982: 382) and it can be seen as an important precursor to both current international trade practices (O'Brien 1984) and of protectionism. (Gilpin 1987) Thus, Buzan argues that the mercantilist doctrines of the 17th and 18th centuries occupied the functional space in international society which today is represented by trade and the market. (2004: 242-3, Buzan and Little 2000: 291) Holsti, however, argues effectively that mercantilism was not “a domain of society. None of the requirements of an institution was there: rules, norms, etiquette, transparency, peaceful standardized practices, or predictability.” (2004: 218) He suggests, rather that trade as an institution is derived from the free trade doctrines of Adam Smith and David Ricardo. (Holsti 2004: 233-6)

one state - France under Louis XIV- sought to violate the jus emigrandi and thereby forced other states to decide how to deal with a large and sustained religious refugee flow. The second norm which began to develop as a result of this crisis was that refugees should be provided with domestic legal protections, though as a practice this only occurred sporadically throughout the 18th century.

3.4 The Revocation of the Edict of Nantes and the Development of Legal Protections

Out of Westphalia we see evolve a doctrine of religious toleration, a doctrine designed to prevent subsequent wars. This, Krasner notes, was “a triumph of European civilization that evolved out of both principled arguments about the illegitimacy of coerced beliefs and a recognition that religious strife could destroy political stability.” (1999: 78) In this sense, Westphalia worked: after 1648, there was an abatement of religious conflict. At first, as Krasner argues, “toleration was not regarded as either possible or desirable, but it was accepted in some specific areas as a matter of political necessity because efforts to repress one religious group or another would have precipitated unrest and even war.” (1999: 82, Holsti 1991: 38)

A cornerstone of the Westphalian doctrine of toleration was the jus emigrandi, the right to leave. States were autonomous within their own territories. Yet, religious repression might set off an additional war. The answer to this was to allow emigration. This policy had a long gestation, but it reflected a clear solution to what might otherwise be a perennial problem. Minorities had a right to leave, and states also continued to possess a right of expulsion. Westphalia, through the continuation of cuius regio, eius religio, allowed states to continue homogenisation policies by expelling unwanted minorities, a pattern continued well into the 18th century and which resurged in the 20th century. (Rae 2002) It did mark a thin

international normative order, as can be deduced from the Westphalian treaties which anchored normative obligations in international law, and from state rhetoric and practice in responding to challenges even decades after the Peace. The crucial test for this understanding was in 1685, when Louis XIV revoked the Edict of Nantes. This caused the flight of 200,000 French Huguenots, even while Louis imposed exit controls.⁶⁴ It was this event that first coined the term ‘refugee.’⁶⁵

The Edict of Nantes was passed in 1598 by Henry IV, who had converted from Protestantism to become King in 1593. The Edict was designed to end a long-running civil war between the Huguenots and Catholics in France by ensuring that the Protestant religion would be protected. Thus, the Edict established that the Huguenots were free to practice their religion, though only in areas they controlled, whereas Catholics enjoyed complete freedom of conscience and worship throughout France. It also allowed for admission of Huguenots to political posts; to use schools, hospitals, and charities; to print books; and the establishment of mixed courts of Catholic and Protestant judges to adjudicate cases between the two religions. As a de-facto peace agreement, it also established guarantees for the Huguenots: they were allowed to maintain troops in 200 towns within their jurisdiction, of which half were fortified. (Robinson 1904: 183-5, Tylor 1892: 8-9, Holt 1995: 163-6)

The Edict was not a concentrated effort towards toleration, but rather primarily a political step (Sutherland 1988), with Henry’s ultimate goal being to establish a religious concord in France. (Holt 1995: 163) Henry’s actions did break with the traditions of the

⁶⁴ Estimates of the flow have ranged from 60,000 to 2 million. Weiss (1854: 80) estimates that it was 250,000 to 300,000, while Norwood suggests it was around 200,000. (1969: 52, Scoville 1952: 296)

⁶⁵ Marrus notes that until 1796 ‘refugees’ was used exclusively to refer to the Huguenots, when the *Encyclopaedia Britannica* noted it had “been extended to all such as leave their country in times of distress, and hence, since the revolt of the British colonies in America, we have frequently heard of American refugees.” (2002: 8-9)

middle ages and sought to expand government power over both religions. As Weiss notes, Henry “would be content with nothing less than the concession to the Protestants of all the civil and religious rights which the intolerance of the adversaries denied them... For the first time, civil power in France rose boldly above religious parties...”(1854: 5)⁶⁶

Following Henry’s assassination in 1610, however, the rights of the Edict began to be circumscribed. This began with restrictions on the ability of Huguenots to hold office and educate their children in Protestant schools. (Stankiewicz 1955: 82) By the mid-1660s, Louis XIV, who had already faced a revolt by the aristocracy in the Fronde early in his reign, moved to cement his authority in France by progressively restricting the rights of the Huguenots. Norwood suggests that Louis had been convinced, by his advisers, including Mme de Maintenon (his mistress and subsequently second, secret, morganatic wife), that Protestantism had been reduced to a negligible point and that Louis could create religious unity in France, as well as increase his own power vis-à-vis the Church, at little cost. (Norwood 1969)

The first step in this process was in 1662, when the government adopted the view that whatever was not “specifically permitted in the Edict of Nantes was forbidden.” (Golden 1988: 16-17) By 1685, following the Truce of Ratisbon in 1684, Louis was free of foreign wars (though only for a short time) and focused on eliminating the Huguenots through conversion by enacting a succession of stronger restrictions on them.⁶⁷ The Revocation was

⁶⁶ This had lasting consequences for the Huguenots. Their military structure, strong enough to contend with the French Army a half century before, declined as Louis XIII removed fortifications and encouraged the Protestant nobility, who had been the military protectors, to convert. (Sutherland 1988, Stankiewicz 1955)

⁶⁷ These included the ‘voluntary’ conversion of Protestant children as young as seven, who were removed from their parents and raised in Catholic households while their parents paid for support; the closure of Protestant churches; banning entry into professions; and quartering troops in Protestant homes. (Norwood 1969: 37-41, Golden 1988: 18)

the final step. It declared Protestantism illegal in France. It also officially denied exit to the Huguenot community, though this was widely ignored. (Golden 1988, Rae 2002: 83-85)⁶⁸

Thus, as Torpey notes, such a policy represented an attempt by Louis XIV to not only assert his authority over immigration, but also over emigration from France and even movements within France. (2000: 21) The repercussions from this event were substantial. Louis' revocation:

abrogated the jus emigrandi which had been granted to religious minorities in Germany under the Treaty of Osnabruck and had gained a status of regional norm...In the international arena, the Revocation was regarded as illegitimate and it had a 'marked effect upon an international opinion growing increasingly hostile to French pretensions and the Bourbon methods.' (Rae, 2002: 218-9)

Not only did the persecutions outrage the Protestant communities of Europe, but the Revocation was also greeted unenthusiastically by many Catholics who feared a return to wars of religion. (Doyle 1992: 201-02) Opponents of the Revocation proceeded to attack Louis in prints and pamphlets as well as casting medals commemorating the flight of the Huguenots. Moreover, while Louis had hoped to gain the Pope's approval, Innocent XI opposed the policy.⁶⁹ The Pope felt that Louis had acted for political, rather than religious reasons; that the King should have been clear that he favoured true religion in his realm, rather than one religion; and, most notably that "we do not approve in any sense these forced conversions, which as a rule are not sincere..."⁷⁰

⁶⁸ Protestant ministers were singled out for expulsion, with most given fifteen days to depart. Most Huguenots were prohibited from leaving on pain of forfeiture of all property and (for men) being sent to work on the galleys for life. French authorities did seek to prevent movements across the border, leading many Huguenots to undertake subterfuges in order to escape by land or by sea. An "underground railway" also developed which worked in part by bribing border guards. For details on these efforts, see Norwood (1969: 49-51, see also Anon 1697)

⁶⁹ Initially, the Pope congratulated Louis "on the annulment of all the laws 'in favour of heretics in your realm.'" (Norwood 1969: 43, O'Brien 1930: 85-6) His change appears to have been motivated by European reactions to the Revocation and his own repugnance to forced conversions. Thus, his change in views is evidence of the influence of an emerging international society which considered Louis' actions to be illegitimate.

⁷⁰ A recollection of statements expressed to the deputy of Holland, in the papers of Cardinal Filippo Gaulterio, nuncio at Paris. (cited in O'Brien 1930: 143) The Pope expressed similar concerns to Leopold, the Holy Roman

Also important were the views of the other European countries. The flight of the Huguenots not only brought condemnation upon France, but also saw these refugees recognized as individuals who required protections in law. Whereas earlier refugee flows had gone unnoticed by other states, the reaction to the Huguenots was substantial.

In Germany, approximately 30,000 Huguenot refugees were received and welcomed by the outraged public. (Wolf 1951: 36) Many of the German states took the added step of providing clear legal recognition to the refugees. Friedrich Wilhelm, the Great Elector of Brandenburg, in October 1685, issued the Edict of Potsdam, whereby the French Huguenots were authorized to establish themselves in his territory and given significant rights in a clear break from earlier practices. These rights included the provision of assistance for the sustenance and transportation of the Huguenots; they could freely choose their locality, occupation or trade; they were granted free of charge ruined dwellings and materials to repair them or several years' free occupancy of empty houses; they could bring in their property duty-free; until they became used to the new legal environment they were to be provided with special judges and courts; and finally, they were to have complete freedom of worship. (Scoville 1952: 399, Reaman 1963) Frederick Wilhelm even set up immigration bureaus abroad. (Anderson 1974: 234) Twenty-five years later, in 1709, Frederick I acknowledged the benefits that the refugees had provided to Brandenburg, noting that "our realm and our provinces have experienced a considerable improvement by the great numbers of persons, who, having been chased from their homeland for religious reasons and various other oppressions, have come to seek a haven under our protection." (Scoville 1952: 404)

Emperor, adding "for what likelihood is there that conversions obtained by torture are real conversions? We have wept, we have bemoaned them instead of rejoicing them. The horrible thought of so many sacrileges which have been committed will cause me to shudder for the rest of my days." (O'Brien 1930: 148)

A number of other German states followed suit. The Landgrave of Hess-Cassel, in April 1685, proclaimed that all Huguenots would find a haven there and in December promulgated an Edict similar to that of Potsdam. The Duke of Brunswick and Lüneburg also accorded immigrants religious, civil, and economic freedom. In a number of German states, relief aid was also raised through public collections and from abroad. (Scoville 1952: 400)

Switzerland received about 60,000 refugees between 1682 and 1720, of which approximately 25,000 would stay. The governments of Geneva, Bern, and Zurich all took the unusual step of providing relief to the refugees, and over 10,000,000 florins were spent. However, Switzerland was unwilling to offer inducements for the refugees to permanently settle because of threats by Louis XIV to engage in economic and military sanctions. (Scoville 1952: 405-06) Concerns over the French reaction explain some of the limitations offered by countries like Switzerland. However, a purely materialist explanation fails to account for why the German states offered the refugees legal protections in addition to allowing them leave to enter the state.

The other notable continental (and Protestant) power was the Netherlands. Like Brandenburg, it sought to provide a long term home to the Huguenots, and encouraged self-sustaining Huguenots to settle there.⁷¹ Here too, economic and security interests help explain their acceptance of the Huguenots. As Reaman notes:

there can be no question that in military science and morale France had been half a century ahead of the rest of Europe and it was partly through the refugee soldiers that the methods... passed to the enemies of France... The accession of refugees had the effect of adding greatly to the strength of both the army and navy and later exercised an important influence on the political history both of Holland and England. (Reaman 1963: 106)

In this case, however, the Netherlands took no immediate steps to provide overt legal recognition until 1709 when the Estates-General of the United Provinces decreed that all

⁷¹ Earlier Huguenot refugees Holland accepted included René Descartes, in 1628. (Reaman 1963: 75)

“Protestant refugees ‘shall be acknowledged and received for the future as our subjects; and they shall enjoy the right of Naturalization.’ ”(Scoville 1952: 329)⁷²

The English had a history of welcoming the Huguenots from France, and had been willing to give inducements to artisans to settle in England. (Reaman 1963: 73) Following the Revocation, greater numbers of Huguenots were also well-received, and the Revocation “did much to unite Protestants in the face of James II (VII)’s attempts to divide them, and the regime which succeeded his publicly abandoned religious intolerance in the Toleration Act of 1689.” (Doyle 1992: 202) One history from the nineteenth century notes that following the Revocation “England again became their chief asylum” and that through his policy “The King [Louis XIV]... drove into exile by his mistaken policy, above 500,000 of the most useful and industrious inhabitants of France.” (Burn 1846: 17)

A succession of British monarchs - Charles II, James II (VII), William and Mary, and Anne - took steps to recognize the Huguenots and extend to them the protection of the Crown, reflecting not only the protections being offered to the Huguenots in Germany, but also the legal arguments of Grotius and Pufendorf. As early as 1681, in response to earlier Huguenot flows, Charles II stated “that he held himself obliged.... To comfort and support all such afflicted Protestants, who, by reason of the rigors and severities which were used towards them on account of their religion, should be forced to quit their native country, and should desire to shelter themselves under his Majesty’s royal protection, for the preservation and free exercise of their religion.”⁷³ Following the Revocation, James II (VII) noted that:

⁷² Echoing Frederick of Brandenburg’s statement, the decree went on to note that: “The prosperity of most nations, and especially of Holland, had been greatly enhanced by the flood of immigrants who had sought sanctuary from the wrath of the French king and who had contributed mightily to the increase of trade, manufactures, and the common good.” (Scoville 1952: 392)

⁷³ Statement by the King in Council at Hampton Court, 28 July 1681. (Reprinted in Burn 1846: 20)

we have thought Our Selves obliged by the Laws of Civilian Charity, and common Bonds of humanity, to take [the French Protestants] their Deplorable Condition into Our Tender Care and Princely Compassion. And to this end we have resolved to receive into Our Gracious Protection as many of them as shall live in entire Conformity and orderly Submission to Our Government.” (1687)

James’ actions were driven not by his own views but by public concern for the refugees. Scofield notes that James “was not very sympathetic [to the Huguenots]. Public sentiment, however, was so strongly in favour of the refugees that even he acknowledged to representatives from the French Court that he did not dare display openly his true feelings.” (1952: 299) The English public accepted that the Huguenots should not only be allowed to leave, but also be accommodated for both religious reasons and through the dictates of common humanity, an understanding that James did not feel powerful enough to violate.⁷⁴

William and Mary, following the Glorious Revolution, declared on 25 April 1689 that “all French Protestants that shall seek their refuge in our Kingdom shall not only have our Royal protection for themselves, [their] families, and estates, but we will also do our endeavour in all reasonable ways and means so to support, aid, and assist them.” (Scoville 1952: 299) However, formal legal recognition was long delayed. William sought to naturalize the Huguenot refugees in 1689, following the practice of Brandenburg, but was unable to persuade Parliament to pass the bill. (Scoville 1952: 299)⁷⁵ It was only twenty years later that Queen Anne would succeed an Act for Naturalizing Foreign Protestants, and that was repealed two years later by “a Parliament ever-jealous of its rights.” (Grahl-Madsen 1966: 278-79)

⁷⁴ William also issued a proclamation in 1699 granting his Letters Patents to assist in gathering alms for refugees in Switzerland and Germany (William III 1699), expanding on a practice started by James II (VII). (James II (VII) 1687)

⁷⁵ Weiss suggested that this, at least in part, may have been due to heavy bribes from France: “The King of France had to content himself with maintaining agents in London, to endeavour to enlist members of Parliament in his interests...” He suggests that additionally a new Tory majority was unwilling to support William because of his own personal unpopularity. Parliament may have also feared to augment the King’s authority. (Weiss 1854: 230) The change in government and policy is discussed in more detail below.

The British government did take some tentative steps towards providing public relief. The Crown undertook a number of fundraising exercises⁷⁶ and Parliament established a fund of 15,000 pounds per year for relief of poor refugees in 1696 though it was rarely distributed. (Scoville 1952: 299-300) Even so, private efforts, particularly through churches, were much more successful.⁷⁷ English practice towards the Huguenot refugees did reflect some of the practices on the Continent, therefore, but also the unique division in domestic political institutions: the Crown was able to provide protections to the refugees, but Parliament was unwilling to provide a fuller legal protection, providing instead only modest relief efforts.

Several important threads can be drawn out concerning the Huguenots. The first is that, at least in part, they were accepted in order to assist the economies of other states. It is clear that material interests - in particular economic motivations - as well as ideational motivations - in particular religious sympathies - were factors in the acceptance of these refugees. James Thompson argues in the case of the Dutch “it was economic interest very largely which led Holland to sympathize with the Huguenots. In fact religious sympathy was never more than niggardly given them by the Dutch,” (Thompson 1908: 45) though others argue that Protestant fervour generally successfully aligned with economic interests. (Stoye 2000: 271)

⁷⁶ James II (VII) had allowed his Letters Patents to be used to raise funds from the general populace to support the Huguenots in England. (James II 1687) William expanded on this practice, also allowing his Letters Patents to be used to gather alms for refugees in Switzerland and Germany. (William III 1699) James II (VII) also created a separate fund to contribute 16,000 pounds per year to poor Huguenots following the direction of Parliament. While the record of this fund is unclear, it was still in existence in 1727, when it was cut in half. (Burn 1846: 21-22)

⁷⁷ Huguenot churches established by earlier refugees were vital to these efforts - in London alone, 9,000 refugees received assistance in 1687, and assistance was still being provided to 7,000 Huguenot refugees as late as 1721. Public opinion also favoured the Huguenots, and throughout England “Anglican sermons overflowed with sympathy, [and] collections made in Anglican churches from 1681 gradually became more generous.”(Stoye 2000: 271) The total number of refugees who received assistance may have been between 40,000 and 50,000. (Scoville 1952: 298) Private efforts providing the bulk of relief to refugees would remain the norm into the 20th Century.

Certainly, the Revocation brought many disadvantages to France, and later Louis, on his death bed, attempted to excuse his actions. (Harris 1964: 93, Clark 1998: 1276) Other governments were impressed by the skills the Huguenots brought with them, and as much by the economic consequences of this loss to France as their own gain, though Doyle notes that “in reality the impact of the persecution on the French economy was not as serious as many contemporaries or subsequent historians believed. But the belief was what counted. The lesson was clear: toleration was good for an economy.” (1992: 202) This was reflected in the moves towards toleration in a number of states during the 18th century, including England, Prussia and the Austrian Empire. (Doyle 1992: 202)

The second was that many European states saw in the flight of the Huguenots further evidence of Louis’ hegemonic ambitions and led to him being cast as “a monarch of Machiavellian intentions and a man willing to break agreements with violence.” (Black 1990: 30, see also Audisio 2005: 385, Wolf 1951)⁷⁸ As Harris notes, “his suppression of the Huguenots in 1685 struck fear into the heart of Protestant Europe” and contributed to a coalition forming against him. (1964: 103) Certainly, he lost valuable Protestant allies, including Brandenburg. (Stoye 2000: 272) Concerns were raised both over what his actions might be following the end of the Truce of Ratisbon, which had ended the First Dutch War, but also what the fate of the Spanish Empire might be upon the death of the sickly (and heirless) Charles II. This led in 1686 to the creation of the secret League of Augsburg, which noticeably included both Protestant and Catholic states, such as the Holy Roman Emperor,

⁷⁸ Black goes on to note that while this view was articulated in many of the Protestant countries, generally there is no clear evidence of it. In fact, “this interpretation is compounded of his insensitivity, obsession with *gloire* and failure to comprehend the views of other powers. In place of a Machiavellian schemer after universal monarchy has come a ruler who served himself, France, and Europe ill by his failings and consequent failures.” (Black 1990: 30)

the Dutch, Spain, Sweden, the Palatinate, Saxony, Bavaria and Savoy, and which received the adherence of the Pope. (Harris 1964: 103-04)⁷⁹

Louis does appear to have been aware of the possible consequences of his actions. In Alsace, Protestant and conquered by France during the Thirty Years' War, he chose not to remove the Protestant population's rights. He used the technical argument that since it had been conquered following the introduction of the Edict of Nantes, the Revocation did not apply. Clark suggests that here, Louis was focused on geopolitical issues: removing their rights would damage Louis' relation with other states and that "it was essential to preserving [control over Alsace] to honour commitments to Alsations... long-term guarantees were in the treaties of the Peace of Westphalia..." (1998: 1277) Alsace may have been bound by the Peace of Westphalia; France, formally, was not. This suggests that Louis was aware of the growing ideational consensus in European society which supported religious toleration, but that he was not concerned over international reaction to the Revocation because he felt it was a domestic issue. He may have simply miscalculated about how gravely his actions would be treated by the other European states.

Finally, the third key point is that there was a clear movement to protect the Huguenots in law. As Grahl-Madsen notes, England's Naturalization Act, like Brandenburg's Edict of Potsdam, (and the other forms of legal recognition) "was clearly an invitation to refugees to come and establish themselves in the Kingdom for the mutual benefit." (1966: 278-79)

Why at this point in time was such a group differentiated and granted legal protections then groups who had previously been similarly excluded? Economic self-interest

⁷⁹ The Nine Years' War which followed was the greatest international conflict since the Thirty Years' War and marked the first time that Louis XIV faced armies that matched his own. The Peace of Ryswick, signed in 1697, saw him lose many of his gains from the previous twenty years. (Doyle 1992: 271)

can explain the response to a degree, in particular as an incentive to attract them. However, it does not explain why the monarchs of Europe decided to grant these groups clear legal protections, or why they in many cases rapidly granted citizenship and an array of benefits which involved clear economic costs. It also does not explain retroactive grants of protection by both Britain and the Netherlands years and decades after the Huguenot flight. In addition, an economic argument can not explain the reaction of the Swiss, who were willing to grant temporary asylum to so many refugees but encouraged them to move on for fear of France. Why accommodate them at all in that case? Finally, economic justifications may provide a reason for some government assistance, but not for the widespread public relief efforts or, in particular, the private funds set up to assist the refugees as co-religious.

Rather, an additional element is needed: the stirrings of normative change. By 1685, Rae argues:

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 behaviour was regarded as illegitimate as it breached the minimal standards of coexistence that had been articulated at this time. (2002: 301)

It was this view that Louis XIV violated by prohibiting the Huguenots from emigrating. These new normative standards were those articulated in the Peace of Westphalia, which established the grounds for religious toleration through such ideas as the jus emigrandi and cuius regio, eius religio, first enunciated at Augsburg. It was these same principles that Louis XIV violated some 40 years later.

At this stage, there were two possible courses of action for other states to pursue. The first was to assume Westphalia no longer mattered, ignore its principles of toleration, and begin anew persecuting their own religious minorities. This, however, would have undermined the stability created through Westphalia, and would have likely seen a return to

the wars of religion. The second would have been to attempt to ignore the principles of sovereignty and intervene in France to prevent the persecutions. But this was unlikely for logistical reasons: France was the major power of the continent and would have taken a substantial, and difficult to create, alliance to defeat. Such an alliance emerged in the later years of Louis' reign, motivated by the Revocation, but its primary goal was to stop his hegemonic ambitions, rather than uphold minority rights. (Kennedy 1989) An intervention in France would have meant the violation of principles of sovereign territoriality that had been created at Westphalia. The third course of action avoided these pitfalls. The refugees were instead accommodated and offered protection.

3.5 Other Religious Refugees of the 18th Century

Following the flight of the Huguenots, European states reacted to new refugee flows in similar ways. Refugees were in most cases allowed to leave and were accommodated elsewhere. Louis XIV's mistake had been to deny the Huguenots a right to exit. For the bulk of the 18th century, subsequent flows of refugees, expelled from their own states, were neither as numerous nor treated as an international concern.

The first of these flows involved a Protestant sect, the Waldensians, who had been long established in Piedmont. In 1686, however, the ruler, the Duke of Savoy, issued an edict effectively banning the religion. This move was heavily influenced by Louis XIV; the Edict included a clear reference to the Revocation. The Edict did give the Waldensians the right to leave the country, though within a space of only fifteen days. Approximately 3,000 refugees, many of whom had been imprisoned after an attempted revolt, were allowed to flee to

Switzerland following extensive negotiations.⁸⁰ Because of the negotiations, the Swiss did not have the same set of fears that they had in accepting in the Huguenot refugees. Consequently, the Swiss provided the refugees with relief and then gradually settled them in the different Protestant cantons. Other Waldensians moved on to Brandenburg, where they were welcomed like the Huguenots. (Norwood 1969: 102-15, Clark 1998: 1277-9)⁸¹

The next major flow was Protestant refugees from the Palatine. While they claimed religious persecution as the cause of their flight, it was also a flight caused by conflict following Louis XIV's invasion of the Palatine in 1708. (Knittle 1965: 6-8) Some 13,000 of them fled to England for two reasons: land speculators offered inducements that they would be sent on to North America, which were inaccurate, and a small number of Palatine refugees had been well-treated in England the year previously. (Dickinson 1967: 465-6, Knittle 1965)

The elector Palatine, none too happy with the flight, issued a decree "making it death and confiscation of goods for any of his subjects to quitt [sic] their native country." (Dickinson 1967: 467) It is unclear to what extent the order was enforced: at least two boats were seized on the Rhine River and the emigrants imprisoned (Knittle 1965: 53), but Cobb notes that "out of necessity, the departure of the emigrants, if not 'by night,' was unheralded." (1897: 59-60)⁸²

⁸⁰ These were the survivors. Norwood notes that there were likely 12,000 Waldensians prior to the exile, and that between 1,000 and 2,000 did convert, but that "no complete record is available of the thousands who died in the persecutions or during the months of imprisonment." (Norwood 1969: 95)

⁸¹ The Waldensians invaded the Savoy in 1689 and successfully occupied their ancestral territory. The following year, Savoy joined the alliance against Louis, ensuring their long term protection. As such, they may be the first successful militarized refugee group.

⁸² This order also led to a diplomatic exchange, with the English agent at Frankfurt being told to assure the Elector that Queen Anne "is in no ways concerned in encouraging his people to leave their country... but...her Maty [sic] does not think it proper to make an apology where there is no complaint made by letter nor any ground for one." (Dickinson 1967: 467) While Anne raised no complaint over the elector's actions, five days later she authorized the transport of the Palatine refugees to England. (Knittle 1965: 55)

The refugees arrived in poverty and were quickly provided with the Queen's charity⁸³ and subsequently with charitable donations raised under the Queen's name. With the Palatines, as with the Huguenots, material interests as well as humanitarian impulses factored in England's decision. Daniel Defoe made the case for accepting them in the interests of commerce and of increasing England's population: "People are indeed the essential of commerce, and the more people, the more trade... The more populous, the more trade, and the more trade, the more populous, and the more of both, must needs produce riches..." Thus it was in the interest of "the People of England, who liberally and with open Hearts and Hands contribute to the Subsistence of their distressed Protestant Brethren." (Defoe 1964 (1709): 9) And yet, with few skills, the Palatines did not easily fit into the mould of the Huguenots. The Whig government, fearing the long term expense of supporting such a large group of refugees, encouraged the majority of them to move onto permanent settlements in the thirteen colonies, using on-migration as an effective relief valve, while a minority settled in England permanently or returned to Germany. (Dickinson 1967)

Moreover, this economic rationale was quickly attacked. The Tories mounted a propaganda campaign designed to embarrass the government, focused on the poverty of the Palatines and the need to do more to help people in England. One English tradesman was quoted in a pamphlet saying that "I think our Charity ought to begin at Home, both in Peace and War, before we extend it to our Neighbours... The Palatines may be Poor enough, but their coming hither can never make us rich..." (Dickinson 1967: 473) Once the Tories succeeded the Whigs in government, in 1710, they argued that accepting the Palatines had been a mistake, "who understood no Trade or Handicraft, yet rather chose to beg than labour;

⁸³ Amounting to ninepence per day for subsistence, and lodgings were provided in London as well as a camp set up on the Surrey side of the Thames. Others occupied warehouses, barns and empty buildings. (Cobb 1897: 79-80, Defoe 1964 (1709): 32)

who besides infesting our Streets, bred contagious Diseases, by which we lost in Natives, thrice the Number of what we gained in Foreigners.”⁸⁴ Thus the new government sought to counter arguments that it was in England’s economic interests to accept in poor refugees. It was also this government that overturned the Act of Naturalization, passed two years before. In the long run, economic rationales, as will be shown in the next chapter, disappeared from the English political discourse, which was re-framed around the need to protect refugees.

Another refugee flow showed the continued resonance of Westphalia. The Prince-Archbishop of Salzburg, part of Austria, sought to expel the Protestant population of his region in 1731 without following the provisions of the Peace. Even though the religious protections of Westphalia did not apply to Austria, the Archbishop provided a justification to ignore its requirements by arguing that “all non-Catholic inhabitants were ipso facto subversive rebels who did not come under the protection of any treaty regulations and hence the three-year period of grace allowed for disposition of property did not apply.” (Norwood 1969: 129-30) Emperor Charles VI, cautious over potential international reaction, unsuccessfully urged the Archbishop to use restraint. Local troops forced out about 20,000 Protestants, most of who were accepted by Frederick William I of Prussia, who invited them to settle on his eastern lands and used diplomatic pressure to allow their passage through Catholic lands. (Norwood 1969: 128-34, Walker 1992)⁸⁵

In 1744, Austria figured again in an expulsion movement, with Maria Theresa’s decision to expel some 20,000 Jews from Bohemia and Prague, in part for alleged pro-Russian sympathies. (De Zayas 1988: 16, O’Brien 1969: 13) The economic consequences of

⁸⁴ The Examiner, no. 44, 7 June 1711. (cited in Dickinson 1967: 483)

⁸⁵ Emer de Vattel, as noted above, used the case of the Salzburger to argue in favour of other states providing protection to refugees. (Vattel 1852: 182)

the decision were substantial: “The state suffered a noticeable reduction of income. Everyone was harmed, nobody benefited, nor could the sovereign be satisfied with the results of her hasty and unjust order.” (Friedlander, cited in Iggers and Iggers 1992: 35-6) This, combined with protests from other countries, secured an annulment of the order. But “the Prague Jews had to suffer a year’s exile, attended by all the dislocation and confusion, before they were permitted to return.” (Norwood 1969: 26)

In all these cases, the refugees fled from religious persecution and were accommodated by other states. Other cases, Henckaerts notes, “are categorized as internal relocation because, allegedly, they took place within national borders.” (Henckaerts 1995: 2) These most notably include the expulsion of the Acadians from Nova Scotia in 1755, where British authorities, “fearing that if the Acadians were repatriated to France or one or another of France’s colonies they would return in arms to reclaim their homes... ordered them dispersed to Great Britain’s colonies” where most faced abject poverty. (Faragher 2005: 374, Henckaerts 1995)

3.6 Conclusions

Following the Peace of Westphalia, a thin normative order developed in Europe concerning refugees. The driver for this important shift was that many states feared that religious persecution might restart the disastrous religious wars of the early 17th century. In order to preserve order within the nascent European society then emerging, therefore, states recognized that groups subject to religious persecution should be allowed to leave their own state and be accommodated elsewhere. This principle of a right to leave was enshrined in the Peace of Westphalia, as well as in the arguments of international legal theorists, who encouraged states to accept refugees and offer them hospitality, and in the economic

doctrines of mercantilism, which argued it was in the state's economic interests to accept refugees and other migrants.

How these states provided protection varied considerably. In only one case, that of the Huguenots, was it provided through domestic law. In other cases, the refugees were allowed to settle or encouraged (as with the Palatines) to move on to North America. But the Huguenots were a unique case: no other refugee flow over this period approached the size of the Huguenot migration and they were extremely useful to the states they settled in. Only with the Huguenots do we see a competition for minds and bodies. In the other cases, the refugee flows were small enough to be easily absorbed by a single state. Thus, these other groups were welcomed routinely, even matter-of-factly. Brandenburg and subsequently Prussia, through an explicit policy of encouraging immigration, received many of the different refugee groups. Similarly, England welcomed refugees even when, as with the Palatines, they were poor and had few skills.

In these patterns of behaviour, we can see some norm-governed understandings. First, these states recognized that refugees were a unique group. Earlier refugee movements, by contrast, merited no attention from the state and they were not identified separately. In addition, states accepted that refugees had a right of exit and to be accommodated elsewhere. Thus we see the universal condemnation of Louis XIV when he prohibited exit, and England's quick decision to accept in the Palatines when they were denied exit.

And yet, no clear regime existed. There was no concurrent responsibility to accept refugees: states, individually, decided whether or not they wished to accept refugees and provide for permanent settlement. The state response to each new crisis did not evolve in a cooperative fashion or within the context of a regime, but rather individually and, as with the

Huguenots, with a degree of competition. Further, the response was rooted in domestically-held norms, in economic interests, and in religious allegiances. These norms were rooted in the Protestant states with common religions and (to a degree) common interests in helping Protestant refugees. Though this may simply be a result of a lack of cases, there is no clear evidence that the Catholic states held similar views. Rather, they tended to be responsible for the majority of refugee flows over this period.

In addition, there is another reason why no cooperative regime evolved over this period. Refugees were understood to be a transterritorial issue, in that they were outside of their own state. However, they were not understood as a 'problem' for the international system which required cooperation. Thus, the mere existence of refugees did not trigger a need for state cooperation for several reasons. In each case, there was at least one state which was willing to accept the refugees. Thus, they were quickly accommodated. As well, these religious refugee flows were understood to be permanent. In only a few cases were refugees granted temporary status, most notably in the response of Switzerland to the Huguenots. Yet, even there, the refugees were granted protection until such a point that they could travel on to other countries for permanent settlement. Similarly, in only two cases - the Waldensians and the Austrian Jews - do we see widespread returns. In the case of the Waldensians, return was brought about through armed force and a geopolitical realignment on the part of Piedmont which allowed for their long-term accommodation. The Austrian Jews were assisted by outcry on the part of other European states. Finally, there is one outlier case here; that of the Acadian expulsion. They were forced out due to political, rather than religious, reasons and were not allowed a full right of exit from the British Empire. And yet this can be explained due to the exigencies of the ongoing war with France. Britain feared that the Acadian

population, if returned to France, might rejoin the war. Once the war ended, return to France became possible.

No true regime existed. As will be shown in the next chapter, this required the notion of refugees to be reframed by the emergence of a clear doctrine of citizenship rights which established that citizens should have political rights within the state and otherwise be allowed to leave. And yet this early period cannot be easily discounted. A thin pattern of normative-based practice is apparent. Following both the doctrines of international law and the Peace of Augsburg and Westphalia, states accepted that religious refugees possessed a right to leave their own state if persecuted, and to be accommodated within another state. As well, with the Huguenots, we see the start of a broader shift which sees refugee protection anchored in domestic law, a shift which became an entrenched normative practice in the 19th century.

Chapter 4: The 19th Century: A Laissez-Faire Regime

4.1 Introduction

State policies towards refugees changed dramatically in the 19th century, not only caused by a shift in the nature of displacement to include political refugees but also by the emergence of clear norms articulating the need to protect refugees. While state practice in the 17th and 18th centuries had been marked by a thin pattern of normative behaviour, rooted in the need to allow refugees to leave their state of origin, other elements of practice such as offering protection in domestic law and providing private or public assistance were neither broad nor consistent.

The shift in how refugees were perceived occurred due to the American and French Revolutions and the emergence of a new fundamental institution, popular sovereignty. This shift was equally informed by the continued evolution of doctrines of international law. These revolutions, and the rights gained by the citizens of these states, ensured that states increasingly derived domestic and international legitimacy from the consent of the governed (Haddad 2003: 304, see also Zolberg, et al. 1989: 9) and equally provided the basic rules by which states sought to behave. In states where this process did not occur, people increasingly sought these rights and if unsuccessful, and particularly after failed revolutions, they also sought to flee. Thus, in the 19th century, the political refugee, the exile, the émigré, became commonplace.

These new political refugee flows created three concerns for states which had not existed with religious refugees. The first was that political refugees were more likely to seek temporary protection and planned to return to their own countries once the political winds were in their favour. This differed from earlier religious refugees who had mainly been

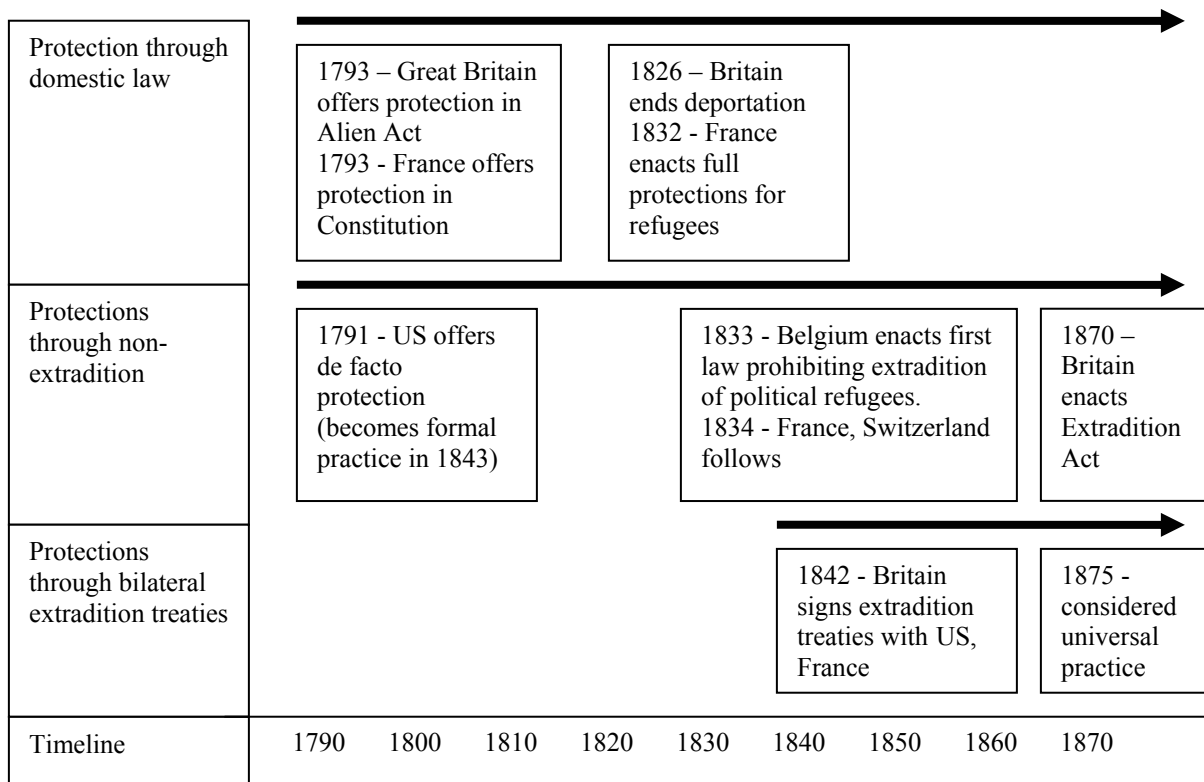
permanent settlers, and this increased movement within the system. The second was the fear among states that, as political revolutionaries, these refugees might seek to challenge the institutions of the receiving state. Finally, the third concern was how the state should respond to the increasing number of requests and demands from countries of origin to return their citizens, particularly if other states sought to use threats or force in order to gain the return. This added complexity meant that states needed to develop new processes to deal with refugees, processes which became norms designed to stabilize state expectations towards refugees and increase the ability of states to cooperate. At the same time, these processes also continued to meet the deeper goal of preserving order within international society by lowering the likelihood of conflict over refugees.

The focus of this chapter is how these norms developed at the domestic level and then how states gradually created a tacit regime to assist their cooperative efforts at the international level. Two norms were critical during this period. The first reflected the practice initiated by states in response to the Huguenot flight: refugee protection should be provided in domestic law. While legislative moves in both England and France began as a mechanism to control inflows, over time the goals of legislators in both countries shifted to providing protection to refugees. This change was reinforced by sophisticated understandings of refugee protection adopted by their domestic publics, understandings which when challenged led to widespread protests and contributed to the fall of Palmerston's first ministry in England as well as indirectly to the 1830 Revolution in France. Even in the United States, where no such laws existed, its government followed this pattern by refusing to extradite any political refugees.

It was the growth of extradition practices that led to the second norm of this regime developing: that states should not demand the return of refugees, even if accused of political crimes. While this norm took time to develop, I argue that it was effectively internalized within a core group of states, including the United States, Britain, France, and Belgium, by the middle of the century. These states then successfully transmitted this norm across international society through the use of bilateral extradition treaties. Their efforts triggered a norm cascade, and by 1875 the non-extradition of political refugees was considered to be a universal practice. These developments are shown in Figure 4.1 below.

Even so, these practices remained restricted to the area perceived as ‘legitimate’ international society. No similar right was accorded to individuals seeking to bring about political change in colonial movements, even in the British or French empires, nor was much

Figure 4.1: Refugee Protections in the 19th Century



of the world's population considered to even merit such status. Therefore, refugee flows, composed of both political and religious refugees, from 1789 until the outbreak of the First World War were entirely within the scope of European-based international society, including Europe, the United States, and Britain's colonial Dominions.

The flight from the American Revolution was the first event to produce large scale emigration since the Huguenots. They were atypical refugees, however, because they continued to be British subjects and their flight was "tantamount to repatriation" either to Britain or to its Canadian colonies and Nova Scotia. (Zolberg, et al. 1989: 10, Baseler 1998)

It was the French Revolution which created the first major political refugee flow to other states, with a total of 129,000 émigrés⁸⁶ fleeing the country. These included not only the clergy and nobility but, as the Revolution progressed, also political opponents of the successive ruling groups. (Zolberg, et al. 1989: 9) These refugees marked a successive pattern of refugee flights from revolutions and they were accommodated. Such policies extended even to the refugees of the Revolutions of 1848, who were less sympathetically accepted both due to fears that they might prove dangerous to the state and due to increasingly strident demands for return.

Flight from revolution was a major reason for flight during this period. Three other reasons were also important, particularly in the latter half of the century. These included territorial changes following conflict, including flows from Germany and France in 1871 and large and sustained flows from and to Turkey, the Balkans, Bulgaria, and Greece, as the Ottoman Empire slowly but inexorably collapsed. The second was religious persecution of

⁸⁶ There are two schools of thought as to why émigré, rather than refugee, became the common term used to refer to those fleeing France. Marrus suggests that it is mainly due to refugees being seen to describe the Protestant Huguenots, and that the émigrés, mainly Catholics faithful to the French throne, did not see their choice in the same light. (Marrus 2002: 9) Zolberg et al argue, rather, that the term was imposed on those fleeing by the revolutionary authorities, and consequently was "a term of opprobrium." (Zolberg, et al. 1989: 9)

Jews in Russia and Eastern Europe. Between 1880 and 1914, 2.5 million Jews became refugees due to repression and harsh living conditions. While this Jewish emigration did trigger a tightening of borders, it was not a crisis because the vast majority were able to migrate to the United States.⁸⁷ The third driver was the emergence of anarchism which, while creating few refugees, contributed to increased suspicions of refugees and migrants and led to both increased domestic legislation and a general increase in border restrictions. The different refugee flows over this period, as well as the reason for flight, are summarized in Table 4.1 below.

This chapter will begin by sketching out the development of the doctrine of popular, rather than dynastic, sovereignty as a new fundamental institution. The following section will then provide a brief overview of the refugee flows over this period, the reasons for them, and the state response, before moving onto detail the normative shift in domestic and bilateral laws. This latter section will focus on the cases of British and American policy, while briefly also offering an overview of the continental view by looking at the policies of France and Belgium. The chapter will end by looking at the two events that challenged this consensus: the rise of new flows of religious refugees and of anarchism and the domestic response.

4.2 The Emergence of Popular Sovereignty

The revolutions of the 18th century fundamentally reshaped the linkages between the citizen and the state and, more indirectly, with international society. This shift was caused by the steady evolution of doctrines of popular sovereignty, which based sovereignty “in the political will or consent of the population of a territory, rather than its ruler or government.” (Jackson 1999: 22, Mayall 1990: 2, see also Mayall 2000: 42-9) Not only did this change

⁸⁷ As Marrus notes, “Jews from the tsarist empire [were] neither entirely refugees nor entirely voluntary emigrants, they included elements of both, sometimes to the confusion of outside observers.” (Marrus 2002: 31)

undermine the “ideological and material foundations of dynastic rule” but it also tied legitimate state action to the “augmentation of individuals’ purposes and potentialities.” (Reus-Smit 1999: 122)

Table 4.1: Major Refugee Flows 1776-1914

| Year | Source Country | Receiving Country | Number | Political or Religious Persecution |
|--------------|---|--|-----------------------------------|------------------------------------|
| 1776-89 | United States | Great Britain | 60,000-100,000 | Political |
| 1789- | France | Great Britain, other European countries | 129,000 | Political |
| 1820-1, 1831 | Italy | Grand Duchy of Tuscany, France, Switzerland, Great Britain | Unknown | Political |
| 1830 | Poland | France | 5,000 | Political |
| Before 1848 | Spain, Portugal, Italy, German states | France* | 20,000 | Political |
| 1848 | German, Italian states, Austrian empire. | Switzerland United States Great Britain | 15,000 4,000 sizable number | Political |
| 1848 | France | Great Britain, Belgium | 45,000 | Political |
| 1863 | Poland | Great Britain, Switzerland | Unknown | Political |
| 1870 | France | Germany | 80,000 | Political (expelled) |
| 1870 | Germany (Alsace-Lorraine) | France | 130,000 | Political |
| 1870-1890s | Germany | Poland | 1,000s | Political (expelled) |
| 1870s-1890s | Turkey | Various | 1,000s | Political |
| 1894-1906 | France | | 1,600 | Political (expelled as anarchists) |
| 1880-1914 | Russia | Great Britain, United States | 2,500,000 | Religious |
| 1890s | Macedonia (Turkey) | Bulgaria | 100,000 | Political |
| 1897 | Greece | Turkey | Unknown | Political/Religious |
| 1900-1914 | Russia | Germany | 50,000 | Political |
| 1912-3 | Balkans | Turkey | 177,000 | Political/ Religious |
| 1912-3 | Turkey | Bulgaria | 370,000 | Political |
| 1912-3 | Macedonia | Bulgaria | 15,000 | Political |
| | Bulgaria (following occupation of Western Thrace) | Greece | 70,000 | Political |
| 1913 | Turkey | Bulgaria | 50,000 | Political |
| 1913 | Bulgaria | Turkey | 50,000 | Political |

*Noiriel notes that in 1831, France was hosting 5,500 refugees - 2,867 Spanish, 1,524 Italians, 964 Portuguese, 21 Poles, and 1 Prussian refugee. In 1837, France was hosting 6,800 - 5,282 Poles, 870 Spanish, 568 Italians, and 14 German refugees. (1991: 38)

Sources: (Marrus 2002: 14-50, Zolberg, et al. 1989: 8-16, Leslie 1956: 259, Noiriel 1991)

Equally important to this shift was a change in the state system, which became rebuilt over time “around the popular principle, deriving both its domestic and international legitimacy from the claims and consent of the governed.” (Haddad 2003: 304, see also Zolberg, et al. 1989: 9) Citizenship, as Brubaker has noted, was rooted in the international state system. It “was not the product of the internal development of the modern state. Rather it emerged from the dynamics of interstate relations within a geographically compact, culturally consolidated, economically unified, and politically (loosely) integrated state system.” (Brubaker 1992: 69-70)⁸⁸

This shift towards popular sovereignty occurred in both the American and French Revolutions⁸⁹ as they “changed the basis of ‘belonging’ to a political unit by making it dependent on membership of a sovereign people... Participation as a citizen was the mark of true membership.” (Dummett and Nicol 1990: 81) The American Revolution created a new form of citizenship which blended civic republican notions of citizenship with the liberal traditions of the Enlightenment forged around a basis of consent. (Klusmeyer 1996: 41, Jackson 1999: 22) As James Kettner has argued, “Americans came to see that citizenship must begin with an act of individual choice. Every man had to have the right to decide

⁸⁸ This a process bound up in the expansion of the state and its territorial redefinition. (Giddens 1985: 210, see also Habermas 1994: 21) As membership became an increasing concern, citizenship was framed by territory and borders and consequently citizenship became about “exclusion from, as well as inclusion into the polity.” (Faulks 2000: 29)

⁸⁹ The shift, as Tilly notes, is often seen as a series of multiple asymmetrical bargains “hammered out by rulers and ruled in the course of their struggles over the means of state action, especially the making of war.” (1992: 102) This, however, reflects a privileged position granted to a set of citizens based on which states they reside in. (Tilly 1996: 8, see also Turner 1986: xii)

whether to be a citizen or an alien. His power to make this choice was clearly acknowledged to be a matter of right..." (1978: 208)⁹⁰

It was with the French Revolution, however, that we see a full alternative legitimating principle put forth, one that undermined the foundation of dynastic legitimacy and "ushered in the modern international system." (Bukovansky 1999: 197)⁹¹ With this switch, citizenship became fused with the nation-state. (Faulks 2000: 8, see also Tilly 1996: 225, Preuss 1998) The core change was the transformation of subjects into citizens: "Rather than passive subjects of an absolute monarch, the French were to become active participants in the public life of the nation... "citoyen" became a central symbol of the Revolution." (Sewell 1988: 106) Individual rights and freedoms, Soysal suggests, were codified "as attributes of national citizenship, thus linking the individual and the nation-state." (1994: 17) Consent factored heavily in this process. As Klusmeyer argues, the French Constitution of 1791 "based French citizenship on a consensual expression of allegiance, which an individual demonstrated through the choice of holding residence in France and pledging a civic oath." (1996: 54)

The introduction of this notion of consent is critical to how states approached refugees during this period. As Arendt noted, new doctrines of human rights embodied in documents such as the American Constitution, the French Constitution (1793) and the Declaration of the Rights of Man were:

meant to be a much-needed protection in the new era where individuals were no longer secure in the estates to which they were born or sure of their equality before God as Christians... throughout the

⁹⁰ Consent, here, builds substantially on John Locke's work, who argued that the state acquires legitimacy from its citizens, "the community put power into hands they think fit..."(Locke 1993: 184) Legitimacy, thus, exemplifies a bond between citizen and state 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)

⁹¹ It should be noted that Bukovansky sees the French articulation of popular sovereignty, as a "holistic, messianic, and universalist rather than a more liberal, constitutional, and constrained form" as fundamentally challenging the existing international system and thereby created a "climate of threat." (1999: 198)

nineteenth century, the consensus of opinion was that human rights had to be invoked whenever individuals needed protection against the new sovereignty of the state and the new arbitrariness of society. (Arendt 1966: 291)

While citizenship buttressed the notion of the territorial state by tying individuals to the state, thus ‘sacralizing’ territory (Mayall 2000: 84), it also undermined state legitimacy in cases where the state was seen as violating the rights of its own citizens. What the French Revolution had done, even while the successive revolutionary governments redefined citizenship, was to create a new class of fugitive: the political revolutionary forced to flee their own state. Other states, accepting that flight was a valid alternative to revolution where consent was not possible, welcomed them. As Oppenheim noted, “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.” (1920: 515) Consequently, as Frost argues, 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.” (1996: 148)

Even so, this change did not alter the undeniable fact that citizenship was (and remains) exclusionary. (Hindess 2000: 1487-94, Haddad 2003: 297-302) As Soysal notes, citizenship “acquired exclusionary properties through compulsory education, conscription, and national welfare, all of which defined culturally unified and sacred entities by creating boundaries around them. These institutions erected a variety of barriers... all of which impeded education.” (1994: 17) Only through an international discourse on human rights can identity and rights, fused together within citizenship, be decoupled. (Soysal 1996)

Some people will not be happy within such a system. In the modern era, this includes not only individuals who face persecution on the part of the state, but also those persecuted

by non-state actors, or who are trapped in situations of generalized violence. Thus we have both the existence and recognition of refugees and, when people cannot flee their own state, the internally displaced. Displacement, as Haddad has noted, is inevitable. (2003: 297) It is not, however, a failure of the system. Rather, states adapted to this problem, which became one of cooperation as it directly affected the survival of the international order. Without a solution, stateless populations would wander from state to state, disrupting relations between states and, potentially, undermining the fragile international order that was in its infancy.

Did states accept such a view during the 19th century? Such an argument challenges views that protection was more often provided through benign neglect or through the inability of states to police their borders. Laura Barnett (2002) suggests that each state reacted on an entirely ad hoc basis and remained in territorial isolation, while Marrus notes that “preventing [the refugees’] entry into countries of refuge or tracking them down once they had arrived was practically impossible; even if they had wanted to eject foreigners, authorities would have been hard pressed to do so.” (2002: 22)

However, as we have seen, states already had the capacity to enforce border controls and to expel elements of their own populations in the 17th and 18th centuries, and this ability continued into the 19th century. Expulsions stopped, rather because, as Zolberg suggests, “the most undesirable had been eliminated – by way of their departure or gradual assimilation into the mainstream - but mainly because of the eventual generalization of rule of law...” (1983: 34, Rae 2002) The ongoing evolution of international law as a fundamental institution served to reinforce popular sovereignty’s role in altering the state’s approach to refugees.⁹²

⁹² In fact, Zolberg et al argues that in the 19th century in Western Europe the absence of religious persecution became “the hallmark of “civilized” states.” (1989: 9)

In addition, the presence of open migration, as Fahrmeir, Faron and Weil argue, does not indicate an absence of regulation and therefore state capacity, but merely:

that regulation was not designed to (and in any case could not) put a stop to migration. 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...' regulations of cross-border travel were imposed in a variety of ways by a great number of different agencies... [influenced by] often short-term, political and economic considerations. (2003: 2)

States did have concrete goals with respect to their migration policies. The first was a commitment to international order by preventing aliens from disturbing public order within states. Disturbances, as Caestecker argues, "had a political connotation; subversive aliens had to be expelled. What subversion implied, was, of course, subject to change." (2003: 121) Thus governments were willing to accept in refugees provided they did not challenge the domestic peace – activities outside of the host state were not seen as an issue. The second goal was to prevent the destitute from gaining entrance. Destitute aliens, rather than being considered as refugees, were often seen by the state as criminals, since begging and vagrancy were criminal offences in most of Europe. States used migration controls, rather than sentencing, as a way to restrict the entry of the poor and to remove them in the event they did cross a state's frontiers. Expulsion policies tended to focus largely on "those aliens who were not able to secure themselves a livelihood in the host country." (Caestecker 2003: 122)

The third goal was social stability. Emigration was a useful tool to allow elements of the population to leave who might otherwise challenge the social status quo. As Dowty has noted, it:

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." (1987: 50)

Similarly, Albert Hirshman argues that European history in the 19th century would have either "been far more turbulent or far more repressive and the trend toward representative

government much more halting, had it not been possible for millions of people to emigrate toward the United States and elsewhere.” (1981: 226-27) Not only did this relief valve contribute to social stability, it also helped to ensure the emergence of modern democracy.

To summarize, states in this period did have active migration policies, but these were designed to minimize public disturbances, prevent the entrance of the destitute, and to ensure social stability. These goals also contributed to the emergence of coherent refugee policy, ensuring that refugees be allowed to leave their own states and be accommodated elsewhere, provided their activities remained inside the law of the host state. And yet in all three states I focus on, Britain, the United States, and France, these policies took decades to first emerge in a coherent fashion and then to contribute to the emergence of clear international norms. These norms, however, continued to display a Eurocentric bias.

4.3. The Evolution of Norms and State Policy

Policy change in both the United States and France was triggered by revolutionary ideology and the primacy of individual rights. In Britain, policy, while framed within a similar view of rights, was tempered by concerns of domestic unrest and insurrection led by enemy agents. All three states accepted clear normative understandings based in their understandings of territoriality, international law, and popular sovereignty concerning refugees: they accepted that refugees were a unique group who should be allowed to leave their own state and be accommodated elsewhere. The policy dynamics whereby these normative understandings were operationalized by individual states did vary: Britain and France provided strong protections in domestic law, while the United States provided de facto protection through strong policies of non-extradition. In all three cases, these processes were driven by public sentiment at the domestic level which reflected strong support for

refugee protection. When governments violated this pattern (as all three did at different times) they faced widespread domestic public unrest and changed subsequent policy.

Domestic law, along with widely internalized normative understandings, was one mechanism of refugee protection. The other important method was through extradition law (Goodwin-Gill 1983: 35-8), which provided a mechanism whereby normative understandings were transmitted across European society.⁹³ Non-extradition was tied to protection because of the “well-founded apprehension that to surrender political criminals would surely amount to delivering them to their summary execution or, in any event, to the risk of being tried and punished by tribunals coloured by political passion.” (Garcia-Mora 1962: 1226)

Extradition was reshaped in the 19th century. Before the French Revolution, it focused almost exclusively on those who were sought for political reasons and was provided for reasons of amity and interest: “sovereigns obliged one another by surrendering those persons who most likely affected the stability of their political order of the requesting state.” (Bassiouni 1974: 4) But this was an exceptional practice, focusing only on the most serious of crimes against the state or sovereign. Common criminals were not perceived as a public danger and not worth pursuing beyond the state’s borders. (Wijngaert 1980: 5)

The origins of non-extradition for political ‘crimes’ was the French Revolution, since Britain and other liberal democratic states felt a clear obligation to not surrender exiled patriots. (Oppenheim and Roxburgh 1920: 512, 15) The political offender, rather than a threat to the sovereign who needed to be returned, became “a precursor and a representative of modern and the most highly developed political ideas... the refusal of extradition for such offences became a principle of the law of extradition.” (Schultz 1970: 15) Thus, non-

⁹³ Extradition in current practice “means a formal process through which a person is surrendered by one state to another by virtue of a treaty, reciprocity, or comity as between the respective states.” (Bassiouni 1974: 2)

extradition was part of the larger liberal democratic project. (Gilbert 1991: 115, Radzinowicz and Hood 1979: 1421)

Following Belgium's adoption of a law explicitly banning the extradition of political refugees in 1833, this became an equally important mechanism not only for individual states' own protection activities, but also to transmit normatively appropriate behaviour. Thus, extradition, while increasingly tied to international efforts to suppress crime, also provided protection for those accused of political crimes and contributed to nascent understandings of human rights. (Bassiouni 1974: 4-5, Garcia-Mora 1962: 1228)

This section focuses on how shared understandings initially emerged at the domestic level in Britain, the United States, and France and how these states then acted as norm entrepreneurs, successfully using extradition law as a mechanism to transmit these normative understandings across international society. In addition to these three states, Belgium also requires a separate mention as an important norm initiator in its own right. In all four states, the methods and processes by which these shared understandings emerged differed considerable, though in all four change was brought about through a mixture of governmental norm entrepreneurs working at the domestic level and broader public support for refugee protection. It is to these individual histories that I now turn.

4.3.1 The Alien Acts and Open Access: The Policies of Great Britain

Throughout the 19th century, Great Britain welcomed political refugees. But it did not offer unfettered access. Beginning in 1793, the British government sought to regulate entry and to deport unwanted individuals. It was only over time, and through significant pressure at the domestic level, that the government gradually established clear protections for political

refugees. These protections were based in domestic law, in particular the lack of a power of deportation from 1826 until 1905, and the principle of non-extradition of political criminals.

The origins of these protections lay in the government response to the refugee crisis brought on by the French Revolution. As we have seen, the British government had previously accepted religious refugees, and was equally forthright in accepting loyalists fleeing the American Revolution. The government was equally quick to welcome the émigré flow from France. This response, as Carpenter notes, was “prompted by a sense of duty, honour and obligation to support those whose position was in sympathy with their own.” (1999: xv) Thus, similar political views helped to ensure their accommodation, just as similar religious views had helped the Huguenots a century before.⁹⁴

The British response, initially, was universalist, sheltering all émigrés who fled without concern as to their religious or political position. (Schuster 2003: 78). This policy of asylum “was maintained, not by law, but by the absence of laws.” (Porter 1979: 3) Even so, welcome rapidly turned into fear within the British public as the Revolution moved towards more extreme positions. The British government began to worry that the revolutionary government might send undesirables to Britain, including insurrectionists who might pose as émigrés in order to overthrow the government. Even though there was no concrete evidence for these views, concerns led to significant support for aliens legislation in order to provide an element of control over who was entering. (Stevens 2004: 18-19, Carpenter 1999: 35-36, Dummett and Nicol 1990: 83) The “laissez-faire, laissez-passer entrance policy,” (Schuster

⁹⁴ The term refugee was still limited in its application at the end of the eighteenth century. The Third Edition of the *Encyclopaedia Britannica*, published in 1796, did reflect a slowly changing perception. It noted that while the term refugee had originally been applied to the expelled French Protestants, it had since “been extended to all such as leave their country in times of distress, and hence, since the revolt of the British colonies in America, we have frequently heard of American refugees.” (Marrus 2002: 8-9) British law began using the term in this period, and by the 1830s, refugee as a term was in widespread use.

2003: 78) which had provided access not only to the émigrés, but also to the Huguenots and Palatines before them, was set aside in favour of domestic control through legislation.

The 1793 Aliens Act⁹⁵ was the first major statute enacted in Britain establishing the rights of aliens. The Act itself was draconian in that it provided the government not only the power to refuse aliens entry - though with a right of appeal within six days - but also required port officers to be provided with a written declaration which included names, rank or occupation and details on their place of residence in Great Britain. (Plender 1988: 64)⁹⁶ In proposing the Act, the government had given little thought to the émigrés: its main concern was not to keep aliens out, but rather to be able to identify and restrict subversives. (Dummett and Nicol 1990: 83) Even so, the Act gave the government unfettered power to restrict émigré entrance. As Stevens notes, “the wide powers in the Act - refusal to disembark, fines, expulsion, and capital punishment - could prevent individuals in genuine need of a safe haven from being granted asylum.” (Stevens 2004: 20, see also Sibley and Elias 1906: 37-42)

Because of these restrictions, the Act was challenged both in Parliament and by the broader public. Successive Alien Acts first introduced and then expanded the rights of refugees under British law. The 1798 Act for Establishing Regulations Respecting Aliens established the first clear protection for refugees from France, though it was tempered by concerns over sovereignty and the potential security risk posed by the refugees. In its preamble, the Act noted:

⁹⁵ 33 Geo. 3, c. IV. An Act for Establishing Regulations respecting Aliens arriving in this Kingdom, or resident therein in certain Cafes. Article X. United Kingdom National Archives, Public Records Office (PRO) Foreign Office (FO) 83/294 (General Refugees Aliens 1782-1868)

⁹⁶ The Aliens Office created to administer it was lenient in enforcement of these provisions. (see Carpenter 1999: 39)

...and whereas the refuge and asylum which on grounds of humanity and justice, have been granted to persons flying from the oppression and tyranny exercised in France... may... be abused by persons coming to this kingdom for purposes dangerous to the interests and safety thereof... it is therefore necessary to make further provisions for the safety of this kingdom with respect to aliens, and particularly to the end that a just distinction may be made between persons who either really seek refuge and asylum from oppression and tyranny... and persons who... have or shall come to... this kingdom with hostile purposes. (Stevens 2004: 21)

As Stevens notes, this protection was introduced as a right of asylum for those refugees in Britain. However, while the rights of refugees were acknowledged in the preamble, these rights were offset by concerns over potential abuses of process and no further mention was made of either refuge or asylum. Thus, refugees continued to be lumped within the broader aliens category: “the term ‘aliens’ continued to be applied to all non-British subjects, whatever their motivation for entry.” (Stevens 2004: 21)

The successive Alien Acts continued to include a right for the state to deport unwanted aliens. This right was used most often between 1793 and 1800, at the height of the French Revolution, and resulted in the banishment of 436 aliens including Talleyrand, who would go on to be the chief French negotiator at the Congress of Vienna. As the European situation stabilized not only did the number of aliens deported decline - from 1801 to 1815 only 218 aliens were removed, and from 1816 to 1823, only 17 were - but domestic opposition also increased.⁹⁷

With the end of the Napoleonic wars, public sentiment ran against the Act.⁹⁸ Opposition to the measure also had political overtones. The Whig opposition supported the

⁹⁷ Opposition grew in part because the power to expel from 1803 onwards actually became much broader and could be done on “mere suspicion.” (Sibley and Elias 1906: 38 fn)

⁹⁸ An editorial in the Times of London noted in 1824, “the Alien Act is a disgrace to the law of England and is supported in the House of Commons by arguments as unworthy of enlightened assembly, as the measure itself is of a free people.” The Editorial went on to note that the Act by allowing banishment enabled foreign ambassadors to force the Home Secretary to comply with tyrannical demands: “...when is it that refugees from continental tyranny are most numerous and plots for its covert through most likely to be undertaken? Precisely when the foreign government is most guilty of those barbarous acts which drive its subjects into exile...” Editorial, The Times of London, 25 March 1824. 2

removal of a right of expulsion primarily because the reasons for its enactment – the issues around the French Revolution - had ceased. This view won the day, as increasingly refugees were seen to be “expatriated friends of liberty to overthrow their tyrants at home” and consequently the refugees gained champions.(Porter 1979: 68) Beginning with the 1826 Registration of Aliens Act⁹⁹ and continuing with its successor, the 1836 Aliens Registration Act, the British government had no power to deport aliens. (Stevens 2004: 21-23)

In 1848, a new Alien Act was enacted as a response to the unease created by the European revolutions. In principle, it granted to the government the power to expel any alien including, presumably, a refugee. (Stevens 2004: 27-28) In practice, however, this power was never enacted in the two-year lifespan of the Act. (Porter 1979: 3) Thus the period between 1823 and 1906 represented a golden period for refugees in British domestic law: Porter finds that in this period “no refugee who came to Britain was ever denied entry, or expelled.” (1979: 8) Restrictions on the rights of refugees were only justified by extraordinary circumstances, such as the French Revolution. In normal times, however, the British public did not think it proper “that governments should have any powers at all to exclude or expel aliens, except under extradition treaties for crimes committed abroad.” (Porter 1979: 3) Consequently, the protections that Britain offered to refugees in the 19th century were significantly stronger than current practice.

Tied inexorably to this process was recognition by the British government of the non-extraditable nature of people charged with political crimes. This notion grew slowly. The first clear statement of this policy was in 1802, when Lord Hawkesbury, the Secretary of State, noted (following demands by the French government that some émigrés be returned):

⁹⁹ 7 Geo. IV C LIV. An Act for the Registration of Aliens 26 May 1826. Article X. PRO FO 83/294 (General Refugees Aliens 1782-1868)

His majesty has no desire that they should continue to reside in this country, if they are disposed... to quit it; but he feels it to be inconsistent with his honour, and his sense of justice, to withdraw from them the rights of hospitality, as long as they conduct themselves peaceably... But the French government must have formed a most erroneous judgment of the British nation, and of the character of its government, if they have been taught to expect that any representation of a foreign power will ever induce them to consent to a violation of those rights on which the liberties of the people of this country are founded... (Hawkesbury, cited in Stevens 2004: 22)¹⁰⁰

Yet, at least within the government, this concept was not clearly entrenched. In 1799, the government demanded the return of two Irish rebels who had sought refuge in Hamburg, one of whom was a naturalised Frenchman. In spite of Napoleon calling the extradition a “gross abuse of hospitality,” the free city complied. The British government faced little domestic criticism over their actions, and the decision was also consistent with German legal opinion at the time as granting asylum was seen to undermine the other state’s sovereignty. (Schuster 2003: 78-79)¹⁰¹

In 1815, by contrast, the public reaction was different. That year, the Governor of Gibraltar extradited a number of rebels to Spain. His actions caused storms of protest in Britain as well as parliamentary scorn. Sir James Mackintosh, a Whig Member of Parliament and a noted legal authority, “declared before... Parliament that no nation should be allowed to refuse asylum to political refugees: ‘Shall a British General perpetrate a violation of the right of suppliant strangers at which an Arab sheikh would have shuddered!’” (Wijngaert 1980: 11) He further argued that “though nations may often agree mutually to give up persons charged with the common offences against all human society, civilized States afford an inviolable asylum to political emigrants.” (cited in Lewis 1859: 43)

This is considered by both contemporary and 19th century legal scholars to be a watershed moment. Lewis suggests that Mackintosh “thus defined the approved practice of

¹⁰⁰ This declaration is all the more powerful as the British denial to return the émigrés was one of the causes of the breakdown of the Treaty of Amiens and the restart of the Napoleonic wars. (Wijngaert 1980: 10)

¹⁰¹ At least one of the rebels, Napper Tandy, was subsequently acquitted by British courts. (Lewis 1859: 48)

civilized nations with respect to the surrender of political refugees.” (1859: 43) Oppenheim notes that “public opinion in free countries began gradually to revolt against such extradition, and Great Britain was its first opponent.” (1920: 513) Wijngaert similarly notes, “from this and many other interpellations in Parliament, it appeared that English public opinion was clearly opposed to the extradition of political refugees.” (1980: 11)

Most notably, the debate in the Commons appears to have permanently shifted government policy. A year after this incident, Lord Castlereagh, then Foreign Secretary, “declared that there could be no greater abuse of the law than by allowing it to be the instrument of inflicting punishment on foreigners who had committed political crimes only.” (cited in Oppenheim and Roxburgh 1920: 513, see also Kellett 1986: 4)

While such a view might have been anchored in British policy, it was not yet clear in law. This latter process would begin through a colonial decision. In 1829, a thief from Vermont tried to prevent his extradition by arguing to the King’s Bench sitting in Montreal that it was being done for political reasons. The court agreed that extradition could not be undertaken for political crimes, arguing that “offences of a political nature, arising out of revolutionary principles, excited in any government” were different. The authority:

of the state to which the accused has fled may well be extended to protect rather than deliver [the political fugitive] up to his accusers, and this upon a wise and humane policy, because the voice of justice cannot always be heard amidst the rage of revolution, or when the sovereign and subject are at open variance respecting their political rights, and therefore no state will ever be induced to deliver men up to destruction... (Rex v Ball, cited in American Jurist 1829: 302, see also Pyle 2001: 81)¹⁰²

Pyle notes that this is the first “judicial acknowledgement that an exception to extradition for ‘political offences’ was appropriate...it implicitly reserved the right to [refuse to grant extradition] if the executive did not refuse surrender first.” (2001: 81)

¹⁰² The case was not a formal extradition case, but was over whether the government of Lower Canada could expel the defendant back to Vermont. The court found that political offences did not apply and that the prisoner “came into this province under suspicious circumstances, charged with a felony; as an alien his conduct did not merit protection...” (American Jurist 1829: 309-10, Pyle 2001: 347)

By the 1850s, not only was there an entrenched notion of Britain's right to grant asylum, and that Britain need not surrender political fugitives, but the British government also recognized the right of others states to do likewise. This, a major shift from fifty years earlier, received a forceful articulation by Lord Palmerston, then Foreign Secretary, 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, both great and small, of the civilised world, 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 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.¹⁰³

This statement is often cited as "the definitive defence of a state's right to refuse to extradite..." (Schuster 2003: 79) It not only provides a clear perspective on British policy at the time, but also takes two important stances. The first reflects the principle of asylum not just for reasons of sovereignty, but also for reasons of a common humanity: Britain could not turn them over because it would challenge this basic notion. Second is that the statement is applied not only to Britain, as was the case during the French Revolution, but is seen as an obligation on all 'civilised' countries.¹⁰⁴ This view was generally inviolable.¹⁰⁵

This view not only challenged the prevailing notions within continental European society, but it also directly struck at Britain's security interests. Following the 1848

¹⁰³ Correspondence respecting refugees from Hungary within the Turkish dominions presented to Parliament, 28 February 1851. (cited in Schuster 2003: 95 fn. 66, Lewis 1859: 47)

¹⁰⁴ This statement was consistent with British Consular practice during this period. See Memorandum relative to the Grant of Asylum to Refugees in HM's Legations and Consulates. May 1870. PRO FO 881/1764. 1-2

¹⁰⁵ Schuster suggests, however, that this statement was primarily used "to put a humanitarian gloss on what was a self-interested policy. It was written when material and ideal interests coincided." (Schuster 2003: 79-80) Using several mid-19th Century German sources, she argues that within two years Britain was accused of violating this principle by demanding those "who engaged in subversive machinations against His Majesty's government should not be granted asylum, and threatened foreign governments who refused to comply with demands for compensation and accusations of complicity." (Schuster 2003: 80) It is possible this referred to Irish rebels, whom by 1866 the British government "regarded as mere criminals, and whose extradition from foreign lands it did not want blocked by applications of the political offence exception." (Pyle 2001: 87)

Revolutions, states throughout Europe demanded the return of revolutionary agitators. British policy was at odds with other European states because the government extended refugee protections to all refugees, regardless of the reason for flight. Britain had redefined how refugees should be normatively perceived. While challenged in the 1840s and 1850s by other European states, this understanding would be universal by the end of the century.

At this point, European opinion concerning Britain was divided between those who saw Britain's lax standards as deliberate policy to subvert or ruin the other states and those who accepted that while Britain's policy was not malicious, it was wrong "because it was unneighbourly, inconsistent with friendly diplomatic relations, and contrary to what was called 'the law of nations.'" (Porter 1979: 51) States that fell within this latter category did generally approve of refugee protections, but saw the 1848 Revolutions as a unique event that needed to see these rights set aside. Thus the French envoy would argue that there was clear evidence of a "continued conspiracy on the part of revolutionary committees organized by the political refugees in London against all the Governments of Europe, and particularly against France."¹⁰⁶ Similarly, Louis Napoleon stated to Lord Malmesbury in 1853 (who had just stepped down as Foreign Secretary) that the British failed "to make sufficient allowance for the Revolution of 1848, which prostrated the country and was felt by all Frenchmen to be only the forerunner of the Reign of Terror..." (cited in Porter 1979: 51) ¹⁰⁷

Perhaps most dramatically, this policy in 1851 and again in 1853 saw the British government fearful of war: "there is a project now under consideration for excluding us from the continent - moreover that we are known to be a defenceless state and that the time is now

¹⁰⁶ Count Alexandre Walewski (French Envoy to Great Britain) to Viscount Palmerston, 29 October 1851. PRO FO83/294 Correspondence on the Foreign Refugees in London.

¹⁰⁷ Malmesbury's response says a lot about British policy, that " 'as we knew that half of them were rascals we should be very glad to get rid of them'; but the fact was that they could not." (Porter 1979: 143)

come for putting us down as a nuisance.”¹⁰⁸ In both cases, the fears “gave many British statesmen and diplomats a whiff of a war they all dreaded.” (Porter 1979: 60) Yet in neither case did Britain seek to alter its policy to mollify the other states.¹⁰⁹

These tensions declined by the end of the 1850s as many refugees either left following amnesties granted in their home countries or moved on to the United States - some 1,500 refugees were secretly assisted with British government money to do so. (Porter 1979: 17, 160) Oddly, it was the last major tension, the so-called “Orsini Affair,” which caused the British government enough concern that they attempted to change the open migration policy. Felice Orsini, an Italian revolutionary who had spent time in Britain as a political refugee, attempted to kill Napoleon III. While Orsini and his accomplices were captured and he was eventually sentenced to the guillotine, the problem for the British government was that the bombs had been made by Orsini and his collaborators in Birmingham:

the continentals had always claimed that by harbouring Mazzini [an Italian radical] and [other refugees] Britain’s policy of asylum was bound to lead, some time or other, to an eventuality like this. Britain had always claimed in reply that the continent’s fears were exaggerated. The Orsini plot seemed to prove that they were not... Morally Britain was suddenly pushed on to the defensive. (Porter 1979: 172)¹¹⁰

The plot led the British to fear war with France, or hyperbolic suggestions within Cabinet that they might have to surrender India in order to save themselves.¹¹¹

¹⁰⁸ Clarendon to Westmoreland, 2 March 1853. (cited in Porter 1979: 60)

¹⁰⁹ Moreover, Britain during this time was not alone in facing these tensions - in fact, many diplomatic arguments occurred over refugees between countries with adjacent land frontiers, “on which refugees amassed more ominously than they could amass against anyone in Dover or Harwich: between France and Spain, for example... between Switzerland and her neighbours, and between Belgium and hers. By comparison with these Britain was a very secondary threat.” (Porter 1979: 53)

¹¹⁰ Interestingly, two years earlier, another assassination attempt directed at Napoleon III - by two French brothers who placed an explosive on a rail-line - produced a similar crisis for Belgium, where the plotters fled. France demanded their extradition, but the Belgian Court of Appeal refused because the act was political. (Kellett 1986: 6) The French government subsequently withdrew the demand. (deHart 1886: 186)

¹¹¹ Seymour to Clarendon, 18 Jan 1858. PRO FO 7/538 though Porter notes it is likely Lord Clarendon, the Foreign Secretary, “was at fault on this occasion, and that things were not as black as he believed.” (1979: 173)

In reaction to French demands for a stricter policy, Prime Minister Palmerston moved not to affect the protections for refugees, but instead proposed a new Conspiracy to Murder Bill. The Bill would make the existing conspiracy laws more effective by increasing the penalties and chances of conviction for international conspirators in Britain including, of course, conspiracies led by refugees. Popular opposition to the Bill was substantial, however, because it was seen as Britain caving to French pressure and it challenged the traditional conception of refugee protection. The Bill was defeated in the House, and the defeat brought down Palmerston's government. (Kellett 1986: 6)¹¹² This demonstrates the impressive salience the British public felt towards these normative understandings.

Domestic protections for refugees in Britain were rooted substantially in the notion of non-extradition for political events. Even though this was a widespread view, however, the government was slow to create bilateral treaties or to enshrine this right within domestic law; by 1870 the state had ratified only two extradition treaties. As Attorney-General John T. Coleridge argued in Parliament that year, there was a deep reluctance to negotiate more treaties because the government "might be required to surrender political offenders, and violate the right of political asylum always afforded here to political refugees."¹¹³

In 1842, an extradition convention was signed between Britain and France, and established that fugitives would be turned over only if "the laws of the country where the fugitive or person so accused, shall be found, would justify his apprehension and commitment for trial, if the crime had been there committed."¹¹⁴ A similar statement was

¹¹² For more detail on these events see Porter (1979: 170-99)

¹¹³ Hansard, Parliamentary Debates, 3d ser., vol. 202, col. 301 (1870) (cited in Pyle 2001: 84)

¹¹⁴ Convention for the Mutual Surrender of Persons Fugitive from Justice. Article I. 13 March 1842. PRO FO 83/294 (General Refugees Aliens 1782-1868)

included in an extradition treaty signed between Britain and the United States the same year.¹¹⁵ In both cases the protection was implicit through the mechanism of explicitly delineating that only certain crimes would allow for extradition. (Kellett 1986: 5)

In 1870, the House of Commons finally created a comprehensive statute to cover all future extradition treaties, a process that had begun in 1852. The 1870 Extradition Act clearly established a political offence exemption:

A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of the State, that the requisition for his surrender has in fact made with a view to try or punish him for an offence of a political character. (Garcia-Mora 1962: 1240)

This clause had two important elements. The first was to establish that those accused of offences of a political nature would not be returned. Over time this evolved into a prohibition against surrender for offences relating to political uprisings but did not cover all possible political crimes such as assassination. The second element was rooted in the prohibition of surrender for crimes where the request was contaminated by partisan political motives. (Pyle 2001: 92) States, in other words, could not cloak a political extradition request by charging the person with criminal acts. Following this change, the British government went on to sign thirty-seven treaties before the outbreak of the First World War (see table 4.2 below for a comprehensive list).

But where was the line drawn between ordinary crimes and political acts? This division was directly tested in the Castioni case in 1890, where the court agreed with an expansive definition that even criminal acts, provided they occurred during political

¹¹⁵ A Treaty to settle and define the Boundaries between the Possessions of Her Britannick (sic) Majesty in North America and the Territories of the United States. 13 October 1842. Article X. PRO FO 83/294 (General Refugees Aliens 1782-1868) Prior to this, the first and only extradition treaty signed by the United States was the Jay Treaty, signed with Great Britain in 1794, which is discussed below.

Table 4.2: Great Britain's Bilateral Extradition Treaties or Conventions (Year of Original Signature)

| Country | Initial Date Signed | Country | Initial Date Signed | Country | Initial Date Signed |
|-------------|---------------------|-------------|---------------------|---------------------------------------|---------------------|
| Argentina | 1889 | Guatemala | 1885 | Paraguay | 1908 |
| Austria | 1873 | Haiti | 1874 | Peru | 1904 |
| Belgium | 1872 | Hungary | 1873 | Portugal | 1878 |
| Bolivia | 1892 | Iceland | 1873 | Romania | 1893 |
| Chile | 1897 | Italy | 1873 | San Marino | 1899 |
| Colombia | 1888 | Liberia | 1892 | Thailand (Siam) | 1883 |
| Cuba | 1904 | Luxembourg | 1880 | Spain | 1878 |
| Denmark | 1873 | Mexico | 1886 | South Africa (Orange Free State Only) | 1880 |
| Ecuador | 1880 | Monaco | 1891 | Switzerland | 1874 |
| El Salvador | 1881 | Netherlands | 1874 | Tonga | 1882 |
| France | 1843 | Nicaragua | 1905 | USA | 1843 |
| Germany | 1872 | Norway | 1873 | Uruguay | 1884 |
| Greece | 1910 | Panama | 1906 | Yugoslavia | 1900 |

Source: British Foreign and Commonwealth Office Bilateral Commonwealth Treaties <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044360289117>

disturbances, could not be used to justify extradition.¹¹⁶ This case informed not only British law, but also subsequent American practice.¹¹⁷

At the same time that Britain was defining the political exemption clause, it was also tightening up its immigration policies. The event that altered the policy of open immigration for refugees would not be the opinion of foreign governments, but rather increasing numbers of Jewish refugees from Russia and Eastern Europe and the rise of anarchism.

¹¹⁶ The case came before the British House of Lords as In re Castioni. Castioni's extradition was requested by the Swiss Government who alleged that during a political insurrection he had murdered a member of the state council of a Swiss canton. The court rejected a definition provided by John Stuart Mill of an offence which is political in character as one "committed in the course of or furthering of civil war, insurrection, or political commotion" to instead assume a "supposedly broader concept. It maintained that 'fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.'" The court ruled Castioni's actions were tied to the political insurrection and hence he was non-extraditable. (Garcia-Mora 1962: 1240, see also Green 1962: 330, Kellett 1986: 16) The Castioni decision provided the definition of a political offence in British law until the R. v. Governor of Pentonville Prison, ex parte Cheng (1973) which added the requirement that the offence had to be political towards the requesting state. (Gilbert 1983: 643) Kellett (1986: 17-8) provides a detailed discussion of other applicable case law.

¹¹⁷ As Garcia-Mora notes, the American policy on extradition "is historically traceable to the Castioni case and, thus, is grounded on the incidence test of English law." (Garcia-Mora 1962: 1245)

Part of this shift was marked by growing intolerance. Racial theories of the day,¹¹⁸ along with widespread anti-Semitism, propelled a movement against alien immigration. Politicians campaigned on claims that “aliens brought crime and vice into the metropolis, and making use of populist prejudice which claimed that the Jewish immigrants were dirty, diseased, criminal and of poor physique.” (Dummett and Nicol 1990: 100) Further, anti-immigration campaigners claimed (with little support) that immigration into Britain was growing exponentially. As Gainer notes, the Whitechapel Almanac, published by the Conservative Party, “claimed in 1903 that immigration in the preceding decade had amounted to 429,298 - nearly double the number the Census had recorded two years earlier.” Other estimates were even more hyperbolic. (1972: 10-11)¹¹⁹ These pressures were heightened by a long-term period of economic decline in Britain, and high unemployment reduced demands for migrants to provide labour. (Schuster 2003: 82) Thus a combination of domestic social pressure and economic decline winnowed down support for open immigration, and increasingly the debate was framed within Parliament in these stark terms.

There was little factual basis to these concerns. A House of Commons Select Committee report in 1889 found that alien numbers not only were not alarming but that no new legislation was necessary. (Wray 2006: 309) Even so, by the turn of the century the Conservative government found itself under considerable pressure from its own restrictionist

¹¹⁸ Schuster notes that originally, these theories, by putting North Europeans at the pinnacle of a hierarchy of ‘races’ reinforced “a paternalistic laissez-faire entrance policy from which a number of refugees from less benevolent and liberal regimes could benefit.” As numbers of refugees grew, however, these theories assumed a much more malevolent cast. (2003: 81)

¹¹⁹ Jewish immigration represented only a small amount of total immigration - between 1881 and 1914, around 150,000 Jews settled in Britain. (Wray 2006: 308)

members and from anti-immigration groups like the Immigration Reform Association (Holmes 1988: 70) while the Liberal opposition continued to support open immigration.¹²⁰

The Conservative government under Arthur Balfour sought to end the pressure by creating a Royal Commission on Aliens, anticipating that its findings “would kill the question once and for all.” (Gainer 1972: 183) While the Commission found that claims that the immigrants suffered from ill-health and poor hygiene were unfounded, it did recommend the re-introduction of controls to limit certain categories of immigrants, especially those from Eastern Europe. (Hansen and King 2000: 397, Dummett and Nicol 1990: 102)

This move faced significant opposition. During 1904, several bills failed. (Wray 2006: 310-11, Hansen and King 2000: 398) A new Aliens Act was passed in 1905 only by offering significant concessions to opponents. Most importantly, it included a clear exemption if the immigrant faced persecution due to religious or political beliefs:

...in the case of an immigrant who proves that he is seeking admission to this country solely to avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb, on account of religious belief, leave to land shall not be refused merely of want of means, or the probability of his becoming a charge on the rates. (Stevens 2004: 39)

Even so, Porter notes that the Alien Act, while designed to safeguard the right of entry into Britain for those facing persecution, “did not preserve the right of asylum in the sense in which the Victorians had understood it. In Victorian times it had been automatic: now it was a matter of discretion...” (Porter 1979: 218) The 1905 Aliens Act, therefore, represented a major change in British policy towards refugees in response to domestic unwillingness to accommodate large numbers of immigrants. Even though its provisions

¹²⁰ Winston Churchill, then a Liberal MP, framed the party position in a letter to the Times in 1904 that there was no good reason to abandon “the old tolerant and generous practice of free entry and asylum to which this country has so long adhered and from which it has so greatly gained.” (cited in Wray 2006: 304)

were extremely lenient,¹²¹ the Act presaged a major change in policy which would take shape following World War I, one that would see the emergence of clear tensions between the rights of refugees and an unwillingness to accept immigrants. This change will be examined in the next chapter.

4.3.2 Refugee Protection Grounded in Practice: The United States

The United States, like Great Britain, offered almost untrammelled entrance to refugees during much of the 19th century. Unlike Britain, however, this policy was rooted in an explicit decision at the federal level to not question the rights of potential refugees and not extradited political refugees. Throughout this period, an open immigration policy was supported: “U.S. legal policy warmly welcomed certain kinds of immigration, and restrictive laws were often poorly enforced.” (Neuman 1993: 1834) This understanding was rooted in revolutionary ideology and the traditions of colonial America.¹²² The new state, Hutchinson notes, “in view of its own revolutionary origin... had a natural sympathy for independence movements and was disposed to welcome the members of such movements who had to flee.” (1981: 521-22) This sympathy was seen as “confirmation of the widespread conviction that the United States was in every way superior to old world countries.” (Seller 1982: 144)¹²³

¹²¹ The Liberals won the December 1905 election, and while deciding not to repeal the act, they did seek to soften its impact by instructing immigration officers to give the benefit of the doubt to all immigrants where cases of potential persecution existed. With the outbreak of World War I, however, a new Aliens Restriction Act was passed by Parliament in a single day, and gave the government sweeping powers to control the entry of aliens, including prohibiting them from landing or departing, requiring them to remain in certain districts, and giving widespread powers of arrest and detention. Moreover, the burden of proof was to from then on lie with the individual. (Dummett and Nicol 1990: 104-7, Schuster 2003: 82-3)

¹²² As Pyle notes: “the doctrine of popular sovereignty arose early and naturally from the experience and necessity of self-government. The colonial officials who resisted the king’s demand for return of the regicides [several of whom fled to the colonies after the restoration of Charles I] asserted the de facto sovereignty of their own political systems... In colonial America, power was not hereditary; it had to be earned through service to the community.” (2001: 9-10)

¹²³ For a description of the various refugee groups who fled to the United States during the 19th century, see Reinhold (1939: 64-65)

This is not to say that these immigration policies were unchallenged: anti-immigration sentiment emerged periodically with great force, particularly during poor economic times; panics and recessions led for calls to limit immigration. But these calls would dissipate as the economy improved. There was no long term or widespread support for anti-immigration, and never enough to decisively shift public or Congressional opinion.

Open immigration offered protection to refugees because it ensured entrance. This was buttressed by a lack of federal control of immigration. No quantitative limits were imposed on immigration by Congress until 1875, and that focused on excluding convicted felons. There were, however, qualitative controls, created by a mixture of state and congressional legislation and international treaties which targeted not only criminals but also prostitutes and Asians thought to be ‘coolies’ who were brought into the United States without their consent. (Reimers 2002: 360, Neuman 1993: 1834, Neuman 2003: 106)

For the first three quarters of the century, control of immigration lay with the individual states. This decision was made in 1788 to avoid “an appearance of intrusion by the federal authority in an area previously controlled by Congress.” Congress therefore recommended to several states that they pass laws to prevent the transport of convicts to the United States,¹²⁴ a step that was a tacit recognition of state jurisdiction over immigration. (Hutchinson 1981: 11) Consequently, Connecticut, Georgia, Massachusetts, Pennsylvania, South Carolina and Virginia enacted legislation to prevent the immigration of felons and paupers. New York, the main port of entry, did not do so until 1833. (Neuman 1993: 1841-83, Neuman 2003: 107, Reimers 1998: 9-11) These exclusionary laws were ineffective, particularly given the fact that immigration was usually dealt with at the ports of entry into

¹²⁴ Throughout the 1780s, Great Britain continued the practice of making informal arrangements with ship captains to unload passengers, generally Irish convicts, in US ports. Given that there was no concrete evidence of British involvement, Congress could only ask that Great Britain restrain its subjects. (Baseler 1998: 164-5)

the United States rather than in individual states. They did, however, articulate “local policy choices that signalled to carriers and European governments opposition to the ‘dumping’ of paupers and convicts.” (Neuman 1993: 1885)

Open immigration alone did not provide full protection for refugees. Protection was also rooted in extradition policy, or rather the deliberate lack of one. As early as 1791, George Washington had asked Thomas Jefferson, then Secretary of State, to examine the state’s right to extradite. He argued that without a treaty, there was no requirement:

England has no [extradition] convention with any nation, and their laws have given no power to their executive to surrender fugitives of any description; they are, accordingly, constantly refused, and hence England has been the asylum... of the most atrocious offenders as well as the most innocent victims, who have been able to get there. The laws of the United States, like those of England, receive every fugitive, and no authority has been given to our executive to deliver them up.¹²⁵

But he also argued, in 1792, that even in the event of a treaty, treason should be exempted because the legal codes of most nations:

Do not distinguish between acts against the Government and acts against the oppressions of the Government. The latter are virtues... strugglers against tyranny have been the chief martyrs of treason laws in all countries. Reformation of government with our neighbours is as much wanting now, as reformation of religion is or ever was any where. We should not wish, then, to give up to the executioner the patriot who fails and flees to us.¹²⁶

These views were tested with the federal government’s first, and brief, foray into immigration legislation through the Alien and Sedition Acts, passed in 1798. These Acts were passed due to strained relations with France as well as an overall distrust of alien minorities among elements of the Federalist Party. The Acts, while not governing admission of aliens, did grant the President and the executive branch the unfettered discretion to arrest and deport aliens seen to be dangerous to the peace and safety of the United States. (Hutchinson 1981: 15, Neuman 1993: 1881)

¹²⁵ Thomas Jefferson to George Washington, 7 Nov 1791. (cited in Pyle 2001: 15)

¹²⁶ Thomas Jefferson, “Heads of Consideration on the establishment of Conventions between the United States and their neighbours, for the mutual delivery of fugitives from justice.” The American State Papers: Foreign Relations, Vol. I. 258

Opposition to the Acts quickly emerged, due to the belief that such broad ranging powers for the President challenged constitutionally-entrenched freedoms and because the Federalist Party was increasingly out of step with the popular and more favourable perception of immigrants. President Adams, though a Federalist himself, was reluctant to enforce it.¹²⁷ State legislatures submitted petitions against the Acts. Thomas Jefferson, in turn, used it as an election issue in 1800, arguing instead for a strict defence of the rights of refugees. In his view, America needed to return to a time when:

no alien law existed... every oppressed man was taught to believe, that here he would find an asylum from tyranny... that it should not depend on the will of any individual, however important and elevated... to force him from this asylum, and banish him without the intervention of a jury...¹²⁸

Jefferson won the Presidency and the Jeffersonian Republicans took control of both Houses of Congress. With their victory, the Acts were allowed to expire after two years.¹²⁹ (Hutchinson 1981: 15-16) Following this, Congress took little active interest in immigration affairs. As opposed to the British case, no laws were passed subsequently to identify and protect refugees. This reflected a policy of benign neglect, however, rather than a lack of support for refugees. In 1835 and again in 1850, Congress took action to grant land to needy refugees, noting that they differed from other groups and had been compelled to leave.¹³⁰

¹²⁷ Smith suggests that the law was never invoked because President Adams was determined to interpret the law strictly and because most of the targeted foreigners fled prior to its passage. (1954: 103)

¹²⁸ Thomas Jefferson. (cited in Baseler 1998: 287-88) Carter notes this reflected Jefferson's views on citizenship, particularly that he opposed a lengthy residence and felt that individuals should both be able to choose their own government as well as that America should become a home for the oppressed. (2001: 43)

¹²⁹ Hutchison notes that there were also partisan political tones over this, as there had been a few years previously over naturalization laws. The Federalists opposed immigration broadly because their Jeffersonian opponents attracted the support of many immigrants. (Hutchinson 1981: 14, see also Baseler 1998: 255-85) The 1800 election effectively destroyed the power of the Federalists, who never again formed a government.

¹³⁰ The first such grant was to some 235 Polish exiles. (Hutchinson 1981: 24; Register of Debates, Senate, 23rd Congress, 1st Session. "Exiles from Poland." May 9 1833. 721-22) As the House noted, the "reasons of their leaving their home... being totally different from those of any other people. They are compelled, by the utmost rigor and perfidy of the Russian government, to say farewell to their sweet home..." (House of Representatives, 23rd Congress 1st Session. "No. 1234 Application of the Polish Exiles for a Grant of Land for Settlement." 22

Such a view remained true throughout the latter half of the 19th century, even as the federal government increasingly did play a role. The United States signed its first major extradition treaty with Great Britain in 1842,¹³¹ though the primary concern was in regulating the border between the US and Canada. Prior to the treaty, the lack of federal authority in the area had led individual states to pass statutes allowing extradition: in 1822 the New York state legislature had authorized the governor to unilaterally surrender fugitives if the crimes alleged were punishable by imprisonment or death, though five years later the legislature amended the statute to exclude treason.¹³² Other states, including Vermont, also refused to extradite without a treaty, which the US courts recognized. (Pyle 2001: 64-7)

The 1842 Extradition Treaty did not explicitly include a special protection for political fugitives.¹³³ Such ambiguity, however, underlined the existence of a clear understanding of who would and would not be included within the treaties. It did not include a clear statement of immunity for political offences because, as Hamilton Fish, then Secretary of State, noted in 1876, “the public sentiment of both countries made it

April 1834. 141-142) The Grant was overturned four years later when it was found that none of the Poles were actually residing on the land. (Hutchinson 1981: 29) In 1850, the Senate passed a similar resolution in favour of Hungarian refugees, noting that “a grant of public land should be made, upon the most liberal terms, to the Hungarian refugees now in this country...” (Senate of the United States, 31st Congress, 1st Session, “Resolution” 5 February 1850.) While exile was used in one case and refugee in the other, it appears that Congress used the terms synonymously.

¹³¹ The Jay Treaty was signed in 1794. It was allowed to expire, however, “because there was no legal specification of the procedures to be employed in carrying out extradition, including the respective roles of the federal executive and judiciary” and after the high-profile extradition, and subsequent execution, of a British mutineer who may have held American citizenship. (Neuman 2003: 109, see also Bassiouni 1974: 30, for a history of the Nash/Robbins extradition crisis, see Pyle 2001: 24-47)

¹³² This statute led to a major crisis in 1839. When asked to extradite a fugitive, Governor William H. Seward (who would later serve as Lincoln’s Secretary of State) refused to act, even after a direct request from President Van Buren. Seward argued that it was unconstitutional unless the President himself authorized the extradition, which Van Buren was unwilling to do without a treaty. (Pyle 2001: 64-7)

¹³³ A Treaty to settle and define the Boundaries between the Possessions of Her Britannick (sic) Majesty in North America and the Territories of the United States. 13 October 1842. Article X. PRO FO 83/294 (General Refugees Aliens 1782-1868)

unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible...” (cited in Hyde 1914: 490) Similarly, at the time of the treaty, President Tyler argued that “in the careful and specific enumeration of crimes, the object has been to exclude all political offences...” (cited in Pyle 2001: 74) Even so, when the United States negotiated a similar treaty with France the following year, it did include a provision expressly prohibiting surrender for “any crime or offence of a purely political character.” (Pyle 2001: 74)

Beyond extradition treaties, the United States government also, in 1848, created an extradition law in order to govern its extradition treaties. At the time of the debate, it was characterized as a measure to properly implement the treaties the US had signed with Britain and France. In the Senate, it was challenged on due process grounds, but passed after assurances that it would not allow for the surrender of political offenders. This remains the basic extradition statute of the United States. (Pyle 2001: 98)¹³⁴

Extradition, of course, represented a very small number of cases. The broader patterns of immigration remained unlegislated at the federal level until 1875, when the Supreme Court ruled that state-based immigration legislation was unconstitutional and that it needed to be a federal matter. (Hutchinson 1981: 65-66, Reimers 1998: 11) The 1875 Immigration Act, the first passed by Congress, focused on excluding criminals while clearly stating that political offenders were to be admitted. (Hutchinson 1981: 522) Seven years later, the 1882 Immigration Act confirmed a right of asylum to “foreign convicts who have been convicted of political offences...” (Sibley and Elias 1906: 25)

¹³⁴ By the turn of the century as the United States signed more extradition treaties, the State Department made few inquiries into the political situation in many states, nor did it abrogate treaties following the overthrow of democratic regimes. Thus “the humanitarian spirit of the political offence exception had been lost to a jurisprudence of blind rules.” (Pyle 2001: 126-7)

While Congress enshrined a right of immigration for political refugees, however, it also moved to begin to restrict immigration. A series of legislative changes, coupled with the Supreme Court supporting limits on Chinese emigration in a series of six Chinese Exclusion Cases between 1884 and 1893, saw this immigration policy cast in racial lines focused on restricting Chinese immigrants. Between 1882 and 1917, therefore, Asian immigration into the United States was severely restricted. (Dunne 2002: 120) Even so, all of these acts followed the principle that, as Section 1 of the 1891 Act noted, “nothing... shall be construed to apply or to exclude persons convicted of a political offence. (Hutchinson 1981: 522) The only political restriction placed on entrance was in the 1903 Immigration Act, which prohibited the entry of anarchists as a reaction to the assassination of President William McKinley. (Zucker and Zucker 1987: 4-5)

In this regard, the government was following domestic opinion. As Seller notes, even while the United States was emerging as a world power, “ironically, these changes were accompanied by a loss of the self-confidence and optimism that had supported the policy of unrestricted immigration.” (1982: 148) A key difference between this period and that subsequent to World War I, however, was “humanitarian motives remained important; many Americans were sympathetic to the plight of Jews fleeing savage pogroms in Russia and Armenians escaping massacres in Turkey.” (Seller 1982: 149) Consequently, refugee admissions continued to be supported even while immigration was slowly restricted.

American policy throughout this period was marked by constant support for the admission of refugees. As opposed to Great Britain, however, such rights were not entrenched in domestic law until well into the 19th century. Rather, there was simply a much

clearer normative understanding accepted by the population at large as well as by the government that refugees needed to be offered protection.

4.3.3 Continental Protections: France, Belgium and other European States

France's policies throughout this period were laid in its revolutionary experience, in particular in enshrining clear rights for refugees. Thus, the Declaration of the Rights of Man and Citizen granted "the natural and inalienable rights of man to those possessing citizenship of a nation and state." This was followed by the Loi relative aux passeports as well as the 1799 Constitution which explicitly defined what an alien was. (Haddad 2003: 307) This doctrine of free emigration was rooted directly in a perception of broader ideals of humanitarianism. As Peuchat wrote in Le Moniteur in 1790, "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." (Le Moniteur, vol 5: 351-2, cited in Torpey 2000: 25)

While these laws allowed free migration for those who had been exiled from their home country for the 'cause of liberty,' French law was far more restrictive towards the émigrés. Throughout the Revolutionary and Napoleonic periods, they were restricted in their right to return, and during some periods were actually condemned to death upon return. (Carpenter 1999: xviii-xxiv, Woloch 2001: 56-57, Oppenheim and Roxburgh 1920: 512) France also forced some other states to return émigrés, most notably Switzerland, which signed a treaty to extradite political offenders against France in 1798. (Pyle 2001: 80)

Still, public opinion in France, like that in the Great Britain and the United States, evolved to recognize the need to protect refugees. This was made clear during the Galotti incident of 1829. Galotti, a Neapolitan officer who had fled to France following the restoration of the Bourbons in Naples, was extradited to Naples for a number of common

crimes. This occurred only after assurances were received by the French government that he would not be prosecuted for political offences. Following his extradition, however, he was prosecuted for his participation in the 1820 Revolution and sentenced to death. France not only revoked its extradition decree and requested his return, but threatened to declare war when Naples refused. (Deere 1933: 250, Wijngaert 1980: 11-12) As Wijngaert notes,

As a result of this pressure, the Neapolitans finally decided not to execute Galotti and in the fall of 1830 his penalty was commuted to exile. This case, however, had provoked such deep emotion in French public opinion that shortly after the incident the French Government declared that henceforth extradition of political offenders would no longer be requested or granted. (1980: 12)

This case, and the start of the Polish refugee exodus in 1832, triggered a need in the French government to codify in law the rights of refugees. This resulted in the Loi Relative aux Etrangers Réfugiés Qui Résideront en France, passed on 21 April 1832. This law, as Grahl-Madsen notes, was pivotal because it offered the first definition of a refugee as “ceux qui résident en France sans la protection de leur gouvernement” (those who reside in France without the protection of their government). Thus, “it would seem that here we have the origin of the notion that refugees are ‘unprotected persons.’” (1966: 280, Haddad 2003: 307) The law did empower French officials to assemble the exiles in certain cities and granted them broad powers of expulsion, however in practice French authorities were lenient. They also supported destitute refugees through living allowances, which were codified in an 1848 law. (Marrus 2002: 16) Therefore France, like Britain, ensured that refugee protections were codified in domestic law.

Other European states reached similar positions over time. A particularly interesting case is that of Belgium. Like Britain, the United States, and France, Belgium’s citizens and especially its liberal elites were sympathetic towards refugees. Unlike these states, the Belgian government also had to worry about antagonizing its much larger neighbours.

(Caestecker 2000: 5-14) In order to prevent demands for refugee return, the Belgian government played a crucial role as a norm entrepreneur by enshrining the non-extradition of political refugees as a new legal understanding, no matter what their country of origin, in law in 1833. (Grahl-Madsen 1966: 280) This was a pivotal change. It codified that refugees would not be returned to their countries of origin through an extradition process. It also shifted extradition law from a purely executive matter normally left in the hands of the sovereign to one that could be subjected to parliamentary conditions and oversight and to judicial control. (Wijngaert 1980: 12) Thus the Belgian law moved extradition away from the realm of policy and instead created it as an institution within international law. (Deere 1933: 249) As we have seen, states quickly followed the Belgian example by adopting domestic legislation to prevent the extradition of political refugees. France followed in 1834, the Netherlands and United States in 1849, Britain¹³⁵ and Luxembourg in 1870, Japan in 1887, and Switzerland in 1892.¹³⁶ (Bassiouni 1974: 371, 75, Deere 1933: 256)

Other European states were not so quick to embrace clear refugee protections. In the 1830s, the central and eastern European powers - Austria, Prussia, Russia and the Germanic Confederation - as well as Spain, reached an agreement to return all people charged with high treason, conspiracy, or participation in a revolt, one of the few multilateral agreements of the period. The policy was unsustainable, however, because it prevented these states from signing extradition treaties with the states of Western Europe. In 1856, the Austro-Hungarian Empire became the first autocratic state to sign an extradition treaty included a political

¹³⁵ Great Britain established that: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of political character, or if he prove... that the requisition for his surrender has in fact made with a view to try or punish him for an offence of a political character.(Garcia-Mora 1962: 1240)

¹³⁶ The Swiss Federal Law on Extradition held that "extradition is not granted for political offences. It is granted, however, even when the guilty person alleges a political motive or end, if the act for which it has been requested constitutes primarily a common offence." (Green 1962: 334) Germany passed its first law in 1929, Norway in 1908, Sweden in 1913, Russia in 1912, and the United States in 1908. (Deere 1933: 247)

crimes exception. The North German Federation and Russia both followed in the 1860s. (Pyle 2001: 82-3, Oppenheim and Roxburgh 1920: 514, Deere 1933: 247, 51)

Equally important, these states relaxed previously strict anti-emigration policies. This movement, as Torpey notes, was both for practical reasons as well as a broader acceptance of a liberal notion of citizenship: “In part, this shift was intended to provide a safety valve for social unrest, giving unhindered passage to those who were most troublesome to the authorities. Yet it also reflected the liberalism of the forces that spearheaded the Frankfurt parliament.” (2000: 75)

It became common practice to enter political offence exceptions into all negotiated extradition treaties. By 1875, Bassiouni notes that almost every bilateral European extradition treaty contained an exception for political offences. (Bassiouni 1974: 371) In 1892, the Institute of International Law also moved to adopt a resolution which established that “extradition should not be granted on a purely political charge.” (Garcia-Mora 1962: 1232)¹³⁷ This practice continued well into the 20th century as both a standard clause in extradition treaties as well as in the municipal laws of many states. (Bassiouni 1974: 371) Consequently, a norm based on the understanding that refugees faced political and religious persecution in their own state and therefore should be given leave to reside in a host state was clearly entrenched by the latter half of the 19th century.

¹³⁷ Such a view made its appearance into extradition treaties, beginning with one signed between the United States and Mexico in 1899. However, US practice had already implicitly accepted such a notion. This understanding was first introduced by the Secretary of State, John Sherman, to the Mexican Minister in Washington on 17 December 1897, when, in commenting on the United States’ decision on the extradition of a Mexican revolutionary, he noted that “the political offence for which extradition should never be granted is the act... punishable solely and exclusively because of its political character. These are absolute political offences.” Interestingly, Sherman quoted Lord Denhan’s statement on the nature of political offences, demonstrating that different states were keenly aware of each other’s jurisprudence. Sherman to Romero, 17 December 1897. Foreign Relations of the United States (FRUS) (1898). 502-7

4.4. Anarchism

One issue with the political offence exemption that remained was that there was deliberately no clear definition of what a political offence was. Thus “what would otherwise be a clear-cut statement of policy concerning the treatment to be accorded political offenders, becomes instead a matter of uncertainty and doubt because of the lack of agreement as to what constitutes a political offence.” (Deere 1933: 247, Wijngaert 1980: 12-18, see also Jones 1941) The pattern was to note exceptions to the exemption, beginning with the Belgian clause of 1854 which determined that attacking a foreign sovereign was not a political crime and therefore could result in extradition of the fugitive. (Wijngaert 1980: 15-16)¹³⁸

The major threat to a common understanding on refugees in the latter part of the 19th century was not new waves of refugees, nor political concerns, but rather the rise of anarchism and widespread public fears that refugees were responsible for fomenting it in host countries. (Gilbert 1991: 116) Anarchists rejected the authority of not only government but also of the state and from 1870 onwards, anarchist elements increasingly engaged in terrorist acts both for their own sake and to symbolize a total revolt against society. (Gilbert 1998: 210, Joll 1980: 78-9)

In responding to this new threat, states acted by seeking to establish anarchist acts as outside of the standard political offence exception. Therefore, anarchists were assumed to not

¹³⁸ Such exceptions have been added as human rights law has developed and now include genocide, war crimes and terrorism. (Wijngaert 1980: 15-16) Ambiguity appears to have helped in ensuring this practice was widely adopted, since states can apply the exemption as liberally or as conservatively as they wish. As the Institute of International Law agreed in 1880, it was the sovereign right of the state requested to grant extradition to determine if the act was political. (Kuhn 1926: 755) Therefore, such discretion allowed “some countries [to] interpret the concept of a political offence broadly so as to protect the individual, while others consider a strict interpretation more consonant with the requirements of international cooperation.” (Garcia-Mora 1962: 1228) Legal opinion at the time also supported such a view. As British Justice Lord Denman noted in 1890, it was not “necessary or desirable... to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character.” (cited in Schroeder 1919: 30-31) Similarly, in 1891 Judge John Bassett Moore remarked that “whether a particular act comes within [the political offence] category is pre-eminently circumstantial.” (cited in Garcia-Mora 1962: 1229)

be subject to the same normative obligations as refugees who committed political acts which fell inside the exception. Some states engaged in minor expulsions, while others sought to “distinguish between acts committed in the furtherance of revolts or revolutions, labelled political and hence not subject to extradition, and individual acts of violence like terrorist bombings, deemed criminal and not protected from extradition.”(Marrus 2002: 26) Other states, including the United States, prohibited entry of anarchists and those suspected of being anarchists.

Anarchism would also bring about the first major multilateral initiative which dealt with refugees, albeit obliquely. As anarchism became a greater threat to Europe, Italy sponsored an international conference of police and other officials in 1898. The conference focused on improving police communication and information exchange, as well as the identification and surveillance of anarchists in Europe. This group included numerous refugees.¹³⁹ A major point of contention was the question of extraditing anarchists. The conference reached an agreement whereby anarchist crimes would be considered non-political for the purposes of extradition. However few states actually modified their domestic legislation to incorporate such a view. (Jensen 1981: 329-30) Moreover, Great Britain, Belgium and Switzerland all refused to alter their asylum policies at all and would not surrender suspected anarchists to their native countries on demand. As Marrus notes, “liberal states, at least, stood firm on the question of individual rights for refugees.”(2002: 26)¹⁴⁰

¹³⁹ Following the assassination of President McKinley by an anarchist in 1901, the United States was asked if it would like to join the program of the Rome Conference, which it declined, in part because “in 1901 the only federal agency that had a nationwide network and was available to carry out some kind of surveillance of the anarchists within the United States was the Post Office.” (Jensen 1981: 337)

¹⁴⁰ Kellett (1986: 7) notes that the British courts had already ruled that anarchist crimes were non-political, and suggests that rather than a spirited stand, the failure to sign showed a lack of political determination.

Anarchism represented a major challenge to the normative understandings concerning refugees held by these states. While non-extradition of political refugees had become universal practice, anarchism led to a distinct limitation grafted onto this norm: that assassination, or attempted assassination, of heads of state was beyond the set of actions that states would legitimately allow. Thus, by the end of the 19th century, a corollary to the norm of non-extradition had emerged. Certain political crimes were considered to be so repugnant that individuals who committed them lost the right to claim refugee status.

4.5. Conclusions

States in the 19th century held a consistent view of refugees as people fleeing political and religious persecution who should be allowed to leave their own states, who should be offered protection in domestic law, and who should not be returned. These states therefore had an ideational conception of refugees and understood their behaviour towards refugees to be bound by a set of norms. Understandings which began to emerge in the 17th and 18th centuries were shaped into a consistent and non-contradictory pattern of practice. While accepting refugees remained the purview of individual states, clear notions of what was correct behaviour towards refugees shaped the interactions of states within international society, founded in the basic rules established by the fundamental institutions of territoriality, international law, and popular sovereignty. As opposed to the earlier period, states no longer offered protections because it was in their economic or religious interests - in many cases, offering protection went against these interests. Rather, it was because offering protection was seen as the right thing to do. Hospitality and humanitarian duty required it.

These norms did not emerge instantaneously. Initially, states did engage in hypocritical patterns of behaviour, such as Britain demanding the return of its own subjects

while refusing to extradite refugees. As time passed, individual governments increasingly adopted normatively correct patterns of behaviour. Two mechanisms led to this. The first was that individuals within government argued that such behaviour was required for state legitimacy, and that this behaviour was just. The second was that governments found their policies bound by the domestic population who would protest any deviance. But even this tactical commitment over time became a whole-hearted commitment to the norms.

These developments also reflected the existence of a regime, though one created through informal understandings. Multilateral negotiations, by contrast, were almost non-existent.¹⁴¹ Even so, norms of refugee protection and non-extradition were transmitted across international society, cascading to the point that non-extradition of political refugees was considered to be a universal practice, with only very limited exceptions based on anarchism. Legalization, therefore, served as the mechanism whereby states created common understandings and reached consensus patterns of behaviour. Thus, Grahl-Madsen could argue that by the beginning of the 20th century, two cornerstones of modern international refugee law had already been laid:

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)

Even so, tacit state cooperation required a system with small numbers of refugees. While states had accepted that there were common normatively-correct goals towards refugee protection, refugee admittance remained the responsibility of each individual state. Not only were there no burden-sharing mechanisms, but states could easily close their

¹⁴¹ 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) It was signed by five states, and successive multilateral treaties were adopted in Latin America, including the 1933 Second Montevideo treaty. (Bassiouni 1974: 22)

borders to unwanted refugees. Obligations to protect refugees in domestic law and to not extradite applied only once they were within the state's territory.

As refugee numbers increased towards the end of the 19th century, as huge numbers of Jews sought to flee from Russia and Eastern Europe, and as states dealt with the fears of anarchism, state policies changed. Governments abandoned earlier notions of open entrance for refugees, though often over widespread protest, and relied instead on bureaucratic processing systems for refugee claimants and increased border restrictions. In spite of these changes, the regime did not breakdown because the United States, with its massive absorptive capacity and domestic impediments to introducing restrictionist legislation, continued to accept huge numbers of refugees. As will be shown in the next chapter, once the United States moved to close its borders following the First World War, coupled with the massive refugee flows created by the war itself, the laissez-faire regime broke down entirely.

Chapter 5: The Interwar Refugee Regime and the Failure of International Cooperation

5.1 Introduction

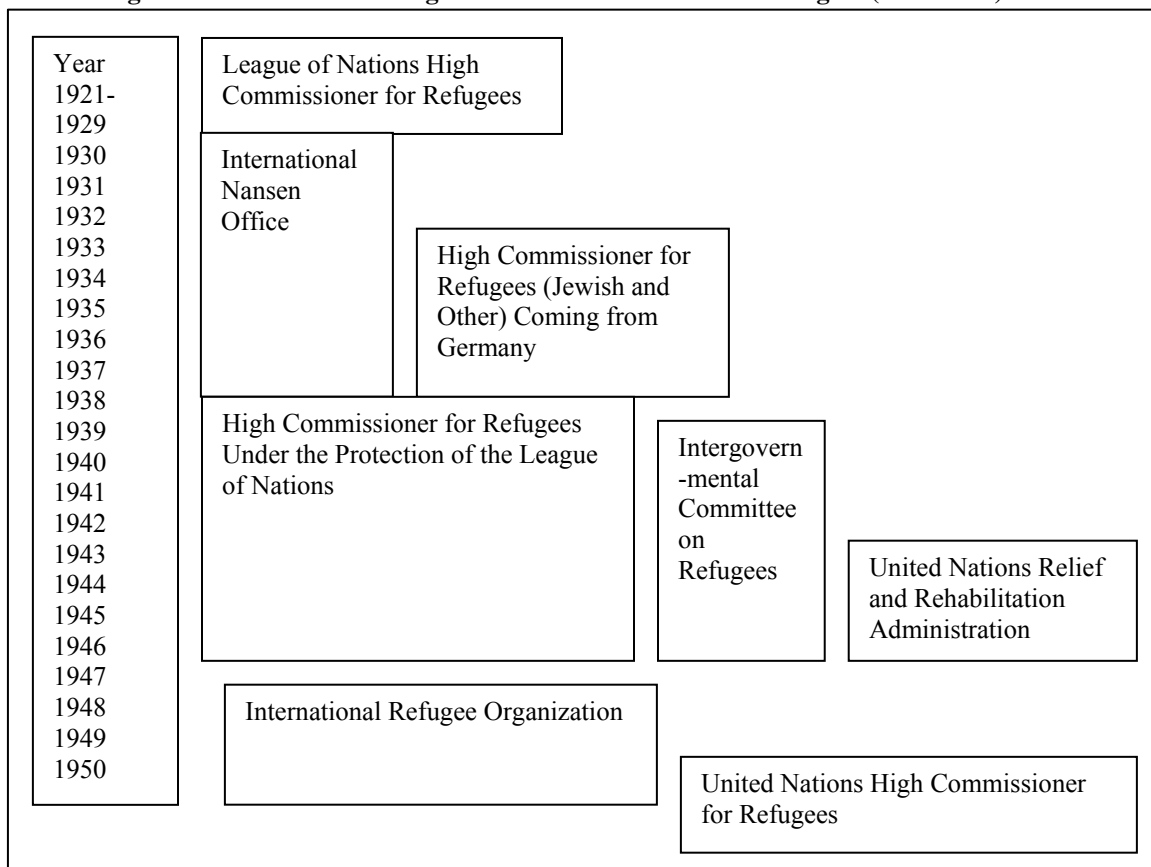
In the 19th century, cooperation had been marked by domestic and bilateral legal protections, and states accepted a humanitarian duty only to refugees who had entered their territory. A tacit regime worked in this situation because the numbers of refugees were small and because open immigration, particularly to the United States, was possible. This regime broke down, however, due to a crisis triggered by the enormous flows of refugees created by the First World War and its consequences. Equally important, a shift against immigration in Europe and the United States meant that states were willing to accommodate few new refugees. (Dummett and Nicol 1990: 104-7, Schuster 2003: 82-3) These anti-immigration movements successfully framed open immigration as a direct challenge to the sovereignty of the state, with the result that anti-immigration policies and legislation were adopted within most of Europe and the United States. Refugees were not a direct target of these policies, but they were caught up in new restrictions. The refugee problem:

was aggravated by the coincident implementation and intensification of stringent immigration controls... Refugees, even if deemed worthy of sympathy, were classified and treated as aliens and therefore as fundamentally undesirable. Traditions of asylum, even if adhered to in state rhetoric, became next to meaningless in practice. (Kushner and Knox 1999: 43)

This chapter focuses on how states and influential norm entrepreneurs – including Fridthof Nansen, the first League of Nations High Commissioner for Refugees (HCR) – sought to construct a new international regime within the limitations imposed on them by anti-immigration norms at the domestic level. Critical to this change was state acceptance that only a formal multilateral solution could successfully deal with the problem. Thus multilateralism, a fundamental institution, provided a basis for a new form of cooperation rooted in a collective responsibility for refugees.

This also led to a new regime, marked by three new norms: a multilateral mechanism was necessary by creating an IO; protection should be enshrined in international law; and the responsibility for assistance should rest with this IO. The interwar period, however, is a bleak history. While states fully accepted the first norm, and rhetorically committed to the latter two, in practice domestic norms which favoured restrictionism limited the abilities of states to follow through. Thus these norms remained contested. This discordance between international and domestic norms also created a complex institutional history, as states were loath to provide IOs during the period with the autonomy and resources they required to be effective; no fewer than seven IOs were created prior to the UNHCR in 1950 (see figure 5-1). This system broke down in the face of increased refugee movements in the 1930s caused by the rise of fascism and of Nazi Germany.

Figure 5.1: International Organizations Created to Assist Refugees (1921-1950)



The first section examines the 1921-1930 period, including the efforts by norm entrepreneurs to successfully convince states to create a multilateral international organization, the League HCR as well as the role played by Nansen in creating an international legal framework to provide protection. It also explores the domestic shift in both the United States and Britain as they moved away from open immigration. The second section examines the 1930-1938 period. Following Nansen's death, states were unwilling to provide more than token support for the League machinery. This continued after the rise of Nazi Germany in spite of efforts by James G. MacDonald, the first High Commissioner for Refugees (Jewish and Other) from Germany. The third section examines the 1938-39 period, which saw a decisive shift in American support for the refugee regime, primarily through the efforts of President Franklin Roosevelt. Even so, international cooperation remained constrained by domestic factors, in particular immigration restrictions. While many of the key policy makers during this time began to support the principle of humanitarianism, they were unable to challenge notions of sovereignty to do so. Efforts to create a new multilateral IO, the Intergovernmental Committee on Refugees (IGCR), were consequently stillborn.

5.2 1921-1930: Refugees become an International Concern

States in 1918 faced an unparalleled refugee situation. The Russian revolution alone displaced over 1 million people. (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, Farer 1995: 76-77) Even governments who were open to receiving refugees faced their own reconstruction problems, and "were ill-equipped for an influx of destitute people whose attitudes and dubious legal status made them a political problem..."(Holborn 1975: 4-5) These flows were also not short term. They

continued to be produced as by-products of the massive changes in the European state structure that had occurred with the War. (Loescher 1993: 34) Throughout the 1920s and 1930s, refugees would be a part of the communal landscape of Europe, as shown below in Table 5.1. In 1926, even as the League of Nations felt that refugees were no longer a pressing issue, there were still at least 9.5 million refugees in Europe alone. (Marrus 2002: 51)

5.2.1 The Russian Refugee Crisis and the Shift to Formal Multilateralism

During the war, a number of refugee support operations had been organized and run by voluntary organizations in Western Europe. (Bicknell 1918: 33)¹⁴² Their success mirrored the pattern of the previous century. With the end of the war, most of these refugees could return home. Their numbers were replaced by Russian refugees fleeing the Revolution.

Table 5.1: Major Refugee Flows 1921-1939

| Year | Nationality | Receiving Country | Number | League Recognition |
|--------------|-----------------|--|-------------------------|--------------------------|
| 1921 onwards | Russians | France, Germany, Poland, Bulgaria, Romania, others | 967,793 (1922 estimate) | Yes |
| 1921 | Hungarians | Hungary | 234,000 | No |
| 1922 | Italians | France, others | 10,000 | No |
| 1922 | Greek | Greece | 900,000-1,200,000 | No (assistance provided) |
| 1923 | Armenians | Various | 320,000 | Yes |
| 1924 | Bulgarians | Bulgaria | 82,000-251,000 | No |
| 1923 | Assyrians | Various | 20,700 (1930) | Yes |
| 1931 | Polish | Various | 8,632 | No |
| 1933 onwards | Germans | France, Great Britain, United States | Over 154,000 | Yes |
| 1935 | Saarlanders | | 8,000 | Yes |
| 1938 | Austrian | France, Great Britain, United States | 126,500 (1939) | Yes |
| 1938 | Czechoslovakian | | 165,000 | No |
| 1939 | Spanish | France | 450,000 | No |
| 1939 | Polish | | 440,000 | No |

Sources: League of Nations C.148.M.84.1922 [XIII] 23 March 1922; League of Nations C.249 1924 Russian Refugees - Report by Dr. Nansen; League of Nations A.27.1938 - International Assistance to Refugees. 25 Aug 1938. 5; Marrus (2002); Simpson (1939), (1940).

¹⁴² One operation provided assistance to 600,000 Belgians, run by the Commission for Belgium, though with some support from the Belgian government in exile and the French government. (Bicknell 1918: 33-39) A similar operation was run in Britain by a network of relief charities (Fowler 1999: 21-22, Holmes 1988: 87)

Assistance was provided, once again, by voluntary organizations working primarily in the countries bordering Russia as well as France and Germany. These organizations continued to apply a wartime model, however, focusing on the Russian refugees as a short term issue.¹⁴³ While their work was significant, shouldering the principle burden of assistance and coordinating the international effort, “it was mostly in the nature of relief. No effort was made to integrate refugees permanently into their countries of refuge nor was there any attempt to move the Russian refugees to areas where they might have resettled...” (Stoessinger 1956: 13) The results were paradoxical: “Having kept so many refugees alive during the critical postwar period, the private organizations helped to maintain the pressure of refugee crises.”(Marrus 2002: 82) By 1921, the ongoing task had become greater than the capabilities of the organizations working on their own. (Grahl-Madsen 1983: 358)

Part of the problem was that the refugee flows were presumed to be short term. As counter-revolutionary efforts bore fruit, both these organizations and Western states assumed that the refugees would return to their own country. Equally problematic was that the Soviet government responded to emigration by removing citizenship rights of those who had fled and had sealed the border by 1923. (Felshtinsky 1982: 328-40)¹⁴⁴ Deprived of their citizenship, these refugees became stateless with little hope of return or resettlement.

¹⁴³ Organizations involved included the Red Cross, the Quakers, the Save the Children Fund, as well as a number of organizations set up specifically for assistance to the Near East, including the American Committee for Relief in the Near East, the Armenian Relief Committee, the Lord Mayor’s Fund and Near East Relief. Generally, assistance took on traditional forms, such as soup kitchens, emergency medical treatment, and orphanages. For a broader description of their efforts, see Marrus (2002: 82-84).

¹⁴⁴ Mass migration from Russia did not begin until 1920, (Felshtinsky 1982: 338) and the denationalization of Russian refugees was a reaction to these flows: “by manipulating the legal status of its subjects, the Bolsheviks could punish from afar...”(Torpey 2000: 124)

Starting in 1920, there were bilateral negotiations undertaken by a number of European countries aimed at transferring refugees to new territories. These efforts, however, usually ended in failure:

because of the unsatisfactory legal status of the refugees as prospective immigrants: some of the Russian refugees, for example, held documents issued by the Tsarist government, while most of the others possessed no identity papers of any kind and were in fact stateless... (Holborn 1975: 4)

States did provide support to the refugees in an ad hoc fashion. In some cases, assistance was provided directly to the populations which states were hosting. 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 committed to assisting refugees who had been part of the allied forces, including the remnants of the White Russian armies. The French had spent F150 million to provide assistance to the remnants of the army of General Peter Wrangel, who had fled to Constantinople. (Simpson 1939: 199, Skran 1995: 89) The British were similarly supporting some 5,000 refugees in Egypt, Cyprus and Serbia at a cost of £22,000 per month.

More importantly, neither country was able to end the problem. 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. Both states had tried to negotiate repatriation agreements with the Soviet Union; however they had been rebuffed primarily because of a continuing lack of trust. Attempts to transfer responsibility for the refugees to Eastern European countries were also unsuccessful. (Skran 1995: 89) By 1921, states had begun to back away from the unilateral provision of assistance, even with the refugees in perilous

conditions and close to starvation.¹⁴⁵ The French had announced that they were being forced to already give less assistance and that they “would shortly be obliged to suspend it entirely.”¹⁴⁶ 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.

Multilateralism, a fundamental institution, provided a possible solution as a basis for a new form of international cooperation rooted in a collective responsibility for refugees shared by states. Such a solution 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) A regime, once established, can make “expectations converge and allow the actors to coordinate their actions.” These expectations become self-enforcing. (Stein 1993: 43) 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, in other words why the previous regime failed, 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) Most interestingly, states continued to follow the core norms of the 19th

¹⁴⁵ A mission by the ICRC to Yugoslavia 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

¹⁴⁶ Russian Refugees - Note by the Secretary-General. LNA, R1713/15001. This also triggered the first appeal for assistance to the League in January 1921, helping to lay the groundwork for Ador’s appeal the following month. Count Bobrinski to the Council of the League of Nations, 10 January 1921. Reprinted as League of Nations Council Document C512/10311/8822. 2

century regime – that refugees were the responsibility of individual states and that assistance should be provided by voluntary organizations – even though this regime could no longer provide an effective solution.

Change occurred because of the interplay of two groups of norm entrepreneurs who took this crisis and provided an effective alternative to states, based in multilateralism. The first, the voluntary organizations, led by Gustave Ador, the President of the ICRC, directly lobbied the League and its membership.¹⁴⁷ The second was the League of Nations secretariat, which actively lobbied its member states to accept an expanded mandate. Ador argued that not only was League intervention vital to assist the more than 800,000 Russian refugees,¹⁴⁸ but he also worked to graft the refugee issue on to other analogous League successes:

The ICRC realizes that the practical organization of assistance for the Russian refugees and the accompanying financial responsibility could with difficulty be considered by the League of Nations as falling within the same category as the repatriation of prisoners of war or the fight against typhus.¹⁴⁹

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.¹⁵⁰ A new organization,

¹⁴⁷ The League in its Covenant pledged to cooperate with the Red Cross. (Grahl-Madsen 1983: 358) The ICRC had sent Brigadier General C.B. Thomson to inspect the situations in Yugoslavia, who argued that it was unjust that Yugoslavia alone should bear the burden, noting that he believed "that the moral effect of help from outside, however small, would be so appreciated by the Government as to make them continue their relief work until the end of the year, if no other solution of the problem is forthcoming." Report from Brig. General C.B. Thomson, 21 April 1921 LNA R1713/12381

¹⁴⁸ Gustave Ador to League Secretary-General Eric Drummond 20 Feb 1921, Reprinted as Council Document 11/111/69/10598. 2 Frick Cramer, Principal of the International Red Cross Committee, had raised the issue with the League a month earlier, on the grounds that the refugees had a legal problem: "since these refugees have no diplomatic representation nor the protection of any Power, they find great difficulty in establishing their legal position." Frick Cramer to Sir Eric Drummond, 12 January 1921. Reprinted as League of Nations Council Document C512/10311/8822.

¹⁴⁹ Gustave Ador to Eric Drummond 17 March 1921, Reprinted as Council Document T6 11/11363/10598

¹⁵⁰ Letter from Gustave Ador to the President of the Council of the League of Nations, 15 June 1921. League of Nations Archives R1713/13314 (Dossier 12319); The League of Red Cross Societies also supported Ador's

he argued, could deal with all these issues as well as coordinate the activities of the various private organizations.¹⁵¹ Most importantly, Ador's proposal included both humanitarian and legal issues. Framing it in juridical rather than strictly humanitarian terms was important for prompting a positive response from the Council. (Hathaway 1984: 351)

The second group to lobby for change was the League of Nations secretariat itself, which actively worked to convince 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."¹⁵² 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.¹⁵³ Noel-Baker and the League Secretariat were able to exercise a great deal of influence in the creation of the HCR as a supposed 'neutral broker,' including conducting a unofficial search for the first High Commissioner and asking for Council approval only after Nansen had been convinced to take on the position. (Skran 1995: 97-9)¹⁵⁴

These suggestions presented states with a new set of policy options, based on a modification of their common normative understandings. It appears that states were

request. David Henderson to Sir Eric Drummond, 14 March 1921. Reprinted as Council Document T6A 11/11619/10598.

¹⁵¹ Gustave Ador to Eric Drummond 20 Feb 1921, Reprinted as Council Document 11/111/69/10598.4

¹⁵² "Memorandum on the Possible Action of the League in Connection with Russian Refugees" 3-4 (nd) Philip Noel-Baker Archives, Churchill College, University of Cambridge (NBKR) 4/450

¹⁵³ Letter from Baker to Lodge, 17 August 1921 NBKR 4/450

¹⁵⁴ Nansen was chosen because he had already successfully negotiated the return of some 1.25 million Russian Prisoners of War, overcoming a major diplomatic crisis due to the ongoing Allied blockade and interventions in Russia. (Marrus 2002: 88-91)

successfully persuaded that 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. The French delegation, 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.”¹⁵⁵ The British government welcomed the proposal, given their fears that the French would otherwise abandon direct assistance to refugees, and saw that it needed to be settled by international methods.¹⁵⁶ Only the Swedish government argued against it, suggesting simply instead that the voluntary international organizations were the best method of helping refugees.¹⁵⁷

Once state support was secured, the League Council acted, creating the new “High Commissioner on Behalf of the League in Connection with the Problem of Russian Refugees in Europe,” (henceforth HCR) headed by Fridthof Nansen. However, while the Council endorsed the need for an organization, it was quick to warn that the League itself “could accept no responsibility for the relief, maintenance, or settlement of the refugees.” (Walters 1960: 187) Administrative support would be provided. However, no assistance for refugees would arrive. This was expected to continue to come from private agencies. (Marrus 2002: 89, see also Holborn 1975: 7) An important step forward had been taken: No longer would individual states be completely responsible for refugees. Rather, they would coordinate their actions through an IO. However, the League’s hesitancy to provide the HCR with resources reveals that states remained wedded to the idea that voluntary organizations could provide

¹⁵⁵ 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 concernant son activité a Paris du 1 au 8 Mai 1921. LNA R1713/12606

¹⁵⁶ 17 May 1921. PRO FO 371 6867/N5827/38/38.

¹⁵⁷ Wrangel to Drummond, 17 June 1921. C. 126.M.72.1921 VII. 29

adequate support. League intervention, Simpson notes, was to be temporary and the funds were to be used only for administrative expenses, not for relief or settlement activities. (1939: 192, see also McDonald 1944: 208-09) Equally, the League did not accept a universal mandate for refugee protection, rather that they had responsibility only for “political and legal protection of certain classes of refugees; at no time has official encouragement been given to suggestion for the extension of League protection to all classes of refugees.” (Simpson 1939: 192) These restrictions ensured that states remained relatively unconstrained by the regime and, in particular, that their domestic immigration policies remained unchallenged. Yet these restrictions also significantly weakened the ability of the HCR and its successor organizations to actually provide a long-term solution to the refugee problem.

5.3 The League of Nations High Commissioner of Refugees

Nansen, as HCR, was expected to not only work to secure a definition of the legal position of the Russian refugees, but also was tasked with repatriating them to Russia or resettling them in other countries where they could secure employment and to also coordinate assistance efforts. (League of Nations 1930: 269) His role was initially limited to “repatriation if possible, resettlement in countries of refuge or other areas, if necessary.” (Stoessinger, 1956: 16) Nansen in his role would be the prototypical norm entrepreneur. He was an exceptional figure, and so many of the League successes with refugees over this period are directly because of his determined personality and sheer force of will. As we will see, he successfully persuaded the member states of the League on a number of occasions to broaden the organizational and legal scope of the regime to incorporate other refugee groups. He also successfully demonstrated that the HCR could play an effective operational role.¹⁵⁸

¹⁵⁸ He was a unique individual, a Norwegian explorer, scientist, public figure and diplomat. In 1893, he had set out to reach the North Pole with a single fellow explorer. While he failed in his quest, he did reach the highest

Nansen's first success was in creating a solution to the Russian refugees' legal status. At a Conference in August 1921 he proposed that the best solution was a legal one: that the refugees be granted the provision of passports or equivalent identity papers. The Conference adopted this as a recommendation with little debate, (League of Nations 1930: 269) and these 'Nansen Passports' not only granted to the refugees a legal identity but also marked the beginnings of international refugee law. The 1921 Arrangement evolved into a broader legal institution, one that will be examined in the next section.

Nansen's other main hurdle was to find a long-term solution to the Russian refugee problem. During the 1920s, a number of refugee flows, including Greek and Turkish refugees created by the Greco-Turkish war in 1923, were solved by host states adopting widespread naturalization policies. This would also have been the easiest solution to the Russian refugee problem. (Skran 1995: 103) However, in Western Europe, while mass naturalization helped the Huguenots in the 17th Century, it was no longer practiced. In Eastern Europe, the refugees often did not share an ethnic identity with the population in host states. These states, focused on creating ethnic homogeneity, were unwilling to naturalize the refugees. (Skran 1995: 103)¹⁵⁹ Notions of popular sovereignty, which had enabled refugee acceptance in the 19th century, limited refugee acceptance in the interwar period as states focused on their own ethnic groups and on policies of homogenization.

latitude then achieved. During the early part of the 20th century, he had gradually assumed more of a political role, serving as Norway's first ambassador to Great Britain and to the League following its creation. As Marrus notes, Nansen "was universally admired and respected, believed to be 'above politics.' At innumerable international conferences in the immediate postwar period, he became a regular fixture, an idealist and visionary, a man of proven personal courage..." (2002: 87)

¹⁵⁹ Adams noted that the three flows that were successfully dealt with – the Greeks, Turks, and Bulgarians – were all "centripetal concentrations of population groups. The refugees entered countries to which they had close 'national' ties." (1939: 28) They also represented forced or negotiated population transfers. For details on all three movements, see Marrus (2002: 96-109) and Skran (1995: 41-48).

Consequently, refugee flows were generally of two types. The first shared an ethnic connection with populations in other states and thus, like the Greeks, were quickly naturalized and received legal protection at the domestic level. In these cases the flows were short term and assistance, rather than protection, was the major problem. The second had no similar ethnic connections. Like the Russians, groups including the Armenians and the Jews counted only on the sufferance of host states, and required legal protections to be provided by the international community. The HCR became responsible for both types.

5.3.1 The Structure of the HCR

In approaching the refugee issue, Nansen faced substantial difficulties within the League. In part, this reflected the fact that the HCR had not been granted overt legal status within the Covenant. (Walters 1960: 187)¹⁶⁰ States were also wary of new organization. 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-defined organization was ever built up.” (1960: 188-89, see also Marrus 2002: 110-12)

These concerns meant that the HCR was provided with few resources. In his first report, Nansen raised this issue explicitly, arguing that governments were independently, and ineffectively, continuing to spend vast sums of money. With even a small amount of support, he felt the problem could be easily solved. Without it, he “was obliged to consider in the first place the measures which could take without undue expenditure...”¹⁶¹ This was in spite of a

¹⁶⁰ Bentwick notes that League action on the refugee issue was based on the “broad object in the Preamble to the Covenant - ‘to promote international cooperation by the maintenance of justice’” and also by Article 23 (a), which provided that members of the League would endeavour to secure fair and human conditions of labour for people in their own and other countries. (Bentwick 1935: 2, Holborn 1939)

¹⁶¹ League of Nations Russian Refugees: General Report on the Work Accomplished up to March 15th 1922 by Dr. Fridtjof Nansen 15 March 1922. C.124.M.74 1922. 4

proven record of effectiveness. Before the creation of the HCR, the British government had been prepared to offer the Yugoslav government £400,000 to £500,000 to take responsibility for some 5,000 White Russian refugees. Responsibility was passed instead onto the HCR, which “in less than six months had liquidated practically the entire number for about 70,000 pounds.”¹⁶² States did not follow up on this success by providing additional resources to the HCR. Rather, they focused on continuing to exercise sovereignty over the provision of assistance, even though this proved to be a costly solution.

To overcome state resistance within the League, Nansen created two consultative mechanisms. He sought to communicate directly with governments, and set up a network of in-country representatives to serve as conduits as well as to gather information by undertaking censuses of refugee numbers.¹⁶³ He also sought to expand the role of the voluntary organizations engaged in providing relief by creating a special joint committee, foreshadowing the United Nations’ creation of ECOSOC but at the time a rare occurrence.¹⁶⁴ (Holborn 1975: 7, Johnson 1938: 159) This Advisory Committee of Private Organizations would prove extraordinarily helpful to Nansen, both in raising funds and in providing an outlet to indirectly criticize governments.¹⁶⁵ The voluntary organizations also provided many of the in-country representatives, who also provided technical support. (Holborn 1975: 7)

In this way, Nansen tied the HCR’s operations into domestic constituencies, echoing constructivist findings that successful norm internalization requires similar connections.

¹⁶² LNA R1715/28099 - Russian Refugees. 2

¹⁶³ League of Nations Official Journal (May 1922). 3

¹⁶⁴ The Committee began with 16 members, including the ICRC. Official Journal (May 1922). 387

¹⁶⁵ In its first year, the committee passed a resolution expressing disappointment at the failure to secure access for refugees to overseas countries. League of Nations. Russian Refugees: Report by the High Commissioner for Russian Refugees. 15 September 1922 A.84.1822. 3 (see also Skran 1995: 187-88)

(Sundstrom 2005) The HCR became “a clearing house for information, to fit the individual efforts into a general plan and to present it to the League of Nations.” (Holborn 1939: 125) Nansen was able to work around the limited staff and administrative support provided by the League. T. F. Johnson, who served under Nansen as Assistant High Commissioner, noted that in the early 1920s, the HCR had a staff of only six. (Johnson 1938)¹⁶⁶

The HCR was envisioned with a very narrow mandate; dealing only with Russian refugees. After no long term solution appeared and as new refugee exoduses occurred, Nansen successfully expanded the institutional scope of the HCR. He did this by arguing that the legal recognitions provided to the Russian refugees should be extended to other groups in similar situations - including the Armenians in 1924 and Assyrians, Assyro-Chaldeans, and Turks in 1928 - effectively grafting new groups onto the norm he had helped create. Equally crucial, he dealt with new refugee situations - including Greeks and Armenians - and assumed a pivotal role in coordinating assistance during refugee emergencies. Even so, Nansen was unsuccessful in getting League recognition for some refugee groups - including most Turkish refugees - or the creation of a universal status for refugees.

5.3.2 The HCR in an Operational Role

Following its creation, the first major issue the HCR had to grapple with was the fate of a group of 25,000 Russian refugees who were in Constantinople, the remains of General Pyotr Wrangel’s White Russian Army which was defeated in the Crimea in 1920. By 1922, the refugees were in danger of starvation, with the French government threatening to stop all assistance and the American Red Cross having exhausted their relief funds. (League of Nations 1930: 270) Nansen successfully dealt with the assistance problem even though it did

¹⁶⁶ These included, among others, Philip Noel-Baker. It also included Viakun Quisling, a Norwegian who would go on to be the pro-Nazi prime minister of Norway during the Nazi occupation. (Marrus 2002: 88)

not fall within his competence as High Commissioner by effectively lobbying governments.¹⁶⁷

Sir Samuel Hoare, then Deputy High Commissioner, provided a report which described the situation as a complex problem solvable only by “protracted effort and the general goodwill of everyone connected to it.”¹⁶⁸ Nansen used the report to secure emergency relief for the refugees from the British.¹⁶⁹ Both the British and French governments, however, were reluctant to provide additional support to evacuate the refugees. (Skran 1995: 187)¹⁷⁰ Instead, Nansen mobilized the voluntary organizations, including a number of American ones, who provided assistance worth over £30,000. (Johnson 1938: 18) These funds were enough to ensure the evacuation of most of the refugees by July 1923.¹⁷¹ Less successfully, Nansen tried to use this situation to argue for improved resettlement procedures for refugees:

When it is realized that practically every country in the world has stringent regulations against the admission of refugees and that most of the refugees themselves are practically destitute, some idea can be obtained of the diplomatic and financial difficulties which had to be overcome...¹⁷²

While Nansen had dealt with the immediate emergency, he continued to search for a long-term solution by voluntarily repatriating the refugees. The Soviet government was cooperative, even allowing inspection teams to be sent by Nansen to examine the conditions

¹⁶⁷ Nansen argued that “it seemed to him useless to endeavour to find productive employment for people who were actually starving.” Russian Refugees: Report to the Council on March 24th, 1922, by Dr. Nansen.

¹⁶⁸ Sir Samuel Hoare, *The League and the Russian Refugees in Constantinople* (nd). In NBKR 4/472 See also Nansen to Secretary-General, LNA R1714/ 45/19787/12319

¹⁶⁹ Their decision was helped by strong support for Nansen’s request from the British High Commissioner in Constantinople, who reported deaths by starvation as a daily occurrence in the city. PRO FO 371/N 12256

¹⁷⁰ Sir Samuel Hoare, *The League and the Russian Refugees in Constantinople* (nd). In NBKR 4/472; League of Nations. Russian Refugees: Report by the High Commissioner of the League of Nations for Russian Refugees. 15 September 1922 A.84.1822. 4

¹⁷¹ League of Nations Russian Refugees: Report by Dr. Nansen C.472.1923. 2

¹⁷² Ibid. 2

of those who had repatriated, but most were unwilling to return. (Marrus 2002: 95) By 1923 it was evident that these efforts would not succeed, in part because a resettlement initiative from Bulgaria ended when the Bulgarian government cut relations with the Soviet Union, and Nansen was unsuccessful in negotiating a more general repatriation agreement with the Soviets. (Grahl-Madsen 1983: 361-2, Simpson 1939: 202)¹⁷³ By the mid-1920s, the Russian refugee situation also stabilized, with most refugees accommodated in their new host countries. France alone accepted 400,000. (Simpson 1939: 106, Marrus 2002: 95-96)

The advent of new refugee flows also gave Nansen the opportunity to show how successful the HCR could be in coordinating and soliciting assistance for refugees. Following the Greco-Turkish War in 1922, Nansen successfully negotiated agreements to exchange 1.1 million Turkish nationals who were Greek Orthodox for 380,000 Greek Muslims,¹⁷⁴ and another transfer of 100,000 refugees between Greece and Bulgaria. (Loescher 2001: 25, Skran 1995: 43-44) While the Greek government naturalized the refugees, the numbers were immense: with a population of just over 5 million in 1920, refugees now made up a quarter of the total population. Nansen took the lead in coordinating relief for the refugees, and lobbied the League successfully to take more long term action¹⁷⁵ which led to the creation of two Commissions to provide support to the refugees by raising

¹⁷³ The Soviet government recognized an amnesty for refugees and allowed the HCR's delegates to supervise reception arrangements, which led to the return of 6,000 refugees. Russian Refugees - Memorandum summarizing the more important work by the High Commissioner. 28 April 1923. 2-3 LNA R1715 28099/12319; T. Johnson, The Situation of Russian Refugees General Notes on the principal outstanding questions connected with the High Commissioner for Refugees. (nd) LNA R1715/ 31937/12319.

¹⁷⁴ These transfers followed the Turkish destruction of the Greek-populated city of Smyrna with the deaths of an estimated 30,000 Greeks. Winston Churchill wrote at the time that "for a deliberately planned and methodically exercised atrocity... Smyrna must... find few parallels in the history of human crime." (Marrus 2002: 98-100)

¹⁷⁵ The fifth committee of the Council, in a resolution adopted on 10 September 1922, formalized this, though the League accepted no responsibility for the refugees. A. 80 1922, in NBKR 4/30/26

international loans and working to integrate the refugees.¹⁷⁶ At the heart of this, however, was Nansen. As Marrus notes, “Nansen, it has been widely agreed, spurred the League of Nations into action, and the League’s involvement helped, in turn, to move governments and international banking houses to help resettle the refugees.” (2002: 105) This is an important point. Not only did the Greek crisis see Nansen’s mandate expand beyond simply dealing with Russian refugees, but he successfully mobilized considerable international support.

The Armenian situation was not so easily solved. The Genocide in 1915-18 had left Armenians fearful of their role in a new Turkish state, and they began to flee in 1920. By 1924, 200,000 Armenians were scattered throughout Europe and the Middle East and many were stateless. (Skran 1995: 45, Simpson 1939: 33, 43) The League took responsibility for their protection in 1923, and negotiated an Arrangement in 1924. (Marrus 2002: 81, 119)¹⁷⁷

5.3.3 1925-1930- Institutional Change within the HCR

By 1925, the existing refugee flows had stabilized and it was also clear that repatriation would not be a viable solution to the remaining Armenian and Russian refugees. Nansen, like other contemporaries, assumed that the important political issues regarding refugees had been solved. (Marrus 2002: 112) Resettlement became the obvious answer for dealing with refugees.¹⁷⁸ However, resettlement in Europe was not really a possibility; France was the only country willing to absorb immigrants on a large scale due to their casualties during the First World War. (Simpson 1939: 203) Nansen lobbied the League to

¹⁷⁶ The Greek Refugee Settlement Commission, raised funds to shelter, feed, and care for the refugees. The Mixed Commission was created by the Lausanne Convention of 1923 in order to supervise the transfers.

¹⁷⁷ Nansen was hesitant to do so, fearing it would allow individual states a way to escape their responsibility toward the Armenians. He spent rest of his life working for an Armenian homeland. (Marrus 2002: 119-20)

¹⁷⁸ Nansen had foreseen this issue in 1922, noting in his report to the Council that the Russian refugees were better off in Western and Central Europe, “however hard their lot may be there, then it would for them to return to Russia...” Report submitted to the Council by Dr. Nansen May 13th 1922 C.280. M.152.1922. 1-2

transfer some responsibilities for refugees, especially the technical issues surrounding employment, settlement, and migration, to the International Labour Organization (ILO). (Grahl-Madsen 1983: 362, Skran 1995: 189)¹⁷⁹ This resulted in a division of activities for the rest of the 1920s, with the HCR dealing with the legal and political questions surrounding refugees, while the ILO would work to find employment and settlement opportunities for the refugees. As Marrus notes, throughout this period, “refugee work continued unspectacularly. Homes and jobs were found... At the end of the decade, just before Nansen’s death in 1930, the High Commission estimated that there remained 180,000 unemployed Russian and Armenian refugees, presumably all others were adequately settled.” (2002: 112)¹⁸⁰

The epithet for the HCR came abruptly. In 1929, with the start of the Great Depression, the ILO’s efforts became fruitless and all responsibilities were transferred back to the HCR. This process, however, was short-circuited by Nansen’s death on the 13 May, 1930. As a leader and champion for refugee issues throughout the 1920s, Nansen’s role as a norm entrepreneur can not be underestimated. Marrus pays a clear tribute to Nansen, noting that he had “helped to cultivate a political will, however fragile, to do something about refugees.” (2002: 121)

¹⁷⁹ This move was not without opposition. The Fifth Assembly and the Governing Body of the ILO approved the move, but limited ILO involvement to “investigation, co-ordination and communication of offers of employment” to refugees and to not provide funds for relief. (Skran 1995: 190) Simpson suggested that the concerns were due to fears that Albert Thomas, the Director of the ILO, was trying to create a permanent refugee service. (1939: 194, 203-04) However, T. F. Johnson in an admittedly biased account alleged that the move had darker motivations: “Nansen’s outspoken criticism of the conduct of certain of the Allies [which led to the Greco-Turkish War] resulted in a ‘Nansen Must Go’ policy in 1923. To counteract this policy Nansen sought an alliance with Albert Thomas...” (1938: 159) Stoessinger, however, argues that Thomas approached Nansen with the idea, “a solution to which Nansen had previously not given much thought.” (1957: 27)

¹⁸⁰ Innovations continued, including a Nansen stamp program by which refugees pay 5 francs for the stamp which would be placed on their identity certificates. Between 1926 and 1930, this program brought in over 400,000 francs to the HCR which were used for small loans to refugees. (Grahl-Madsen 1983: 362, Skran 1995: 193) The program was discontinued because officials within the League found it “required a complicated system of accounts” clearly showing the lack of League interest. League of Nations, International Assistance to Refugees: Report by Sir Herbert Emerson, High Commissioner for Refugees (24 July 1939) A.18.1939.XII.

5.3.4 The Creation of the Arrangement System

Nansen's other main accomplishment was to create a distinct legal formulation for the protection of refugees, which as a novel approach differed considerably from post-Second World War efforts. The League focused on a group or categorical approach: that someone was outside of their country of origin and without the protection of their own government was enough to receive refugee status once that group received status through the League. (Goodwin-Gill 1983: 2, see also Weis 1954: 194, Sadruddin 1976: 4) As Hathaway notes, the focus in this early period 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." (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)

Legal protection during this period was negotiated in two forms: non-binding Arrangements and Conventions. The first Arrangement, in which Nansen played a vital role, 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)¹⁸¹ These 'Nansen Passports' marked the beginning of international refugee law. (Torpey 2000: 129, Beck 1999: 603) For the first time "refugees of specified categories became the possessors of a legal and juridical status." (Holborn, 1975: 10) The Arrangement, however, did not define who constituted a refugee, and while the League's Legal section did provide a definition it was extremely broad:

¹⁸¹ It is "...highly desirable that some satisfactory scheme should be devised for supplying papers of identity to those refugees who are prevented exclusively by lack of passports from traveling and perhaps thus finding employment..." Note for the Conference on Russian Refugees. LNA R1728/15883/15883.

in principle, however, any refugee originating from territory which formerly belonged to Russia... could legally be treated as a Russian refugee for the purposes of the activities of the league High Commissioner, and would be eligible to have an identity certificate issued to him by the government of the country in which he had taken refuge.¹⁸²

There was no requirement for the individual to be fleeing persecution. Once refugee status was assigned by the League to a group, all group members qualified. Fifty-one states agreed to recognize these passports, with several noting that such an international agreement provided a way to avoid what otherwise might be bureaucratic obstacles.¹⁸³ The Arrangement, however, was not binding on states, nor did it restrict the powers of the individual states; in particular, 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) (see Table 5.2 below).

Even so, these Arrangements 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). Thus as J. L. Rubinstein noted:

Theoretically, these papers may be ‘vised’ to allow a refugee to enter a country to which he desires to go, but in practice visas are granted with reluctance, and are invariably refused unless the Nansen Certificate authorizes its owner to return to the country of original issue... The existing practice in this respect, however, is most unsatisfactory. (1936: 22)

The League was aware of these problems, but failed to respond to them, even after attempts by Nansen. In 1926, he tried to extend the Arrangements to include some 155,000 other refugees but the proposal was not accepted by the League members. (Hathaway 1984: 355)

¹⁸² Minute Defining Russian Refugees” 28 June 1923. LNA R1729/45/29389/15833.

¹⁸³ Governmental Conference on Passports for Russian Refugees. Held at Geneva July 3rd to 5th 1922. (C.R.R/C.I./P.V.1.(1). LNA 45/21588/15833.

Table 5.2: Signatories to the Arrangements and Conventions

| Country | 1922 | 1924 | 1926 | 1928 (I) | 1928 (II) | 1933 | 1935 | 1936 | 1938 |
|-----------------|------|------|------|----------|-----------|------|------|------|------|
| Europe | | | | | | | | | |
| Albania | X | X | | | | | | | |
| Austria | X | X | X | X | X | | | | |
| Belgium | X | X | X | X | X | X | | S | S |
| Bulgaria | X | X | X | X | X | X | X | | |
| Czecho-slovakia | X | X | X | X | X | X | | | |
| Denmark | X | X | X | | | X | X | S | S |
| Danzig | X | | | | | | | | |
| Estonia | X | X | X | X | X | A | X | | |
| Finland | X | | X | | | A | X | | |
| France | X | X | X | X | X | X | X | S | S |
| Germany | X | X | X | X | X | | | | |
| Great Britain | X | X | | | | X | X | S | S |
| Greece | X | X | X | | X | A | | | |
| Hungary | X | X | X | | | | | | |
| Ireland | X | X | X | | | | X | | |
| Italy | X | X | | | | X | X | | |
| Latvia | X | X | | X | X | A | X | | |
| Lithuania | X | X | | | | | | | |
| Luxembourg | X | | X | | | | | | |
| Netherlands | X | | | | | | | | |
| Norway | X | X | X | | | X | X | S | S |
| Poland | X | X | X | X | X | | X | | |
| Portugal | X | X | | | | | | | |
| Romania | X | X | X | X | X | | | | |
| Saar | X | | | | | | | | |
| Sweden | X | X | X | | | A | | | |
| Switzerland | X | X | X | X | X | A | X | S | |
| Yugoslavia | X | X | X | X | X | | | | |
| Americas | | | | | | | | | |
| Argentina | X | | | | | | | | |
| Bolivia | X | | | | | | | | |
| Brazil | X | X | | | | | | | |
| Canada | X | X | X | | | | | | |
| Chile | X | | | | | | | | |
| Cuba | X | X | X | | | | | | |
| Guatemala | X | | | | | | | | |
| Mexico | X | | | | | | | | |
| Paraguay | X | | | | | | | | |
| United States | X | X | | | | A | | | |
| Uruguay | X | X | | | | | | | |
| Africa | | | | | | | | | |
| South Africa | X | X | | | | | X | | |
| Egypt | X | X | | | | S | | | |
| Liberia | X | X | | | | | | | |

| Country | 1922 | 1924 | 1926 | 1928(I) | 1928 (II) | 1933 | 1935 | 1936 | 1938 |
|-------------|------|------|------|---------|-----------|-------------------------|------|-------|------|
| Asia | | | | | | | | | |
| Australia | X | X | | | | | X | | |
| China | X | | | | | | | | |
| India | X | X | X | | | | X | | |
| Iraq | X | X | | | | A | | | |
| Japan | X | X | | | | | | | |
| New Zealand | X | X | | | | | X | | |
| Palestine | X | X | | | | | | | |
| Siam | X | X | | | | | | | |
| Turkey | X | | | | | | | | |
| | | | | | | | | | |
| Totals | 52 | 39 | 22 | 13 | 13 | 8 (X) 8 (A) 1 (S) | 16 | 7 (S) | 7(S) |

Source: Skran (1995), 106-7; 126-7; League Document A.23.1929.XII 13; A.28.1930.XII, 26

Note: X= ratification; A= applied without ratification; S= Signatory

1922 refers to the Arrangement of 5 July 1922 Relating to Russian Refugees

1924 to the Arrangement of 31 May 1924 Relating to Armenian Refugees

1926 to the Arrangement of 12 May 1926 Relating to Russian and Armenian Refugees

1928 (I) to the Arrangement of 30 June 1928 Extending Protection to Assyrian, Assyro-Chaldean, Turkish, and Assimilated Refugees

1928 (II) to the Arrangement of 30 June 1928 Relating to the Legal Status of Russian and Armenian Refugees

1933 to the Convention Relating to the International Status of Refugees, 28 Oct 1933

1935 to the Arrangement of 24 May 1935 Relating to Refugees from the Saar

1936 to the Provisional Arrangement Concerning the Status of Refugees Coming From Germany, 4 July 1936

1938 to the Convention Concerning the Status of Refugees Coming from Germany, 10 Feb 1938

The rapporteur who brought this proposal to the League Council argued that “the mere fact that certain classes of persons are without the protection of any national Government is not sufficient to make them refugees...”¹⁸⁴ Even with this failure, Nansen did succeed in convincing the League to create a legal definition of refugee status for the first time. Russian refugees were considered to be “any person of Russian origin who does not enjoy, or who no longer enjoys, the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired another nationality.” A similar definition applied to Armenians.¹⁸⁵

¹⁸⁴ League of Nations Official Journal 1137, (1927) 8 (10) cited in (Hathaway 1984: 355)

¹⁸⁵ League of Nations, Report by the Secretary-General on the Future of Organization of Refugee Work. A.28.1930.XIII 2

The 1933 Refugee Convention, negotiated by the HCR's successor, the International Nansen Office, broke this pattern. Earlier attempts to create a binding Convention had failed. In 1928, for example, negotiations had been convened but most states the majority of participating States proved unwilling to contract formal obligations on behalf of these refugees.” (Beck 1999: 604, Hathaway 1984: 357) 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 formalized a clear understanding of the principle of non-refoulement.¹⁸⁶ (Grahl-Madsen 1966) This right was also included in the 1938 Convention on Refugees Coming from Germany, but only seven countries signed. (Skran 1995: 137)

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, namely Russian, Armenian, Assyrian, Assyro-Chaldean, and Turkish refugees. 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)¹⁸⁷

¹⁸⁶ Such an understanding had emerged within the League, and the 1933 Convention represented an important step in the progression of a new normative understanding. In 1932, 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 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...” League of Nations Nansen International Office for Refugees. A.19.1933 Report of the Governing Body. 1, 5

¹⁸⁷ Low number of adherents reflected some states’ unwillingness to be bound by an international convention. For other states, however, there was a level of confusion. Britain for example did not sign due to an erroneous translation which suggested that ‘refouler’ referred to refusing entry, as opposed to not sending back. (Beck 1999: 621) British opposition also stemmed from a fear that signing the Convention would obligate them to extend the terms to all refugees. (Sherman 1973: 44) As a Foreign Office Memorandum noted, “it was felt that it might be difficult... to resist a demand for the extension of the terms of the Convention to all refugees and

As the flight of refugees from Germany grew in scope, states were unwilling to extend this legal formulation and the League only slowly provided any protections both for fear of antagonizing Germany and because of rampant anti-Semitism in many states. 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 limited, applying only to those who had already emigrated and was applied exclusively to the Germans - even the stateless were excluded, an oversight corrected in the 1938 Convention.¹⁸⁸ (Hathaway 1984: 363-4)

These legal efforts remained rudimentary, covering only the main elements of a refugee's status and ratified by few states. (Weis 1954: 154) Hope-Simpson critiqued the process for missing the essential characteristic, that a refugee sought asylum "as a result of political events which rendered his continued residence in his former territory impossible or intolerable." (Simpson 1940) Still, these efforts did mark a slowly forming consensus among states of the need to create a formal international legal framework. The vagueness of the Arrangements also helped as a negotiating strategy - as they became more comprehensive, the number of adherents declined, though support remained steady among the core host countries in Europe. (Holborn 1975: 16, Skran 1995: 111, 17)

5.4 The Domestic Shift

International cooperation was insufficient to deal with refugees in the 1920s, mainly because immigration restrictions were significantly tighter in many of the countries which

stateless persons, and the Home Office was particularly anxious to avoid any such commitment." Memorandum, 9 August 1935 PRO FO371 19677, W 5796/346/98. Britain did sign the Convention in 1936, in part because the Home Office removed its reservations following the drafting of an arrangement concerning German refugees, and because it was "politically desirable to do so." Lord Cranborne, 9 April 1936, PRO FO 371 20480, W3188/172/98 (Sherman 1973: 44-45, 71).

¹⁸⁸ League of Nations, Refugees Coming from Germany. A.19.1936.XII 3-4; League of Nations, Refugees Coming from Germany. A.25.1938.XII 1-2

had previously been open. In Great Britain and the United States, as well as the broader world, this process was affected by the growth of economic and political nationalism. (Fahrmeir 2003: 52-53, Baines 1991: 71) Australia and New Zealand introduced policies restricting immigration for non-British migrants. Canada distinguished immigrants from 'preferred' countries (primarily from Western Europe) and non-preferred countries (Central and Eastern Europe), with exceptions for agricultural skills. Latin America limited immigration to those with agricultural experience or from countries with similar cultural traditions. (Skran 1995: 22-3) I will begin by examining the one outlier to this shift, France, and then turn to a more detailed focus on Britain and the United States. In both of these latter cases, the domestic shift was responsible for a shift in their international refugee policies.

The one country that did remain open to refugees was France for humanitarian as well as economic interests. (Maga 1982: 425) France needed to recover from the massive numbers of casualties the country had taken during World War I. The French government, therefore, focused on domestic initiatives to increase the birth rate and focused on immigration and the integration of new immigrants into French society. (Marrus 2002: 113, Simpson 1939: 297, Collomp 1999: 45) While France was an outlier throughout this period,¹⁸⁹ the Great Depression saw the country reverse course. As unemployment rose, both the French government and population began to question this open immigration policy and protect French workers. In 1932, this led to a law protecting the national labour force and in 1935 the government revised the alien work permit process, which resulted in harsher policies and much higher levels of declines for renewals. (Skran 1995: 123, Simpson 1939: 275)

¹⁸⁹ There were concerns over this policy. In 1919, a bill was proposed which would control immigration and keep foreigners, including political refugees, away from the frontiers. It would exclude nationals from countries which had borne arms against France. The bill, however, was not passed due to the 1919 election and when re-proposed in 1924 was effectively ignored. (Maga 1982: 427)

Even so, French refugee policy continued to be relatively unrestricted. The government was divided throughout the 1930s. One side, such as Prime Minister Edouard Daladier, (who served in 1933, briefly in 1934, and from 1938- 1940) saw refugees as a security problem - they could be a 'Trojan Horse' of spies and subversives. The other, including Prime Ministers Camille Chautemps (who served from 1933-1934 and again from 1937-1938) and Leon Blum (1936-1937 and briefly in 1938) saw the refugee problem in more humanitarian terms. Neither Prime Minister "desired to be known in history as the politician who abandoned the country's long-standing humanitarian approach towards the oppressed of other nations." (Maga 1982: 434) In the end, Daladier succeeded in ending this policy with the decree-law of 2 May 1938. While guaranteeing the rights of older refugees including the Russians and Armenians, the law made it very difficult for new refugees to be granted permanent or temporary residence and gave border officials broad powers of expulsion. (Maga 1982: 435, Marrus 2002: 147)

Both Great Britain's and the United States' policies during this time underlined the growing contradiction between principles of humanitarianism and those of sovereignty and territoriality. In both, open immigration was asserted as demonstrating weak state sovereignty, and was framed as a policy which allowed other states to flood the country with undesirables. Further, in both countries, legislation removed a unique distinction for refugees from the broader group of migrants. By doing this, legislators effectively shifted the burden of determining who constituted refugees away from the legislative and judicial branches and into the bureaucracy. The key difference between the two countries' policies is that Britain did not seek to implement a race-based immigration policy because of the continued emphasis on maintaining the political unity of the Commonwealth, whereas the United States

deliberately sought to curtail immigration from certain regions through the literacy requirement and the quota system. (Fahrmeir 2003: 53)¹⁹⁰

5.4.1 The Policies of Great Britain

Following the First World War, Britain continued the practice set by the 1905 Aliens' Act and the Aliens' Restriction Act of 1914. While the 1914 Act introduced major restrictions on the rights of aliens in light of the war, these practices continued to form the basis for British law throughout the interwar period. Thus the new Aliens' Restriction Act of 1919 abolished in perpetuity the right of appeal, sought to control movement more generally through passport requirements, and failed to mention refugees at all. (Schuster 2003: 84-85, Stevens 2004: 53)¹⁹¹ This reflected a redefinition of what political asylum meant in Britain. In response to a question on the right of asylum, the Home Secretary, J.R. Clynes, answered that "I must correct what is, I find, a widespread misapprehension. The 'right of asylum' in so far as it exists or ever existed is not a right attaching to an alien, but is a right of the Sovereign State to admit a refugee if it thinks fit to do so..." (Clynes, cited in Kushner and Knox 1999: 64) Under the Act, refugees and asylum seekers simply reverted to "the status of 'alien' and were no longer viewed as warranting exceptional treatment." (Stevens 2004: 54)

¹⁹⁰ Spencer argues that while Britain may have engaged in such imperial rhetoric, in practice their policies "constituted an undeclared immigration policy whose clear intention was to keep out Asian and black settlers" in part as a mechanism to avoid inter-racial violence, (1997: 8-9) thus serving a similar role to the American legislative provisions. Other countries of immigration used similar tactics. Canada introduced a head tax on all Chinese migrants in the Chinese Immigration Act of 1885 and another Chinese Immigration Act in 1923 banned immigration entirely, with the Act repealed only in 1947. The Australian Immigration Restriction Act of 1901 introduced a dictation test that was used to block the entry of Chinese and other South Asian migrants. The Act, though amended, remained in force until 1958.

¹⁹¹ As Stevens documents, this Act was subject to far more debate than the 1914 Act was. A number of MPs argued in favour of the need to protect asylum, including Sir Donald Maclean who pleaded for the "great and noble traditions of the past" to be upheld" and Colonel Wedgewood who argued against "persecution of the weak." Even so, the majority followed the "extravagant and inaccurate assertions of Horatio Bottomley" who noted that Great Britain "had been the dumping ground for the refugees of the world for too long" and that the refugee provision of the 1905 Act had been very much abused. (2004: 53-54).

The migration discourse reflected concerns over sovereignty, particularly the notion that aliens could overwhelm the country. Traditional views of asylum no longer held:

The situation in the 20 years since the passing of the 1905 Aliens Act had changed remarkably. First, ministers from both the Conservative and the Labour governments had no embarrassment in declaring that Britain was not or was no longer a country of immigration. Second, considerations of refugee asylum were of little concern- policy was... directed toward aliens. (Kushner and Knox 1999: 65)

The internationalist views of Britain in the 19th century had not entirely disappeared. Groups continued to campaign for more open and generous policies. But they were isolated. State support for restrictions, once established, granted the restrictionist movement a greater legitimacy and framed the debate. (Kushner and Knox 1999: 65) Instead, all aliens including refugees were permitted to land only if they could support themselves or receive a permit issued sparingly by the Ministry of Labour and National Service. The arbitrary power to grant or deny entrance rested with individual immigration officers and at the level of pure ministerial discretion. (Stevens 2004: 55) The effect of these two Acts were to establish, as former Lord Chancellor Hailsham noted in 1969, “one of the least liberal and one of the most arbitrary system of immigration law in the world.” (Cited in Stevens 2004: 55)

5.4.2 The United States and the Quota Laws

Throughout much of the interwar period, the United States took no formal actions to assist refugees. This, in part, was due to their decision to not join the League of Nations and hence none of the mechanisms created under League auspices.¹⁹² But it was also framed by the domestic context, in particular the broader American shift towards isolationism. The United States is an interesting case during this period. They refused to go along with efforts by the League to create a new regime to facilitate state cooperation concerning refugees.

¹⁹² The United States Senate had rejected the Treaty of Versailles by a 38-53 vote on 19 November 1919. However, as both Margaret MacMillan (2002), in her recent account of the Paris Peace process, and John Ruggie (1996) have argued, this result reflected the unwillingness of President Woodrow Wilson to make changes to the Treaty in order to receive Senate approval. The US did join the ILO and informally discussed issues within the League framework. See (Ostrower 1979, Fleming 1938, Berdahl 1929: 624)

However, their behaviour was norm-governed during this period, but by the norms of the 19th century regime. The US framed the issue as one of domestic responsibility in law and policy, and that assistance should be provided exclusively through voluntary organizations.

As early as 1920, the United States government had been approached by France to provide assistance for the relief of Russian refugees, particularly the remnants of the White Russian armies residing in Turkey.¹⁹³ While the government supported voluntary associations in providing assistance, including the US Central Committee for Russian Relief and the American Red Cross, it felt no direct responsibility for these refugees and argued that the European governments needed to bear the costs. As Herbert Hoover, then Secretary of Commerce, noted to the Secretary of State, “it is my impression that America has done and is doing more than her share in this problem... and it does appear to me that the European Governments have more obligation in this matter than they have so far admitted.”¹⁹⁴

This attitude was sharpened in 1922 by the Greek exodus from Turkey. Admiral Mark Bristol, the United State High Commissioner for Constantinople, argued that:

the present disaster in Anatolia, with its appalling refugee situation and attendant suffering, is largely if not entirely due to the Allies. Now that it has arrived the Allies turn to the United States and apparently... expect us to handle the disaster which they have brought about.

He recommended that the State Department “bring pressure to bear upon the Allies to make them realize their responsibility in sharing the enormous expense and burden of this work.”

¹⁹⁵ Therefore, while the US government was prepared to allow private organizations to

¹⁹³ Letter to Secretary of State Colby from J. J. Jusserand, Ambassador of the French Republic, 27 December 1920. United States National Archives and Records Administration (NARA) State Dept RG 59 861.48/1337.

¹⁹⁴ Letter to Secretary of State Charles Evans Hughes from Herbert Hoover, 3 May 1921. NARA, 861.48/1439. US officials also felt that part of the effort to ask for other funds was because France in particular was embarrassed with having to support a “semi-armed force of anti-Bolshevik Russians” Letter to Hughes from the United States High Commissioner, Constantinople, 26 April 1921. NARA 861.48/1444.

¹⁹⁵ Bristol to Hughes, 13 September 1922. NARA 868.48/160. 2-4. While Bristol was critical of the allied response, he praised Nansen’s efforts: “I desire to take this occasion to congratulate you ... Undoubtedly, this co-operation which has produced greater and more efficient work of relief with more economic expenditure of

provide assistance,¹⁹⁶ it would not work within the League framework. The American Ambassador to Greece specifically informed the Greek government that it was “impossible for American relief organizations to work under the supervision of Doctor Nansen.”¹⁹⁷

In both cases, the American government was aware of the perilous situations of the refugees. Their actions, however, were not driven purely by isolationism. Rather, they felt that the refugees were in Europe and therefore the Europeans had the responsibility. Otherwise, the American government would not have been willing to approve and verbally support the actions of American voluntary organizations. Isolationism’s main effect, rather, was to remove the United States from a substantive role inside the League. The new norms that Nansen was advocating - particularly for multilateral institutionalization of a collective state response and for international legal recognition of the rights of refugees - were both seen to be League projects, and therefore were ignored by the United States government.

The American position internationally was also affected by changes in their domestic approach to immigration. The openness that had marked US policies towards migrants in the pre-World War I era, apart from restrictions on Chinese migration, disappeared very quickly in the early 1920s.¹⁹⁸ While some restrictions had been imposed prior to World War One, the first major success for the nativist and anti-immigrant factions within the United States came with the 1917 Immigration Act. This introduced the first restrictions that affected immigrants

funds. I feel that, if this co-operation can continue, work will be brought to a successful and satisfactory conclusion.” League of Nations “Russian Refugees: Report by Dr. Nansen” C.472.1923. 3

¹⁹⁶ President Warren G. Harding issued a statement on 8 October 1922 which recognized the situation in the Near East as an emergency, but the American Red Cross and the Near East Relief were “the logical instrumentalities through which this relief may be extended and it is a manifest duty that they should take care of the situation.” Presidential Statement forwarded to the American High Commission, 9 October 1922. NARA, 861.48/180a

¹⁹⁷ Memorandum to Hughes from Mr. Caffery, Charge D’Affairs, Athens, 31 October 1922. 868.48/215

¹⁹⁸ Prior to World War I, immigration per year routinely was around one million individuals. U.S. Immigrants and Emigrants: 1820-1998 in (Sutch and Carter 2006)

as a whole: a requirement to prove their literacy. Even so, the Act explicitly exempted religious refugees (though not political ones) from having to meet this requirement.¹⁹⁹

This literacy requirement, designed to block migration from Southern Europe, had little effect on overall immigration levels. With the end of war, the levels of immigration quickly returned to per-World War I levels, reaching 805,228 by 1921. Congress thus introduced two new laws governing immigration. The first, the 1921 Quota Law, was a temporary measure designed to numerically restrict immigration to three percent of the foreign-born persons of that nationality living in the United States in 1910.²⁰⁰ The second, the 1924 Immigration Act (the Johnson-Reed Act), made the 'quota system' permanent, limited the quota for each country to two percent plus 200 immigrants, shifted the base year from 1910 back to 1890, and set the burden of proof for admissibility on to the immigrants themselves. (Hutchinson 1981: 190, 94) These two laws dramatically limited immigration: Following implementation of the Act in 1924, immigration fell to around 300,000 per year.²⁰¹ Anti-immigration proponents had been on the ascendant since before the War. These forces had generally been tempered by pro-immigration Americanization movements, who

¹⁹⁹ The Act exempted "all aliens who shall prove... that they are seeking admission to the United State to avoid religious persecution in the country of their last residence..." It was used extensively by Jewish migrants. (Lewis and Schibsy 1939: 74) Previous versions of the Act had been vetoed by Presidents Taft and Wilson. Wilson also vetoed this one, arguing that "tests of quality and of purpose can not be objected to on principle, but tests of opportunity surely may be." Congress overrode the veto. (Hutchinson 1981: 167)

²⁰⁰ The Immigration Committee in the House had added an exempted class clause to the original bill that the Act would not apply to "aliens who shall prove to the satisfaction of the proper immigration officer or of the Secretary of Labour that they are seeking admission to the United States to avoid religious persecution." This clause was in the bill passed by the House, but removed in conference between the House and Senate. (Hutchinson 1981: 178-80)

²⁰¹ "U.S. Immigrants and Emigrants: 1820-1998" in Sutch and Carter (2006). The quota laws also made an important change in administering immigration. Following the 1924 Act, grounds for excluding immigrants would no longer be determined at the point of entry, but rather by American Consuls abroad. (Stewart 1982: 9) In 1923 the Senate passed a bill, the Near East Refugee Act of 1923, which would have enabled Armenian refugees to petition for admission to the United States. The bill, however, was not considered by the House and expired with the end of the session, not to be reintroduced. (Hutchinson 1981: 184-85)

felt that foreigners could be moulded into 'good' Americans. These movements, however, fell apart after the War. (Reimers 1998: 21-22) Reimers suggests that this renewed salience was the result of a number of factors:

No doubt fears of immigration's alleged adverse impact upon American workers played a role in the enactment of legislation in the 1920s. So did the belief that the United States was being overrun by radicals, the diseased, criminals and morally unfit immigrants and that too many Jews and Catholics were arriving. But the triumph of the national origins quotas coupled with Asian exclusion demonstrated that Washington wanted the nation's ethnic make up to remain as it was... (1998: 22)

Anti-immigrant forces, however, were only part of the explanation for this change. Equally important, especially in the Congressional debates, was a newfound concern for American sovereignty. Cheryl Skanks argues that the arguments around the exclusion of immigrants were based in a belief that failure to control the borders would undermine US sovereignty.²⁰² 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."²⁰³

More fundamentally, these arguments also undermined their traditional openness towards refugees. Consequently, the United States made no provision for refugee admittance in law. Senator Bourke Cockran argued that without providing provision for refugees:

You will have the world reduced to this condition, that however desperate might be the peril, however frightful the persecution to which people of another country might be subjected, a fugitive from those dreadful countries would be sent back by the hand of our officers to expiate in his own person our renunciation of the principles of civilization which we were supposed to embody in the highest degree during all our existence (Applause).²⁰⁴

²⁰² The US Supreme Court had adopted such a view 1891 in a case which allowed for the exclusion of a Japanese woman: "It is an accepted maxim of International Law, that every sovereign nation has the power as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions..." US Supreme Court, Nishimura Ekiu v. U.S. 142 U.S. 651 (1891) (cited in Skanks 2001: 40)

²⁰³ Henry Cabot Lodge (R-MA), Congressional Record (CR) v. 65 pt.6 (68C/1S) 14 April 1924. (Ibid: 41)

²⁰⁴ Bourke Cockran (D-NY), CR v. 61, pt. 1 (67C/1S), 22 April 1921, 585. (Cited in Skanks 2001: 53) Such points had been raised five years earlier in the House of Representatives against the 1917 Act: "no provision has been made so that men escaping on account of oppression - that is, political - may be allowed to make this country their haven of refuge, as has been recommended not only by the commission, but which has been the policy of this government from the very day of its foundation." (Immigration of Aliens into the United States,

Such views were in the minority, tempered by sovereignty-based arguments that refugee admissions meant “that any foreign country could force a minority group upon us that they did not happen to like by persecuting or mistreating them”²⁰⁵ and that foreign governments’ regulation of emigration violated US sovereignty: “Foreign countries are to-day dictating the class of immigrants that the United States must accept.”²⁰⁶ The 1924 Immigration Act passed Congress by a wide margin, with a vote of 323 to 71 in the House and 62 to 6 in the Senate. (Stewart 1982: 14)

The quota laws dominated US refugee policy throughout the interwar period. They still provided for some immigration, with Western Europe receiving the major share of the overall total of 153,774 immigrants. Congress was reluctant to deal with the issue again since “the large number of immigrant Americans and the civic ideal that the United States was a haven for the oppressed made the restrictions highly controversial.” (Kraut, et al. 1984: 7) With the Great Depression, however, President Hoover and the State Department would move to enact even greater restrictions, ones that would directly target refugees.

5.5 1930-38: The Troubles

Nansen’s death and the start of the Great Depression would both adversely international efforts to assist and protect refugees. With Nansen gone, League efforts dwindled in spite of efforts by the voluntary organizations and a number of key individuals, including Lord Robert Cecil and James McDonald, to preserve them. Equally crucial was that domestically, states across Europe and North America raised immigration restrictions

House Report 95, 64th Congress, 1st session (1916), pt.2: minority views, 2. (cited in Skanks 2001: 53) Interestingly, this point had been made by the Republican Party, then in the minority.

²⁰⁵ Walter Newton (R-MN) CR v. 64, pt. 1 (67C/1S), 13 Dec 1922, 437. (cited in Skanks 2001: 43)

²⁰⁶ Albert Vestal (R-IN), CR v. 65, pt.6 (68C/1S), 2 April 1924, 5443. (cited in Skanks 2001: 43)

with no separate protections for refugees. In 1930, however, many of the widespread refugee problems were seen as contained. Flows of German Jews fleeing Nazi Germany, a new crisis for the regime, showed that this system was inadequately designed.

Following Nansen's death, the League's refugee machinery began to break apart. Rather than appoint a new High Commissioner, and with the perception that the major issues of the refugee problem had been dealt with, the League simply created the autonomous Nansen International Office for Refugees.²⁰⁷ This Office was created as a temporary organization set to expire in 1938 and the League Council reserved for itself all final policy-making authority, as well as denying the Office all financial support except for administrative expenses. (Grahl-Madsen 1983: 362-3, Simpson 1939: 210, Stoessinger 1956: 30)²⁰⁸ The Office, consequently, had little of the authority of the HCR.²⁰⁹

5.5.1 The Creation of the High Commissioner for Refugees from Germany

This machinery, and the League more broadly, could not deal with the rise of Nazism and the refugee flows it spawned. In the first year of Hitler's rule alone, some 60,000 people fled Germany, and by September 1935 80,000 refugees had left with about eighty percent

²⁰⁷ The League initially decided to divide responsibilities for refugees. The Office would deal with the humanitarian aspects of refugee assistance, while the League Secretariat would deal with the legal and political protection of refugees. This division was ill-conceived. The Nansen Office quickly had to deal with all the aspects of the refugee problem, since "the Secretariat had no general scheme of local representation and had to depend upon the local representatives of the Nansen Office who were invested annually by the Secretary-General with power to undertake certain quasi-consular functions for refugees arising from the Arrangement of 1928." (Holborn 1939: 132)

²⁰⁸ The Office's major accomplishment, the 1933 Refugee Convention, was a response to these trends in order to consolidate refugee protection after the Nansen Office disappeared. (Simpson 1939: 210)

²⁰⁹ An example of the endemic problems of the Office was the response to the first major refugee flow it needed to deal with, 25,000 Assyrians who fled massacres in newly-independent Iraq. The Office was unable to receive adequate assistance to provide even a basic level of support: "the Nansen Office, with the limited means at its command, established a refugee camp for them in Syria, but the conditions of these refugees was even more intolerable than [the Armenians]... Repeated and urgent appeals ...were greeted with even greater indifference than the efforts of Dr. Nansen had been." (Stoessinger, 1956: 31)

being Jewish. This provoked a major crisis in the League, as governments did not want to raise the issue for fear of offending Germany. As Marrus notes, here was:

the classic League of Nations dilemma: on the one hand, it seemed obvious that some international response was necessary as refugees streamed from Germany into neighbouring countries; on the other hand League delegations were extremely concerned not to interfere in the internal affairs of a member state or to criticize German policies too violently. (2002: 161, see also Skran 1995: 196-97)²¹⁰

Once again, the voluntary organizations, led by Ernst Feilchenfeld, a member of the American Jewish Congress, sought to improve this response. However, the changed international situation as well as competing priorities meant that the League was loath to undertake major changes. They initially proposed to the League that the Office of the High Commissioner be revived, including within the mandate both the existing refugee flows and the German refugees.²¹¹ After considerable lobbying, the Netherlands was persuaded to step forward and proposed the resurrection of the High Commission.²¹²

League negotiations, with the consensus rule, were always difficult, and in this case the Germans acted by not opposing the motion, but rather by arguing for changes. James McDonald, heavily involved in the negotiations, “considered it more likely that the Nazis either planned to sabotage the proposal or thought that the resolution would die a natural

²¹⁰ Similar problems did not affect refugees from the Saar region which was returned to Germany following a plebiscite in 1935. They were included in a new Arrangement in 1935, in part because France championed their cause. The German Jewish refugees, by contrast, lacked a champion within the League. (Simpson 1939: 211, Stoessinger 1956: 36-7)

²¹¹ This was done in part to placate Germany by emphasizing its humanitarian rather than political nature.

²¹² Norman Bentwick, previously a League refugee official, sought the support of several governments, with little success. (Norman Bentwick to Kohler, 7 September 1933. cited in Stewart, 1982: 95) The British government in particular was unwilling to take action, concerned at the time with Palestine, and they were facing considerable domestic lobbying from the Jewish community to open up emigration in spite of concerns that it needed to be “strictly conditioned by what the country can absorb.” [Cabinet Committee on Aliens Restrictions, Report, 7 April 1933. C.P. 96 (33) British National Archives, and Sherman (1973: 30-35)] The British were also concerned that measures of assistance for the refugees would be regarded by Germany “as an act of unwarranted interference, if not of hostility...” (Foreign Office to Home Office, 20 May 1933. PRO FO 371 16274 C4549/319/18.) However, this pressure was effective in the long run- four months later Foreign Office officials agreed that while the government would not take the lead, it would support the actions of other governments. (Minute by Perowne, 6 September 1933, PRO FO 371 16757/C7866/6839/18)

death.” His intuition proved correct, with the Germans winning major concessions which weakened the High Commission, including receiving no funds from the League, but only from governments or private funds. It also would be independent and unaffiliated directly with the League. (Stewart, 1982: 91-99)

McDonald²¹³ was offered the post as the High Commissioner for Refugees (Jewish and Other) Coming from Germany. His role as High Commissioner, however, would be very limited. First, he reported not to the League’s Assembly, but rather to a new Governing Body, which forwarded reports to individual states which would be likely to be able to provide assistance. (Simpson 1939: 216, Stewart 1982: 99) This Governing Body included few refugee experts but rather mainly nondescript diplomats already stationed in Geneva “who knew little, cared little, and wanted to do as little as possible about the cause.” (Bentwich 1962: 131) The few exceptions to this include Lord Robert Cecil from Britain, Joseph Chamberlain, an American, and Senator Henry Berenger of France. Even so, the Governing Body failed to offer any solutions because a consensus had already been formed that Europe could not support further groups of refugees. Migration overseas was a possibility, but no financial assistance was forthcoming. (Stewart, 1982: 119)²¹⁴

McDonald was also stymied by a lack of resources.²¹⁵ He was provided with only a tiny organization and budget, and yet a huge two-fold task: to co-ordinate relief and

²¹³ McDonald, an American, was the Chairman of the Board of the American Foreign Policy Association and importantly had the confidence of the New York Jewish Community. (Skran 1988: 289, Simpson 1939: 216)

²¹⁴ They also felt the United States could do more. When Chamberlain justified American restrictions, Berenger replied that “hard times were universal, so was this problem... whereas France was caring for nearly half the refugees, the United States... had taken scarcely any.” (Berenger, quoted in Stewart, 1982: 120)

²¹⁵ For example, Skran notes that at their first meeting, Joseph Avenol, the League Secretary-General, “made McDonald’s independent status blatantly clear to him... Avenol stressed the separate status of the High Commissioner and that McDonald would report to the Commission’s own Governing Body, not the League Assembly. To add insult to injury, Avenol insisted that the initial 25,000 Swiss francs given by the League to begin operations were only a loan and had to be repaid within a year.” (1988: 290)

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.²¹⁶ By the end of 1935, frustrated with the lack of progress in both negotiations and unwillingness within the League to consider more effective institutional arrangements, 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)²¹⁷ 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) Through his advocacy, he was able to once again bring attention to the refugee issue and reinvigorated the League approach, albeit briefly. Unfortunately, his successor did not capitalize on this.

5.5.2 A New League HCR

The Norwegian government, on the eve of McDonald’s resignation, argued in favour of the need to revisit this problem, but the issue was forestalled after a debate within the League²¹⁸ by creating a Committee of Experts.²¹⁹ The Committee’s report is quite insightful

²¹⁶ He approached a number of governments unsuccessfully, including Britain and the United States. Britain once again hewed to the line that assistance was to be provided only from the voluntary organizations. Letter to the High Commissioner from O.G. Sargent, British Foreign Office, 29 Oct 1934. LNA C1609 No.4 Great Britain; Foreign Office Memorandum on the attitude of HMG to the performance of refugee work by the League of Nations 1926-33. 21 June 1935. PRO FO 371 19677/W5796/356/98.

²¹⁷ He argued that “conditions in Germany which create refugees have developed so catastrophically that a reconsideration by the League of Nations of the entire situation is essential” and that it was clear that the efforts of the Office had been weakened by the decision to separate it from the League. (McDonald 1936: 5-12)

²¹⁸ Rapport du Sous-Comité Pour L’Assistance Internationale aux Réfugiés 20 Septembre 1935 (A./VI/9 1935). LNA R5633 20A/20038/20038 II. The debate was divided between states which wished to liquidate the Nansen Office and those favouring a new refugee organization, with Great Britain supporting international solutions but not expanded responsibilities for relief or resettlement. Makins, “Refugees - Memorandum on the Refugee Question, September 1 1935- September 1 1936. 1 September 1936 PRO FO 371 W10548/172/98

²¹⁹ The Committee had a limited mandate, including not proposing anything “which might prevent the eventual return of Germany to the League” and to not “arouse the suspicion of the Soviet Government in the sense of an attempt to get round the decision to close down the Nansen Office by the end of 1938.” Observations Présentées par Sir Horace Rumbold (annexe) - Comité Pour L’Assistance Internationale aux Réfugiés. Procès-Verbal (C.A.I.R./P.V.) 18 December 1935. LNA R5633/21365/20038

into both the problem at the time and its possible solutions. The Committee felt that the only solution was closer co-operation between all states, including those not in the League.²²⁰ The Committee saw the division between the two offices as responsible for the failure of efforts to assist the German refugees, and argued that the Offices needed to be combined and the High Commissioner needed a broader mandate. In the report's conclusions, the Committee called not only for a need for all states to engage in burden-sharing, but also to deal with refugees in terms of permanent administrative, financial and legal measures.²²¹

Unfortunately, the states involved were unwilling to take such a large step, choosing instead to a limited mission for the new High Commissioner, one which would be confined:

to seeking the assistance of Governments in order to find solutions for the problems raised in connection with the legal status of the refugees, ... The various tasks connected with the assistance of refugees are in the province of the private organizations...²²²

Few changes were enacted except the new High Commissioner, Sir Neill Malcolm, did report to the Council and the Assembly of the League. (Simpson 1939: 217)²²³ By refusing to consider the mandate of the Office or the issue of assistance, the member states of the League avoided a discussion of burden-sharing which the Committee felt needed to

²²⁰ They couched this in terms of a requirement for civilized society: Other views represented "a retrogression from the moral and humanitarian ideal and indeed, would be the negation of civilization." Ibid. 7-8

²²¹ Ibid 13-16. The Report concluded that states burdened with refugees should receive assistance as a break with existing practice: "This evolution will necessitate, on the one hand, a very wide appeal to official and private assistance and a better co-ordination of effort among the various bodies engaged in relief work and, on the other, appropriate negotiations with the States directly concerned..." Ibid. 23-24

²²² Rapporteur's comments on the Council Committee's conclusions, cited in Sir Neill Malcolm, Refugees Coming From Germany: Report submitted to the Seventeenth Ordinary Session of the Assembly of the League of Nations A.19.1936.XII. 1 September 1936. 2 States were concerned that a revived High Commission with broad powers could challenge restrictive immigration policies and could also interfere with the internal affairs of states. Comments by Lord Cranborne. 16 Jan 1936. PRO FO 371 W445-172-98 (Sherman 1973: 67) The British accepted this change but, as noted in a internal Foreign Office memorandum, "we do so on one express understanding. It will be the function of the new High Commissioner to concern himself with existing, not with potential refugees. It is quite inadmissible that a League organization should encourage... the emigration of Jews from Germany." Foreign Office Memorandum on Report of Committee on International Assistance to Refugees. 16 Jan 1936. PRO FO 371 W445-172-98

²²³ Malcolm was a much-decorated retired officer who had been the General Officer Commanding in Malaya. (Stewart 1982: 231, Sherman 1973: 68)

occur. Once again, governments were unwilling to accept that they had a responsibility to fund the multilateral structure they had created, or to alter their own restrictive policies.

A powerful High Commissioner could have fought this process. Malcolm could have used the still-influential weight of League support to lobby individual states directly. Unfortunately, Malcolm was not another Nansen. He choose to deliberately limit his role even beyond the restrictions that the League had placed on him, and was concerned almost exclusively with “questions of legal and political protection, on which he... effectively intervened with governments.” (Simpson 1939: 216-18)²²⁴ He refused to accept money from private sources, and while he asked the voluntary organizations to set up their own Liaison Committee to communicate with him, he was not bound by its advice or recommendations. (Stewart, 1982: 231-2)²²⁵ The largest change was that the League did authorize the issuance of a limited number of Nansen certificates to refugees coming from Germany, under the Provisional Arrangement of 1936, but the Nansen Office refused to assist the High Commissioner in processing them. (Stoessinger, 1957: 37-38)

Two years later, the League once again revisited the refugee question. A lengthy debate among the member states resulted in the decision to finally combine the Nansen Office and the High Commissioner for Refugees Coming from Germany.²²⁶ In so doing, the

²²⁴ Malcolm was quite effective as helping individual refugees through his direct intervention. He reported to the League in 1938 that as many as 5,000 refugees had directly benefited from his personal intervention with governments. Sir Neill Malcolm “Refugees Coming from Germany: Report submitted to the Nineteenth Ordinary Session of the Assembly of the League of Nations.” A.25.1938.XII 22 August 1938.

²²⁵ Norman Bentwick, who was elected as Secretary of the Liaison Committee, found that Malcolm was “devoid of initiatives and ideas. He seemed to think exclusively in terms of formalities and meetings... His last report to the League of Nations was a sad confession of inactivity.” Bentwick to Warburg. (Cited in Stewart 1982: 232)

²²⁶ By this point, the Nansen Office was due to be liquidated at the end of the year even as refugee flows across Europe were on the rise. Great Britain argued in favour of a “single League body should be established to deal with both categories of refugees,” (Sherman 1973: 81) though the Home Office opposed the change for fear the new organization might “pursue an idealistic and adventurous policy which would not commend itself to the

duties of this new High Commissioner of the League of Nations for Refugees continued to focus on the political and legal protection of refugees. But, as part of an expanded mandate, it would also have a role coordinating assistance and assisting governments and private organizations to promote emigration and permanent settlement.²²⁷ In effect, due to the now-substantial pressures on the League, member states had recreated a High Commissioner which included the attributes which Nansen had fought so successfully for a decade earlier.

While the offices were combined, the new High Commissioner, Sir Herbert Emerson,²²⁸ 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) The primary goal of this change was to better process the “the considerable paperwork associated with refugee conventions, coordinate humanitarian assistance and promote resettlement. But with a small budget, no political direction, and caution being argued from every quarter, there was no hope it would achieve much in the emerging refugee crisis.” (Marrus 2002: 166) It effectively became superseded by the Intergovernmental Committee for Refugees.

countries of temporary refuge.” (Cooper to Hayter, 11 January 1938, PRO FO 371/22525, W527/104/98). The Soviet delegation opposed a combination on grounds of cost, suggesting that material assistance should be entrusted to governments and public organizations and that “while political assistance... might be entrusted to the League, the latter should not have to bear any costs in connexion with it.” (Foreign Office Minute, The Refugee Question 1 August 1938, PRO FO 371/22532 W11768/104/98. 2) However, the Soviet delegation in the end abstained, after receiving assurances that the organization would not bear Nansen’s name; that no refugees served in its administration; and that it was temporary. (Foreign Office Minute, The Refugee Question 1 August 1938, PRO FO 371/22532 W11768/104/98. 3-5)

²²⁷ League of Nations, International Assistance to Refugees: Report submitted to the twentieth ordinary session of the Assembly of the League of Nations. A.18.1939.XII 24 July 1938

²²⁸ Emerson was a veteran civil servant about to retire from governing the Punjab (Marrus 2002: 166). Sir John Hope Simpson had also been considered, but was seen as being unnecessarily critical of British policies. Foreign Office Minute 22 July 1938 PRO FO 371 22531 W10261/104/98 and PRO FO 371 22532 W10727/104/98 5 August 1938. (see also Marrus 2002: 165-66)

League efforts had been marked by such promise. Like much of the other work of the League, however, these efforts fell apart in the 1930s. Part of the problem was that, as Stoessinger has argued, League aspirations for universal state membership meant that refugee efforts would arouse the hostility of potential or current members of the League. Thus all efforts were “a source of political embarrassment to the League and the organization, in its work on behalf of the uprooted, was actually divided against itself.” (1957: 32-33) But states continued to be unwilling to commit to a coherent or consistent international policy because of their views that “national interests were best served by imposing and maintaining rigid limits on immigration...” (Loescher 2001: 29) The outcome of the League’s failure is stark. As Torpey has noted, the unwillingness of states to accept in the refugees Germany was producing, which otherwise would have provided a form of exit, may “ultimately have helped to push the Nazis toward extermination as the ‘final solution’ of the ‘Jewish problem.’” (Torpey, 2000: 135-136)

5.6 1938-1939: The United States Becomes Involved

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. This represented a major shift. With the outbreak of the Great Depression, domestic pressure for decreased immigration in the United States had been renewed. This ‘nativistic restrictionism’ became part of the isolationist movement. (Harwood 1986: 203) Additionally, President Hoover asked the State Department to strictly apply a little-used provision of the 1917 Immigration Act that those “likely to become a public charge” be refused entry (the ‘LPC’ clause as it was otherwise known). (Kraut, et al.

1984: 7, Reimers 1998: 23)²²⁹ The United States, like Britain, was responding to domestic opinion which reflected nativist and even anti-Semitic views. (Harwood 1986: 203)²³⁰ There was little support within the population, even by the late 1930s, to increase immigration.²³¹ More broadly, the 1924 Immigration Act became a frame through which all debates around immigration occurred. No one sought to alter the existing law out of fear that Congress would pass even more restrictive laws. Advocates for refugee admissions were confronted by a law no one sought to change.

Equally important in understanding US policy in the 1930s was the role that the State Department played in enforcing the LPC clause. Under the Hoover directive, the State Department limited acceptances to no more than ten percent of the quota. The strict application of the clause ensured that most refugees could not qualify for an immigration visa and could not enter the United States, and the State Department controlled both the application and review processes. Consequently, with no Congressional interest in changing legislation, and little interest among Presidents Hoover and Roosevelt to support more open

²²⁹ The President justified this change, with little factual basis, by arguing that refugees were no longer an issue: “with the growth of democracy in foreign countries, political persecution has largely ceased. There is no longer a necessity for the United States to provide an asylum for those persecuted because of conscience.” (cited in Zolberg 2006: 270)

²³⁰ Polls taken between March 1938 and April 1940 “consistently found that about three fifths of the respondents believed that Jews had objectionable qualities” and other polls in early 1938 and early 1942 found that “between one third and one half of the people questioned agreed that Jews had ‘too much power’ in the United States. (Wyman 1985: 10-22) One poll asked if “the persecution of the Jews in Europe has been their own fault” to which 48% of respondents answered partly, and 10% answered entirely. (Simon 1974: 96)

²³¹ A poll which asked “should we allow a large number of Jewish exiles from Germany to come to the United States to live?” had 71 percent of respondents answer no. (Simon 1974: 97) These opinions held even when religion was not a factor. As Harwood notes, “in an opinion survey in May 1938, fully 68 percent of the public opposed letting refugees from Germany and Austria seek refuge in the United States” (1986: 202) and in a 1939 poll, when asked what they would do if elected to Congress, “83 percent of the American public said they would oppose a bill that allowed more European refugees to enter the United States.” (Harwood 1986: 202)

policies, the State Department created a staunchly restrictionist immigration policy.²³² The interwar period prior to Roosevelt's ascendancy demonstrated the ineffectiveness of a non-entrepreneurial presidency. Because change lacked support from either Congress or the President, Breitman and Kraut suggest that "few bureaucrats were willing to consider the rescue of persecuted foreigners as compatible with the defence of the national interest." Even those who were willing to champion the cause "found themselves confined to the channels and bound by the procedures of the bureaucratic system." (1987: 9) In an era of conservative dominance of Congress, only the president wielded the institutional authority to direct and lead Congress to rethink policies such as immigration and refugees. (Dickinson 1997)

5.6.1 Refugees and the State Department in the 1930s

Policy changed quickly in 1938 because President Roosevelt became directly involved. Why, however, did American policy not change earlier? Primarily because Roosevelt's major role earlier was "in deciding not to alter the outcome of the bureaucratic process." (Breitman and Kraut 1987: 9) Feingold, similarly, argues that:

Generally Roosevelt was content to let the State Department handle the refugee matter. He preferred to remain above the battle although he might occasionally make an inquiry or a suggestion... It allowed the agency involved to absorb much of the pressure and ire that might otherwise be directed at the White House. In the case of American Jewry it proved extremely effective. Roosevelt's benevolent image emerged from the war relatively unscathed. (Feingold 1970: 18)

Domestic opinion, couched in terms of sovereignty, had turned against refugee admissions. But humanitarian principles would be used again and again by senior

²³² Wilbur J. Carr, then Assistant Secretary of State for the Visa Division and Consular Affairs, held an influential and almost unquestioned role in the Department. His view was that immigration restrictions should be maintained, and that the Hoover decision could not be overturned except through legislation. (Stewart 1982: 48-51) Cordell Hull, who became Secretary of State in 1933, had little knowledge of immigration affairs and was ill-prepared to challenge the more experienced officers. (Stewart 1982: 48) An additional factor was that of anti-Semitism in the State Department. Feingold argues that Breckinridge Long, who became Assistant Secretary of State for Special Problems, was anti-Semitic and committed to halting the flow of refugees, (1970: 15, 134-35, see also Wyman 1985) though he has since suggested anti-Semitism was only a factor within "the existence of a broad spectrum of opinion on the issue among decision makers... and the complex intertwining of personalities, domestic politics, and conflicting views of the world." (Feingold 1980: 247)

government officials as they sought to challenge the State Department. Unfortunately, the crucial variable was Presidential support. (Breitman and Kraut 1987: 9, Feingold 1970: 18)²³³ Thus the role of the State Department was to block attempts to change American policy at either the domestic or international level. The government had consented to being represented on the new High Commission for Refugees Coming from Germany's Governing Body by Dr. Joseph Chamberlain,²³⁴ who worked closely with McDonald in an effort to convince the Department of the urgency of the problem. The Department, however, refused to provide any support.²³⁵

The State Department also refused requests to provide Nansen passports for the refugees.²³⁶ While the United States had supported early efforts, by the mid-1920s the State

²³³ Frances Perkins, the Secretary of Labour, argued unsuccessfully at the Cabinet level on a number of occasions that the restrictions needed to be relaxed because "it was consistent with American traditions and policies to grant free entry to refugees." (Kraut, et al. 1984: 9) Other approaches directly to the President also did not succeed. Governor Herbert H. Lehman of New York appealed to Roosevelt to alter the policies. Roosevelt, however, declined to do so, simply replying that "I believe that the Department of State and its consular officers aboard are continuing to make every effort to carry out the immigration duties placed upon them in a considerate and humane manner." Roosevelt to Lehman, 2 July 1936. (cited in Nixon 1969: 342)

²³⁴ This was not a shift in broader policies concerning the League. (Stewart 1982: 102-03) A number of other people were considered for the position, including Admiral Mark Bristol, who had dealt directly with the refugee problem in Constantinople 10 years previously. However, showing the department's lack of support, Bristol did not have the private means to travel and the Department refused to pay any expenses. Therefore he was unable to accept. (Stewart 1928: 116)

²³⁵ Joseph Chamberlain. "Meeting of the Governing Body of the High Commission for Refugees (Jewish and Other) Coming from Germany." 28 Dec 1933. NARA 548.D1/86. 7 In his first report to the Governing Body, McDonald noted that he expected the dealings with individual refugees be left "to the private organizations already functioning..." Statement of James G. McDonald to the Governing Body December 3, 1933. NARA 548.D1/84 The State Department understood this to mean that the American government would make no contributions to the Office. Even after McDonald had received Roosevelt personal assurance of a contribution of \$10,000, the State Department argued against it, suggesting it would require Congressional approval and could only be made if other governments also made payments. (Memorandum by Moffat, 8 October 1934. NARA D 1/162; Memorandum by Wilbur J. Carr, Assistant Secretary of State, 18 December, 1934. NARA D 1/194; Letter from William Phillips, Under Secretary of State to Joseph Chamberlain, 21 January 1935. 548. D1/202; Letter from Carr to Moffat, 29 January 1935. NARA 548. D1/212) As a result of the Department's opposition, McDonald withdrew his request. (McDonald to Roosevelt, 23 Feb 1935. NARA 548.D 1/216.)

²³⁶ McDonald to Hull, 6 Feb 1934. NARA 548.D 1/94; "...there is no provision under the laws for the issuance by the United States authorities of documents of Identity and Travel to aliens." Memorandum by John Farr Simmons, Visa Division, 3 Mar 1934. NARA, 548. D 1/100.

Department became critical of the process: “American consular officers certainly cannot be authorized to issue travel documents of Armenians.”²³⁷ This view continued into the 1930s. In a note to the Secretary-General of the League responding to the 1933 Refugee Convention, the Department noted that “... the status of all persons coming to the United States of America is fully defined by existing legislation and this Government therefore does not contemplate becoming a party to the draft Convention in question.”²³⁸

The State Department also refused to accept substitute travel documents for aliens still in their own country.²³⁹ Thus, the Secretary of State noted to McDonald that little could be done within US policy, adding that the LPC meant most aliens would be ineligible for visas in any case.²⁴⁰ The State Department justified restrictions based on rules that it did have the power to change. But, these restrictions ensured that almost no German refugees would be allowed into the United States unless they had means of support.

5.6.2 A Sea-Change in US Policy as Roosevelt Becomes involved

Only following the Austrian Anschluss in 1938, which created massive new refugee flows, did Roosevelt finally argue that “America could never return to the passive role she had been playing.” (Stewart, 1982: 267) The Austrian refugees represented an immediate crisis for the international community. Adding to the problem, Great Britain decided to shut down large scale migration into Palestine, limiting immigration to just 12,000, whereas between 1933 and 1936, an average of over 41,000 refugees had entered Palestine per year.

²³⁷ Letter from the Acting Secretary of State to Drummond, (nd). NARA 511.1 C1/7 They did continue to accept the Nansen documents in lieu of passports.

²³⁸ Letter to the American Minister, Bern, 21 April 1937. Enclosure: Note to Secretary-General of League of Nations. NARA 548.D 1/327

²³⁹ Memorandum by John Farr Simmons, Visa Division, 3 Mar 1934. NARA, 548. D 1/100.

²⁴⁰ Secretary of State to McDonald, 28 April 1934. NARA D.1/127

(Skran 1995: 206) In the previous crises in the 1920s, the League of Nations (and particularly Nansen himself) had exercised leadership to deal with the problem. This time, however, the League did not fulfill this role, in part because its prestige had by then been fatally damaged, and with it its “competence to deal with technical and humanitarian issues also decreased.”(Skran 1995: 207) ²⁴¹ The League remained focused solely on the legal aspect of the problem (and Austrian Jews were quickly added to the 1936 Provisional Arrangement regarding German refugees receiving Nansen passports). As Roosevelt would subsequently note:

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 this decision, Roosevelt appears to have been motivated by humanitarian principles, particularly the “steady flow of prominent refugees whose calibre impressed him and whose personal misfortunes aroused his sympathy.” (Feingold 1970: 23)²⁴² Increasingly, too, the State Department realized that some form of action needed to be taken. George Messersmith noted in a memo to the Secretary and Undersecretary of State that:

in spite of the difficulties involved in doing anything constructive, I believe that the prospects for at least some definitely useful action are good... The problem remains a long range problem and one that is not susceptible of rapid solution nor of solution by any one country. It is a problem which will require cooperative action such as that planned by the new Committee.²⁴³

Roosevelt, by calling an international conference, was focused on an institutional solution outside of the League. In this sense, he was serving as a norm entrepreneur, focused on a

²⁴¹ Walters (1960) provides a comprehensive history of the collapse of the League.

²⁴² Roosevelt also decided to form an advisory committee on political refugees (PACPR) which would serve a liaison function between the US government, the voluntary organizations, and the new organization. Even so, the group was unprepared to support funding refugee resettlement since that would have meant dealing with Congress. (Breitman and Kraut 1987: 59) Britain took similar steps, in part because the Home Office feared that without such support, the voluntary response would be confused and overlapping. (Sherman 1973: 99)

²⁴³ Messersmith to the Secretary of State. 31 March 1938. NARA RG 59 840.48 Refugees/84 ½.

finding a new multilateral solution. The 1938 Evian Conference, however, failed in part because Roosevelt failed to challenge the Congressional position on migration.

5.6.3 The 1938 Evian Conference

While the Conference's goals were laudable, even before it began distinct handicaps were placed on it. In particular, "any financing of the emergency emigration referred to would be undertaken by private organizations..." and therefore no states would be obligated to provide support. Further, "no country would be expected or asked to receive a greater number of immigrants than is permitted by its existing legislation."²⁴⁴ The first point reflected the abiding norm of the time that all support for refugees still needed to come from voluntary organizations. The second point existed to ensure public support within the US that the quota laws would not be altered. The administration:

perceived too many drawbacks to initiatives to bring much larger numbers of Jews to the United States. Conflicting American priorities and political constraints, as well as diabolical Nazi exploitation of anti-Semitic sentiment abroad, prevented Washington from going beyond what the quota system already allowed." (Breitman and Kraut 1987: 56, Stewart 1982: 274-76)

The United States, therefore, quickly adopted the norms reflected in the interwar regime: that there need to be international legal protections for refugees, that there needed to be an IO mechanism to facilitate cooperation in protecting and handling the refugee population, but that assistance would remain within the private sphere.

Myron Taylor,²⁴⁵ who would serve as the US Representative to the Evian Conference, argued that a new organization "should not be restricted in its efforts to the narrower mandate of the proposed combined office of the High Commission. Instead, such an Inter-Governmental Commission as is created under any arbitration treaty should be free

²⁴⁴ Department of State Press Release No. 142, 24 March 1938. NARA 840.48 Refugees/61.

²⁴⁵ Taylor had served as the chairman of the board of the US Steel Corporation. While he knew nothing about refugees, he was an effective participant at the Conference. McDonald was appointed as his deputy.

to attack the problem on broad lines.”²⁴⁶ Along with many American officials, he shared the view that the League’s approach had failed and that the existing terms of reference limited the recreated High Commissioner for Refugees.²⁴⁷ Taylor was in an excellent position to push for the creation of a new organization

The European powers were quick to support Roosevelt’s move. Great Britain was concerned that the US clearly had no intention of revising its own policies, and that this might simply be the President trying to assuage his domestic constituencies. These concerns were shared with the French. (Feingold 1970: 29) Even so, the Foreign Office noted that the “American willingness, after years of aloofness from the League of Nations refugee work, to associate itself with any international effort to alleviate the refugee problem was however unreservedly welcomed in Whitehall.” (Sherman 1973: 96) They welcomed the idea of the conference as a way to internationalize the refugee burden in ways in which the League had been unsuccessful. (Sherman 1973: 97) Most other governments were supportive of the Conference, though Poland and Romania, whose applications to attend were rejected, “volunteered to attend as ‘refugee producer’ countries and indicated a desire to assist the departure of their own Jewish minorities.” (Skran 1995: 209)

The negotiations at Evian, however, would not be so simple. Britain’s response to the Conference was one of caution. As R.M. Makins (the Assistant Adviser for League of Nations affairs) noted in a memorandum, the Americans appeared to have not thought out the conference proposal clearly. He feared that proposals at the Conference would be “wild and impracticable” and that the British should define their own position. By the same token, the United States by itself could do a lot - simply by combining the German and Austrian quota

²⁴⁶ Telegram from Taylor to the Secretary of State, 7 July 1938. NARA RG 59 840.48 Refugees/468. Sec 4.

²⁴⁷ Ibid. Sec 3.

(which Roosevelt had stated would occur) and allowing three quarters of those to be reserved for refugees, the Americans might solve a major portion of the problem.²⁴⁸ The Foreign Office was supportive. The British contribution could be financial or territorial by granting emigration to colonies overseas. Both required a change in policy, but could lead to increased support from “world Jewry” for Britain’s Palestine policy. The Evian Conference might even help restore the League’s prestige.²⁴⁹ Unfortunately, the Treasury was quick to state that financial assistance to refugees “was almost out of the question” because of the precedent it would create, and the Colonial Office noted that the colonies “were not in a position to make a serious contribution to the problem.” (Sherman 1973: 103) In spite of the efforts of the Foreign Office, British policy would not change.

Once the Conference convened, few countries were willing to do more. France broke with a long pattern of refugee acceptance by declaring that it “was no longer a haven for the oppressed.” (Maga 1982: 437)²⁵⁰ Delegates justified their own policies, and congratulated themselves on how much had already been done, while making sure that existing immigration policies were not discussed and little pressure was applied. As one Jewish participant noted, “the little that was achieved bore no relationship to the hopes that were aroused.” (Marrus 2002: 171) George Rublee, who served as the first director of the new Committee, would later express the opinion that the Roosevelt administration:

‘thought that some sort of gesture was necessary to assuage the indignation excited by the persecution of the Jews, but [had little] real hope of success in improving the lot of the Jews in Germany.’ Rublee thought Roosevelt’s conference ‘merely an impressive protest.’ (McClure 2003: 249)

²⁴⁸ Memorandum by R. M. Makins, “International Assistance to Refugees” 23 May 1938. PRO FO 371/21749 C5319/2289/18. See also (Sherman 1973: 100-01)

²⁴⁹ Ibid; (Sherman 1973: 101-02)

²⁵⁰ Berenger, the head of the French delegation, argued that France had reached a ‘saturation point’ of over three million foreign residents. (Maga 1982: 437)

George Warren, who served as Taylor's advisor, similarly noted that Roosevelt "felt he had to do something to react to the Anschluss in Austria. He didn't know what else to do," but the President was "terribly embarrassed because, having called the conference, he couldn't do anything about taking refugees into the United States himself." (Warren 1972: 7)

The result was the creation of a new IO, the Inter-Governmental Committee on Refugees (IGCR). However like the League organizations, the IGCR had only a limited mandate. Its primary role, which proved fruitless, was to negotiate with the German government in an effort to stop expulsions and to allow refugees to take property with them. (Marrus 2002: 182) It was also empowered to approach governments "with a view to developing opportunities for permanent settlement." This kept the door open for expanded immigration, but only vague terms. Rather, the focus would be on negotiations with Germany, something that the League High Commission could not do. (Marrus 2002: 171)²⁵¹

It is unclear if the Conference could have been more successful. Warren, in a 1972 interview, noted that he had not been satisfied with the outcome. But he adds:

there were reasons for that and it wasn't a complete failure. It was toward the end of the depression. All the Latin-American countries, which might have been reception countries of resource, were having trouble by movements from the rural areas into cities -- and serious unemployment. Our own Congress was very hostile to the idea of admitting any refugees. We tried to get the United Kingdom to provide some place of resettlement on the land. Everybody at that time thought that the only thing to do was to colonize them in agriculture. (Warren 1972: 4)

5.7 Conclusions

The Evian Conference represented the last real effort to change the institutional structure. Its outcome - the IGCR - was provided too limited a mandate to effectively help refugees. Like the League HCR, it had little success in directly helping refugees to find

²⁵¹ Even the creation of the IGCR had been challenged at the Conference. Britain argued that no new agency was required given the existing League structures. This argument was countered because the League could not negotiate with Germany. In the end, as Feingold notes, "the British, still sensitive to what they considered a clumsy American intrusion which might create more problems that it solved, gave in." (Feingold 1970: 30)

protection. This did change gradually following the start of the Second World War, with the IGCR's mandate being altered considerably as a result of the 1942 Bermuda Conference. Not until after the War that states would focus their activities on creating a new regime.

By the end of the interwar period, states had accepted that formal multilateralism was the only mechanism through which to cooperate: it had become an entrenched norm. While there would continue to be efforts to create 'temporary' organizations and to limit the number of people who qualified as refugees, never again would states in international society seriously propose having no institutional structure at all. As Loescher notes:

Twenty years of organizational growth and interstate collaboration had firmly established the idea that refugees were victims of human rights abuses for whom the world had a special responsibility. Moreover, the first international co-operative efforts on behalf of refugees and the establishment and evolution of the international refugee agencies of the period, had constructed the foundations on which successor institutions would build. (Loescher 2001: 34)

The normative debate in the postwar period focused instead on how these organizations should operate, and whether their primary goal should be resettlement or repatriation.

The legal understandings created in the interwar period continue to hold sway. Nansen passports have been forgotten, but this is because all refugees now have enshrined rights in international law, administered by an IO. Similarly, while efforts to evolve the Arrangement system into a formal, binding international convention in 1933 failed, the legal understandings that existed within that convention, as well as those reached during World War II and its immediate aftermath, changed into what is now a universally-recognized legal document, the 1951 Refugee Convention. Most notably, a right of non-refoulement, introduced in the 1933 Convention, would take on a moral normative resonance even before this new Convention. These changes were shaped by the failures of the interwar regime. Decision-makers involved in the post- World War II efforts were guided by it, particularly the keen understanding that never again should large numbers of refugees be left to die.

Chapter 6: American Leadership and the Emergence of the Post-War Regime

6.1 Introduction

The Evian Conference of 1938 marked the last major attempt by states to find a multilateral solution to protect refugees fleeing from Germany and Nazi-occupied Europe. While states undertook little action to help refugees during the Second World War, following it the Allies understood that the cooperative efforts of the Interwar period had failed because of the unwillingness of states to provide adequate resources and to alter their domestic immigration policies to accept in refugees. States became more attenuated to the plight of refugees, to the entails of the voluntary organizations, and to the concerns of their own domestic populations. These factors all contributed to the emergence of a new regime, one which had its base in the acceptance of a humanitarian duty by states. Thus Holborn notes that “Western countries...considered it necessary to put human considerations above political ones” (1956: 32) and that the governments involved were “motivated primarily by humanitarian and political ideals.” (Holborn 1956: 365, see also Stoessinger 1956: 201-02)

Little of this was demonstrated during the Second World War, when the plight of refugees was ignored. The few efforts taken on behalf of refugees during this time, most notably the Bermuda Conference of 1943, were reactions and sops to public pressure with few concrete results. Refugees did find some sanctuary in neutral countries,²⁵² however many were trapped in Nazi-occupied Europe. Thus, this period marks an interregnum. And yet, even while Jewish refugees were neglected, planners in both Britain and the United

²⁵² These countries, including Switzerland, Spain, Portugal, and Sweden, did have restrictionist policies. Many refugees entered illegally and faced imprisonment and possible refoulement. For a description of the policies of the neutral countries towards refugees, as well as the wartime escape routes, see Marrus (2002: 240-82)

States were focused on the massive refugee and displaced person problem²⁵³ they would face with the end of the war. The only solution, in their eyes, was through multilateral cooperation to provide assistance to these people as well as repatriate them. This work occurred through a new IO, the United Nations Relief and Rehabilitation Agency (UNRRA).²⁵⁴ The IGCR, moribund after the outbreak of war, received a new lease on life as a protection agency for those who could not be returned. It was assumed, however, that the vast amount of people displaced would want to return home and could do so. At the Yalta Conference in 1945 the United States, the Soviet Union, and Great Britain made this assumption explicit. They agreed to repatriate each other's citizens, by force if necessary.

It was forced repatriation which led to a new regime being created through American leadership. As we have seen, a legal norm was established in the 1933 Refugee Convention prohibiting non-refoulement. This norm had little resonance, however, and returns continued, even among signatories to the Convention. Change occurred in 1946 within the American government which framed refoulement as a violation of humanitarian principles. This contributed rapidly to a norm against refoulement taking on resonance within the US government, and structured the domestic American response to refugees. Equally important, the United States government then sought to establish this as an international norm through efforts to create new institutional mechanisms: The UNRRA, tasked with repatriation, was no longer supported. The Americans discontinued it and focused their efforts on a new IO,

²⁵³ Displaced persons treated differently from refugees. As Salomon notes, "a DP may be defined as a person displaced by war but wishing to return to his home once the fighting is over. A refugee, on the other hand, may be defined as a person who has fled his home or native country and who does not wish to return, at least not to the circumstances that caused his flight." (1991: 39) There are suggestions that this terminology was also used since both the British and American governments were fearful that the use of the word refugee might also imply "acceptance that the person in question could not return to his home country." (Wasserstein 1996: 8)

²⁵⁴ The UNRRA was created prior to the formation of the United Nations, and in its name reflected the involvement of the wartime allies, the 'United Nations,' as opposed to the formal IGO.

the International Refugee Organization (IRO). In this process they hoped to receive Soviet support. Even so, they were unwilling to compromise on the fundamental issue of forced repatriation. The United States, Great Britain and, to a lesser degree, the Soviet Union therefore all played crucial roles in redefining how states cooperated to protect and assist refugees by challenging the views that had shaped the interwar period.

Recognition of a humanitarian duty helped states to commit to a more robust set of institutions and legal constraints. Equally important during this period was American leadership and its support for a regime based around the IRO. This change would not have been possible without individuals in the American government, particularly President Harry S. Truman and his advisors, playing key roles as norm entrepreneurs. Truman not only accepted that the United States had a moral commitment to refugees; he also felt that a long term solution was necessary to prevent the large numbers of refugees from destabilizing Europe. Further, he accepted that no solution was possible without also ensuring that the United States would accept a sizable number of refugees, a solution that required him to both overcome Congressional opposition and reframe how refugees were perceived domestically.

This chapter focuses on the important normative shifts that occurred within the United States and how the American government subsequently provided significant leadership at the international level to ensure that these new normative understandings became international norms. There were three stages to the emergence of this new regime. The first was during the Second World War, when little was done to protect refugees but the normative seeds were laid for a new regime. The second was increased support for principles of humanitarianism and with it an emerging norm of non-refoulement in the immediate post-war period. This period is most clearly marked by the negotiations around, and creation of,

the IRO. The third stage, the creation of a new IO – the UNHCR - and the expansion of the regime from a European basis to a global one will be dealt with in the next chapter.

6.2 The Second World War Interregnum

With the start of the Second World War, and as Jewish organizations in Britain exhausted their resources, the British government began to subsidize the costs of refugee maintenance and re-emigration. (London 2000: 169-70)²⁵⁵ At the same time, the government adopted stricter measures of entry, based on the assumption that the only refugees now being released from Germany would be “persons whose entry into other countries was desired for reasons connected with the war.”²⁵⁶ A humanitarian-based admissions policy was set aside in favour of security. As London notes, “the policy of not admitting refugees - alien or British - to the United Kingdom solely on humanitarian grounds was repeatedly affirmed at Cabinet level.” (London 2000: 173) The focus of British policy, and of the IGCR, was to encourage emigration of “refugees who had reached countries of refuge at the outbreak of war.”²⁵⁷ Restrictions on entry meant that Jews who were still in German territory could not obtain British visas, even though they still had the right to emigrate: Nazi authorities did not finally prohibit all Jews from emigrating until the autumn of 1941. (London 2000: 175)

The United States also increased restrictions with the start of the war. The State Department adopted stricter policies, no longer accepting affidavits of financial support from relatives and instructing consular staff to withhold visas from anyone about whom they had

²⁵⁵ Following the German occupation of the Sudetenland in Czechoslovakia, Great Britain had begun some efforts to fund relief efforts for refugees fleeing that region. This was due to a commitment in the Munich Agreement for Britain to protect the personal and property rights of the area under German control. (London 2000: 145-6)

²⁵⁶ War Cabinet, Committee on the Refugee Problem, “Summary of Conclusions” 25 Sep 1939. British National Archives PRO CAB 98/1.

²⁵⁷ Ibid

any doubt whatsoever. (Zucker and Zucker 1987: 22, Wyman 1985: 174, Peck 1980) These actions were not based in new legislation. Rather, as Breitman and Kraut note, “instead, the discreet, less politically volatile path of altering bureaucratic procedure was taken, as it had before.” What had changed was the rationale for such action: “Now the State Department cited the danger of subversion by immigrants, the ‘fifth column’ threat, as sufficient reason to reject a liberal refugee policy.” (1987: 120)²⁵⁸ Fears of a ‘fifth column’ threat were prevalent among American officials, including among a number of prominent Jews. As such, Breitman and Kraut suggest that such suspicions did not come out of anti-Semitism, but rather a “genuine concern that careless visa policy might endanger national security.” (1987: 123)²⁵⁹ Similarly, George Warren, then serving with the State Department, suggested that:

Roosevelt's hands were completely tied by an overwhelming unwillingness in the Congress to admit refugees based partly on fear that the refugees would be fifth columnists. I don't think that fear was real, but there was no question about the attitude of Congress. Roosevelt's hands were tied. He did all he could in the situation. (Warren 1972: 6-7)

Such concerns affected efforts to rescue the Jews and other refugees in occupied Europe. In particular, these moral concerns were framed within the greater priority of bringing about a successful and rapid conclusion to the war. Hasian notes that this frame was effective: By positioning efforts within the more important rubric of winning the war, “any massive rescue efforts seemed to be morally reprehensible, because they might prolong the war and create national divisions.” (2003: 163) As Senator Scott Lucas argued, while he

²⁵⁸ Roosevelt was swayed by such arguments, in part because public and congressional sentiment continued to run in favour of restrictions. (Peck 1980: 368) At a June 1940 press conference Roosevelt set out this policy, arguing that, while he was sympathetic to refugees, spying was a issue: “Now, of course, the refugee has got to be checked because, unfortunately, among the refugees there are some spies... not all of them are voluntary spies - it is a rather horrible story but in some of the other countries that refugees out of Germany have gone to, especially Jewish refugees, they have found a number of definitely proven spies...it is something that we have to watch.” (5 June 1940 Presidential Press Conference, cited in Breitman and Kraut 1987: 121-22)

²⁵⁹ Even so, they find little evidence that German or Russian activities in the United States depended on refugee spying: “fewer than one-half of one percent of all refugees arriving from Nazi-Soviet territory in 1940 (23,000) were ever taken into custody, for questioning. Only a fraction were ever indicted on any charge, and most of those were violations of immigration regulations rather than espionage.” (Breitman and Kraut 1987: 124)

cared about the persecuted peoples in Europe, he was also thinking of American soldiers and their families: “Every day that you postpone bringing this war to a conclusion you take upon your hands the blood of American boys” (cited in Breitman and Kraut 1987: 180) The British similarly argued that to engage in negotiations with the Germans “would be relieving Hitler of an obligation to take care of these useless people.” (Feingold 1970: 197-99)

Such reasoning made sense if sensibly applied. However, as Breitman and Kraut argue, for both governments it effectively became “an all inclusive and elastic standard... in the eyes of some officials in both London and Washington, virtually any publicized assistance or attention to European Jews jeopardized some requisite of the war effort.” (1987: 180) The effects of arguments in favour of the war effort and of security concerns were to reinforce the status quo policies of limited immigration.

6.2.1 The Bermuda Conference and the Re-emergence of the IGCR.

Not surprisingly, these views were also reflected in the international efforts led by both governments. They were, however, quickly forced to respond to public opinion which favoured a more humanitarian approach following the public declaration on 17 December 1942 by the Allied governments that the Nazis were committing atrocities against the Jews. This statement mobilized the best of humanitarian domestic opinion in both countries and produced a new consensus around the need to take actions to help the Jews of Europe. (Karatani 2005: 527, Penkower 1988: 98)²⁶⁰ The American press, in particularly, shifted

²⁶⁰ The Declaration was issued by the allied United Nations and affirmed the “solemn resolution” of those government “to ensure that those responsible for these crimes [should] not escape retribution, and to press on with the practical measures to this end.” (cited in Stevens 2004: 118) The same day, British Foreign Minister Anthony Eden rose in the House of Commons to state that the allies condemned “in the strongest terms this bestial policy of cold-blooded extermination.” (Penkower 1988: 98)

attitudes in favour of action to help the refugees.²⁶¹ Even though neither government wanted to take action, public opinion and pressure was such that both governments felt the need to at least appear to take action. (Wasserstein 1979: 176-9) The most effective response, the governments decided after much discussion, was to hold a conference in Bermuda in April 1943.²⁶² Both states approached the conference with limited agendas and little interest in altering their current positions on refugees.

The British policy in particular was self-interested, rather than focused on humanitarian obligations arising from the Holocaust and the possibility of ending or mitigating its effects. Instead, the British sought to expand the scope of the conference to discuss all refugees, so that it would not “be treated as though it were a wholly Jewish problem.” They were unwilling to consider new immigration policies, justifying this by arguing that transport was unavailable and that the absorptive capacity of neutral countries in Europe was approaching its limits. They were also unwilling to open Palestine to immigration from ‘enemy’ countries, which included refugees already in neutral countries.²⁶³ In effect, the British government had decided that any attempts at rescue were impossible and that it was time that the idea “[was] shown up as illusionary.”²⁶⁴

²⁶¹ While the press continued to accept the place of the war effort (the New York Times noted that “nothing, not even the desperate plight of the refugees, can be permitted to interfere with an undertaking in which the lives of men and women of so many nations are being sacrificed”), it was felt that some measures should be taken, especially some which went beyond “palliative [ones] which appear designed to assuage the conscience of the reluctant rescuers rather than to aid the victims” and the New York Herald Tribune observed that expressions of sympathy were pointless unless “also [a] dynamic stimulus to action.” (all quotes from Lipstadt 1982: 66-67)

²⁶² British Embassy to the Department of State “Aide Memoiré: Refugees from Nazi-Occupied Territory” January 20 1943. FRUS, 1943, Vol. 1. 134 (see also Penkower 1988: 98-101)

²⁶³ *Ibid.* 134-138. There is, however, no clear indication that Britain had consulted with the neutral countries prior to this statement.

²⁶⁴ Randall Minute, 16 April 1943, PRO FO 371/36658 (cited in Wasserstein 1979: 189)

The British feared that a positive result of the Conference would actually be detrimental, both for fear of raising false hopes among refugee advocates but also, amazingly, because it might make the refugee problem worse if Germany or its satellites changed “over from the policy of extermination to one of extrusion, and aim as they did before the war at embarrassing other countries by flooding them with alien immigrants.”²⁶⁵ Therefore, focused on preventing more refugee flows, the government was unwilling to consider options that might have mitigated the effects of the Holocaust.²⁶⁶ The British suggested only that the US accept more refugees or approach the Latin American countries.²⁶⁷

The Americans, while initially suspect of British motives,²⁶⁸ supported the Conference while arguing that debate should be limited to examining the role of the IGCR.²⁶⁹ This shift meant that neither state’s migration policies would be questioned: the United States acquiesced to a British request that Palestine would not be raised, in exchange

²⁶⁵ British Embassy to the Department of State “Aide Memoiré: Refugees from Nazi-Occupied Territory” January 20 1943. FRUS, 1943, Vol. 1. 134 Wyman also points to the “deep fear that the two powers shared that a large exodus of the Jews might take place.” (1984: 114)

²⁶⁶ For further details on this, see Aronson (2004).

²⁶⁷ Ibid. 134-138. Herbert Emerson fought against these trends, and, working with Myron Taylor, he attempted to get both governments to increase their refugee admissions and for transport and maintenance. He argued that the 1942 declaration “if not followed by such action as practicable to save persons is a mockery.” US Embassy London to State Department, 28 Dec 1942. NARA RG59 840.48 Refugees/ 3557.

²⁶⁸ The American position changed after a request from the Foreign Office, because “public opinion has been rising to such a degree that the British Government can no longer remain dead to it. The temper of the House of Commons is such that the Government will be unable to postpone beyond next week some reply...” (The Charge in the United Kingdom (Matthews) to the Secretary of State. 20 Feb 1945. FRUS 1943 Vol 1. 138 and reply The Secretary of State to the British Ambassador (Halifax). 25 February 1943. FRUS 1943. Vol 1. 142-143). The American response appears to have been an effort to avoid unilateral action on the part of the British.

²⁶⁹ A clear sign that the US government, too, was facing public pressure was that, in breach of diplomatic protocol, the government immediately released this news. This led to British complaints that their consent had not been obtained and was embarrassing as it appeared that the US had taken the initiative. This reinforces a view that British policy over the conference was one of media optics. (The Acting Secretary of State to the Charge in the United Kingdom (Matthews) 6 March 1946. FRUS 1943 Vol. 1. 144-145); (Breitman and Kraut 1987: 176) The US proposed Ottawa as the site, but this was opposed by Canadian officials, “fearful that their own extremely restrictive refugee policy would become the object of critical examination” (Marrus 2002: 284)

for an agreement that neither would the American quota laws. (Feingold 1970: 190-91, London 2000: 212)²⁷⁰ Publicly, at least, the Conference positioned itself as having laudable goals when it opened on 19 April 1942.²⁷¹ Yet both the British and the Americans deliberately limited the discussions at the Conference to focusing on a negotiated solution to the refugee problem. Even more limiting was their decision that negotiations could not be opened with Germany and other enemy states.²⁷² The only major decision made²⁷³ was to allow the IGCR to negotiate with other Allied nations to promote resettlement and with neutral countries, especially Switzerland and Sweden, to accept more refugees. (London 2000: 217)²⁷⁴ The IGCR was deliberately chosen by the US because it had an existing membership, thus ensuring that a new organization did not have to be created. But the IGCR's use could also serve a public relations purpose as it would be seen as continuing

²⁷⁰ Memorandum, Afternoon Conference, 21 April 1943, NARA RG 59 State Lot File No. 52 D 408 Records relating to the IGCR. Box 3 Bermuda Conference. Bermuda Conference Minutes. 1

²⁷¹ The Chairman, a member of the American delegation, Dr. Harold Dodds, opened the Conference with the ambitious statement that: "Germany's ambition under Nazi ideology has resulted in a calculated policy of oppression and extermination, the effects of which extend far beyond the territories actually under its ruthless heel. This created the necessity for all possible assistance to such helpless peoples, and it is under these conditions and with this purpose that this conference convenes." (cited in Blumenthal 2003) The same day was the eve of Passover and the start of the Warsaw ghetto uprising.

²⁷² Confidential Memorandum for the Chairman, Morning Conference, 20 April 1943. NARA RG 59 State Lot File No. 52 D 408 Records relating to the Intergovernmental Committee on Refugees. Box 3 Bermuda Conference. Bermuda Conference Minutes. 1-6

²⁷³ The Conference also debated setting up camps in French Africa, then occupied by American troops. Two camps were eventually established, but received only about 2,000 refugees. (Breitman and Kraut 1987: 178)

²⁷⁴ Even this was disputed. The British delegation feared that even this small step might mobilize refugee advocates to ask for more. They argued, however, that the main problem was institutional design. In their view, the IGCR had too limited a mandate and scope to deal with the wartime situation, and that its membership included France as well as pro-Axis neutrals. (The Consul General at Hamilton (Beck) to the Secretary of State. 19 April 1943. FRUS 1943 Vol 1. 153) The American reply was that there "is no doubt that the British Government agreed to the use of the Executive Committee of the Intergovernmental Committee..." (Secretary of State to Beck 20 April 1943. FRUS 1943 Vol 1. 154-55) Even so, by the end of the Conference the British had accepted the use of the IGCR. As Richard Law, one of the British delegates, noted on 23 April: "The success of the Bermuda Conference will depend very largely, perhaps almost exclusively, upon the degree of life and authority which can be injected into the Intergovernmental Committee..." (cited in London 2000: 215)

Roosevelt's policies, thereby assuaging domestic Jewish opinion.²⁷⁵ In addition, as a show of allied unity, membership was extended to the Soviet Union. (Wasserstein 1979: 217)

The role of the IGCR was expanded, with a broadened scope, revised mandate, and increased membership. It was given the power to negotiate with neutrals and Allies, though not the enemy.²⁷⁶ Member governments paid all administrative costs, continuing the assistance pattern set by the League IOs. However, a major change was that the United States and Great Britain jointly accepted responsibility for all operational expenses, (Vernant 1953: 28)²⁷⁷ though such support was determined on a case by case basis.²⁷⁸

The IGCR assumed this new role in the summer of 1943, with Emerson continuing as director. Its budget and staff were enlarged. But it was still unable to play an effective role, as "a political organization without a political mandate," and no ability to provide relief or to negotiate with neutral or enemy states as it continued to lack any source of independent authority. (Marrus 2002: 286, Wasserstein 1979: 218) Vernant notes that had the "IGCR

²⁷⁵ Secretary of State to Beck 21 April 1943. FRUS 1943 Vol 1. 156-57. This represented a major shift within the US administration, as they had been allowing the agency to die a natural death. (Feingold 1970: 201) Privately, the Assistant Secretary of State, Breckinridge Long, had argued in favour of the IGCR as a way to "go through the motions of doing something about rescue without actually doing anything" (Feingold 1970: 201) and he worried that the British were trying to dump "'responsibility and embarrassment' for the refugee problem 'in our laps'" and consequently had adopted a defensive posture to counter both this and to protect the internal security of the United States. (Breitman and Kraut 1987: 139) Every "subsequent recommendation for a more active rescue policy which could not be disposed of by arguing that it was outside the purview of the Conference or would help the enemy, was referred to the [IGCR]. ." (Feingold 1970: 200)

²⁷⁶ Morning Session, 22 April 1943. NARA RG 59 State Lot File No. 52 D 408 Records relating to the Intergovernmental Committee on Refugees. Box 3 Bermuda Conference. Bermuda Conference Minutes. For a description of how this was to be implemented, see "Emerson Memorandum", copied to the Secretary of State, 29 Dec 1943. NARA RG 59 State Lot File No. 52 D 408 Records relating to the Intergovernmental Committee on Refugees. Box 1- Miscellaneous Subject File, 1942-47. IGC Mandate Folder

²⁷⁷ This change was motivated by Taylor, then the US delegate to the IGCR, who argued that both governments needed to be "prepared to lead the way for the other governments and to make definite commitments regarding...cost ..." Hull was unwilling to commit to an open-ended arrangement, but did suggest to Roosevelt that the United States be prepared to undertake partial financing of some operations. Hull to Roosevelt, 7 May 1943. NARA RG 59 General Records of the Department of State Lot File No. 52 D 408. Records relating to the Intergovernmental Committee on Refugees Box 2. IGC Relations with War Refugee Board Folder.

²⁷⁸ Roosevelt to Hull 14 May 1943; Hull, Morgenthau and Stimson to Roosevelt 25 May 1944. Ibid.

been given more funds and more practical support, it is possible that it might have done more even while the war was being fought; as things were, it was an instrument of which the member governments made only limited use.” (1953: 28) But as a “means of deflecting awkward pressure for more active assistance to refugees, above all on the two dominant member-states the United States and Britain” it was successful. (Sjöberg 1991: 236) The IGCR’s role during the war amounted to little beyond a coordinating function between the British and American governments. Emerson’s efforts to influence policy or assume a more active role were undermined and obstructed by the Foreign Office. In 1943 he admitted to Taylor that his opportunities for action were limited until after the war. (London 2000: 224-25, Wasserstein 1979: 218-19)²⁷⁹

His view was prophetic. By the end of the war the IGCR’s role was steadily expanded as it assumed the role of the ‘default’ refugee organization, with the UNRRA being assigned the role of dealing with displaced persons. The changes made at Bermuda were ratified at the Fourth Plenary Session of the IGCR in August 1944, which extended the mandate to “all persons, wherever they may be, who, as the result of events in Europe, have had to leave, or may have to leave, their countries of residence because of the danger to their lives or liberties on account of their race, religion, or political beliefs.” (Biehle 1947: 144) This allowed the IGCR to protect refugees created by the war, as well as League refugees, and, for the first time, Spanish refugees. (Weis 1954: 210, Sjöberg 1991: 153) Its mandate was extended again in 1946 to provide emigration services for non-repatriable refugees from Germany, Austria and Italy. The IGCR also took the lead in negotiating legal arrangements by holding an

²⁷⁹ Emerson himself would remain a staunch advocate for continuing legal and political protection for refugees. This problem without international cooperation, he warned, would be “intractable and insoluble.” Emerson to Sean Lester, Acting Secretary-General of the League of Nations “The Refugee Problem after the War.” 29 July 1942. LNA R5637/20A/41400/X

intergovernmental conference in London in October 1946. There, sixteen governments agreed to create a new Arrangement, which provided travel documents for refugee under the IGCR's mandate. This remained the standard travel document until the entry into force of the 1951 Refugee Convention. (Vernant 1953: 29, Weis 1954: 207, Holborn 1975: 18) On paper, the IGCR had a broad mandate including protecting both pre-war refugees and refugees created by the war, and negotiating with states. And yet, amidst this expansion, the IGCR remained resource starved and incapable of providing substantial assistance or resettlement opportunities to refugees. (Chamberlain 1947: 87, Proudfoot 1957: 295-6)

The Bermuda Conference did bring about one other change - a substantial shift within the American government around the refugee issue. In particular, the State Department's role in preventing refugee migration was placed under increased scrutiny. The Treasury Department became aware that the State Department had quietly lowered immigration quotas to less than 10 percent of those allowed by law and had done little to help rescue efforts. More alarming, they had also blocked information on the Holocaust from reaching the American public, and actually impeded rescue efforts put together by American Jewish organizations on their own. To cover these actions, they "delivered altered documentation to the Treasury Department in an effort to cover up the information cutoff." (Wyman 2002: 47)

This, however, was not a repeat of the 1930s. As Henry Dexter White, the Assistant Secretary of the Treasury, noted, there was broad public feeling that the refugees needed to be assisted. While the State Department had effectively continued the policies of the 1930s, they had done so under a veil of secrecy and altered documents. White and Henry Morgenthau, the Treasury Secretary, argued to the President that action needed to be taken, because "this Government had played a role that is little short of sickening." (White, cited in

Wyman 2002: 47) There were also concerns about potential electoral fallout over the issue, particular since Congress was about to discuss a rescue resolution.²⁸⁰ The solution was to have the President pre-empt Congress by establishing a new rescue agency. (Wyman 2002: 48-49, see also Aronson 2004: 119, Daniels 2006)²⁸¹

The result was the creation of the War Refugee Board (WRB) which, while not an international organization, provided a US focus on rescue efforts for the rest of the war.²⁸² Its mandate was broad, including planning rescue operations, evacuating and caring for refugees, and negotiating with foreign governments, thus complimenting the IGCR's mandate. (Breitman and Kraut 1987: 193) Its resources were provided through private sources though it did receive a start up injection of one million dollars from Roosevelt's emergency fund and other government funding throughout its term. (Marrus 2002: 289)²⁸³

6.2.2 The Allies, the UNRRA and the Repatriation of DPs.

Even while the Allied governments did little to help the Jews, they were conscious of a looming refugee crisis which would occur with war's end. By the middle of 1943, it was

²⁸⁰ For details of the efforts of domestic Jewish organizations to mobilize the American government to engage in rescue efforts, see (Peck 1980) and (Wyman 2002).

²⁸¹ This point was reached in part because of how effective the American Jewish organizations had become at lobbying the government. As Morgenthau himself noted: "The tide was running with me... The thing that made it possible to get the President really to act on this thing [was] the Resolution [which] at least had passed the Senate to form this kind of a War Refugee Committee, hadn't it?...."(Morgenthau, cited in Wyman 2002: 49) Even so, Hurwitz argues that the Congressional resolution had little effect on Roosevelt's views since Congress remained mainly anti-refugee, nor would it likely have provided funding. (Hurwitz 1991)

²⁸² This change horrified the British, who were concerned about "the difficulty of disposing of any considerable number of Jews should they be rescued." In response, the Treasury proposed to Hull that "we cut the Gordian Knot now by advising the British that we are going to take immediate action to facilitate the escape of Jews from Hitler and then discuss what can be done in the way of finding them a more permanent refuge." (London 2000: 229)

²⁸³ It operated unofficially out of the Treasury Department and this was critical to its success, as the State Department continued to oppose its efforts into 1944. Pehle to Stettinius, 10 March 1944. NARA RG 59 General Records of the Department of State Lot File No. 52 D 408. Records relating to the IGCR Box 2. IGC Relations with War Refugee Board.

estimated that some 21 million people had been displaced,²⁸⁴ either driven from their homes by the fighting or forcibly removed by the invaders. Approximately 8 million of these had been taken to Germany or Austria, and another nearly 8 million people were internally displaced within their own countries. (Woodbridge 1950: 469)

The Allies made the assumption that the first impulse of all these people would be to return to their own homes. Such unorganized, large-scale, and mass movement, however, “would interfere with the war effort, spread disease, and increase social and economic confusion.” (Woodbridge 1950: 469)²⁸⁵ The response to those movements required significant logistical support and a clearly coordinated effort by military authorities, national governments, and private agencies. Following the previous trend of responses to refugee crises, the Allies decided to create a new IO, the UNRRA, in November 1943.²⁸⁶ In this case, the United States ensured that it would have a great deal of control over the organization by providing the bulk of contributions. Of the \$3.6 billion spent during its mandate, the American government contributed over \$2.8 billion. (Saloman 1991: 48)²⁸⁷ The UNRRA had two different roles. The first was to provide assistance to the civilian populations of liberated

²⁸⁴ Estimates of the number of people displaced in Europe are as high as 65 million. (see Cronin 2003: 164 fn)

²⁸⁵ James T. Shotwell, a Columbia professor who had served with the American delegation at the Paris Peace negotiations in 1919, contrasted the UNRRA with his experiences after the First World War: “There was no such organization as the UNRRA at the end of the First World War, for the Americans organizations for relief, the greatest of which was under Mr. Hoover’s direction, were never officially coordinated... This was inevitable so long as the governments, as well as private organizations, still thought in terms of charity.” (cited in Borgwardt 2005: 119) Borgwardt argues that the UNRRA represented a clear transition from private to public relief and rehabilitation and the internationalization of New Deal-style problem-solving. (Borgwardt 2005: 119)

²⁸⁶ Some 44 countries initially signed on to support the UNRRA. Its main policy-making plenary, the UNRRA Council, consisted of one representative from each government. However, it met only six times during the UNRRA’s existence between 1943 and 1947. Most policy decisions were taken by the Central Committee which was composed of China, the United States, the United Kingdom, and the Soviet Union. In August 1945, France and Canada were added. (Saloman 1991: 48, see also Fox 1950)

²⁸⁷ All three of the UNRRA’s directors would be Americans. The first was Herbert Lehman, former Governor of the state of New York. After his resignation, Fiorello H. LaGuardia, the former mayor of New York took over. He resigned in 1947 and was replaced in turn by Major General Lowell Ward.

territories, over which it would have all responsibility. The second was to work with “appropriate government and military authorities” to secure the repatriation of DPs to their former countries.(Woodbridge 1950: 471) For those who could not be repatriated, assumed to be a small number, the IGCR would serve to resettle them. (Woodbridge 1950: 474)

After its formation, the UNRRA’s mandate covered only DPs and assumed that they would be easily returned. In August 1945, however, in a dramatic expansion of its mandate, refugee protection was added. It was the Washington office that pushed for this change, suggesting a more generous interpretation of displacement was necessary, including “political dissidents as well as post-war political refugees.” (Stevens 2004: 121)²⁸⁸ The policy was also challenged by the Eastern bloc, and led to a revised policy which required applicants for refugee status to “establish ‘concrete evidence’ of persecution before being admitted to the care of UNRRA.” (Hathaway 1984: 373-4) However, this division within the organization foreshadowed the much broader debates that would occur over how to define and assist refugees in the next five years.

The UNRRA thereby provided assistance to five different groups:

[1] Those... who have been obliged to leave their homes by reason of the war and are found in liberated or conquered territory; [2] those... displaced within their own (liberated) countries; [3] those... in other countries who are exiles as a result of the war, and whose return to their homes [is]...a matter of urgency; [4] those... and [also] those stateless persons who have been driven as a result of the war from their places of settled residence...[5] other categories of persons.²⁸⁹

²⁸⁸ This caused a debate within the organization. In particular, the London office was critical of the move, arguing that it meant: “any inhabitant of a liberated area who wishes to leave his country for economic reasons qualifies for UNRRA care on what appears to us the purely fortuitous circumstance of internal displacement [if it occurred during the war]. This leaves the door wide open to political refugees of every kind, which is likely to cause a strong reaction against the use of UNRRA funds for the support of malcontents.” UNRRA Outgoing Cable No 1675 [9 February 1946] (cited in Hathaway 1984: 373, see also Vernant 1953: 31)

²⁸⁹ UNRRA Journal, First Council, “Report of the Subcommittee,” paragraph 5. Cronin notes that repatriation would require logistical coordination and significant funds, thus governments “presumed that the situation was a temporary one that could be resolved through national action and international cooperation.” (2003: 164-5)

Not all DPs and refugees were eligible for UNRRA assistance. The organization was required to screen out war criminals from among the camps, and also to distinguish between DPs and refugees and the Volksdeutsche, ethnic Germans who had fled in the wake of the German retreat along the Eastern Front. There was unanimous agreement among the Allied governments that these people should not be eligible for UNRRA assistance because of their connection to the Nazis. (Stoessinger 1956: 50, Vernant 1953: 30-32)²⁹⁰

These limitations were driven by the views of the Soviet Union, who demanded that all UNRRA decisions needed to have its support, but also that aid should be provided primarily to the states which had struggled against Nazism. The Soviet Union, Dean Acheson later noted, felt that the UNRRA “existed to give prizes for fighting Hitler.” (cited in Marrus 2002: 318)²⁹¹ Thus the Soviets had made it clear that they expected a substantial share of any relief payments through the UNRRA, (Acheson 1969: 69, 78-9) and assistance to the displaced was a secondary priority.

The largest issue for the UNRRA, however, was whether or not DPs should be forcibly repatriated. At the Yalta Conference, repatriation agreements²⁹² were negotiated by Roosevelt, Prime Minister Winston Churchill, and Josef Stalin for the return of prisoners of war and civilians who had been forcibly deported to Germany. The result was that between 1945 and 1946 some five million Soviet citizens were returned to the Soviet Union, many

²⁹⁰ The UNRRA’s responsibilities, in a significant departure from the IOs of the interwar period, extended to include Asia. The Japanese invasion of China had resulted in significant displacements and returnees faced a “gutted land and a broken economy...” (Stoessinger 1956: 48, Pelcovits 1946)

²⁹¹ Acheson felt that Soviet intransigence in UNRRA was the start of a long running pattern: It “uncovered the classic Soviet positions towards international institutions. Nothing might be done within any country without that country’s consent and except through its agencies; decisions by UNRRA must be unanimous...”

²⁹² For details on the two agreements signed, see (Proudfoot 1957: 154-57)

against their will. These agreements violated the norm of non-refoulement established in the 1933 Refugee Convention, to which Great Britain was a signatory.

The Yalta agreements raised considerable moral issues within the American government. Yet, these concerns were inadequately conveyed to the delegation at Yalta. The Americans there were faced by an existing precedent, created by the British starting in 1942 who had forcibly returned all Russians who fell into their hands. This precedent was reaffirmed and made into official Cabinet Policy in 1944. (Elliott 1973: 267)²⁹³ As Admiral William Leahy, Roosevelt's chief of staff, argued, "since the British War Office, with Foreign Office concurrence, has agreed that all captured Soviet citizens should be returned to Soviet authorities without exception, 'from the military point of view... it is not advisable for the United States Government to proceed otherwise...'”²⁹⁴

Within the American Cabinet deep moral reservations existed as well as concerns about the legality of the action, though the United States was not a signatory to the 1933 Convention.²⁹⁵ The State Department had similar reservations.²⁹⁶ Both sets of concerns were

²⁹³ Kirk (United States Political Adviser on the Staff of the Supreme Allied Commander, Mediterranean Theatre) to the Secretary of State, 16 September 1944. FRUS 1944 IV. 1250

²⁹⁴ Telegram, Leahy to Hull, Nov. 2 1944, FRUS, 1944 IV, 1262 fn 52. See also Elliott, 1973: 267-268 US policy diverged from the British. By October, the State Department decided to rescind policy that Soviet citizens retain Prisoner of War status, which Moore argues marked a violation of international law. (Moore 2000: 383-84) For details of the British discussion of this policy in 1944 see Murphy (see Murphy 2001).

²⁹⁵ Secretary of War Henry L. Stimson argued against forced repatriation on moral grounds. He objected to it, arguing that "first thing you know we will be responsible for a big killing by the Russians... Let the Russians catch their own Russians." (cited in Elliott 1982: 37) Attorney General Francis Biddle agreed with him because he was not sure if there was a legal right to remove Soviet citizens from American territory by force. He wrote to Stimson: "I gravely question the legal basis or authority for surrendering the objecting individuals to representatives of the Soviet Government... Even if these men should be technically traitors to their own government, I think the time-honoured rule of asylum should be applied... It has been so applied in many cases of men who were firmly regarded as traitors or otherwise political criminals in their own country. (cited in Elliott 1982: 37)

²⁹⁶ Cordell Hull had resigned as Secretary of State due to health reasons. Joseph Grew, the Under Secretary and Acting Secretary while Stettinius was in Yalta, "knew that Stettinius was a diplomatic novice and felt compelled to advise him on the repatriation issue." (Elliott 1973: 267) Grew was concerned the agreement

marginalized however, with Secretary of State Stettinius replying that “the consensus here is that it would be unwise to include questions relative to the protection of the Geneva Conference...we believe that there will be serious delays in the release of our prisoners of war unless we reach prompt agreement”²⁹⁷ Both countries’ views were motivated by anti-fascist sentiment, Churchill felt bound by prior precedent, and Roosevelt followed the views of the military, rather than the State Department which was more familiar with refugee issues. The result, however, as Elliott argues, was that “the Yalta delegation was ready to sacrifice the right of political asylum in order to ‘reach prompt agreement on this question.’” (Elliott 1973: 267) Given how easily dismissed these concerns were, there was no clear normative or moral prohibition against refoulement.

The agreement negotiated between the Supreme Headquarters, Allied Expeditionary Force (SHAEF) and the Soviet military, while silent on forced repatriation, included a provision that “necessary measures are taken to complete this repatriation in the shortest possible time.”²⁹⁸ The Joint Chiefs of Staff, tasked with creating the policy to enforce the Yalta Agreements, therefore interpreted it as including the right to use force if necessary, concluding that “Soviet displaced persons will be repatriated regardless of their individual wishes.”²⁹⁹ (Elliott 1973: 271, Fischer 1949: 6-7, Proudfoot 1957: 215) The repatriation

would violate international law, particularly the 1929 Convention relating to the Treatment of Prisoners of War, which the US was a signatory to. Acting Secretary of State (Grew) to the Secretary of State 7 Feb 1945. FRUS, Conferences at Malta and Yalta, 1945. 697 Coupled with Stettinius’ lack of experience was that Roosevelt tended “to heed more the advice of his military advisers than that of his political advisers” at the Conference who were less aware of international law. (Elliott 1973: 266) In addition, General Eisenhower had argued in favour of mass repatriation to avoid antagonizing the Soviet government. (Moore 2000: 387)

²⁹⁷ Stettinius to Grew, 9 Feb 1945, FRUS, Conferences at Malta and Yalta 1945. 757

²⁹⁸ ‘Plan’ Signed by K.D. Golubev on behalf of the Red Army and R.W. Barker on behalf of the US Army. (cited in Proudfoot 1957: 210)

²⁹⁹ SHAEF Administrative Memorandum Number 39 (Revised- 16 April 1945) Displaced Persons and Refugees in Germany. Paragraph 23 (c). (cited in Proudfoot 1957: 461 (Appendix B))

effort proceeded in earnest once the agreement was approved on 22 May 1945. Within the first five days some 100,000 Soviet DPs were transferred. By 30 September, over 2 million DPs had been transferred. (Proudfoot 1957: 210-11)³⁰⁰

Opinion, however, shifted rapidly within the US military, starting with a decision to not return any Balts, Poles or Ruthenians as the Americans had not recognized any territory changes as a result of the war. Beyond this, troops on the ground increasingly interpreted the orders as broadly as possible - if a DP claimed they were not a Soviet citizen, they were not returned unless Soviet Reparation Officers could prove that they were. (Proudfoot 1957: 215-17) Sentiment in the military changed due to the actions of the Soviet repatriation officers, including kidnapping DPs in broad daylight. (Marrus 2002: 317) Equally important was how badly DPs reacted to being repatriated - suicides and attacks on allied soldiers to prevent people being sent back were common. (Applebaum 2003: 436-37, Elliott 1982: 87-92)

Pressure to change the policy was also working its way through the US military and civilian bureaucracies. To a degree, this change reflected that the massive repatriation effort had significantly lessened the economic burden to the Allies of the DPs and that British and American POWs had mainly been returned. Both changes lessened the leverage that the Soviet Union had. (Marrus 2002: 317) Even so, the shift also reflected a significant humanitarian change. By September 1945 Eisenhower reversed his prior position, and, “reacting to a groundswell of opposition within the military, as well as to the dictates of his own conscience, requested the State Department to re-examine the whole question.” (Elliott 1973: 272) Within the State Department, Dean Acheson, then the Undersecretary of State,

³⁰⁰ Even with these rapid efforts, the Soviet Union complained constantly. As Proudfoot notes, “the memoranda... were so numerous and the allegations so obviously unfounded, that their individual rebuttal was futile and blanket replies were dispatched... It was soon apparent that these complaints were intended to serve Soviet purposes by silencing potential counter-complaints concerning Soviet non-compliance with the Yalta Agreement pertaining to British and United States prisoners of war.” (Proudfoot 1957: 213)

questioned the policy because of evidence that few of the DPs were returning to their homes in the Soviet Union.³⁰¹ Acheson raised his concerns both with Secretary Byrnes³⁰² and with President Truman. (Elliott 1982: 109-12)

Based on these concerns, in December 1945 the Americans formally announced that they would limit transfers to Soviet soldiers and known collaborators. (Elliott 1973: 273)³⁰³ The State Department also began noting that the US had a tradition of protecting political refugees and therefore opposed mass expulsions of such persons, and within the United Nations had adopted a position which opposed in principal forced repatriation.³⁰⁴ By 1947, in the clearest statement on the issue, Secretary of State George Marshall noted that “any coercion of displaced persons under our jurisdiction would not be tolerated.” (Marshall 1947) The forced repatriations not only shaped Acheson and Truman’s views on *refoulement*, but also as we shall see altered their views on refugees more generally. Both men would play pivotal roles in shaping the international response to refugees over this period.³⁰⁵

³⁰¹ The US ambassador to the Soviet Union, Averill Harriman, had raised concerns that those being repatriated were being executed or sent into slave labour. He knew of only a single liberated Soviet citizen who had been repatriated and then actually returned to his home. Harriman to the Secretary of State, 11 June 1945. FRUS 1945 V. 1097-98

³⁰² Edward Stettinius served as Secretary of State for only a year, though during this period he served as one of the major forces in negotiating the UN Charter. He was succeeded by James F. Byrnes, a former Senator. This change occurred primarily because President Truman had no Vice-President and therefore the Secretary of State was next in line for the Presidency. Truman wanted a Secretary of State who had been previously elected to a position by the voters. (Schlesinger 2004, Truman 1955: 22-23) Byrnes would in turn be replaced by George Marshall, who had previously served as the General of the Army, in 1947.

³⁰³ This was not a universal shift. In March 1946, the State Department was still directing that Soviet citizens who voluntarily rendered aid and comfort to the enemy “should be repatriated without regard to their wishes and by force if necessary...” Byrnes to Kirk, Political Adviser to the Supreme Allied Commander, Mediterranean Theatre, 14 March 1946. FRUS 1946 V. 152

³⁰⁴ Byrnes to the United States Political Adviser for Germany. 25 July 1946. FRUS 1946 V. 174-5

³⁰⁵ The British position did not immediately change and the Foreign Office urged the Americans to reconsider this new interpretation. The British view against non-*refoulement* crystallized in June 1946, when the British Cabinet approved a request from Foreign Minister Bevin to adopt a similar exemption, in part due to concerns

The SHAEF had operational responsibility for the DPs until it ceased functioning in mid-July 1945. At that point, responsibility for the care of the DPs was transferred to each of the states in control of the occupation zones, as agreed to at Yalta, and to the UNRRA. (Kochavi 2001: 14) By 1946, the policy was to allow the DPs to decide whether or not they wished to return to their home countries. Neither country would sanction forced repatriation, effectively abrogating the Yalta agreements. (Kochavi 2001: 18) The Soviets opposed this, arguing that halting repatriation would allow anti-Communist groups a chance to coalesce. The Soviets were also opposed to the UNRRA providing assistance to Soviet citizens, arguing that assistance discouraged them from returning. Both the Americans and British were adamantly opposed to this view. (Kochavi 2001: 19, Loescher and Scanlan 1986: 15)

Increasingly, these normative shifts and the division between the United States and Britain on the one hand and the Soviet Union on the other meant that the UNRRA had an untenable mandate. It was not designed for large numbers of refugees, nor could it effectively deal with divisions between the Allies. As Dean Acheson noted in his memoirs:

...to both Congress and the [Truman] Administration, internationally administered relief had been a failure. The staff obtainable had been weak and the leadership weaker... [the supplies provided by UNRRA] went to the wrong places and were used for wrong purposes. Due to rules built into the charter of UNRRA... the great bulk of relief, largely supplied or paid for by the United States, went to Eastern Europe and was used by governments bitterly hostile to us to entrench themselves, contrary to agreements made at Yalta and in countless resolutions of the organization. (Acheson 1969: 201)³⁰⁶

President Truman was also critical of the UNRRA, noting that its role had been “negligibly small in Western Europe” and that a major difficulty had been that when it was established, “its purpose was not clearly defined...” (Truman 1955: 466) As Karatani notes, both the UNRRA and the IGCR failed to “provide adequate international protection for

over the rights of Polish soldiers who had fought for the Allies. By this stage, however, the overwhelming majority of Soviet citizens had been returned. (Elliott 1982: 114-16, Kushner and Knox 1999: 222-23)

³⁰⁶ Acheson’s views of the UNRRA were not entirely negative: “At first we saw [postwar relief needs] almost as capable of being met by semiprivate charity, as in Belgium during [the First World War]; gradually our conception enlarged to the international program of the UNRRA, and then, three years after the end of the war, to the massive effort of the Marshall Plan and the associated foreign aid plans.” (Acheson 1969: 726)

refugees.” Neither of these IOs had effective responsibility for the million non-repatriable DPs: “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) Thus, the United States began focusing on an alternative solution.

At the same time, the encampment of the DPs was also not working. Treatment of the DPs, with most of the camps under American military control, varied dramatically from camp to camp.³⁰⁷ Concerns about their treatment, particularly those of Jews released from concentration camps, were raised by prominent Jewish leaders in the United States. In reaction to this and pressure from Secretary Morgenthau, Truman sent Earl G. Harrison on a mission to Europe.³⁰⁸ He told Harrison that “it was important to the early restoration of peace and order in Europe that plans be developed to meet the needs of those who, for justifiable reasons, could not return to their countries of former residence.” (Truman 1955: 311)

Harrison’s report, however, showed that the situation was far worse than Truman had thought. Harrison found that three months after the war had ended in Europe:

many Jewish displaced persons and other possibly non-repatriables are living under guard behind barbed-wire fences, in camps of several descriptions, (built by the Germans for slave-labourers and Jews) including some of the most notorious of the concentration camps, amidst crowded, frequently unsanitary and generally grim conditions, in complete idleness, with no opportunity, except surreptitiously, to communicate with the outside world...³⁰⁹

³⁰⁷ Some units treated DPs in a humane fashion while others, notably the Third Army under General Patton, generally treated them as prisoners. In his diary, Patton noted on 15 September 1945 that others “believe that the Displaced Person is a human being, which he is not, and this applies particularly to the Jews who are lower than animals.” (George S. Patton, cited in Dinnerstein 1982: 16-17)

³⁰⁸ Memo from Grew to Truman “Earl G. Harrison’s mission to Europe on refugee matters,” 21 June 1945. NARA RG59 Lot file No. 52 D408 Records relating to the Intergovernmental Committee on Refugees, Box 1-Miscellaneous Subject File, 1942-46 Folder labelled IGC Earl G. Harrison. Harrison had formerly been the US Commissioner of Immigration and was then both the Dean of the University of Pennsylvania Law School and the American representative on the IGCR. (Dinnerstein 1982: 34-35)

³⁰⁹ Most damningly, Harrison wrote “we appear to be treating the Jews as the Nazis treated them except we do not exterminate them... One is led to wonder whether the German people, seeing this, are not supposing we are following or at least condoning Nazi policy.” “Report of Earl G. Harrison” August 1945. NARA RG59 Lot file

Clearly, they could not be kept in such conditions. General Eisenhower argued in a rebuttal to the report that many of the individual issues Harrison had pointed to had already been changed, and that many of the other problems were due to the intricate problems of adjusting to mass repatriation.³¹⁰ Even so, Eisenhower took additional steps to improve the lot of the DPs, including adding an adviser for Jewish Affairs. He also created separate assembly areas for Jews, as well as for Poles and Balts, who also were not to be returned. Finally, he ensured rigorous enforcement of the rules.³¹¹ Increasingly, these populations were treated as distinct from the broader DP population; thereby recognizing that they were akin to refugees.

Equally, too, the report served to convert Truman. He found the report “a moving document. The misery it depicted could not be allowed to continue.” (Truman 1955: 138) Thus, the Harrison report is a powerful example of the mechanism of persuasion: when informed of the conditions, Truman’s views rapidly changed. From this point on, “a combination of humanitarian impulse with political considerations directed President Truman in his treatment of [refugees].” (Genizi 1993: 67) For the Jewish refugees, he considered Palestine to be the ideal solution.³¹² The President argued to Prime Minister Clement Atlee that the DPs should be allowed in, referencing both American public opinion in favour of such a move, but also suggesting this could provide for a more stable Europe.

No. 52 D408 Records relating to the Intergovernmental Committee on Refugees, Box 1- Miscellaneous Subject File, 1942-46 Folder labeled IGC Earl G. Harrison

³¹⁰ Letter from General Eisenhower, Commanding General, US Forces, European Theatre to President Truman, 8 October 1945. NARA RG59 Lot file No. 52 D408 Records relating to the Intergovernmental Committee on Refugees, Box 1- Miscellaneous Subject File, 1942-46 Folder labeled Harrison Report.

³¹¹ As one Army Colonel admitted to journalists, as “a result of the Harrison report ‘the heat’ had been turned on and he had been getting orders fired at him so fast he had been unable to keep up with them.” (Dinnerstein 1982: 45, see also Genizi 1993: 29)

³¹² One of Harrison’s recommendations was that the US take an active role in lobbying Britain to reopen migration to Palestine. “Report of Earl G. Harrison”

However, this was not purely a strategic argument; he also provided a moral dimension, suggesting that “no claim is more meritorious than that of the groups who for so many years have known persecution and enslavement.”³¹³ Even so, the British remained unconvinced, fearful of Arab reaction, and suggested that the matter be referred to the United Nations.³¹⁴

While the United Nations might provide for a long term solution, at this stage the DP situation remained a critical problem, especially as emigration from the Eastern bloc began to increase. (Loescher and Scanlan 1986: 7) If the DPs could not be returned, another solution, one that was proposed by military officials in both the United States and Great Britain, would be to simply cut off aid and close the camps. Both Field Marshal Bernard L. Montgomery, then the commander in chief of the British Zone in Germany, and General Joseph T. McNarney, in command of the American zone, argued to their respective governments that the camps should be closed. Montgomery suggested that the new policy be that any DPs who had not returned by 1 April 1945 be “taken out of his camp and set to work as a civilian in Germany living on German rations and under conditions parallel to Germans.” (Kochavi 2001: 20) McNarney similarly argued in favour of discontinuing aid and assistance to the DPs, though not including those who had been persecuted. (Kochavi 2001: 21) His fears,

³¹³ President Truman to the British Prime Minister (Attlee) 31 August 1945. FRUS 1945 VIII. 737-38 In his approach, Truman ignored the State Department: “it seemed to me that they didn’t care enough about what happened to the thousands of displaced persons who were involved. It was my feeling that it would be possible for us to watch out for the long-range interests of our country while at the same time helping these unfortunate victims of persecution to find a home.” (Truman 1955: 69, see also Acheson 1969: 169-70)

³¹⁴ Attlee to Truman, 16 September 1945. FRUS 1945 VIII. 740-41. The British felt that Truman was trying to score domestic political points, though Acheson argues that “this was not true... Mr Truman held deep-seated convictions on many subjects.” (Acheson 1969: 169) Truman acquiesced to working with the British to find alternative resettlement opportunities, though it has been argued that he felt constrained by Roosevelt’s policies. (Dinnerstein 1982: 73-74) Truman himself noted “it was my attitude that America could not stand by while the victims of Hitler’s racial madness were denied the opportunities to build new lives. Neither, however, did I want to see a political structure imposed on the Near East that would result in conflict.” (Truman 1955: II 140) Truman’s instincts on this point were correct - once the State of Israel was founded in 1948, much of the DP population in Europe immigrated there. Truman is seen as having played a “decisive diplomatic role” in Israel’s creation. (Cohen 1990: xi)

reflected both within the War Department and by Secretary Brynes, was that the United States government would be caught indefinitely financing the camps.³¹⁵ Separately, the War Department also urged that Germany's borders be closed in order to prevent this influx.³¹⁶

In both cases, however, such a policy shift was blocked. In Britain, the Foreign Office argued that such actions would effectively become a form of forced repatriation and contrary to British policy as it would affect not only Soviet citizens, but also Poles, Germans, and Jews.³¹⁷ The British also sought to oppose an American change in policy, arguing that such actions would lead to uncontrolled mass movements of DPs.³¹⁸ Within the US administration, Dean Acheson argued to Truman that the United States should "continue the present liberal policy so long as it is consistent with maintenance of satisfactory conditions among the Jewish displaced persons in Germany and Austria."³¹⁹ Truman supported this latter view, cancelling the order issued by Brynes and suggesting that the UN General Assembly should have an opportunity to address the issue first.³²⁰

³¹⁵ The War Department was aware of concerns from both the UNRRA and voluntary organizations who felt the camps needed to be maintained until "a solution is found through the Intergovernmental Committee on Refugees or a new organization of the United Nations for the resettlement of those who remain." Memorandum by the Secretary of State to President Truman 12 April 1946. FRUS 1946 V. 153. Even so, they supported the closures. Howard C. Petersen, the Assistant Secretary of War, argued that each day which passed without the camps closing "makes the departure from the camps harder to initiate and the home-coming less inviting." Secretary of War Patterson similarly argued that preserving the camps would mean that the American authorities in Germany would have to provide for three to four hundred thousand DPs. (Kochavi 2001: 23-24)

³¹⁶ Acheson (Acting Secretary of State) to Truman 2 May 1946. FRUS 1946 V. 156

³¹⁷ MacKillop to Gottlieb, 22 December 1945. PRO FO 371/51128/WR3682.

³¹⁸ Gallman (Charge in the United Kingdom) to the Secretary of State 28 Feb 1946. FRUS, 1946 V 148-9.

³¹⁹ Acheson (Acting Secretary of State) to Truman 2 May 1946. FRUS 1946 V. 156 Acheson had a considerable different view on the DPs to Brynes, and was able to exercise restraint on US policy whenever he was in an acting capacity. (Acheson 1969: 192-93)

³²⁰ Brynes to Patterson (Secretary of War) 23 April 1946. FRUS 1946 V. 155 In part, Truman's reaction was due to the public perception of the change in the US, particularly fears of "a domestic imbroglio" and Truman's concerns that both the Catholic Church and the Polish Community "are simply going to have a spasm if we close out these camps without some sort of arrangement to take care of the people who can't go back." (cited in Dinnerstein 1982: 53) Truman went against the wishes of a number of American officials, including McNarney and the War Department, who felt the decision made it impossible to close the camps. (Kochavi 2001: 23-24)

The United States and Great Britain had both chosen to not accept policy solutions – forced repatriation and camp closures - which would have been the easiest way to end the DP situations, but which would also have violated the norms of the emerging regime, focused particularly on non-refoulement. This left both countries needing to find a solution to the DP problem. Not only were there over a million DPs who would not be repatriated, but the numbers were growing through both Jewish immigration from the East and from the Volksdeutsch movement. The institutional structure, designed a scant three years earlier, was not designed to accommodate this new and growing problem.

In addition, Cold War politics increasingly informed the US foreign policy position. As anti-Communist refugees grew in numbers, both countries began to recognize “the political and propaganda significance of the refusal of the DPs to be repatriated, especially in light of the escalating Cold War.” (Kochavi 2001: 31) By December 1946, the battle lines were drawn. The evidence that repatriated Soviet citizens were being treated as war criminals and sent to Gulags was too much, and “the military began actively hindering the efforts of UNRRA repatriation teams and brought the delivery of prisoners into Soviet hands to a virtual halt.” (Loescher and Scanlan 1986: 15) Since the US had little ability to reshape the UNRRA’s policies, the decision was made to terminate the IO and instead to create a new organization within the United Nations. As Joseph Chamberlain would write the next year:

the large number of the displaced persons, and the difficulties of finding homes for them and of settling them, warrant the declaration of the United Nations that the displaced persons constitute an international problem and the creation of an international agency of the United Nations to deal with their problem. (Chamberlain 1947: 87-88)

6.3 The American Domestic Shift: President Truman as Domestic Entrepreneur

By 1946, President Truman had recognized that the only solution to the DP problem was through international cooperation within the United Nations. This is not surprising. As

Charlton, Farley and Kaye note, “US recognition of its predominant global position and concomitant responsibilities [were] likely to predispose the Executive towards more overt recognition of its international obligations to these displaced persons.” (1988: 242) They argue that crucial to this was the recognition that pre-war efforts had been shamefully inadequate. (Charlton, et al. 1988: 242, Aleinkoff and Martin 1985: 620-1 fn).

There is also clear evidence of a similar shift, led by the Truman administration, at the domestic level. Within the United States, Truman effectively framed the refugee issue within the broader looming confrontation with the Soviets in 1946-1948. As Loescher and Scanlan note, he effectively converted it from an immigration issue into “an aspect of the emerging Cold War, and thus providing a new basis for conservative support which was only marginally related to traditional interest group politics.” (1986: 14-15) Zolberg similarly argues that the Truman Administration saw the DP problem as a “threat to the social and economic stability of a strategically crucial region. Given local conditions, the solution required some form of international resettlement, which would necessarily involve admission to the United States.” (1995: 123) In this regard, Truman sought to securitize refugee entrance into the United States. Securitization occurs when actors declare a referent object to be existentially threatened. (Buzan, et al. 1998: 36, Emmers 2003: 422) Truman sought to deliberately reframe US refugee policy within the context of the Cold War to ensure that refugees would receive protection.

But Truman was not just acting strategically - as shown above, he believed that the United States also had a moral commitment to these refugees. Thus, he played an important role as a norm entrepreneur, using strategic and security considerations as a frame. But he also understood that robust support for refugees internationally could not work without

consummate support at the domestic level - that had been the lesson of the interwar period. Thus he sought to link the suffering of refugees to the need for change at the domestic level. His directive of 22 December 1945 declared that “this Government should take every possible measure to facilitate full immigration to the US under existing quota laws” and that “common decency and the fundamental comradeship of human beings require us to see that our established immigration quotas are used to reduce human suffering.” (Loescher and Scanlan 1986: 5-6)³²¹ He also took executive action to allocate unused immigration quotas to the displaced - by 1948, 40,000 DPs had thereby been admitted to the United States. (Charlton, et al. 1988: 243) In his 1946 State of the Union address, he also urged Congress “to find ways whereby we can fulfill our responsibilities to these thousands of homeless and suffering refugees of all faiths.” (cited in Loescher and Scanlan 1986: 14)³²²

This discourse faced a constraint in the continued restrictiveness of Congress. It took effort on the part of both the Truman administration and domestic voluntary organizations to ensure legal changes.³²³ The more active refugee groups, including the American Council on Judaism and the American Jewish Committee, understood that efforts within Congress continued to face both restrictionist attitudes and anti-Semitism. They played down Jewish claims and included them within the broader DP category. (Loescher and Scanlan 1986: 9)³²⁴

³²¹ Charlton, Farley and Kaye argue that Truman’s actions reflected the lack of available policy instruments to deal with the refugee problem in addition to his need to compromise with a restrictionist Congress. (1988: 242-3) The issue here, was not the lack of formal instruments - the US had had an effective refugee policy without those. Rather, it was that Truman did not trust the State Department to properly reflect his vision.

³²² This was a limited solution “focused exclusively on the problems of the holocaust survivors” which the US argued were non-repatriable. (Loescher and Scanlan 1986: 6, Genizi 1993: 68)

³²³ The views of the State Department changed with more activist leadership. Secretary of State George C. Marshall advocated that the United States “admit a substantial number of these people as immigrants” and that Congress needed to take a “prompt decision and action.” (Marshall, cited in Genizi 1993: 75)

³²⁴ To lobby Congress, both groups created a new organization, the Citizens’ Committee on Displaced Persons headed by Earl Harrison. The first DP Bill proposed was one written by it. (Loescher and Scanlan 1986: 10-12)

In spite of these efforts, Congress remained intransigent, dominated by restrictionist Republicans and Southern Democrats. By January 1948 Truman restated a “desire that our country afford sanctuary to a substantial number of the men, women and children who lost their homes and all they held dear during years of persecution in the Old World.” (Truman, cited in Genizi 1993: 78) His actions, along with lobbying efforts, finally lead to Congressional support for a new law. The Displaced Persons Act of 1948 provided for the first time a clear and official distinction between ordinary migrants on the one hand and refugees and DPs on the other. It was, however, both limited in the numbers admitted - restricting this to 200,000 DPs admitted over two years - and only considered those in camps on 22 December 1945 as DPs. (Genizi 1993: 78-79, Hutchinson 1981: 280)³²⁵ Truman, while accepting that no better legislation was possible, argued that it was both discriminatory and “anti-Semitic and anti-Catholic.”³²⁶

The frame which did effectively resonate with Congress was the securitization of the refugee issue through association with the increasing tensions of the Cold War. By the early 1950s, Congress sought to place restrictions on any assistance to organizations which might aid the Eastern bloc. As Holborn records, “the East-West split had become so acute that Congress vetoed the use of American funds for any international organizations which would include Iron Curtain countries.” (1975: 59) Congressional rhetoric, however, was also moving in favour of accepting more refugees through this prism. Even those who had supported the strict provisions of the 1948 DP Act, such as Congressman Alexander Wiley,

³²⁵ The Act allowed that quotas for subsequent years to be mortgaged for DPs. But “the results were ludicrous. By 1951 the Latvian quota had been mortgaged to the year 2255, the Estonian to 2130, and the Lithuanian to 2079.” (Zucker and Zucker 1987: 28-9, Dinnerstein 1982: 182)

³²⁶ Anthony Levieros “Truman to Deliver Congress Message in Person Tuesday” *The New York Times*, 22 Jul 1948. 1, 19 (see also Truman 1955: II 208) Zolberg suggests that the administration accepted the discriminatory provisions towards the Jews in order to secure Congressional approval. (1995: 123)

argued that “if we revise this law speedily and equitably, it will be a real inspiration for all free people. It will be an ideological weapon in our ideological war against the forces of darkness, the forces of communist tyranny.”³²⁷ Thus Charlton, Farley and Kaye suggest that a crucial consensus in Congress grew during this period around refugees as an element of anti-Communist policies:

it was this particular facet of a series of policies, both foreign and ‘intermistic,’ which ‘sold’ them gradually but steadily to a Congress whose predominately domestic orientations and substantial isolationist biases were only overcome by the growing conviction that the threat of Communism... is a single fused and total threat.” (1988: 246)

Effective in this, too were the refugee advocacy groups who successfully linked “the victims of Communism in DP camps in Europe, who should not be repatriated forcibly, and the need to admit some of them into America...” (Genizi 1993: 76)

The frame of refugees as a Cold War issue created its own issues, particularly that these refugees were coming from Communist countries and internal security concerns began to trump open refugee admission policies. The Internal Security Act of 1950 gave the American government increased authority to screen aliens and to exclude subversives, including anyone who had belonged to the Communist Party. The Act was enacted over Truman’s veto, who argued that “under this bill the government would lose the limited authority it now has to offer asylum in our country as the great incentive to such defection.”³²⁸ The Immigration and Nationality Act of 1952 was similarly restrictive, retaining the quota system. Once again, Truman’s veto was overridden, by a Democratic-led Congress in spite of his argument that “we do not need to be protected against immigrants

³²⁷ Alexander Wiley, quoted in (Loescher and Scanlan 1986: 24, see also Charlton, et al. 1988: 247)

³²⁸ “Internal Security Act of 1950 - Veto Message of the President of the United States.” Congressional Record, September 22, 1950. 15631

from these countries; on the contrary, we want to stretch out a helping hand...”³²⁹ (Bennett 1966: 130)

Both Acts were subsequently modified. The Internal Security Act was amended to allow for less restrictive security measures. While the Immigration and Nationality Act remained, emergency legislation, the 1953 Refugee Relief Act, was passed to provide for visas outside of the ordinary quota system, with half being reserved for recent escapees and refugees from Communist Europe. (Loescher and Scanlan 1986: 25-7, 45-6, Zucker and Zucker 1987: 29-30) In 1953 the National Security Council explicitly noted that it was a device to “encourage defection of all USSR nations and ‘key’ personnel from the satellite countries’ in order to ‘inflict a psychological blow on communism.” (Zolberg 1995: 124)³³⁰

Framing the refugee problem as a Cold War issue ensured Congressional acceptance for what had initially been humanitarian concerns for the Truman administration. From 1945 on, the United States was far more accepting of refugees than they had been in either during the Second World War or during the interwar period. Yet, the Communist frame would have lasting consequences for American domestic refugee policy. The 1953 Act, while encouraging refugee migration, also created a precedent by focusing on distinct groups of refugees rather than providing for universal access. As we will see in chapter 8, this had major implications for American refugee acceptance policies throughout the Cold War, as they focused on refugees from Communism while assuming that the UNHCR and other

³²⁹ Congressional Record 98, 25 June 1952. 8033 Sovereignty was once again raised in this debate. As one of the authors of the Act, Representative Francis Walter (D-Pennsylvania), noted “are we to have an immigration policy based primarily on the desires of Europe, Africa, and Asia or one based primarily on what is good for America?” The other author, Senator Patrick McCarran (D-Nevada) stated that “we have in the United States today hard-core, indigestible blocs which have not become integrated into the American way of life but which, on the contrary, are our deadly enemies...” (both cited in Bennett 1966: 133)

³³⁰ The executive retained control over refugee policy by the Attorney-General’s parole powers, which were used to also facilitate entry particularly after the Hungarian exodus in 1957. This is detailed in Chapter 8.

states would deal with the rest. The 1957 Refugee Escapee Act, which created the first permanent refugee admissions category, continued this pattern, defining refugee-escapees as those who were victims of racial, religious or political persecution fleeing Communist or Communist-occupied or dominated countries and those from the Middle East, and this definition would stand until 1980. (Charlton, et al. 1988: 244)

Truman's actions, therefore, created a clear legacy. But this also meant that while US refugee policies in the 1950s mirrored international refugee problems, by the 1970s it had become discordant. Even while refugees increasingly became an issue for the developing world, and flows came from non-Communist regimes, US policy remained the same. During the Cold War, over 90 percent of refugee admissions to the US came from Communist states.³³¹ (Zucker and Zucker 1987: 32, Charlton, et al. 1988: 243, Teitelbaum 1984: 430, Rosenblum and Salehyan 2004: 683) These policies would also have another effect. In 1946, the United States took the lead in reconstituting international cooperation to protect refugees and, indirectly, in creating a new refugee regime. By the 1950s, by contrast, the US increasingly pursued only limited IOs and bilateral policies focused on refugees from the Communist world. Consequently, this shift meant that the US surrendered the initiative to other states and, after 1950, to the UNHCR itself. Thus while the Truman administration had played an active role in norm and regime creation in the 1940s as a norm entrepreneur - both around non-refoulement and, as we shall see below, the IRO - the United States surrendered leadership of the issue to an IO by the 1950s.

³³¹ Even though the United States was part of the negotiations for the 1951 Convention, they did not ratify it. This was primarily because the Americans felt that the Convention applied primarily to refugees who had been displaced by the war, and "Truman felt that the United States had already responded to the crisis through its own legislation... Signing on to the treaty, it was felt would have no added value." (Salehyan 2001: 16)

6.4 The Regime Begins to Crystallize: The Creation of the IRO

Prior to that discussion, however, we need to return to 1946. At this stage, the United States, along with Great Britain, had realized that the DPs and refugees needed to be handled by an IO, even while the international structure was rapidly unravelling. In 1946, not only was the UNRRA winding down because it was inadequate at protecting refugees, but so too was the League of Nations HCR, still nominally protecting refugees from before the war. Thus League HCR refugees, as well as non-repatriable DPs and refugees under the UNRRA, would be left without any form of international protection; yet no efforts had been made to create a replacement organization. Thus, one of the critical components of the regime - coordination through an IO - appeared to be about to collapse.

During this period, Great Britain moved from a position of norm promoter to a follower. Through the 19th Century and the interwar period, Britain had taken the lead at the international level in promoting the necessary protection of refugees, even while it engaged in increasingly restrictive policies domestically. By 1946, however, not only was it fearful of accepting large numbers of refugees, but the British government no longer felt that existing organizational arrangements were fair. Their arguments became tied to financial implications and issues of burden sharing; rhetoric that minimized the role of humanitarianism and infuriated the Americans. Yet, as both the creation of the IRO in 1946 and the subsequent creation of the UNHCR in 1950 show, Great Britain was not entirely driven by self-interest. It continued to accept the key norms of the regime - a need to protect refugees and a need to ensure international cooperation. Thus, while they suggested policies that would serve their interests, the British were willing to abandon them if it meant either a violation of the existing norms or if it might lead to a break in the post-war institutional structure. The

negotiations leading to the creation of the IRO demonstrate this clearly. The United States, while committed to cooperating with the Soviet Union in 1946, was not willing to do so if it meant violating normative standards. The British, while increasingly concerned over their own domestic situation, would follow the US lead in substantive matters.

6.4.1 Resettlement or Repatriation: A Normative Divide

The United States had two main interests during this process. The first, and dominant one, was how to handle the Soviet Union. During 1945 and early 1946, the Americans made substantial efforts to compromise on major issues with the Soviet Union, seeing it as a necessary partner in the steadily emerging international institutional structure. This resulted in a number of crucial compromises the year before as the United Nations Charter was negotiated in San Francisco. (Schlesinger 2004)³³² During the lengthy negotiations around the creation of the International Refugee Organization, which lasted a year, the United States continually played the role of compromiser, often substituting its own proposals for British ones to which the Soviet Union would not agree. Crucially, therefore, the Americans were seeking to include the Soviets, even at the expense of weakening the organization.

While they were willing to compromise, however, the Americans were not willing to surrender on a key point: the question of forced repatriation. A few years earlier, American authorities had been happy to forcibly repatriate Soviet citizens. By 1946, a domestic consensus had evolved focusing on the rights of refugees led by President Truman. This evolving norm against refoulement consistently informed the American position vis à vis the IRO, and formed a threshold below which they were unwilling to compromise.

³³² 1946 was a year in flux for US policy towards the Soviet Union, as it shifted from ally to enemy. While Truman was not interested in accommodating the Russians, “strong countervailing forces kept the President from implementing this policy consistently during his first year in office... Knowledge that the American people still regarded the Russians as allies further inhibited Truman.” (Gaddis 2000: 199-200, see also Truman 1955: I 261, 552, Acheson 1969: 151, 95)

6.4.1.1 The British-American Divide

The need for a new refugee IO was already apparent. At San Francisco, the Norwegian Delegation had suggested the need for such an organization.³³³ Sir Herbert Emerson, the Director of the IGCR and the League High Commissioner for Refugees, was becoming equally concerned with the non-repatriable DPs which did not properly fall within the UNRRA's mandate. While Emerson had had a somewhat discordant and marginalized relationship with the British government, here they agreed and echoed his concerns.³³⁴

At the same time, the United States raised the possibility of concentrating all efforts within the IGCR by placing it within the United Nations.³³⁵ For the Americans, the IGCR appeared to be an expedient solution since, as an existing organization, a new role for it would require minimal negotiations with the Soviet Union and it had a mandate to resettle refugees. Their fears were over continued demands on the part of the Soviets that the DPs, as disloyal citizens, be returned immediately by force if necessary. This would, in their view, be a pivotal conflict if it was not carefully avoided.³³⁶ The major concern for the British, by contrast, was financial rather than effectiveness. The Cabinet Committee on the Reception and Accommodation of Refugees³³⁷ was “strongly of the opinion” that Britain could not

³³³ IGCR. Minutes of the Fifth Plenary Session. (cited in Holborn 1956: 29)

³³⁴ Cabinet Committee on the Reception and Accommodation of Refugees “Draft minutes of a meeting of the Committee held... on Friday 15th June, 1945.” PRO FO 371/51095 WR1879/1/48. 3 By this point, the British had followed the American lead that refugees should not be repatriated. See Foreign Office Minute “Discussion with Soviet Delegates” 4 Aug 1945. PRO FO 51098/WR2336/1/48

³³⁵ The State Department's recommendation had been “that the refugee work now being carried on by three bodies... should be concentrated in due time in the [IGCR], which should operate independently of the Economic and Social Council, but be required to accept policy directives from it.” Mr. Coppock to Mr. Wilcox “Refugee Problems”. 8 Jan 1946. NARA 59 501.BD Refugees 1-846

³³⁶ “Refugees” Report attached to *ibid*.

³³⁷ This title was somewhat oxymoronic. As laid out at its first meeting, the objectives of the committee were “ i) to save money’ ii) to avoid having large numbers of refugees left on our hands, and; iii) to ease the pressure

continue relief contributions along the IGCR model, with expenses divided equally between them and the Americans. Consequently, the British viewed any suggestion of expanding the IGCR's role, such as it providing relief to non-repatriable DPs, with deep suspicion.³³⁸

For the British, the United Nations provided the perfect alternative. It was a body which could ensure that "every country realizes its responsibilities and takes its fair share of the burden," something that neither the UNRRA nor the IGCR could do. The IGCR, in particular, "is too small and limited in scope, and lacks any solid international basis."³³⁹ Their solution, by contrast, was a new commission within the Economic and Social Council of the UN (ECOSOC). This had the advantage of allowing better access to funds, since it would then automatically be part of the UN budget, and would provide greater autonomy to the organization while allowing it to have the authority of a UN body.³⁴⁰ Thus, they raised the issue at the UN and placed it on the agenda for discussion at the Third Committee

on Palestine." Cabinet Committee on the Reception and Accommodation of Refugees "Draft minutes of a meeting of the Committee held... on Friday 15th June, 1945." PRO FO 371/51095 WR1879/1/48.

³³⁸ The Committee went on to argue that if the IGCR was used, "it would be essential to reorganize that body, and in particular get its financial structure placed on a proper international contractual basis..." Non-Repatriable Refugee: Memorandum by the Minister of Education, Acting Chairman of the Cabinet Committee on the Reception and Accommodation of Refugees. 19 June 1945. PRO FO 371 51095/WE1911/1/48. These concerns continued to inform British policy throughout the early negotiations on the IRO and were also communicated to the Americans. See Ambassador Gallman to the Secretary of State, 16 April 1946. NARA RG 59 501.BD Refugees 4-1646; Note by MacKillop 22 January 1946. PRO FO371 57700/WR193/6/48

³³⁹ "Problem of Non-Repatriable Refugees" 8 January 1946. PRO FO371 57700/WR136/6/48; For the American reaction to this, see Acting Secretary of State (Acheson) to George Warren, 4 April 1946. NARA RG 59 501.BD Refugees 5-426.

³⁴⁰ Britain saw two main advantages to this move, as they argued privately to the Americans. The first was only ECOSOC would be the "proper forum for the discussion and settlement of the difficult political questions which are bound to arise and would give the new organization the full authority of the United Nations and the advantage of the support of public opinion." (Memorandum, British Embassy to the Department of State. 13 May 1946. FRUS 1946 V. 159, 161- 3; Coppock to Wilcox. 8 Jan 1946. NARA 501.BD Refugees/1-846). The second was that there was no need to preserve the IGCR in order to prevent a major international debate - a strong enough majority in favour of non-repatriation of refugees existed to block the Soviet Union and its allies. The British felt that such majorities were sustainable well into the future. (Foreign Office message to the Secretary of State. Enclosure to Makins to Wood, 20 May 1946. FRUS 1946 V. 165; Makins to Rendel, 14 January 1946. PRO FO371 57700/WR193/6/48). The League was also seen as a potential precedent. (Note by MacKillop 22 January 1946. PRO FO371 57700/WR193/6/48)

(Economic and Social) meeting of the General Assembly in London in January 1946. (Holborn 1956: 29)³⁴¹ The British, however, failed to secure American support for their position. In particular, the Americans felt that the British were being short sighted, and wanted “to put the refugee work directly under ECOSOC mainly in order to shift part of the financial burden to other countries.”³⁴² The State Department accepted that, with British opposition, the IGCR could not continue. They therefore proposed to instead create a new agency within the UN.³⁴³

Great Britain, too, moved towards a more conciliatory position, fearful that a failure of negotiations at this point would block any form of multilateral solution, and would instead require them to reach a bilateral agreement with the US to handle the situation in Germany and Austria, even though “an Anglo-American outing would be unable to undertake half the duties... required of a refugee agency.”³⁴⁴ They also realized that they lacked the support within the UN to push the issue, especially after the American compromise motion.³⁴⁵

³⁴¹ “Paper on refugees for UNO assembly” Foreign Office Minute (Mr. Mackillip) 4 Jan 1946. PRO FO 371 57700/WR67/648. This move was without prior consultation with the Americans. Within days of the meeting happening, they were having “difficulty in getting our point of view accepted by the representatives of the State Department.” Note by George Rendel, 3 January 1946. PRO FO 371/WR 180/6/48.

³⁴² Mr. Coppock to Mr. Wilcox “Refugee Problems”. 8 Jan 1946. NARA 59 501.BD Refugees 1-846

³⁴³ The Americans had a number of concerns with such a model. They did not trust the effectiveness of an agency within the UN, with Acheson suggesting to George Warren, leading the US delegation, that: “you should suggest in your comments or private conversations with other members of the Committee the lack of confidence of this government in the potential effectiveness of a new agency consisting of all the member governments of the United Nations to be created to deal with the problem de novo.” Acting Secretary of State (Acheson) to George Warren, 4 April 1946. NARA RG 59 501.BD Refugees 5-426; No title. Two pages marked “Secret” attached to NARA RG 59 501.BD Refugees/ 5-746. “Refugees” January 1946. PRO FO371 57700/WR136/6/48. 4. They were also concerned that the process to create a new agency would take too long. Gallman to Secretary of State 16 April 1946. NARA RG 59 501.BD Refugees 4-1646.

³⁴⁴ 24 January 1946. PRO FO371 57700/WR293/6/48

³⁴⁵ Note by MacKillop 29 April 1946. PRO FO371 57700/WR1173/6/48; Harriman to the Secretary of State, 7 May 1946. US NARA RG 59 501.BD-Refugees/5-746.

But why the American focus on a specialized agency? Pivotal to how the US viewed the refugee regime was the role that this IO would play. Cronin has argued that while the US was a key founder of the UN, “it viewed it as a deliberative body rather than an operational agency and favoured functional specificity rather than universalism as the organizing concept for the UN’s activities.” (2003: 170) The Americans, as we shall see, made such arguments clearly in the debate around the creation of the IRO, even at the expense of siding with the Soviet Union and the other Eastern bloc countries against the proposals of its allies. The result meant the creation of an organization with a specialized but limited mandate.

6.4.1.2 The American- Soviet divide

The major question of contention around this new agency was whether its focus should be on repatriation or resettlement. This reflected what had become a progressively wider normative difference. The Americans and their Western allies, while prepared to pay lip service to repatriation, were not willing to engage in forced repatriation. For them, the focus of this new International Refugee Organization would be resettlement, since this was the only long term solution to the camps currently in Germany.

This view was in part informed by fears of potential instability in Europe if a solution was not found. In tabling their proposal for a new agency operating within ECOSOC, the British had argued that the refugee problem “constituted an immense international problem of concern to all members... one which would cost the United Nations dearly if no satisfactory solution could be found.”³⁴⁶ But these views were balanced by humanitarianism.

³⁴⁶ Philip Noel-Baker. Committee 3 Summary Record 28 January 1946. In United Nations Journal No. 18 Supplement No. 3 A/C.3/11. 8 The Netherlands supported the British position, arguing for an all-round solution which would help both refugees as well as other uprooted people which would need three elements: “1) How to define and classify uprooted persons including the refugees; 2) What were the main lines of solution and the resources available; 3) What would be the most appropriate machinery for action.” They also saw this as a humanitarian issue and as an opportunity for the UN to demonstrate the rights and freedoms incorporated in the Charter. Statement by Mr. Sassen (Netherlands), Committee 3 Summary Record 30 January 1946. In *Ibid*.

Thus Eleanor Roosevelt, serving as the US delegate, “emphasized that international action was needed ‘in the interest of humanity and social stability.’” (Holborn 1956: 31) The Americans similarly argued that their goal was to find “ways... in the interest of humanity and social stability to return... thousands of people who have been uprooted from their homes and their countries to a settled way of life.”³⁴⁷

The Soviet Union and its allies, instead, favoured repatriation of all refugees, regardless of whether they wished to be repatriated or not.³⁴⁸ The eastern bloc did not see this as a question of humanitarianism; rather they saw it as simply returning their own citizens. Those who did not wish to return were likely “hostile elements” which “must be silenced” and war criminals and traitors who must be extradited.³⁴⁹ They argued that with the defeat of fascism, “there was now no reason why displaced persons who had fled the Axis countries should not return home...”³⁵⁰ In effect, therefore “no permanent international machinery was necessary, therefore, to organize assistance...” (Holborn 1956: 31)³⁵¹ They

³⁴⁷ Committee 3, 28 Jan 1946. E/REF/1.7 For a detailed discussion of the debates which occurred in ECOSOC and the General Assembly, see (Holborn 1956, Cronin 2003)

³⁴⁸ Unofficially, as they told a member of the American delegation: “we are aware that some displaced persons who are not criminals or traitors will not wish to return to their countries because they do not like their governments. We do not ask that they shall be forced to return... But we cannot agree that they should receive international assistance to resettle or that they should be the concern of an international organization. How could you expect us to contribute towards the support and resettlement of those who are politically opposed to us and wish to work for other countries.” (Penrose 1951: 147)

³⁴⁹ Statement by Mr. Bajan (Ukrainian SSR) Committee 3 Summary Record 1 February 1946. In United Nations Journal No. 12 Supplement No. 3 A/C.3/19.

³⁵⁰ Statement by Ales Bebler, Yugoslav delegate. Committee 3 Summary Record 28 January 1946. In United Nations Journal No. 18 Supplement No. 3 A/C.3/11. 9

³⁵¹ The Soviet Union added to this with a suggestion that general international machinery was not needed, but rather that it could be dealt with through bilateral agreements. Statement by Mr. Arutinian (USSR) Committee 3 Summary Record 4 February 1946. In United Nations Journal No. 22 Supplement No. 3 A/C.3/19. If an IO was necessary, the Soviet Union “stressed that [the] new organization should be temporary, independent and specialized and have a very loose relationship to ECOSOC.” (Harriman to the Secretary of State (Telegram) 7 May 1946. NARA RG 59 501.BD Refugees/ 5-746.) Response to this was swift. The Canadian delegate noted how the two proposals were based on different premises, and to accept that of the Yugoslav delegate would

suggested that the British proposal would deal with those responsible for the conflict, those “who decided to displace themselves of their own free will at the end of the war...”³⁵²

For the Soviet Union, favouring resettlement over repatriation would not only allow war criminals to escape justice (Ginsburgs 1957: 353-4) but would keep “the refugees to a joyless life far from their homeland, in circumstances of all sorts of discrimination” as well as open to merciless economic exploitation.³⁵³ In addition, however, the Soviet Union offered a clear normative challenge by seeking to redefine the ties between citizen and state. The Soviets felt “the tie between a state and its citizens was an exclusive one, and individuals could not simply ‘opt out’ and choose a new nationality.” The West’s proposals were “at best an affront to state sovereignty and at worst a deliberate attempt to undermine the authority of the state within the refugees’ countries of origin.” (Cronin 2003: 168) By contrast, the Western states continued to look “upon the rights of the individual as paramount.” (Ristelhueber 1951: 180) Thus Roosevelt argued in favour of the right of the individual to free choice, while Vishinsky, the Soviet delegate, argued of the paramount authority of the state over its nationals, even those outside of the state’s borders. (Holborn 1975: 28)

The Soviets also increasingly felt that France, Great Britain and the United States had violated the provisions of their wartime repatriation agreements and that while “the displaced persons and refugees of Soviet citizenship desire to return to their homeland, [they] cannot.” (Ginsburgs 1957: 351-52) Thus A. Y. Vishinsky, speaking at the General Assembly

“make impossible any effective work in this field.” (Statement by Mr. Knowles (Canada). Committee 3 Summary Record 28 January 1946. In United Nations Journal No. 19 Supplement No. 3 A/C.3/14.)South Africa felt that the proposal “minimized the complexity of the problem.” In addition, they suggested that a hard core of refugees would remain who could not be repatriated. Statement by Mr. Egeland (South Africa) Committee 3 Summary Record 1 February 1946. In United Nations Journal No. 12 Supplement No. 3 A/C.3/19.

³⁵² A/C.3/12 Speech by the Yugoslav delegate 28 January 1946

³⁵³ Speech by A. A. Gromyko (Soviet Ambassador to the United Nations) to the General Assembly, 15 Dec 1946. (cited in Ginsburgs 1957: 353)

debate on the IRO constitution, argued that: “it is obvious that... the displaced persons in the camps, finding themselves in a positions of having absolutely no legal rights and in extremely difficult material conditions, cannot freely express their desires to return home.” (cited in Ginsburgs 1957: 352)³⁵⁴

Once again, therefore, the United States and Great Britain found their normatively-held position, blocking the forced repatriation of the DPs, being challenged. In this case the “Western countries... considered it necessary to put human considerations above political ones...” (Holborn 1956: 31-32) Yet, they sought to compromise with the Soviet Union. The United States introduced a compromise resolution which, while guaranteeing the rights of refugees to not be returned to their country of origin, did entrust the international community with making every effort to encourage repatriation. (Holborn 1956: 32, Ristelhueber 1951: 180-81)³⁵⁵ In deference to the Soviet Union, they did not directly mention the need for resettlement. (Proudfoot 1957: 399)

Even so, the debate was not over. Negotiations moved on to the structure of the new organization’s constitution, a duty assigned to a Special Committee on Refugees and Displaced Persons.³⁵⁶ The Soviets proved to be crafty negotiators in this forum. As E.F. Penrose, a member of the US delegation, recorded:

³⁵⁴ Ginsburgs notes that this position subsequently changed with the ratification of the 1951 Refugee Convention, from which the Soviet Union abstained. Following that, the Soviet Union then seemed to consider the IRO Constitution “as a codification of the international law on refugees and displaced persons, and the only valid international legal code on the subject. Thus, in 1951 it was still being written... that the cause of the existence of refugees and displaced persons was Fascism.” Since the Soviet Union is not a fascist state, by this logic anyone who flees from it “are not genuine political refugees.” (Ginsburgs 1957: 357-58)

³⁵⁵ Brynes explicitly acknowledged that the United States’ position adopted “acceptable features” of both the Yugoslav and Soviet proposals in order to ensure that it passed in the Committee. Brynes to Consular Officers, 14 February 1946. Reprinted in *FRUS* 1946 V 135-136; Resolution adopted by the General Assembly on 12 February 1946 (Doc A/45) (The full text can be found in Holborn 1956: 588-89)

³⁵⁶ This Committee did seek to broker an agreement acceptable to all sides and included both Western and Eastern countries. There were substantial efforts to compromise, (Marrus 2002: 341) with the British delegation

It was difficult to defeat once and for all a specific proposal that seemed to endanger the rights of refugees. No sooner had one proposal been disposed of than another was put forward on a different part of the agenda which, if it did not reopen all the dangers of the first, threatened partially to undermine the decision already reached.” (1951: 152)³⁵⁷

The IRO reflected these divisions while trying to assist both refugees and DPs.³⁵⁸

This led to an extremely convoluted definition of who the organization assisted, including some individual and some group-based definitions as well as strict exclusions. Thus, refugees had to be outside of their own country and either had been victims of the Nazi or Fascist regimes; Spanish Republicans; or people considered refugees prior to World War II for reasons of race, religion, nationality, or political opinion. People of Jewish origin or foreigners or stateless persons who had been victims of Nazi persecution and who had been detained in or forced to flee and subsequently returned to those countries were also considered to be refugees, provided they had not become firmly resettled. Displaced Persons included people both within and outside of their own country. Here, the main difference was that DPs who had not been individually persecuted, but rather had been compelled to undertake forced labour or had been deported for racial, religious or political reasons, were treated as a separate category.

Both forms of status were not automatic, and were granted only by the IRO if the DPs could not be repatriated or had expressed valid objections against being returned. Even so, while this was a very complicated definition, it did permit persons to refuse to return on the

actually being specifically ordered by Cabinet to take “special care... not to damage relations with other United Nations by pressing views too hard or too strongly.” “Refugee Question.” Memo by MacKillop. 30 April 1946. In PRO FO371 57706/ 6/48.2

³⁵⁷ United Nations, Report of the Special Committee on Refugees and Displaced Persons. E/REF/ 75. 29

³⁵⁸ For a detailed discussion of the negotiations, see Report of the Special Committee on Refugees and Displaced Persons. E/REF/ 75

basis of persecution or fear of persecution because of race, religion, nationality or political opinion, provided that these were not in conflict with the principles of the United Nations.³⁵⁹

As Marrus notes, by considering the individual's reasonable expectations of persecution to play a role, "the IRO foreshadowed the definition of refugees adopted in 1950." (2002: 342, see also Sadruddin 1976: 5)³⁶⁰ Thus, like the IGCR before it, the IRO was able to accord legal and political protection to the DPs and refugees under its mandate. (Saloman 1991: 53)³⁶¹ Even so, while expansive, the valid objections criterion was constrained in that it applied only to specified categories of people. In addition, refugees and DPs could be excluded from protection due to one of the definitions cessation clauses, which included:

refugees returning to their country of origin, acquiring a new nationality, becoming firmly established, unreasonably refusing to accept IRO repatriation or resettlement proposals, failing to make a substantial effort towards earning a living when able to do so or otherwise exploiting the IRO...(Hathaway 1984: 374-76)³⁶²

The definition was both complex and unwieldy. Yet by mid-1947, as Hathaway notes, it "was the only effective international standard" as the IRO took over the responsibilities of the UNRRA, the IGCR, and indirectly the League HCR. (1984: 376)

³⁵⁹ Constitution for the International Refugee Organization, Annex 1, Part I, Section A-C. Reprinted in International Organization, Vol. 1, No. 3 (Sep 1947).

³⁶⁰ These definitional issues had a direct effect on the DPs and refugees in the camps as well. Soviet citizens concerned that they might be repatriated were quick to assume new national identities, either as members of the Baltic states or other Eastern European countries or even rekindling the 'stateless' status of the interwar period. Thus in July 1948, the IRO officially found 1452 Soviet DPs in its camp. Guesstimates among IRO officials, however, ranged as high as one million Soviet DPs. (Fischer 1949: 8)

³⁶¹ While this was provided for in the IRO Constitution, Weis notes that nowhere was a precise definition of such activities provided. In the Statute creating the Office of the UNHCR, the term used instead was "international protection" and a more comprehensive definition of activities was provided. (Weis 1954: 211)

³⁶² An additional group who were excluded were the Volksdeutsch, all ethnic Germans who had been dislocated due to population transfers. They instead became the responsibility of the German and Austrian authorities. (Stoessinger 1956: 87)

There was also agreement that the focus of the organizations would be repatriation.

The IRO's mandate would be to:

- a) To facilitate the return to their countries of origin of those persons who desire to return;
- b) To facilitate the re-establishment in the reception countries, whether temporary or permanent, of non-repatriable persons or families, and, subject to certain reservations, to facilitate the carrying out of schemes for group settlement in these countries.³⁶³

In addition, in order to ensure that the efforts to repatriate “the refugees was speeded up and to facilitate the participation of countries reluctant to make prolonged financial sacrifices” a deadline of 30 June 1950 was imposed on its mandate. (Ristelhueber 1951: 220) The IRO was also limited in that it provided protection only to those who were refugees and DPs prior to its ratification- subsequent flows were not included. (Ginsburgs 1957: 356)³⁶⁴

The negotiations were long, ensuring that, as the Americans had feared, the IRO's constitution was not approved until December 1946. Moreover, even with the various compromises offered by the Western countries, the Soviets refused to join the organization and they, along with Poland, Ukraine, Byelorussia, and Yugoslavia, voted against it. The compromises made to ensure the Eastern bloc's participation, however, crippled the organization. As Rees argues, they “proved disastrous and unavailing. The Constitution as drafted failed to win general consent and the IRO emerged as an organization to which no communist government adhered and which was saddled with a definition of a refugee which was narrow, partial and in specific instances discriminatory and unjust.” (1953: 267) Other writers of the period shared similar views. Ristelhueber argues that as a result of this “a humanitarian organization... took on a political character which was to become even more marked...” (1951: 180) Reston argued that “sometimes the concessions made by the West to

³⁶³ Report of the Special Committee on Refugees and Displaced Persons, 31

³⁶⁴ As we shall see, the IRO did take actions to change the deadline for admissions of new refugees from Eastern Europe, and managed to get around this rule in a few specific cases. (Kulischer 1949: 172)

meet the objections of the Soviet negotiators merely result in the weakening of the international institutions, without winning the support of the Soviet Union. The protracted negotiations over the constitution of the International Refugee Organization were a case in point.” (1947: 102) And Proudfoot posits that, in spite of the efforts to find a compromise, the Soviet Union saw “from the beginning the IRO [as] entirely an instrument of the West, and from first to last the opposition of the Soviet bloc to the IRO was bitter and uncompromising.” (1957: 401)³⁶⁵

6.4.2 The IRO in operation

While the IRO would in principle focus on repatriation, in practice its main method of dealing with the DP and refugee populations of Europe was through resettlement. This change was due primarily to the rise of Cold War tensions. Because of the long negotiations, and coupled with the substantial financial commitment for potential members, many of whom had concerns over the European focus of the organization, (Saloman 1991: 52, Malin 1947: 453-54) it did not come into formal existence until August 1948.³⁶⁶ This was in spite of strong US efforts to get the Constitution ratified, and efforts within the US to receive rapid Senate ratification.³⁶⁷

³⁶⁵ An exception to these views is that of Penrose, who notes that throughout 1946, the Russians had spoken in favour of the need to have an IO which would deal with refugees and DPs. They opposed, however, the idea that it be used for resettlement. Thus he argues that “the Russians meant what they said, that they sincerely desired that a temporary international body should be set up... But their efforts so to restrict its scope were frustrated and they decided later... that they preferred to remain outside it...”(Penrose 1951: 164-65)

³⁶⁶ Since the UNRRA discontinued care of the DP population on 30 June 1947, the Preparatory Commission of the IRO (PCIRO), charged with brining the organization into effective operation as soon as possible, began to run administrative operations during this period. With the creation of the PCIRO, both UNRRA’s responsibilities and those of the IGCR were transferred over. (Vernant 1953: 34)

³⁶⁷ The US Congress had concerns that the IRO would require changes in domestic immigration law and a considerable financial commitment. The Truman administration made two arguments in favour of the organization. The first focused on how resettlement was necessary for both humanitarian and foreign policy reasons. Thus Secretary of State Marshall, in hearings before Congress, argued that to turn the DPs “back to the Germans would be to perpetuate grave tensions and an ever present threat of internal conflict...” They were

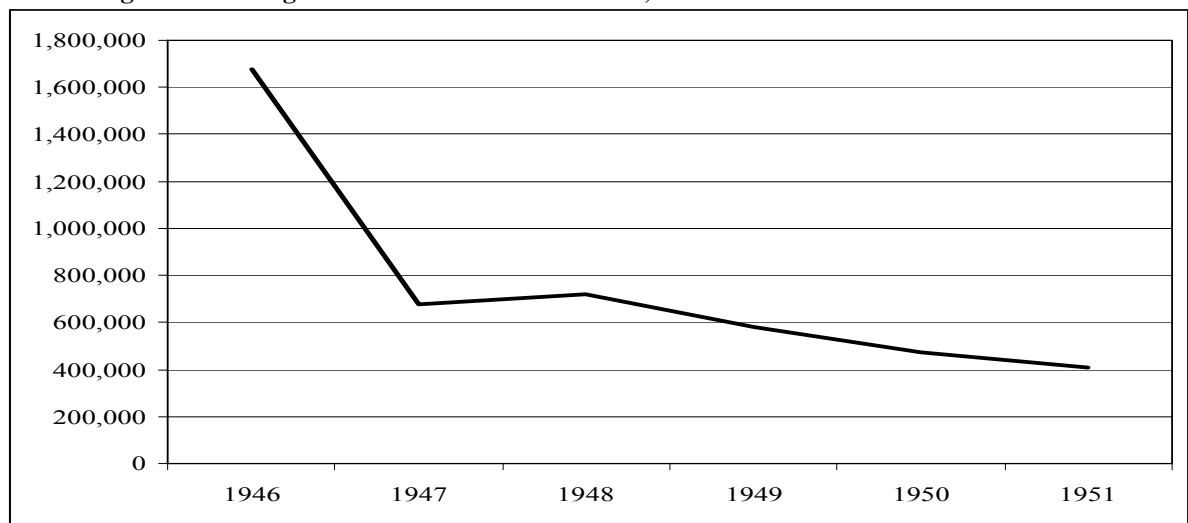
6.4.2.1 Identification and Resettlement

The IRO's problems were two-fold. The first was simply determining who were DPs and refugees within its rather complicated mandate. The IRO Constitution focused heavily on different rules for determining eligibility (Holborn 1956: 49) and much of the determination process was handled by IRO staff in camps on an individual basis. The second problem was how to deal with the remaining refugee population. Its focus was on quickly solving the DP crisis and initially its focus was to encourage repatriation, including offers of clothing and three months of food for those willing to return voluntarily. (Ristelhueber 1951: 181) Given the Cold War climate, however, IRO officials quickly recognized that repatriation would be ineffective in most cases. Consequently, for the rest of its mandate, the IRO focused primarily on resettlement. In that, it was very successful. During its 5 years of operation, over 1 million refugees were resettled (see figure 6.1). This success was for two reasons. The first was a steady pattern of change at the domestic level in the United States, as Congress began to move away from its restrictionist policies with the passing of the Displaced Persons Act in 1948. The second was the creation of an independent state of Israel in the same year.³⁶⁸ Suddenly, a number of countries were open to resettlement. Of the over 1 million resettled, the United States accepted 329,000; Canada, 123,000; Australia, 182,000; and Israel, 132,000.

also quick to argue that the IRO, as a multilateral resettlement effort, would reduce the expenditures the US faced from \$130 million to \$73 million. While the administration had not yet adopted a hard anti-Communist rhetoric, this was raised in the debates. As Loescher and Scanlan note, "the pro-Western bent of the IRO was presented as one of its major assets and, not incidentally, as a way of distinguishing it from UNRAA..." (1986: 18) Thus Congressman Jerry Vorys argued in the House that the Soviet Union had "its own solution for the DP's problem" and Senator Arthur Vandenberg argued that the possibility of Soviet membership was a "fantastic notion" inconsistent with its "constant, persistent, relentless" and "bitter" opposition. (all quotes cited in Loescher and Scanlan 1986: 17-18)

³⁶⁸ The IRO did not resettle refugees to Palestine prior to the creation of Israel, arguing they could not be responsible for fostering movements into an area where there is a state of war or armed truce. (Rucker 1949: 70)

Figure 6.1: Refugees Within the IRO's Mandate, 1946-1950



Note: In 1946, 1,676,000 refugees were transferred from the IGCR and the League of Nations to the IRO.
Sources: Holborn (1956: 202); Vernant (1953: 31, 36); Proudfoot (1957).

Equally important was the structure of the IRO and the resources available to it. For the first time, a refugee agency had access to substantial and sustained resources. During its existence, the IRO spent almost \$430,000,000, with the American contribution to the organization exceeding \$250,000,000. It had a staff of over 2,600 by 1949, and included 39 chartered ships. (Vernant 1953: 33-38, Saloman 1991: 52-53)³⁶⁹ It not only developed more efficient methods of providing basic services to refugees, including food, shelter and medical care, but it also created a resettlement program on a massive scale. As Holborn notes “the success of the IRO was proof that such a machine could be built and made to work through international cooperation.” (1975: 35) Proudfoot similarly lauds the organization, fashioned for only one purpose and “not subordinated to any other authorities.” (1957: 407) Critically, therefore, through the work of the IRO we can begin to see a norm of “collective responsibility” for refugees evolve between and IO and its individual member states (Holborn 1975: 32, see also Cronin 2003: 169)

³⁶⁹ The IRO's staff included about half of the staffs from both the IGCR and the UNRRA, so it began with an experienced and knowledgeable staff. (Stoessinger 1956: 146-47)

The IRO's Director-Generals – all American - also helped with the last, J. Donald Kingsely, hailed as a “brilliant and efficient administrator” for the organization. (Stoessinger 1956: 146) These Director-Generals had significant autonomy, with complete control over the large administrative apparatus and the power to evolve their own policies, control their own personal, and distributed their own supplies and resources. Outside agencies began to rely on the IRO's abilities and expertise. As Proudfoot notes, the zonal authorities in Germany, “far from being in a position to dictate to the IRO, came to depend on it in the hope that its resettlement program might solve the intractable refugee problem.” (1957: 407)

The IRO also continued the legacy created with the League institutions of ensuring protection for refugees once resettled. In particular, the organization worked to ensure that in all resettlement agreements reached with individual countries, refugees were accorded the same labour conditions as national workers as well as according the IRO's general competence to provide protection to the refugees until their status changed. (Weis 1954: 199-200, Jaeger 2001: 732)³⁷⁰

6.4.2.2 The Creation of the Hard Core

Resettlement created a new burden for the IRO. Resettlement countries wanted to be able to pick the refugees they accepted, following immigration criteria, and tended to ignore those who might become charges or were sick, disabled, infirm, and too old to work. (Stoessinger 1956: 139-40) Throughout its mandate, the IRO worked to alter what it saw as a “ruinous policy of ‘skimming the cream’ in selecting immigrants from among the refugees and displaced persons. The IRO insisted that this policy was a denial of its “humanitarian aims and an economic heresy...” (Proudfoot 1957: 429) In this sense, the IRO was

³⁷⁰ For a detailed discussions of these agreements, see John Alexander, Officer in Charge of Refugee Questions, IRO to M. Langier, Assistant Secretary-General, Department of Social Affairs “International Protection of Refugees” 26 September 1950. UNHCR Archives HCR/6/1/GEN-Protection General-AA.

successful because it did not challenge state sovereignty: states could pick and choose which immigrants they wanted thereby, as Hans and Suhrke have suggested, creating “a degree of coincidence between the needs of the refugees and the interests of the host countries.” Importantly, too, the refugees were generally European. Shared core values as well as cultural and racial commonalities all helped to facilitate the resettlement process. Economic conditions and a broad sense of obligation in the West for the victims of the war also helped. (Hans and Suhrke 1997: 86-7, Kushner and Knox 1999: 217) This exposed a clear flaw in the organizing principles of the IRO: support for sovereignty meant that no real solution to the refugee problem could be reached. There would always be a refugee ‘hard core.’

Patrick Malin, the former Vice-President of the IGCR, condemned these practices in 1947. He pointed to the hypocrisy that while the governing authorities of occupied areas “may be eager enough to claim international support in shouldering the costly burdens of interim maintenance or final resettlement... they are in many instances overridingly reluctant to expose themselves to external interference in their sovereign rights.” (1947: 444) He argued that:

no country of potential reception wants to surrender the smallest part of its control over even the initial decision to admit or exclude any applicant for immigration, and the fear that membership in an international refugee organization will be interpreted as a moral obligation to receive refugees as immigrants operates to make it suspect. (Malin 1947: 444-45)

The IRO did try to convince states to alter these policies. In 1948, the Director-General had proposed a ‘fair share plan’ by which each country receiving refugees who were able to work also agreed to accept a quota of those who were physically handicapped, sick, and aged. The plan failed for two reasons, highlighting continued tensions within the refugee regime. The first was that governments were unwilling to alter domestic immigration laws in order to receive them. The second was how the IRO proposed the plan- that each country

would accept a certain share of the hard core. Governments were unwilling to accept a quota that would be determined through majority vote within the IRO council. (Holborn 1956: 483) Thus, the ability of the IRO to independently alter policies was distinctly limited.

By 1949, the IRO began to focus instead on providing added resources to the countries that would accept the hard core refugees. Sir Arthur Rucker, the Deputy Director-General noted that “everything depends on whether the countries will in fact take refugees in sufficient generous form to leave us only with a small ‘hard core.’” (1949: 70) Similarly, William Tuck, the Director General, argued before the IRO’s General Council that the Organization had a responsibility to find a solution to the problem of the hard core prior to the time it ceased operating. (Holborn 1956: 481)

The next year, the IRO offered subsidies to countries which accepted individual refugees, ranging from \$500 for the elderly to \$1000 for those with tuberculosis. (Holborn 1956: 486-87) In addition, the IRO began financing the establishment and maintenance of old-age homes, hospitals, and other institutions in Germany to provide a permanent home for these refugees. (Holborn 1956: 491) Even with these efforts, the IRO accepted that there would continue to be a refugee population in Europe, even as its deadline was extended successively to 28 February 1952. What finally ended the organization was the same government that had helped to create it - the United States.

6.4.2.3 American Resistance to the Organization

Publicly, the United States argued that the organization simply cost too much money. As George Warren argued in 1951, “the IRO has cost my Government a tremendous sum of money. The organization was not established to function indefinitely and the time has now

come to attempt solutions to the problem through bilateral negotiations.”³⁷¹ Part of the problem was that funding was not balanced among UN members. When the IRO had been created it was expected that the majority of UN member states would contribute to it. By 1952, however, only 18 countries had contributed to it (see table 6.1). By this stage, those countries “were no longer willing to contribute to a costly and large-scale operational agency which should be the responsibility of the entire membership of the UN.” (Holborn 1975: 37)

But the larger issue was that the Americans had misgivings about how effective the IRO would be in dealing with refugees as a Cold War issue. In 1948, the then-Preparatory Commission for the IRO’s (PCIRO) response to the first major Czechoslovakian refugee flows was considered problematic by US authorities. In a memorandum to the British, they argued that the reception provided for the refugees:

Falls far short of a reasonable minimum standard of care for those who have so valiantly resisted the political forces to which their country eventually succumbed. The public interest in these refugees is extensive and growing, and it appears inconsistent with the publicly states policies of the democratic countries represented...³⁷²

At the same time, they argued that the resources of the PCIRO were enough for the care, maintenance and resettlement of these refugees. In particular, the Americans were concerned that the poor conditions in the camps were “discrediting [the] US among non-Communist elements in Czecho. (Sic) If amnesty is followed by voluntary return to Czecho of any considerable number of refugees as result of inadequate conditions, US position would suffer in countries where efforts being made to encourage resistance to Communism.”³⁷³

³⁷¹ IRO Doc. GC/257/Rev.1, 8 Nov 1951. (cited in Stoessinger 1956: 154) He was, however, willing to concede that the refugee situation did remain “so grave in terms of human suffering that they call for urgent consideration by the United Nations.” UN Doc A/1948, 10 Nov 1951.(cited in Stoessinger 1956: 154)

³⁷² Marshall to Robert Murphy, US Political Adviser for Germany. 25 June 1948. NARA 501.MA/6-1148.

³⁷³ Marshall to Robert Murphy, US Political Adviser for Germany. 25 June 1948. NARA 501.MA/6-1148. While the IRO was supposed to deal only with refugees dating from before 21 April 1947, this principle was abrogated by the United States for the Czechoslovakian refugees. See W. Hallam Tuck, Executive Secretary,

Table 6.1 Contributions made by member governments to the IRO

| Member Governments | Accumulated Totals, 1 July 1947 to 7 Feb 1952, Contributions Due and Received |
|------------------------------|---|
| Australia | \$9,194,156 |
| Belgium | \$5,262,255 |
| Canada | \$18,164,167 |
| China | \$13,591,513 |
| Denmark | \$2,491,948 |
| Dominican Republic | \$209,826 |
| France | \$21,652,462 |
| Guatemala | \$209,926 |
| Iceland | \$75,272 |
| Italy | \$8,290,709 |
| Luxembourg | \$147,002 |
| Netherlands | \$4,766,750 |
| New Zealand | \$2,299,784 |
| Norway | \$2,299,784 |
| Switzerland | \$4,033,698 |
| United Kingdom | \$76,218,086 |
| United States | \$237,116,355 |
| Total Contributions Due | \$406,867,295 |
| Unpaid Contributions | \$8,270,493 |
| Contributions from UNRRA | \$15,140,541 |
| Contributions from IGCR | \$517,326 |
| Total Contributions Received | \$414,254,669 |

Source: (Holborn 1956: 122-3)

The American abandonment of the IRO also reflected a deeper change in US foreign policy. Their goal by 1950 was to limit their activities within the UN, and to ensure that future action for refugees was handled outside of it. The United States did little to create the UNHCR. Rather, they saw the existing hard core to instead be the responsibility of the Western European governments, “now reluctant upon the termination of IRO to resume unilateral care for these persons and hold the view that they should continue to be provided for out of international assistance funds.”³⁷⁴ The US, by contrast, held the opposite view:

PCIRO to General Lucius Clay, Commanding General, EUCOM, 13 September 1948. NARA 501.MA/9-2948
The reason for limiting the change to only this one group was due to the burden the refugees placed on the German economy, and, indirectly, the financial obligation placed on the United States. Clay to Tuck, 28 September 1948. US NARA 501.MA/9-2948

³⁷⁴ “Refugees and Stateless Persons.” FRUS 1950 Vol. II. 539-40

The burden of caring for indigents among the residual refugees should not fall so heavily on any one country as to justify international assistance funds. Congress has made it clear that it does not propose to appropriate funds annually hereafter to cover United States contributions to such a fund.³⁷⁵

They were prepared to engage in international cooperation, but it must be cooperation led by the United States. In planning for European economic recovery, Will Clayton, the Assistant Secretary of State, noted, that “we must avoid getting into another UNRRA. The United States must run this show.” (Clayton, cited in Acheson 1969: 231) This view extended to refugees. Rather than supporting the UNHCR, they instead created two separate programs over which they could exercise control and which would be focused on Communist refugees; “whenever possible, the US sought to find forums outside the UN for such activities and to restrict the role of the UN in handling such problems.” (Holborn 1975: 59)³⁷⁶

The first of these was the United States Escapee Program, launched in 1952. The goals of the program were to:

Establish better facilities of reception for escapees in the countries of first asylum; to supplement the care and maintenance already provided by the governments... and to assist the new escapees either to emigrate abroad or to establish themselves in the free European countries. (Warren 1953: 84, see also Rees 1953: 295-7)

The first substantial contribution was authorized by President Truman in March 1952, for four million dollars. While resettlement may have been the priority, it was clearly understood that the main objective was political, to “facilitate the arrival in the free world for

³⁷⁵ “Refugees and Stateless Persons.” FRUS 1950 Vol. II. 539-40

³⁷⁶ Other authors have also pointed to this. Cronin notes that “American support for the refugee regime varied with its wavering support for multilateralism and international organization, while West European and Latin American support remained relatively strong and constant...” (Cronin 2003: 169) Salomon notes that the US focused increasingly on strengthening bilateral and regional ties with its allies through such cooperative initiatives as the Marshall Plan. The United States, he suggests “did not want to continue large-scale financial contributions through a multilateral organization.” (Saloman 1991)

refugees from Communist countries.” (Saloman 1991: 232, Vernant 1953: 53)³⁷⁷ Even so, as Elfan Rees noted in 1957, the program’s declared motives for establishment “are unexceptionable, its record of service is outstanding, but why it is unilateral in a day of international organization remains a mystery.” (Rees 1957: 225)

The other program created by the Americans, in part as a reaction to the UNHCR being perceived as too European “to be entirely trusted with US strategic interests in refugee movements,” (Newland 512) was the Intergovernmental Committee on Migration (ICEM). The ICEM was established in 1951 following a conference organized by the US, and its main goal was to facilitate the emigration of people, including refugees, from countries believed to have excess population. The ICEM gained one immediate advantage - the fleet of ships which had been controlled by the IRO were transferred over to them to assist with broader migration. (Vernant 1953: 46-7, Robbins 1956: 329-30) The ICEM was designed to be an operational organization,³⁷⁸ helping states to manage and structure their migration flows. As Loescher notes, “the United States promoted the agency as the successor to the IRO and ensured that the ICEM was financed to the full extent of its requirements... The ICEM was established as a multilateral institution outside of the United Nations, with an American

³⁷⁷ As a 1957 Statement of Policy on Defectors, Escapees and Refugees from the National Security Council noted, the US had a specific interest in helping these refugees: “Quite apart from humanitarian considerations, US assistance to persons who have fled Communist-dominated areas contributes to the achievement of US national security objectives both toward Communist-dominated areas and the Free World. Such assistance demonstrates US concern for the captive peoples of Eastern Europe and sustains the defector program.” While the report argued that the US should not continue to encourage defections, because Communist control “can be more effectively weakened by continuing disaffection of nationals within those countries,” this was balanced against the fact that “the United States has always recognized and should take all feasible action to support the principle of asylum for those fleeing from persecution.” United States National Security Council “US Policy on Defectors, Escapees and Refugees from Communist Areas. 8 Mar 1957. 2-3

³⁷⁸ In setting up the organization, the American government estimated that over-all costs would be 34,000,000. They agreed to immediately contribute \$10,000,000. Other member states were expected to contribute about \$3,000,000, while contributions to the operating fund would be voluntary. Warren to Hickerson, 14 Nov 1951. US NARA 398.18-BR/11-1451; Warren “Confidential Report on the Conference on Migration Held at Brussels.” US NARA 398.18-BR/1-1752.

Director, and a board composed entirely of democratic nations friendly to the United States.” (2001: 59)³⁷⁹ Consequently, the United States increasingly focused on organizations over which it would have substantial influence and ideally control. Organizations within the UN, if supported, should be granted only limited mandates. This view would be framed substantially within the negotiations leading to the creation of the UNHCR.

6.5 Conclusions

The post-war regime, consequently, embodied several important normative understandings. The first two norms - that refugees required international cooperation and internationally-entrenched legal rights- were legacies of the interwar period. Even during the Second World War, a time when refugee admissions and rescue policies in both Great Britain and the United States were severely truncated by security concerns and the war effort, these states continued to provide a basic level of protection and the IGCR continued to function. While both states had little interest in refugees during this period, they continued to engage in cooperation due to substantial public concerns. Thus, while much of both states’ actions were merely rhetorical lip service, they did lay a foundation for the post-war era.

The next norm within the regime, the obligation to not refoule legitimate refugees, emerged out of the United States’ experience with the forced repatriation of millions of Soviet citizens. The agreement reached at Yalta which authorized such practices led to substantial and sustained resistance from the public and from those within government at the highest levels. Solutions to the post-war refugee and DP problem, consequently, emerged within a distinctly limited policy environment. Actions such as returning the refugees to the East, or even simply closing the camps in Germany, were no longer accepted as legitimate by

³⁷⁹ Its membership in 1952 included Australia, Austria, Belgium, Brazil, Canada, Chile, Denmark, the Federal Republic of Germany, France, Greece, Israel, Italy, Luxembourg, the Netherlands, Norway, Paraguay, Sweden, Switzerland, the United States, and Venezuela. Its budget for in 1952 was \$36,755,475. (Vernant 1953: 47)

the American government, particularly President Truman and Secretary of State Acheson. This caused them to argue not only that international cooperation was necessary but that a new IO, the IRO, needed to be created to ensure the repatriation and the resettlement of these refugees. The negotiations around this organization are critical. They show that while the US sought to compromise with the Soviet Union, they refused to surrender on this critical point, suggesting the importance that the American government attributed to this new norm. While it resulted in a weaker IO with a limited mandate, it also entrenched a norm which had been ignored, even after the creation of the 1933 and 1938 Conventions, and which would be re-ratified with the 1951 Convention.

Assistance was a more complicated matter. The Americans were willing, first with the IGCR and the UNRRA and then with the IRO, to accept a substantial part of the financial burden for assisting and resettling refugees even while other Allies, notably the British, backed away from such undertakings. As the United States' policies shifted away from the United Nations, however, so did their support for IOs within its purview. They allowed the IRO to die and, as we shall see in the next chapter, provided little support to the UNHCR.

At this stage, we begin to see the emergence of a coherent regime, based in states accepting a collective responsibility for refugees, enshrined in international organizations, the provision of assistance, and doctrines of non-refoulement. Critical to this process remained a number of fundamental institutions: multilateralism formed the basis for international cooperation; international law provided the mechanism to ensure refugee protection. These institutions provided the prism through which states saw the refugee problem, and contributed greatly to the institutional solution adopted.

Yet, at this stage the regime was incomplete. Most of the understandings embodied within it were simply that- understandings with no international legal significance. In addition, the institutional structures created were significantly supported by the United States. As their focus moved away from the UN, it was unclear if the regime would continue and how new refugees would be protected and there remained the issue of the Second World War refugee hard core. The IRO had been very successful, but it had been unable to significantly alter states' preferences towards resettlement. A realist perspective would suggest that the regime would be transformed or replaced as hegemonic interest wanted. A neo-liberal perspective would suggest that the regime might continue if its benefits continued to outweigh its costs. As we will see in the next chapter, European and American views were divided on how to proceed. The Americans succeeded in creating a weak successor organization – the UNHCR – and yet the organization prospered in spite of a weak mandate due to its independent sources of moral and expert authority. Thus, the UNHCR would succeed in redefining how states perceived the refugee problem, expanding its own legal and operational role as well as providing a global basis to the international refugee regime.

Chapter 7: The Norm Entrepreneurship of UNHCR

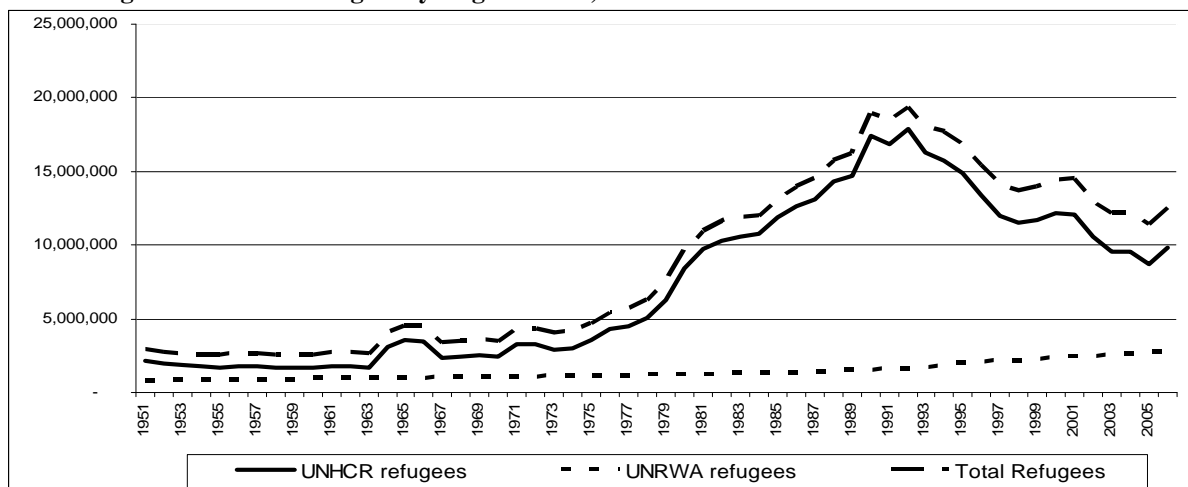
7.1 Introduction

In the immediate postwar period (1946-1950), American leadership helped to create a new refugee regime, centred on protecting refugees displaced in Europe by the Second World War. These efforts were not entirely altruistic: strategic interests, in particular the concern that large number of refugees could destabilize postwar Europe, played a role. But these efforts were also framed within the broad scope of humanitarianism. President Truman believed that the United States needed to help build a functioning institutional architecture to protect refugees at the international level. As Cold War tensions mounted, the American government abandoned this position, bringing about the end of the IRO, and focused instead on organizations such as the ICEM and the Escapee Program over which they could have control. Yet this position was unsustainable. Western European states had accepted that refugee protection needed to be provided by an international organization, the United Nations High Commissioner for Refugees (UNHCR).

This chapter examines how international and domestic normative understandings shaped the negotiations surrounding the creation of the UNHCR and the 1951 Refugee Convention. These negotiations led to the creation a weak organization with a limited mandate. In the second section, I examine how the UNHCR successfully assumed the role of norm entrepreneur. The organization succeeded in dramatically expanding its own role by demonstrating that it could be an effective assistance organization within the politics of the Cold War. In so doing, it created its own sources of authority as an expert and moral actor. Equally important, it became a legitimate actor in international society by ensuring that its procedures were proper and that its goals were consistent with those of the global

community. Finally, as it reacted to new refugee exoduses during the 1950s and 1960s, it also gained legitimacy through its effective performance. With these independent forms of authority and legitimacy, the UNHCR successfully expanded the normative scope of the refugee regime by arguing in favour of a universal, rather than geographically limited, view of refugees and by creating a comprehensive assistance mechanism. The UNHCR moved in this direction because of a change in the nature of refugees: increasingly, they came not from the Europe but from the developing world as decolonization led to an expansion of international society. More recently, these new flows have resulted in a magnitudinal shift in the number of refugees (see Figure 7.1 below) and have created a crisis within the regime, as the UNHCR has been forced to compromise its core protection mandate in an effort to accommodate the shifting interests of its state contributors. At the same time, the UNHCR's authority as a moral and expert actor has been questioned by states, as has its ability to effectively meet its goals and to accommodate the interests of state actors within the regime. Thus, the last section of this chapter focuses on how the UNHCR has attempted, and too often failed, to deal with these new types of refugees and refugee flows created by this shift.

Figure 7.1: Total Refugees by Organization, 1951-2006



Sources: UNHCR, <http://www.unhcr.org/statistics/>; UN Relief Works Agency (UNRWA) <http://www.un.org/unrwa/publications/index.html>

7.2 Decolonization and Changes in Global Refugee Movements

With decolonization, a major shift occurred in the basic rules of international society: the sovereign equality of states became a key principle of popular sovereignty. Prior to this, states were recognized based both on their domestic legitimacy (their treatment of their own citizens) and international legitimacy.³⁸⁰ It was this understanding of statehood that was codified in the Montevideo Convention of 1933.³⁸¹ Colonies lay outside of this system, and formed a separate international institution designed to preserve order among the imperial powers at the expense of individual rights. (see Holsti 2004: 240-3)³⁸² Decolonization granted independence for the first time to the majority of the world's peoples. But its dark side was to introduce many states incapable of or unwilling to support their own populations. (Jackson 1990: 8, Clapham 1996)

From the 1960s onwards, these states became the major sources of refugees. Like Europe of the previous century, people were fleeing state based persecution. But they also fled persecution by non-state actors, such as guerrilla movements, or situations of generalized violence, civil wars, regime change, or state failure. (see Dowty and Loescher 1996, Weiner 1996, Lischer 2005, Salehyan and Gleditsch 2006) Borders between these fragile states became increasingly porous, and rebel movements sought sanctuary in neighbouring states. (Adamson 2006, Lischer 2005, Loescher 2001)

³⁸⁰ As Hedley Bull argued, internal legitimacy or sovereignty meant “supremacy over all other authorities within that territory and population,” (Bull, 1977: 7) and external sovereignty, which referred to independence of outside authorities. (Bull, 1977:8)

³⁸¹ This included four criteria for state 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...” (Grant 1999: 5-6)

³⁸² For a stark account of life in Colonial Africa, see (Hochschild 1998)

These movements have triggered a two-fold crisis for the UNHCR, for states, and for the refugee regime. On one hand, states in the developed world have shifted their policy orientations away from welcoming refugees from the Communist world (Hathaway 1997: xix, see also Hans and Suhrke 1997: 86) to preventing flows of refugees and illegal migrants from entering their territories. As Helton noted, the response has evolved 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.” (2002: 65-66) This change will be discussed in the next chapter.

On the other hand, there has been the shift in how states in the developing world respond to these new flows. In the 1960s and 1970s, as Jeff Crisp has noted, these refugees were products of independence struggles and wars of liberation and were welcomed by neighbouring states that had shared the same experience. (2003: 77) Many of the countries in the developing world accepted in refugees out of a sense of compassion or responsibility. (Helton 2002: 13, Hans and Suhrke 1997: 103)

Since the end of the Cold War, however, the length of time that refugees spend in host states has dramatically increased.³⁸³ The costs associated with these refugees fall disproportionately on states least able to afford it (Dowty and Loescher 1996: 47) and can exacerbate fears of difference, cultural confrontations and security threats for host governments. (UNHCR 2006: 31, Helton 2002: 13, Hans and Suhrke 1997: 103)

³⁸³ In 1993, there were 27 protracted refugee situations, with a total population of 7.9 million refugees. By 2003, there were 38 cases with a total refugee population of 6.2 million. This is in spite of total refugee numbers falling from 16.3 million at the end of 1993 to 9.6 million at the end of 2003. Most alarming, the average of major refugee situations has steadily increased from nine years in 1993 to 17 years in 2003. (Loescher and Milner 2005: 15-16, see also Smith 2004: 38) In addition, in camp environments, refugees often find their rights under the Refugee Convention restricted, notably freedom of movement. Unfortunately, the UNHCR often feels unable to advocate on behalf of these refugees: “If a state agrees to admit and not to refoule a group of refugees, but refuses to grant that population freedom of movement, then UNHCR has little choice but to accept such an arrangement.” (Obi and Crisp 2002: 3) See (Harrell-Bond and Verdirame 2005: 7-8, Orchard 2006)

Critical to these problems is a lack of donor involvement, coupled with an ongoing belief that the UNHCR can fill in the gaps. As Loescher and Milner note:

Failure to engage with the host country reinforces the perception of refugees as a burden and a security concern, which leads to encampment and a lack of local solutions. As a result of these failures, humanitarian agencies, such as UNHCR, are left to compensate for the inaction or failures of the major powers and the peace and security organs of the UN system. (2005: 19)

Faced with these problems, governments in the developing world have increasingly rejected asylum seekers at borders or forcibly removed them to countries where their safety and protection cannot be assured.³⁸⁴ But this response is driven by a feeling of disconnect between the governments of the developing and of the developed worlds. As the former Indian permanent representative argued to the 48th session of the UNHCR executive committee:

...it has to be recognized that refugees and mass movements are first and foremost a ‘developing country’ problem and that the biggest ‘donors’ are in reality developing countries who put at risk their fragile environments, economy and society to provide refuge to millions. An international system which does not address these concerns adequately cannot be sustained in the long run... (cited in Gorlick 2003: 81)

Thus, the UNHCR’s role has been forced to change from one of norm entrepreneurship and leadership to doing “the best in difficult circumstances and to implement the least bad options - and not to uphold universal principles.” (Loescher and Milner 2003: 13) Increasingly, pragmatic coping strategies undertaken by the organization have had the long-term effect of undermining the international refugee regime. While its first thirty years were a record of remarkable success, since the 1980s the UNHCR has increasingly seen its independence, mandate, and authority compromised in ways that have challenged the basic norms of this regime.

³⁸⁴ Incidents include Pakistan and Iran closing their borders to Afghan refugees in 2001; countries in the Great Lakes region of Africa forcibly returning refugees to the Democratic Republic of the Congo in 2002; Indonesian refugees from Aceh being returned by Malaysia on the grounds that they were illegal migrants in 2003; and South American countries seeking to remove Colombian refugees, also in 2003. (UNHCR 2006: 33) More recently, as the Iraqi refugee crisis has grown larger, Syria and then Jordan have closed their borders to refugees, though neither country is a signatory to the Refugee Convention. (Harper 2007, Colville 2007)

7.3 The Creation of the UNHCR

The UNHCR's creation was not foreordained. In the late 1940s, while the IRO was still in existence, the United Nations and the Commission on Human Rights began to consider the issue of refugees in relation to broader issues of human rights and international law. (Holborn 1975: 36) While the IRO constitution was internationally-legally authoritative, it was limited in its application, in its mandate, and in connection with the broader issues of international law as they applied to refugees. It had also not replaced the pre-war international conventions. Consequently, refugees were legally protected by a diverse mixture of interwar Conventions (particularly those of 1933 and 1938), which continued to have few ratifications, and the London Convention of 1946 which provided them with access to travel documents. This mixture of different documents, however, meant there was no clear understanding of who qualified as a refugee, and what refugee rights were.

The question of refugees' legal rights was directly related to an additional concern within the UN: how to deal with large number of stateless refugees.³⁸⁵ In 1948, the ECOSOC directed the Secretary-General to undertake a study on statelessness to find a solution. (Robinson 1955: 1-2)³⁸⁶ The report's main finding was that existing protections could be

³⁸⁵ Stateless refugees first became a problem with the Russian Revolution and the Soviet decision to strip many of its refugee citizens of their citizenship. However, throughout the interwar period they were treated similarly to refugees. States agreed to create two Conventions: one for refugees, and one for the stateless (Ad Hoc Committee on Statelessness and Related Problems, 5th Meeting, 18 Jan 1950. E/AC.32/SR.5 (Holborn 1975: 75)) which occurred in 1954 as the Convention relating to the Status of Stateless Persons. Stateless persons were defined as "a person who is not considered as a national by any State under the operation of its law." (Article 1) For details on the negotiations, see Robinson (1955). A subsequent Convention on the Reduction of Statelessness (1961) came into force in 1975 and obligated states to grant nationality to any person born in its territory who would otherwise be stateless, however only 25 states have ratified it. (UNHCHR 2002) Currently, the UNHCR is assigned by the General Assembly to prevent and reduce the number of stateless and to ensure their protection. In 2006, the UNHCR estimated that there were 15 million stateless persons. (2007: 14)

³⁸⁶ The report included both *de facto* stateless refugees, unable to enjoy the protection of their own governments, and *de jure* stateless refugees, those who had lost their own nationality. (United Nations 1949: 8-9) Gilbert Jaeger has argued that the study is "a key document in the modern history of international protection of refugees" and that the main elements of the 1951 Convention are embodied in it. (Jaeger 2001: 733-34)

improved by increasing the ratifications of existing instruments, including the Conventions of 1933 and 1938. In the long run, however, it argued:

the necessity of a convention, based on the agreements now in force, determining the legal status of stateless persons...[and] to recognize the necessity of providing at an appropriate time permanent international machinery for ensuring the protection of stateless persons. (United Nations 1949: 73-74)³⁸⁷

There was clear recognition at the time within the UN that a new organization was necessary. J. Donald Kingsley, the IRO Director-General, appealed to the ECOSOC to examine the problem “of future international action on behalf of refugees, since the ‘situation demanded a new organization corresponding to the facts.’” He was concerned about the large number of refugees under the IRO’s mandate who would cease to be protected when it shut down, as well as with new refugees who also needed protection. (Holborn 1975: 38)³⁸⁸ At the same time, officials within the UN Secretariat felt that a Convention would be pointless without an organization to provide refugee protection. As John Peters Humphrey, the Director of the Human Rights Division within the UN, argued:

In fact, experience had shown two things, first that a convention without an ‘international duly authorized watchdog’ looking after its generalization and implementation might soon fall into disuse; two, that the field of intervention by an international agency empowered with the exercise of legal and political protection was infinitely larger than the sector of the field covered by conventional measures.³⁸⁹

³⁸⁷ As UN Secretary-General Trygve Lie noted in a memorandum to the General Assembly supporting the report’s recommendations, coordinated international action was required: “No Government will be willing to take the first step in this direction for fear of being the only one to improve the status of stateless persons, thus causing an influx of them into its territory... Ratification of a convention in which all these provisions find their natural place gives rise to less difficulty... A general convention is a lasting international structure; being open to the accession of States which have not signed it, it encourages governments to associate themselves with the work of their forerunners...” United Nations, Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General, 3 January 1950. E/AC.32/2

³⁸⁸ Similarly, Arthur Rucker, the Deputy Director-General, argued that while governments could not be expected to continue their heavy contributions indefinitely, “provisions had to be made for certain parts of the work to continue notably legal protection...” (Holborn 1975: 39) The voluntary agencies working with the IRO agreed that action was necessary, and in a letter to the UN urged “the continuation of at least those services which are a bounding international responsibility.” (Holborn 1975: 39)

³⁸⁹ “Notes on Meeting with Dr. Humphreys (sic) on Statelessness” 23 April 1948. Paul Weis Archives PW/PR/IRO/5/2 (underlining in the original).

Adding to these concerns were new refugee flows which demonstrated that the assumption by states that the refugee problem would end once the Second World War-era refugees were resettled was incorrect. The largest flow, triggered by the partition of India – which resulted in 600,000 deaths and the displacement of fourteen million people between 1947 and 1951 - did not fall within the IRO's mandate since the movements had not been accompanied by loss of nationality. By 1951 over seven million people remained in camps with few resources and almost no external aid. (Zolberg, et al. 1989: 129-33) Another flow was that of the Palestinians following the creation of the State of Israel in 1948. Once again, the IRO had no mandate to deal with the problem and the General Assembly instead created a separate agency, the UN Relief and Works Agency (UNRWA) for Palestine Refugees in the Near East, to provide assistance.³⁹⁰ The third major source of refugees was the Korean War, which produced almost seven million refugees from North Korea. As in the other cases the IRO was unable to help the refugees. The General Assembly created yet another agency, the United Nations Korean Reconstruction Agency, to provide assistance. (Stoessinger 1956: 159-61, Saloman 1991: 231-2)

In each of these cases, massive refugee flows were occurring outside of Europe, and the IRO was unable to take action either due to lack of resources or mandate. The UN response was ad hoc, establishing individual agencies to handle individual situations and relying considerably on American support. (Loescher 2001: 64) Even in Europe, new flows of refugees continued from the East. By 1951, refugees were entering into West Berlin and West Germany at a rate of 15,000 a month. Once the IRO closed its doors these refugees

³⁹⁰ UNRWA continued to have responsibility for Palestinian refugees after the UNHCR's creation because the Arab states wanted the issue addressed separately. (Aga Khan and Bin Talal 1986: 21)

would no longer receive international assistance, but have to rely on the West German government and various German voluntary organizations. (Stoessinger 1956: 162-3)

Continuing the IRO was not an option because of American opposition.³⁹¹ The UN Secretary-General, Trygve Lie, proposed three alternatives to deal with the impending crisis: 1) the United Nations assumes direct responsibility; 2) establishing a new specialized agency; or 3) creating a new High Commissioner's Office under UN control. (Saloman 1991: 219)³⁹²

7.3.1 Negotiations for a new Institutional Framework

A Study on Statelessness had clearly indicated that a new IO was necessary. The first step in this direction was taken on 3 December 1949, when the General Assembly accepted in principle the need to create an Office of the United Nations High Commissioner for Refugees, which would come into force on 1 January 1951, when the IRO was expected to terminate its activities. The drafting of the new Office's Statute, like that of the IROs' three years earlier, was delegated to the ECOSOC. (Holborn 1975: 65)

Within the UN, the debate surrounding the creation of the UNHCR and a new Convention for the rights of refugees occurred primarily between the United States and the countries of Western Europe. While the Soviet Union and its allies argued against the need for a new IO, their voices were marginalized within the debate due to their unwillingness to

³⁹¹ Following the decision to terminate the organization, the states of the IRO General Council deferred the refugee matter to the United Nations, noting they were "relieved (by June 1950) of the responsibility which will rest upon them until then as members of the organization." (cited in Holborn 1975: 37)

³⁹² The American government thought the proposal, orchestrated by France and Belgium, was done to reiterate "their well known apprehension over: a) being saddled with a hard core when the IRO closed down; and b) possible infiltration into their countries of refugees and DPs from Germany as a result of cutting off care..." Troutman to the Secretary of State, 30 June 1949. NARA 501.MA/6-3049. 2 The US did support referring the matter of future protection of refugees to the ECOSOC "through the medium of a small bureau..." United States Memorandum, Instructions for the United States Delegation to the Fifth Session of the Executive Committee, IRO. 16 June 1949. NARA 501.MA/6-2349.

cooperate.³⁹³ Complicating matters, on January 16, 1950 the Soviet Union began boycotting the meetings in an effort to gain UN recognition for the People's Republic of China.³⁹⁴

There were broad areas of consensus between the United States and the European countries, reflecting the normative elements internalized from previous regimes. All Western states accepted that “the primary function of a new international refugee organization should be to provide international protection to refugees.” (Holborn 1975: 62, see also Gallagher 1989: 580) Thus, not only did multilateral cooperation remain an important norm of the regime; so too did the need to provide legal protection. Debate, rather, focused on what would be the scope and mandate of the organization and how broadly or narrowly the status of ‘refugee’ should be defined and how expansive refugee rights should be. Negotiations over both the UNHCR and the Convention occurred over the same time and lasted two years through two different mechanisms. The debates over the UNHCR occurred first within ECOSOC and within the General Assembly’s Third Committee. The debates over the Convention, by contrast, occurred within an ad hoc committee struck by ECOSOC with the goals to decide if a Convention was necessary and, if so, to draft it.³⁹⁵

7.3.1.1 The Scope of the Organization

The United States sought to limit the organization’s scope. It was leery of making open-ended commitments to refugees because the recent flows across the Iron Curtain and in

³⁹³ As Holborn notes, “The East objected at every step of the process that created the UNHCR; but its draft resolutions received little support, and when the time came for action, the West had more than enough votes to support its view.” (1975: 62) Mr. Altman of Poland noted the measures showed “some delegations were making every effort to prolong its existence indefinitely.” The Byelorussian delegate argued that the IRO “had been transformed from an organ of repatriation into a slave-labour agency,” while the Czechoslovakian delegate thought it was a political rather than humanitarian issue. UN General Assembly Official Records (GAOR) 324th Meeting 22 Nov 1950 (A/C.3/SR.324). 332; 325th Meeting 24 Nov 1950 (A/C.3/SR.325). 334-340.

³⁹⁴ Mr. Klimov (USSR) Ad Hoc Committee on Refugees and Stateless Persons, Summary Record, 1st meeting, 16 January 1950. E/AC.32/SR.1. For the American view, see the Charge in Yugoslavia (Reams) to the Secretary of State, 17 January 1950. FRUS 1950 (Vol II) The United Nations; the Western Hemisphere. 196-7

³⁹⁵ ECOSOC Resolution 248(IX)B of 8 August 1949.

India, Korea, and other countries had convinced “American officials that the world refugee problem was virtually unlimited. They were not willing to pledge unlimited support to those displaced by oppressive regimes.” (Loescher and Scanlan 1986: 41)³⁹⁶ Eleanor Roosevelt emphasized the limits of American generosity and warned against an “increasing tendency to drive the United Nations into the field of international relief and to use its organs as the source and center of expanding appeals for relief funds.”³⁹⁷

In this regard, the American position had changed markedly since the IRO negotiations, primarily because they no longer saw the remaining numbers of refugees in Europe as a crisis which could destabilize the European continent. New refugee flows from the Communist world, they felt, could be accommodated within the Escapee Program and the ICEM, organizations over which the American government could exercise control. The fact that this was not the ultimate outcome points both to the independent capacity of international organizations to create autonomous spaces and shape their own mandates and the limitations of the hegemonic role in international society, bound within an existing set of normative understandings.

The European position, while varied, generally favoured an organization with a broad scope and which had an operational role. The French and Benelux delegations argued that the UNHCR should be a strong, permanent, and multipurpose organization. This view had wide support, including from the German and Austrian governments (neither of whom yet had a voice at the UN), as well as non-European states such as India Pakistan, and Brazil

³⁹⁶ Loescher and Scanlan suggest that American concerns were not so much over the issue that it would be expensive, but that it would help refugees “who were of little political interest to the United States” (1986: 41) and reflected a calculation of interests. This does not explain US willingness to support a broad Convention, discussed below.

³⁹⁷ Statement by Eleanor Roosevelt (United States) GAOR 262nd Meeting 14 November 1949 (A/C.3/SR.262)

who foresaw the need for the UNHCR to be able to raise funds to provide assistance on a voluntary basis. Great Britain occupied the middle ground, arguing that the primary responsibility for refugees should lie with the host states. Many of these positions were fluid. During the debates, the British delegation moved to favour an organization with broader powers, while the French delegation limited their calls for a powerful agency. (Holborn 1975: 63-4, Loescher 2001: 44)

The debates around the scope of the UNHCR focused on three related questions: 1) How the agency would relate to the United Nations and how the High Commissioner should be selected; 2) The lifespan of the agency; and 3) what should be the central role of the agency, whether it should focus on assistance, like the IRO did, or only on legal protections.

The relationship of the UNHCR to the UN dealt directly with the issue of its independence: should it be placed within the existing framework of the Secretariat, or should an independent High Commissioner be directly responsible to the General Assembly? The French and Belgian delegations supported this latter view, proposing an independent High Commissioner with a small office to offer legal protections to refugees and administer any funds placed at the Office's disposal by the General Assembly. (Saloman 1991: 219)³⁹⁸ The United States delegation, preferring the High Commissioner to be appointed by the Secretary-General, sought to delay the decision by referring the matter to the Secretary-General. (Holborn 1975: 66)³⁹⁹

³⁹⁸ The French delegation argued that setting up a High Commissioner's office was the only logical solution, because the Secretariat would provide solely administrative machinery, "whereas the need would be for an eminent international personality... The task was to find another Dr. Nansen." (Statement by Mr. Rochefort, 326th Meeting of ECOSOC, 6 August 1949. ECOSOC Official Records, 1950. 617-620) The British similarly argued that its functions should be in the nature of the League machinery. (Statement by Mr. Rundall, Ibid. 625)

³⁹⁹ The US delegation argued that "the time was not ripe" for creating new machinery because of many problems involved in determining "suitable continuing machinery." (Statement by Mr. Kotschnig, Ibid. 622). (see also Saloman 1991: 219) Internally, the US position was that UN activities be "restricted to provision of

This decision backfired for the United States. Secretary-General Lie argued that the High Commissioner needed to both “enjoy a special status within the UN” and also to “possess the degree of independence and prestige which would seem to be required for the effective performance of his functions.”⁴⁰⁰ As a mechanism to ensure this level of independence and prestige, Robert Rochefort, the French delegate, argued that the High Commissioner should be directly elected.⁴⁰¹ In spite of arguments made by the American delegation that the High Commissioner would need to work closely with the Secretary-General and should be appointed by him, the French delegation position prevailed. (Holborn 1975: 61) This also helped to keep the UNHCR “outside the fray” of the political debates that the Secretariat was exposed to. (Sadrudin 1976: 42)

With regard to the agency’s lifespan, the American delegation once again argued in favour of a limited mandate. This reflected their belief that the UNHCR should only be concerned with the remaining IRO refugee caseload, and would have no role once those refugees were resettled. Thus the agency could be disbanded after three years. This position was questionable since it failed to provide a mechanism to deal with new refugee flows, particularly those from outside the Communist world. Additionally, Donald Kingsley sought to apply lessons learned from the IRO experience to the new agency, testifying that the temporary nature of the IRO had made it impossible to complete the task of providing protection. (Holborn 1975: 68) This view was persuasive, and the General Assembly

legal protection with respect to civil status of refugees and DPs who have not acquired citizenship in countries of resettlement” or the hard core. No other functions “such as administration of internatl (sic) financial assistance to refugees envisaged.” Acheson to USUN. 11 Aug 1949. NARA 501.MA/8-549.

⁴⁰⁰ United Nations, Refugees and Stateless Persons, Report of the Secretary-General, A/C.3/527 - 26 Oct 1949 See also (Sadrudin 1976: 42-3)

⁴⁰¹ Privately, Rochefort argued that this would suit American interests, since using the Secretariat increased the likelihood of the USSR “insisting on representation on the staff... with consequent danger of misuse of information.” Alvin Roseman to George Warren, 15 Sep 1949. NARA 501. MA/ 8-1749.

accepted that even if the agency's mandate was limited to providing legal protection, it would need to function for more than three years. (Holborn 1975: 67) In light of American concerns, the General Assembly adopted language allowing for the review of the agency's work in 1953 and a vote on the renewal of its mandate.⁴⁰²

The final issue was how broad the agency's mandate should be. The key issues here were whether or not the UNHCR should be able to provide material assistance to refugees and whether there should be a permanent international fund to institutionalize the raising and disbursement of funds. Once again the American delegation's position focused on ending the existing refugee problem. While they were willing to devote considerable funds to resettlement, particularly while the IRO fleet continued to operate, they did not want a long term commitment. This view was also motivated by arguments within the US delegation that the Western European countries were trying to multilateralize the financial burden they would bear individually from new influxes of refugees once the IRO disbanded.⁴⁰³

The European view, particularly that of the French delegation, was that financial assistance was as important as legal protection. And this view had historical weight - both the UNRRA and the IRO provided assistance and had significant financial resources. Initially, this view carried weight, with the ECOSOC requesting that the Secretary-General make a

⁴⁰² General Assembly Resolution 319 (IV) Refugees and Stateless Persons. 3 December 1949. Article 5. Its mandate was renewed in 1953 (Resolution 727[VIII]. 23 October 1953). (Holborn 1975) Its mandate has since been renewed every five years as a pro forma process, most recently in 2003 (General Assembly Resolution 57/168: Continuation of the Office of the United Nations High Commissioner for Refugees. 4 Feb 2003.)

⁴⁰³ This view came from two sources. Within the State Department, the view was that "the Western European Governments, accustomed since 1945 to have indigent refugees on their territories cared for out of international funds, are now reluctant upon the termination of IRO to resume unilateral care... The United States Government holds the opposite view: that the caring for indigents among the residual refugees should not fall so heavily on any one country as to justify international assistance funds." This view was also motivated by Congressional views of assistance: "Congress has made it clear that it does not propose to appropriate funds annually hereafter to cover United States contributions to such a fund." "Refugees and Stateless Persons: Problems of Assistance to Refugees" 2 September 1950. FRUS 1950 Volume II The United Nations; the Western Hemisphere. 539-40

proposal “for the administration of any assistance funds which the General Assembly might put at the disposal of the United Nations for the benefit of certain classes of refugees.”⁴⁰⁴ During the General Assembly debate, however, the United States delegation successfully introduced an amendment which required Assembly approval as a precondition for all appeals for voluntary contributions. This meant that the UNHCR would only have direct access to a small administrative annual budget. (Loescher 2001: 44)⁴⁰⁵ Underlying this was the optimistic view that refugee flows would be confined to the ‘hard core’ remaining from the Second World War. (Sadrudin 1976: 45)⁴⁰⁶ Such a view, had it remained unchallenged, would have undermined the regime. The limited mandate initially assigned to the UNHCR, one which the agency effectively challenged, represented a yearning by states to reduce the support they were required to give, a change that was unsustainable in the long run.

Even the election of the first High Commissioner was fraught with difficulties. Following their failed attempt to have the High Commissioner appointed by the Secretary-General, the American delegation put forth J. Donald Kingsley for the post, anticipating that like the IRO, they would control the appointment. In this, they were opposed by the British and Western European delegations, fearful that Kingsley would be a servant of the State Department and the “worst elements in Congress.” (Loescher 2001: 50-1) The British delegation argued for a High Commissioner from a neutral country, and backed Gerrit Jan

⁴⁰⁴ ECOSOC Resolution 248 (IX), August 1949.

⁴⁰⁵ This decision, Sadrudin Aga Khan notes, was motivated in great part by government impatience and weariness over continued refugee flows: “They wished to put an end to measures which were by definition temporary and geared to an exception and urgent situation which they regarded as being largely past. To them, the time seemed to have come for a return to traditional standards involving basic, if not exclusive, responsibility of each State toward the refugees whom it was sheltering.” (Sadrudin 1976: 45)

⁴⁰⁶ Gerrit Jan van Heuven Goedhart, the first High Commissioner similarly argued that when the UNHCR was created, “there was a general over-optimistic assumption that the refugee problem for all practical intents and purposes had been solved, and the governments of the countries of residence of the refugees... would bear the burden of providing such material assistance as was still needed.” (Goedhart 1955)

van Heuven Goedhart of the Netherlands who was subsequently appointed. Goedhart had not only been a refugee himself - as a leader in the Dutch resistance, he had fled to Britain after being targeted by the Nazis - but had also chaired the Third Committee discussions on both the Statute and the Convention and therefore knew the spirit behind each clause. (Loescher 2001: 50-1)⁴⁰⁷

7.3.1.2 Debates over how Refugee Status Should be Defined

Another point of contention was over how refugee status would be defined in the UNHCR's Statute, as well as in the Convention Relating to the Status of Refugees. These parallel processes had different goals: the UNHCR negotiations focused on international actions while the Convention focused on national responsibility. (Holborn 1975: 80) Since Convention negotiations were taking longer, simply defining refugees in the Statute by referring to the Convention, a British proposal, was unworkable. Thus two different definitions needed to be negotiated.

As with the negotiations around the UNHCR's scope, the European states favoured a broad definition. As the British delegation argued, the United Nations, in accepting the responsibility for the international protection of refugees, had accepted:

the protection of all refugees, regardless of their place of origin or the date upon which they became refugees. Hence the High Commissioner's competence should extend throughout the world and to all refugees... Adoption of such principles [a geographic restriction or specific dates] was not only to be condemned on humanitarian grounds but would inevitably complicate the application of the convention."⁴⁰⁸

⁴⁰⁷ Goedhart picked as his Deputy James Read, an American with little connection to the State Department. This damaged Goedhart's relations with some of the European governments since Robert Rochefort, the French delegate to the Third Committee and Chef de Cabinet of the French Foreign Minister, made it clear that he wished the position. (Loescher 2001: 52) The Americans were also surprised by his decision. Warren to Hickerson. 12 Mar 1951. NARA 320.42/3-1551.

⁴⁰⁸ Statement by Lord MacDonald (United Kingdom). GAOR 324th Meeting 22 Nov 1950 (A/C.3/SR.324).330

They felt, rather, that the only criteria should be whether “the potential refugee had no government to which he could turn for protection.”⁴⁰⁹ (Bem 2004: 611) The French delegation similarly suggested a definition of refugees focused on those requiring international protection due to a “justifiable fear of persecution” from their states of origin.⁴¹⁰ They also argued that international protection reflected a collective responsibility, and that a broad refugee definition was “the very embodiment of the liberalism of the European countries. It would be difficult to find a broader definition... The hospitality offered by the countries of Europe was a service they rendered on behalf of all the United Nations to the cause of freedom and civilization.”⁴¹¹

The American delegation’s position favoured a narrower, group-oriented definition which would include only certain categories of refugees as requiring international protection.⁴¹² Their main concern, once again, was being obligated to deal with future refugee flows. As the State Department argued against a global definition:

Such a definition would commit the United Nations to the protection of unknown groups of refugees and divest the Assembly of its freedom of action to deal with new refugees situations which might arise in the future. These new refugee situations...can always be added later to the competence of the High Commissioner by Assembly action.⁴¹³

⁴⁰⁹ Ibid. 331.

⁴¹⁰ The French definition was the only one which reflected Article 14 of the Universal Declaration of Human Rights (UDHR) which had been passed in 1948. (Ad Hoc Committee on Statelessness and Related Problems, France: Proposal for a Draft Convention 17 Jan 1950. E/AC.32/L.3) The UDHR enshrined a “right to leave any country, including his own, and to return to his country” (Article 13.2) and established that “everyone has the right to seek and to enjoy in other countries asylum from persecution.” (Article 14.1)

⁴¹¹ Mr. Rochefort (France) Ad Hoc Committee on Refugees and Stateless Persons, 33rd meeting, 14 August 1950. E/AC.32/SR.33

⁴¹² (Ad Hoc Committee on Statelessness and Related Problems, United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention. 18 January 1950. E/AC.32/L.4); Louis Henkin (United States) Ad Hoc Committee on Refugees and Stateless Persons, 3rd meeting, 26 January 1950. E/AC.32/SR.3.

⁴¹³ “Refugees and Stateless Persons: Provisions for the Functioning of the High Commissioner’s Office for Refugees.” 9 Sept 1950. FRUS 1950 Vol. II. 542

Thus Roosevelt argued that “the appearance of new refugees in fact raised new political problems, which must be settled in accordance with the particular circumstances in which they arose. The United Nations and governments could not commit themselves in advance to unascertained responsibilities without jeopardizing the current work.”⁴¹⁴ This position was helped by a shift within the French delegation, which began to argue in favour of the necessity of knowing in advance the number of refugees they were committed to protecting. (Loescher 2001: 45)⁴¹⁵ A narrower definition, one focused on Europe, was also supported by a number of developing countries. (2004: 618)⁴¹⁶ But a group-based definition, while the historical model, was also open to critique. Delegates were particularly concerned with the IRO’s experiences, which had required a trained body of eligibility experts and a semi-judicial tribunal to determine which refugees fell within its mandate. A universal definition, by contrast, eliminated the need for such substantial legal machinery and could deal with new refugee groups. (Holborn 1975: 77)

Once again, a compromise was reached with both universal and group-based components being introduced into the definition. It treated interwar refugees, groups who had been victims of the Nazis, and those who had been victims or who had a well-founded fear of being victims of the Falangist regime in Spain, as groups needing protection. The other part

⁴¹⁴ Statement by Eleanor Roosevelt (United States) GAOR 324th Meeting 22 Nov 1950 (A/C.3/SR.324). 331 This divergence in views was clearly noticed by observers to the Committee. See Weis to Kullman, 19 Jan 1950. Paul Weis Archives PW/PR/IRO/6/34/1.

⁴¹⁵ Rochefort justified this shift by arguing that “never before had a definition so wide and generous, but also so dangerous for the receiving countries, been put forward for signature by governments,” (cited in Bem 2004: 614) though John Humphrey, the Secretary to the Ad Hoc Committee, felt that but the shift occurred because Rochefort wished for American support to be named Deputy High Commissioner. (Humphrey and Hobbins 1994: 124)

⁴¹⁶ Humphrey also argues that support for the definition was because “the majority was obviously frightened of financial repercussions (pretty far fetched because this is a convention that merely gives a status to refugees) and the problem of admissions. The Committee thus shows itself to be extremely conservative; but it is competent and it is realistic.” (Humphrey and Hobbins 1994: II: 10)

of the definition was universalist in scope, but crucially varied between the Statute and the Convention. The Statute read:

Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it. (UNHCR Statute, Chapter II, 6.A (ii))

The Convention, by contrast, offered a limiting factor,⁴¹⁷ establishing that “events occurring before 1 January 1951 could be understood to mean either:

- (a) “events occurring in Europe before 1 January 1951”; or
 - (b) “events occurring in Europe or elsewhere before 1 January 1951”, and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.
- (2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations. (Convention on the Status of Refugees, 1951, Article 1. B) (see also Sadruddin 1976: 6)⁴¹⁸

The Statute definition was a victory for the universalist view. It allowed new refugees who met the criteria to be automatically included in the competence of the UNHCR, and also that the agency’s competence would, in effect, be broader than that stipulated in the Convention. (Holborn 1975: 77-9, Loescher 2001: 45) The Convention, by contrast, created an “instrument for the legal protection of European refugees...” (Loescher 2001: 45)

Even so, in both cases, these definitions were strictly limited. Thus, Gallagher notes that states were motivated “to keep the numbers down” though the definitions did help to provide clear indicators of who “required the special attention and legal protection of the

⁴¹⁷ The Convention also excludes from refugee status those who have committed war crimes, crimes against humanity, serious non-political crimes, or who are guilty of acts contrary to the purposes and principles of the UN. (Sadruddin 1976: 6-7) More recently, the UNHCR has argued that exclusion applies to those who commit acts so grave “that they render their perpetrators undeserving of international protection as refugees.” (2003)

⁴¹⁸ This wording was amended by the 1967 Protocol Relating to the Status of Refugees, which noted that “2...the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” “and the words”... “a result of such events”, in article 1 A (2) were omitted.” (Article I) Today, 144 states are party to the Convention, and 144 states are party to the 1967 Refugee Protocol. 147 states are party to one or another. (UNHCR 2007)

international community.” (1989: 581, 94) Similarly, Barnett and Finnemore note that the definitions shielded states “from open-ended commitments by narrowing the range of people who could claim refugee status and the rights they might possess.” (2004: 85) It also imposed no duty on states to admit refugees, only to not return them. (Hathaway 1997: xviii)

The IRO, while somewhat successful in steering the debate,⁴¹⁹ had distinct reservations around the dateline clause, arguing that many of the political and social changes then unfolding would have effects after July 1, 1950.⁴²⁰ Their efforts did lead to one change. In drafting the date-line restriction, the Committee noted that the limitation would not apply to persons “who may become refugees at a later date as a result of events which had occurred before then, especially where the results of these events made themselves felt at a later date.” (cited in Sadruddin 1976: 6) As we will see below, this stipulation allowed the UNHCR to expand its mandate significantly over time.

7.3.1.3 Legal Rights in the Refugee Convention

Beyond the definition, these negotiations also focused on three priorities with the goal of clarifying and ensuring refugee protection: 1) consolidating all previous refugee instruments, thereby providing a comprehensive codification of refugee rights; 2) providing basic minimum standards for the treatment of refugees; and 3) providing for non-discriminatory treatment for refugees as well as ensuring their access to documentation. (Office of the United Nations High Commissioner for Refugees 2006: 5-8) Here, the American delegation did support a broad set of rights for refugees under the assumption that

⁴¹⁹ Kullman to Kingsley “Draft Convention Concerning the Status of Refugees” 20 Dec 1949. Paul Weis Archives PW/PR/IRO/6/10/1

⁴²⁰ Kullman to Weis, 3 Feb 1950. Paul Weis Archives PW/PR/IRO/6/53/1. The IRO also felt that the reasons for the dateline were “entirely political” based around the American unwillingness to have unknown groups in the definition. Weis to Kullman, 10 Feb 1950. Paul Weis Archives PW/PR/IRO/6/62/1

they would be administered by individual states. As the State Department noted, “it is essential that the convention be opened for signature at the earliest possible time and applied as broadly as possible.”⁴²¹

The Convention lays out a core set of rights for refugees, including rights to property, to access courts, of association, to employment, to housing, to education, to support and assistance, to freedom of movement, to identity papers, and to travel documents. (Office of the United Nations High Commissioner for Refugees 2006) In addition, it establishes two clear norms. The first precludes punishment for illegal entry of persons in search of asylum (Farer, 1995: 79). The second enshrines the right of non-refoulement: “No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” (Article 33.1)

To summarize, these two sets of negotiations demonstrate several important points. The first was the degree of consensus among states: there was unquestioning support for the idea of refugee protection in international law, and also of the need for a multilateral international organization to protect them. The United States was opposed to the form this organization took, preferring an organization which it could control and which would minimize or eliminate the Soviet voice entirely. Even so, it accepted the necessity of having an organization. The second point is the level of responsibility that states were willing to assign to the UNHCR, and the level they would take on themselves. Here, the critical point of difference appears in the two different definitions. States were willing to assign a broader

⁴²¹ “Draft Convention Relating to the Status of Refugees” 9 Sept 1950, FRUS 1950 Vol. II. 545 They ensured that refugees would not have a status less than ordinary aliens and for wording to limit the ability of states to make reservations. Louis Henkin (United States Delegate) Ad Hoc Committee on Refugees and Stateless Persons, 33rd meeting, 14 August 1950. E/AC.32/SR.33; Henkin 23 February 1950. E/AC.32/SR.26

responsibility for refugees to the UNHCR by introducing a definition in its Statute with no geographic limitation. They limited their own responsibility by introducing a geographic limitation in the Convention definition which allowed states to decide how broadly or narrowly they wished to proceed.

The third point is the limited role assigned to the UNHCR. While the European states pushed for a more robust organization, the Americans were able to block their attempts to provide the agency with an independent ability to raise funds. The European states did succeed in ensuring that the High Commissioner would be independent from the UN secretariat. As time passed, this independence was crucial in allowing the UNHCR to take on a much broader mandate than even its most supportive creators envisioned. The UNHCR, over the next three decades, succeeded in redefining the refugee regime in three ways: by expanding its mandate to include Convention refugees throughout the world; by broadening the type of refugees which came under its mandate, include de facto refugees and, through the OAU Convention on refugees, those displaced by generalized violence; and by becoming an operational agency and in so doing altering how assistance was provided to refugees.

7.4 The UNHCR Engages in Mandate Expansion

The UNHCR began its existence with little authority. Its main focus was to provide international protection to refugees who fell within its mandate and to seek permanent solutions to the refugee problem, either through voluntary repatriation or by promoting assimilation through local integration or resettlement. (UNHCR 1971: 16-7) It did have its own moral authority as an organization designed to protect those who could no longer count on the protection of their own state. Yet, it had little else: it was a temporary body destined to be reviewed in three years time. It had only \$300,000 of funding, no operational budget or

ability to provide material assistance, and only a limited staff. (UNHCR 1971: 13, 17)⁴²² The UNHCR, however, succeeded in making itself invaluable as an authoritative actor which could quickly respond to new refugee situations, ensure refugee protection, and coordinate assistance. Moreover, as an impartial UN agency, it was able to act in areas where individual states would be otherwise unable to because of the politics of the Cold War. As a result, over the next two decades it prospered, growing in strength, authority, and autonomy.⁴²³

7.4.1 The UNHCR Empowered as an Assistance Organization

The UNHCR Statute established that while the organization would provide legal protections to refugees, it would not provide assistance nor act as an operational agency. However, the agency realized that providing protection alone would not meet the needs to the refugees that were still in camps. (Read 1962: 10) The UNHCR and particularly its first two High Commissioners, Goedhart and Auguste Lindt, made effective use of a series of new refugee flows to convince the UN Secretariat and the General Assembly, and particularly the United States, that the agency could play a crucial role as an assistance organization creating a source of performance-based legitimacy for it.

Almost immediately after the UNHCR's creation, Goedhart made the first step to expand the scope of the Office by asking the General Assembly to authorize the creation of an emergency fund to provide limited relief to refugees still in camps. (UNHCR 1953, UNHCR 1961: 25)⁴²⁴ Given the stipulations of the Statute, the General Assembly had to approve the proposal before he could request contributions directly from governments.

⁴²² Dr. Goedhart noted that when he was appointed, "I found three empty rooms and a secretary and had to start from scratch." (cited in UNHCR 1971: 28)

⁴²³ For a detailed history of the UNHCR from 1951 to 2000, see Loescher, 2001.

⁴²⁴ This request, while designed to help all refugees, was triggered by an emerging catastrophe in Hong Kong. The UNHCR had made use of its funds to provide some staple foods to these refugees who no longer received any assistance with the end of the IRO. By the beginning of 1952, the situation had gotten so dire that the

The debate within the General Assembly was divisive. The American delegation once again reiterated their opposition to the UNHCR being able to provide assistance. Eleanor Roosevelt argued at the Third Committee that she “could not vote for the resolution which would set the precedent of authorizing the United Nations to collect funds for a rather indefinite program...”⁴²⁵ The Norwegian delegation, however, argued in support of the “idea of establishing a relief fund to be maintained by voluntary contributions. The Norwegian example was followed by the majority of the delegates... The General Assembly followed suit and authorized the High Commissioner to become an international mendicant.” (Stoessinger 1956: 167) The fund was limited to being used only in emergencies, rather than to promote long-term solutions. Moreover, it was undersubscribed, in part because the United States did not provide support. Other potential donors followed the American example so that only 14 governments contributed a total of \$755,000, less than a third of the \$3 million Goedhart sought. (Loescher 2001: 62-64, UNHCR 1971: 14, Soguk 1999: 172)⁴²⁶

The UNHCR responded by turning to the Ford Foundation for money for local integration programs. The Foundation provided the agency with a \$2,900,000 grant under

refugees now faced starvation. Goedhart, in appealing for an emergency fund, decided to follow in the steps of Nansen 30 years earlier when faced with a similar crisis in Constantinople. (Stoessinger 1956: 166-7)

⁴²⁵ Statement by Eleanor Roosevelt. (cited in Stoessinger 1956: 166) The Americans felt that Goedhart was merely trying to expand his mandate because most of the refugees under his competence “are already self-supporting... Less than 100,000 will require continuing partial or total support... Dr. Goedhart’s interest in expanding the coverage of his Office may be related to his need for justifying an international fund.” Warren to Hickerson. 12 Mar 1951. NARA 320.42/3-1551. 2-3 Thus, US resistance related in part to their view that the UNHCR’s responsibilities extended only to the former IRO refugee population. The US position was also based in part on the simple reasons that “Congress has made its position quite clear that it does not plan to appropriate further funds for refugee relief... However, the foregoing is obviously without prejudice to consideration of the needs of any totally new refugee situation which may arise.” (Hickerson to Warren, 12 March 1951. NARA 320.42/3-1551. The Eastern Bloc countries took the opportunity to once again condemn the efforts of the West to engage in forcible resettlement, rather than repatriation and charged that refugees were being exploited as cheap labour and to engage in subversive activities in the Communist countries. (Stoessinger 1956: 166-7)

⁴²⁶ As Loescher notes, during this same time the US had given over \$150 million for UNRWA and around \$75 million for the UNKRA. (Loescher 2001: 64) Their opposition was not for financial reasons. The UNHCR did work with the Escapee program and the ICEM, but the ICEM actively tried to expand its own role into areas where it directly competed with the UNHCR. (Loescher 2001: 66)

three conditions: that the money be used to help refugees help themselves; that no discrimination be shown among refugee groups; and that no funds be allotted as pure relief with no view towards a permanent solution. (Loescher 2001: 66, Stoessinger 1956: 167, Ford Foundation 1958: 17) The grant allowed Goedhart to undertake a series of small scale programs. It also provided a foundation for the UNHCR to solicit more funds. As the final report of the program notes:

At a time when governmental interest in the refugee problem was at a low point, it encouraged governments, private sources, and the general public to take greater interest, moral and material, in furthering a solution of the refugee problem, and was a prime factor in enabling the voluntary agencies to expand their efforts towards this end. (Ford Foundation 1958: 9)

The program started what Goedhart referred to as a “peaceful chain reaction.” The Emergency Fund by the end of 1958 had received \$17 million in contributions, \$3 million of which came from private sources. An additional \$24 million were received as contributions from the countries in which the individual UNHCR programs were undertaken. (UNHCR 1971: 62, Read 1962: 17) The UNHCR spent these funds effectively: most notably, of the 130,000 refugees remaining in the ‘hard core’ in 1952, all but 26,500 had been successfully resettled or reintegrated by 1959. (Ford Foundation 1958)

While the UNHCR was beginning to receive some financial support, new refugee flows into West Germany in 1953 demonstrated to the United States that the agency could play an effective role within the politics of the Cold War. Refugee movements into West Germany, and particularly Berlin, grew dramatically in the beginning of 1953, rising from 15,000 in December 1952 to 48,000 per month by March 1953. The existing camps and reception centres were quickly overwhelmed. (Holborn 1975: 359) While these refugees were not clearly within the UNHCR’s mandate, Goedhart proposed providing housing relief

in West Germany. He justified these actions by arguing that the UNHCR would use the Ford grant to pay the costs, money that was unrestricted. (Read 1962: 14-15)⁴²⁷

This response proved a major success for the UNHCR. It demonstrated that the agency could mobilize quickly and provide direct assistance to refugees, thereby legitimating its role as an assistance organization. The UNHCR also showed that it had the capacity to coordinate an inter-agency effort. Consequently, “the US came to perceive the UNHCR as a useful political instrument.” (Loescher 2001: 72) The US also felt that the UNHCR could play important roles where its own programs were questioned: thus in Austria the State Department’s view was that supporting UNHCR projects would help to renew trust in US programs such as the USEP. For the first time, therefore, “the US began to perceive UNHCR programs as being potentially useful in the ideological struggle between East and West.” (Loescher 2001: 74) Added to this, and in a boost to its legitimacy, in 1954 the UNHCR was awarded the Nobel Peace Prize in recognition for its work in promoting the fraternity of nations. (Stoessinger 1956: 168)⁴²⁸

While its response in West Germany had increased its visibility, the UNHCR’s response to refugees fleeing Hungary would make its reputation. On 4 November 1956, the Soviet Union invaded Hungary to remove the Nagy regime, which had made moves to leave the Warsaw Pact and declare neutrality. Flows of refugees began immediately, assisted by the fact that the border with Austria was broadly unguarded. By 21 November, refugees were crossing into Austria at the rate of 7,000 a day and by March 1957, 171,000 refugees had

⁴²⁷ He argued that while “it was clearly the intention of the Assembly... not to create another operational organization, it was equally clear that the majority of governments... did not consider that the work of my Office should be restricted to the purely legal aspects of protection. (UNHCR 1954: Paragraph 5)

⁴²⁸ Even while it was accorded this honour, however, the UNHCR was once again receiving little financial support. Goedhart went so far as to sell “for 14,000 dollars a gold bar purchased by the Nansen Office with the proceeds of its own 1938 prize in order to meet emergency needs.” (Marrus 2002: 357)

entered, while another 20,000 had gone to Yugoslavia. The total refugee flow would be over 203,000 refugees. (Loescher 2001: 82-83, Marrus 2002: 359, UNHCR 1961: 26) This movement redefined how the international community would respond to refugee flows. As Elfan Rees recorded, the tendency had been for “the whole financial burden of the care and maintenance of refugees [to be] borne solely by those countries that granted them asylum.” The Hungarian refugee flows conclusively demonstrate “that countries of first asylum cannot go it alone.” (Rees 1957: 234, UNHCR 1957)⁴²⁹

The UNHCR also successfully redefined its role by devising a legal justification for its presence within the dateline set by the Refugee Convention. Paul Weis, the Legal Adviser to the High Commissioner, argued that the departure of the refugees related to the establishment of the People’s Republic, which had occurred in 1947, and therefore this new refugee exodus was “an after effect of this earlier political change.”⁴³⁰ Consequently UNHCR involvement, he argued, did fall within the scope of its mandate.

Unfortunately, High Commissioner Goedhart had died in July 1956. A new High Commissioner, Auguste Lindt, was elected by the General Assembly in December 1956. Lindt, who had been serving as the Permanent Observer of Switzerland to the United

⁴²⁹ In response, the UNHCR Executive Committee expressed unanimously that “responsibility for the refugees should be borne by the whole world, each country making a contribution...” (UNHCR 1957)

⁴³⁰ Paul Weis, “Eligibility of Refugees from Hungary.” 9 January 1957. UNHCR Archives, HCR/22/1/HUNG. See also (Loescher 2001: 86); Alexander to Goedhart “Definition of Protection” 17 Mar 1953. UNHCR Archives HCR/6/1/GEN-Protection General-43. The American government confirmed informally that they would be willing to adopt a new approach for the new arrivals. (Dr. V.A.M. Beermann, UNHCR Representative Vienna, to the High Commissioner. 17 Oct 1956. UNHCR Archives HCR/22/11/AUS [2]- 185.) This principle, once established, was quickly applied as a procedure to other situations around the world. As a clear sign of its flexibility, within a month the UNHCR branch office in Egypt was arguing that 25,000 Jews who had their citizenship revoked by a change in Egyptian law needed protection, arguing “that the recent events are after-effects of the major political events and territorial changes which took place in the Middle East prior to 1 January 1951...” 15 Feb 1957. UNHCR Archives HCR/6/1/GEN-Protection General-56A. 2

Nations, was hand-picked by the Secretary-General to take on the role.⁴³¹ Importantly, Lindt was on good terms with the American government and under his leadership the Agency's orientation became clearly pro-American.⁴³²

In facing the Hungarian refugee exodus, the Austrian government was fearful of Soviet attack, especially after Moscow Radio alleged that Austria had violated its neutrality by allowing the US to use its territory to provide weapons and ammunition to the Hungarian refugees. Both Britain and the United States, however, signalled to the Soviets that they would consider an attack on Austria as an act of war. Austria, reassured by these guarantees, moved to accept the refugees. The government also took steps to officially grant asylum and assistance to all the refugees, a huge undertaking for the small country.⁴³³ The UNHCR was asked by the General Assembly to organize international relief efforts and, for the first time, specifically designated a lead agency. (Loescher 2001: 83-4, UNHCR 1971: 69-71) The agency, helped by favourable changes in immigration restrictions on the part of several countries, (Read 1962: 18) resettled some 154,000 refugees outside Austria while 18,000 refugees were repatriated to Hungary. (Marrus 2002: 362, UNHCR 1961: 26)

The response to the Hungarian crisis was a success for the UNHCR because the agency was able to clearly demonstrate its operational capabilities in handling an emergency, being designated as the lead agency by the General Assembly. It was thereby able to position

⁴³¹ Franklin Gowan, US Representative for International Organizations, to the Department of State 21 Dec 1956. NARA RG 59 320.42/12-2156; Dulles to American Embassy the Hague, 8 Sep 1956. NARA RG 59 320.42/9-456; and American Embassy the Hague to Dulles, 12 Sep 1956. NARA RG 59 320.42/9-1256.

⁴³² The State Department felt that Lindt was an improvement "in terms of competence, of personality, and of hard headed efficiency which is nonetheless palatable to the soft hearted. Dr. Lindt is extremely pro-American, and has been most helpful to us." J.W. Hanes to Dulles, "Your appointment at 11:45 with the United Nations High Commissioner for Refugees" 15 Nov 1957. NARA RG 59 320.42/11-1557.

⁴³³ The Austrian government made it clear to UNHCR officials that while they supported a liberal asylum policy, they would be unable to provide assistance after four to six months. Thus part of the expense for new refugees would need to be borne by outside sources. Dr. V.A.M. Beermann, UNHCR Representative Vienna, to the High Commissioner. 12 Oct 1956. UNHCR Archives HCR/22/11/AUS [2]-184.

itself as a gatekeeper more generally. The UNHCR was able to extend this authority even outside of the UN agencies by establishing a coordinating group to manage emergency assistance. The American government, abandoning earlier resistance, advocated that all relief should be planned and coordinated by the UNHCR. (Loescher 2001: 84) As then-Deputy High Commissioner James Read later wrote, the ICEM “and all the foreign private voluntary agencies helping to deal with the influx were allowed to operate only insofar as they were integral parts of the mission.” (Read 1962: 15)

In addition, UNHCR was able to once again expand its mandate with the acquiescence of the UN member states. (Gallagher 1989: 582, Gordenker 1987: 35) In 1957, the General Assembly extended the UNHCR’s role to include coping not only with the remaining refugee hard core, but also with any new emergencies, including new ones outside of Europe. The Executive Committee of the UNHCR⁴³⁴ was to “advise the High Commissioner as to whether it is appropriate for international assistance to be provided through his Office in order to help solve specific refugee problems remaining unsolved...”⁴³⁵ The High Commissioner was also authorized to make appeals for funds for any of these emergencies, thus removing the requirement that the UNHCR first receive General Assembly approval.⁴³⁶ The resolution also effectively removed any geographic limitation on the UNHCR’s operations. (Loescher 2001: 89-90, UNHCR 1961: 28)⁴³⁷

⁴³⁴ The Executive Committee of the UNHCR was created in 1958, and replaced the United Nations Refugee Emergency Fund Executive Committee, which had in turn replaced an initial Advisory Committee. Composed of member states, its terms of reference include advising the High Commissioner in the exercise of his function, to authorize the High Commissioner to make appeals for funds, and to approve projects for refugee assistance. (General Assembly Resolution A/RES/1166 (XII) “International assistance to refugees within the mandate of the United Nations High Commissioner for Refugees.” (26 Nov 1957)

⁴³⁵ General Assembly Resolution A/RES/1166 (XII) 26 Nov 1957. Article 5 (c). A/RES/1165 (XII) of 26 Nov 1957 extended the UNHCR’s mandate for another 5 years with a decisively positive vote- 66 countries were in favour, none against, and 9 abstentions. (Read 1962: 18-9)

⁴³⁶ General Assembly Resolution A/RES/1166 (XII) 26 Nov 1957. Article 5 (d).

In its first seven years in operation, therefore, the UNHCR successfully and dramatically expanded its mandate and ensured considerable autonomy from the UN and its member states. From a tiny Office with no operational mandate, it proved its capability not only for providing assistance to refugees, but also coordinating the response to large scale emergencies. In addition, the UNHCR had successfully convinced states to remove geographic and dateline restrictions on its operations. Thus, the UNHCR had successfully expanded its scope of concern, the legal definition of refugees and their protection in international law, and its finances. (Gordenker 1987: 35) Its “latitude to act - albeit with permission and encouragement of states - was significantly widened.” (Gallagher 1989: 582)

7.4.2 The UNHCR Expands its Legal Mandate: The Good Offices Protocol

Even though the UNHCR had successfully expanded the scope of its mandate to include assistance, it remained hobbled by the temporally and geographically limited definition of refugee status under which it operated. Throughout its first twenty years of existence, consequently, the agency made a concerted effort to remove these limitations. In particular, through the use of the High Commissioner’s good offices, a notion created by Lindt and used by successive High Commissioners, the agency dramatically increased operations in the developing world and became a global organization. As new refugee situations emerged, the General Assembly increasingly went through pro forma motions to

⁴³⁷ See also “Statement Made by Mr. A. Lindt, United Nations High Commissioner, at the Opening Meeting of the Fourth Session of the UNREF Executive Committee.” 15 Feb 1957. UNHCR Archives HCR/6/1/GEN-Protection General-56A. Not all governments were open to this dramatic expansion of the UNHCR’s role. The Swedish Permanent Representative argued in the Assembly that “there was considerable doubt in her mind as to whether the High Commissioner should be entrusted with the care of such new groups of political refugees as might in the future come into being. Any question of extending the High Commissioner’s mandate to cover such future groups should be carefully examined in each individual case and a separate decision should be taken on each...” (cited in Jackson 1999: 115)

broaden the scope of its mandate.⁴³⁸ Through these efforts, the agency succeeded in redefining the legal basis of the refugee regime and, in so doing, ensured that states increasingly deferred their judgements to the UNHCR creating an authoritative basis for the organization as an expert in the field. (see Barnett and Finnemore 2005: 169)

The good offices formula was first applied to a long lasting refugee situation which did not easily fit into the existing definitions in either the Convention or the Statute. With the Communist victory in China in 1949, some 700,000 refugees fled into Hong Kong. Great Britain, interested in developing a positive political relationship with the Communist government, declared that most of these refugees were illegal immigrants subject to immediate expulsion. As Loescher notes, “despite the fact that these were refugees fleeing Communism, they lacked strong external patronage.” (2001: 93) The UNHCR’s response ensured not only that the refugees received protection, but also that the issue could be resolved without endangering the bilateral relationship between the two countries.

Goedhart argued that the UNHCR had a world-wide mandate to assist refugees (Goedhart 1953), and would be prepared to deal with the situation if given the authority and funds to do so. He was confronted with two major problems, however. Britain did not want the Chinese refugees to be legally considered as such (including deliberately not extending its ratification of the 1951 Refugee Convention to Hong Kong), and the Republic of China (ROC) government, still occupying China’s seat at the UN, claimed that the refugees were entitled to its protection as the official government of China even though it accepted few for

⁴³⁸ As a UNHCR report recorded in 1961: “It was the plight of European refugees in countries of first asylum in western Europe and in the Far East which had impelled the General Assembly to set up [UNHCR]. One these refugees were settled, it was expected that the need for the UNHCR would disappear. As time went on, however, and the membership of the United Nations broadened, the attention of the General Assembly was drawn more and more to problems of non-European refugees, and certain governments became increasingly aware that the problem of refugees was not an isolated and largely European phenomenon, but a feature of the international scene.” (UNHCR 1961: 27)

resettlement. Consequently, the governments which recognized the ROC felt that the refugees were outside the UNHCR's mandate since they did have protection.⁴³⁹ In 1954, following negotiations between the UNHCR and Britain, an independent assessment was conducted by Edvard Hambro of the International Court of Justice. While it failed to take a definitive position on the eligibility of the refugees, the Hambro Report did find that the refugees should be considered to be de facto under the UNHCR's mandate since the ROC could not effectively protect or resettle them. (Hambro 1955, Holborn 1975: 434-6, Loescher 2001: 93-5, Read 1962: 19-20)⁴⁴⁰

In 1957, the issue was referred to the General Assembly,⁴⁴¹ which decided that the problem was of concern to the international community and authorized "the United Nations High Commissioner for Refugees to use his good offices to encourage arrangements for contributions."⁴⁴² As Holborn notes, the General Assembly made the decision to empower

⁴³⁹ The furthest action the UNHCR advisory committee was prepared to take was to express "the hope that the voluntary agencies working in cooperation with the Hong Kong authorities would continue their efforts to provide emergency assistance" and to refer the matter to the General Assembly as a matter of international concern. ("Report of US Delegation of 5th Session of HC Advisory Cmmt on Refs 6-10 Dec 1954" 10 Dec 1954. NARA RG 59 320.42/12-1054. 4; Ruth Bacon to Mr. McConaughy, 6 Feb 1957. NARA RG 59 320.42/2-657.) The United States also felt that the expansion of the UNHCR to areas outside of Europe would be positive and deal with "the criticism of UN members from Arab and Asian regions." Ibid. 2

⁴⁴⁰ Following the Report, the ROC reversed their position. Their observer to the High Commissioner's advisory committee "laid stress on the plight of the refugees concerned, on their urgent need for international assistances and on the efforts made by the Chinese Government... to assist them...these refugees definitely fell under the [UNHCR's] competence..." General Assembly, High Commissioner's Advisory Committee on Refugees - Revised draft report on the Fifth Session of the Advisory Committee A/AC.36/L.9 10 Dec 1954. 3

⁴⁴¹ This was facilitated by a change in Britain's position- they recognized that the refugees were under the UNHCR's mandate for legal and political protection. (Ambassador Whitney (London) to Secretary of State, 4 Sep 1957. NARA RG 59. 320.42/9-457.) There were divisions within the British government over their position, with the Colonial Office advocating for non-recognition against the wishes of the Foreign Office. Secretary of State Dulles to American Embassy, London, 30 Aug 1957. NARA RG 59 320.42/8-3057

⁴⁴² UN General Assembly Resolution, "Chinese Refugees in Hong Kong" (A/RES/1167 (XII). 26 Nov 1957. The UNHCR quickly acknowledged that they understood that the resolution did not "imply that Chinese refugees in Hong Kong are at present within the competence of this Office according to its Statute." James Read to the Secretary of State, 12 Feb 1958. NARA RG 59 320.42/2-1258 Read, however, later recorded that in one sense the resolution "was a disappointing result. The language of the resolution was deliberately vague and

the High Commissioner to provide assistance outside of the Statute in order to achieve “the end desired - more aid for the Chinese refugees - without making any declaration as to the legal status of the refugees and thereby become embroiled in the perennially troublesome issue of the two Chinas.” (1975: 436) Not only had the UNHCR once again successfully expanded its mandate, but it had also been able to overcome the opposition of a great power - Great Britain - to having people within its territory classified as refugees. In this case, however, the international community provided only limited support and the UNHCR received only a few hundred thousand dollars to provide assistance. (Read 1962: 21)

The good offices formula was also successful in dealing with another refugee crisis involving a great power: the Algerian war of independence against France. 85,000 refugees had fled into Tunisia, facing miserable living conditions, and that government had requested material assistance from the UNHCR. (Thomas 2002) Like Goedhart before him, Lindt felt that the UNHCR’s mandate was worldwide: He “was determined that no group of countries should consider his Office more partial to certain refugee problems or solutions than to others.” (Read 1962: 21) Thus the Algerian case, like the Hong Kong case before it, saw the UNHCR deliberately challenge Western and Eurocentric notions of refugees.

This strategy initially appeared ineffective when the French government denied the UNHCR any authority to provide assistance. Instead, officials posited that Algeria was an integral part of France and that agency involvement might internationalize the crisis. Lindt nevertheless sought to have the UNHCR play a role, at the expense of a potential rift not only

flabby. The members obviously did not want the High Commissioner to become involved in the large and expensive relief to Chinese refugees that would be necessary.... Western apathy to a refugee problem on the other side of the world was clearly in evidence.” (Read 1962: 21)

in the international community, but also within his own agency.⁴⁴³ He began by convincing the United States that it was in their interest to support the UNHCR becoming involved: by channelling support to the Algerian refugees through the agency the US could win goodwill with the African states and avoid damaging its relations with France.⁴⁴⁴ Following a UNHCR mission to Tunisia, Lindt met with the French Foreign Minister, Christian Pineau, and provided details of atrocities committed by French forces against Algerians. Pineau acknowledged the findings and, when Lindt said that UNHCR would provide aid to Tunisia, he noted that it was “okay, but don’t make too much of a fuss.” (Loescher 2001: 100)⁴⁴⁵ The UNHCR began working in Tunisia, but it “did not make any clear determination of refugee eligibility so as to avoid a direct confrontation with the French government.” (Loescher 2001: 100) Lindt argued that it was not a legal issue, but that people needed help and he was giving it. (Read 1962: 25) By December 1958, he received approval from the General Assembly to continue.⁴⁴⁶

⁴⁴³ As Loescher documents, Lindt’s views provoked a crisis within the UNHCR, with some officials, notably Bernard Alexander, Goedhart’s right-hand man, arguing that: “it was politically impossible for the UNHCR to declare the Algerians refugees, because such an action would imply that France... was persecuting some of its own subjects.” (Loescher 2001: 99) This rift represented a broader issue, that between Lindt’s views and those who felt the “UNHCR should limit its activities to European refugees and argued against UNHCR expansion to the developing world.” Lindt won this internal battle, but had to convince individual states that the agency could effectively manage a role in the conflict.

⁴⁴⁴ Lindt, in discussions with the United States, argued that while he had hoped to not make a political issue out of the Algerian refugees, a refusal to investigate the situation would justify charges that the High Commissioner was for European refugees only. Gowen to Dulles, 5 June 1957. NARA RG 59 320.42/6-557 After the UNHCR became involved, he argued that the UNHCR needed American financial support. Villard to Dulles (Telegram) 11 Aug 1959. NARA RG 59 320.42/8-1159

⁴⁴⁵ This represented a major shift in the French position. Previously, they argued there should be no investigation at all of the refugee status of the Algerians. Gowen to Dulles, 7 June 1957. NARA RG 59 320.42/6-757.

⁴⁴⁶ UN General Assembly Resolution 1286 “Refugees in Morocco and Tunisia,” 5 Dec 1958. (A/RES/1286 (XIII)). A subsequent resolution requested for the first time that the High Commissioner assist the return of refugees and “consider the possibility, when necessary, of facilitating their resettlement in their homeland as soon as circumstances permit...” (UN General Assembly 1672 “Refugees from Algeria in Morocco and Tunisia,” 18 Dec 1961 (A/RES/1672 (XVI)) expanding the “Mandate rationae materiae” (Sadrudin 1976: 11)

A year later, the General Assembly formally removed the requirement that the UNHCR seek further authorizations for each new refugee group.⁴⁴⁷ Thus, the UNHCR now had the power to determine on its own the groups to be assisted under the good offices format. As Holborn notes, both the Chinese and Algerian cases signified that the Assembly was now “willing to turn to the UNHCR whenever its services could be usefully applied in meeting the needs of new and different refugee groups.” (1975: 437) Similarly, Gordenker notes that both cases “had offered an opportunity to stretch the limitations contained in the definition of refugees...” (1987: 39) Even so, Lindt himself considered the good offices formula as only enabling the UNHCR to act more quickly and not specifically an expansion of the mandate. (UNHCR 1971: 101)

The 1960s saw the rapid expansion of the UNHCR activities into Africa.⁴⁴⁸ In December 1960, Lindt stepped down to become the Swiss Ambassador to the United States. His successor was Felix Schnyder, another Swiss national who was serving as that country’s Permanent Observer at the United Nations. Under Schnyder, the agency was able to successfully react to the dramatic increase in refugees in Africa as a consequence of decolonization. He used the good offices protocol to do so, suggesting that it was elastic, though dependent on continued state support: “We must realize that we are not more than instrument of the international community. We must therefore make sure that governments

⁴⁴⁷ The resolution authorized “the High Commissioner, in respect of refugees who do not come within the competence of the United Nations, to use his good offices in the transmission of contributions designed to provide assistance to these refugees.” UN General Assembly Resolution 1388 (XIV) “Report of the United Nations High Commissioner for Refugees.” 20 Nov 1959. (A/RES/1388 (XIV)) Article 2

⁴⁴⁸ The UNHCR received American support for this move. As President Eisenhower wrote to Lindt: “Your efforts to gain acceptance by more governments of the principles governing asylum and the protection of the legal status of refugees now stand as beacons of hope and security to countless thousands... Of hardly less importance, your efforts to secure a greater world consciousness of the tragic material plight still suffered by many refugees has resulted in a remarkable increase in aid...” Despatch From the Mission in Geneva to the Department of State. 6 April 1961. FRUS Vol. XXV Foreign Relations, 1961- 1963. Document 311.

will support us and provide the means, either directly or indirectly, for an action that can be carried out until its successful conclusion.” (cited in UNHCR 1971: 102, Loescher 2001: 106, Singh 1984: 36-7)⁴⁴⁹

Schnyder also dramatically altered the UNHCR’s focus, in a pattern started by Lindt, away from Europe towards the world. As part of this, he moved to strengthen developing world representation in the agency, including appointing Prince Sadruddin Aga Khan as his Deputy High Commissioner. Sadruddin⁴⁵⁰ would in turn succeed Schnyder in 1965, the first High Commissioner from the developing world, and one who would dramatically expand its operations. Under Sadruddin, the UNHCR “developed a degree of independence and credibility it had not enjoyed before. Its autonomy and authority derived from its status as the guardian of international refugee norms and as the holder of specialized knowledge and expertise on refugee issues.” (Loescher 2001: 140) At the same time, the UNHCR closely followed the steady definitional expansion within General Assembly resolutions. In 1965, the reference was that the UNHCR should provide assistance to “refugees within the HC’s competence.” In 1966, it was to “refugees who are the HC’s concern, within the limits of his competence.” By 1967, it referred to “groups of refugees who are the concern of UNHCR.” As John Colmar, a UNHCR official, noted, “one may see that there is no longer a specific

⁴⁴⁹ The United States, while it did not encourage this shift, tacitly endorsed it in part because it made sense and “the lack of U.S. opposition to the trend apparent in recent years toward broadening the UNHCR responsibility through special UNGA resolutions, would appear to encourage such a shift in emphasis as the problem of European refugees is reduced to manageable proportions... After supporting a series of General Assembly Resolutions assigning additional and diverse responsibilities to the UNHCR; after a series of public statements, if not actually in support of, at least not inconsistent with such development; and in an era in which the concept of collective action through the U.N. has acquired increased importance, it might appear detrimental to U.S. leadership to oppose what could be regarded as a historic trend.” Despatch From the Mission in Geneva to the Department of State. 6 April 1961. FRUS Vol. XXV Foreign Relations, 1961- 1963. Document 311.

⁴⁵⁰ This appointment required careful negotiations with the United States, who initially felt that the position should go to an American but that “Prince Khan is “western” in his orientation and would be acceptable to us if we could not arrange for the appointment of an American.” Memorandum from the Director of the Office of International Administration, Bureau of International Organization Affairs (Westfall) to the Assistant Secretary (Cleveland). 31 March 1961. FRUS Vol. XXV Foreign Relations, 1961- 1963. Document 310.

reference to the mandate, but to the notion of ‘competence’ or of ‘concern’, which is undoubtedly more flexible.”⁴⁵¹

Over this period, the organization had developed its position as a moral authority with regard to refugees, an authority which provided it with an autonomous role and a source of power in its relations with states. (Price 2003: 589-90, Barnett and Finnemore 2005: 169-73) In only a few areas was UNHCR prohibited from operating – notably, the United States “had made clear it did not see any role for an international agency in overseeing American asylum policy.” (Loescher 2001: 132) Thus while states were willing to accord the UNHCR a great scope and autonomy, there were limits. In particular, the United States was not prepared to give the agency any operational scope within the US domestically, nor to allow the agency to question its domestic resettlement policies. This lends credence to arguments that states will limit the autonomy of IOs or interfere with their operations if the IO challenges the state’s perceived interests. (see Abbott and Snidal 1998: 5) This, as I show in chapter 8, was an ongoing hallmark of American refugee policy. And yet in other cases – with Britain and the Chinese refugees in Hong Kong, and with France and the Algerian refugees – UNHCR succeeded in articulating an approach that provided the refugees with protection and mollified both countries’ concerns.

Even so, few states had such concerns at this time or sought to challenge the agency’s increasingly wide-ranging role. Rather, the UNHCR found this expansion of mandate and the size of new refugee flows in the developing world to pose their own legal and assistance

⁴⁵¹ Colmar, “Note on the Good Offices” 2 Apr 1968. UNHCR Archives HCR/1/1/71 “Good Offices” Policy- 6. 3 underlining in document.

problems. (Elie 2007: 10)⁴⁵² While they seemed likely to fall under the UNHCR mandate, logistical difficulties meant that the UNHCR could not carry out individual determinations of refugee status. As a consequence of this, UNHCR began to embrace a conception of “collective prima facie eligibility” driven by the inability to process large numbers of refugees and, as Sadruddin notes, as a “more pragmatic and humane rather than legalistic approach to the refugee problem.” (Sadruddin 1976: 48, see also UNHCR 1966: Appendix I) This enabled the UNHCR to provide protection en masse, and if individual determinations were needed, they could be undertaken later. (Gordenker 1987: 39)

By the late 1960s there was increasing internal debate over the ‘good offices’ concept. It was understood that the concept, in order to ensure the High Commissioner could respond quickly, “had to remain vague... the High Commissioner, to a great extent, has judged himself whether or not to deal with new refugee problems in various parts of the world.”⁴⁵³ Even with this flexibility, however, the UNHCR encountered situations where the existing refugee definitions did not apply. The world situation had begun to change substantially, with refugee numbers expanding due to decolonization, political instability, and increased violent conflicts. (Capelli 1987: 28, Soguk 1999: 173)

⁴⁵² By the 1960s, Sadruddin Aga Khan notes that the UNHCR was facing a number of refugee flows in Africa, resulting from independence movements and internal strife in countries which had already gained independence. The former included those under Portuguese administration as well as South Africa, Namibia, and Southern Rhodesia. The latter included Rwanda, Zaire, and Ethiopia. (1976: 11-3) Similarly, in 1964 the UNHCR’s Executive Committee, composed of member states, noted that there was a growing split in the UNHCR activities between the ‘old’ refugees in Europe and ‘new’ refugees and refugee situations elsewhere which would require a more significant focus on development initiatives as well as assistance. (Warner 1990) Thus, the UNHCR was faced with a rapidly expanding set of refugee flows and the organization expanded its development activities accordingly with the support of its member states. (Crisp 2001: 169-72)

⁴⁵³ A. Rorholt to J. Colmar “Good Offices and their Use” 18 May 1967. UNHCR Archives HCR/1/1/71 “Good Offices” Policy-3.

7.4.3 Empowerment through Legal Changes: The 1967 Protocol and Expanded Regional Definitions

The changing international environment meant that the Refugee Convention definition of refugee states was increasingly anachronistic. Schnyder therefore embarked on a process to amend the Convention.⁴⁵⁴ His goal, Davies suggests, was not only to remove the geographic and dateline limitations but to also create a definition applicable to a wider range of refugee situations and which would provide for prima facie determination. (2008: 704-8)

This legal review began with a UNHCR-sponsored meeting of a group of experts in Bellagio, Italy, in April 1965. This Colloquium was tasked with the issue of examining what had become a “growing discrepancy between [the Convention and the Statute] due to the existence of refugees who are not covered by the Convention but for whom the High Commissioner is competent under his Statute.”⁴⁵⁵ The Colloquium found that the refugee problem was both universal and of indefinite duration, and argued that “it was urgent for humanitarian reasons that refugees at present not covered by the Convention should be granted similar benefits by means of an international instrument.” They recommended a Protocol which would remove the dateline and geographic limitations from the Convention.⁴⁵⁶ The High Commissioner consulted UN member states, who generally replied

⁴⁵⁴ Several scholars have suggested that the Protocol was not necessary given that states could derogate the geographic constraints and that European states were more willing to provide protection because of the limitations. (see Bem 2004, Jackson 1999, Goodwin-Gill 1996: 297, n. 3)

⁴⁵⁵ “Memorandum by the United Nations High Commissioner for Refugees on the Report of the Colloquium on Legal Aspects of Refugee Problems” 23 Sep 1965 (HCR/RS/31), Paul Wise Archives PW/PR/HCR/BSN/14/2

⁴⁵⁶ Ibid. 2 A Protocol also helped to avoid a discussion within the General Assembly of the whole substance of the Convention, grounded in the fear “that there remained a large number of governments resistant to the idea of accepting increased legal obligations, as they saw it, to an unforeseen number of potential refugees.” (Davies 2008: 722)

positively to the request.⁴⁵⁷ After securing broad state support, and discussing the Protocol with the Executive Committee, the UNHCR submitted the Protocol to the UN for ratification and it entered into force in 1967. (Lewis 2005: 77)⁴⁵⁸

Most notably, apart from removing the previous restrictions, thereby universalizing the UNHCR's mandate (Helton 2000), it was structured so that states who acceded to it would also in effect be undertaking all the obligations of the 1951 Convention. States that had previously not signed the Convention, including the United States, now became party to both. (Loescher 2001: 124) Thus, the removal of both the time and geographic restrictions which has previously bound the UNHCR "eliminated the central anomaly between the Statute of UNHCR and the Refugee Convention - the Refugee Commissioner's simultaneous responsibility for refugees and the limitation of his authority..." (Gallagher 1989: 583) With this change, the Convention gained "a more legitimate claim to universality" and a much wider global acceptance. (Smyser 1987: 13) The 1967 Protocol represented a high point for the postwar refugee regime. Refugees were now understood to be a universal issue, one not restricted either to Europe or to Cold War tensions.

However, while the dateline was now gone, the refugee definition remained limited in other ways. It continued to lack a duty to provide asylum (Roberts 1998: 381) and also remained focused on state-based persecution. As David Matas has 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."(1989: 42)

⁴⁵⁷ UN General Assembly "Proposed Measures to Extend the Personal Scope of the Convention Relating to the Status of Refugees" 12 Oct 1966 (A/AC.96/346). 8. Paul Wise Archives PW/PR/HCR/BSN/14/8

⁴⁵⁸ A number of states from the developing world expressed concerns that the Protocol did not go far enough, but only after the vote had already been taken so as to not delay the extension. (Davies 2008: 725-6) Davies argues that unequal state representation in the drafting process, focused on states from the developed world, had limited discussion of broader issues. (2008: 727-8)

These limitations meant that by the late 1960s, most refugees no longer fell within the tight bounds of the Convention, a pattern that continues today. Because of this, new broader definitions were advanced at the regional level, thereby creating an expanded notion of refugee status. (Arboleda 1991: 186-7) The UNHCR supported these efforts; however it was primarily a defensive move to convince the OAU that the agency could provide regional refugee assistance and to avoid the creation of a new regional IO.

The Organization for African Unity (OAU) in 1969, two years after the Protocol, enacted a Convention which defined refugees far more expansively, as:

every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it... The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁴⁵⁹

Such a definition includes not just state-based persecution, but also broader challenges to public order. Thus it incorporates situations of generalized violence as well as the possibility not of state action against the refugee, but of the incapacity of states to stop such actions. It also commits African states to both preserve the right to asylum and to non-refoulement. (see Gibney 2004: 7, Rwelamira 1989)⁴⁶⁰ In so doing, it allows individuals to acquire refugee status without having to justify their fear of persecution. (Arboleda 1991: 194) In this sense, the OAU definition returns to the views of the interwar period. Even so, it

⁴⁵⁹ Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Article 1 and 2

⁴⁶⁰ Milner notes that Article II(1) of the Convention constitutes a right to asylum by providing that member states "shall use their best endeavors consistent with their respective legislations to receive refugees..." It also establishes a strong legal provision for burden sharing among African states. (Milner 2004: 6) Rutinwa argues that the "norm of non-refoulement covers both non-rejection at the frontier and non-return and applies even to persons who are still inside places where they fear harm." (Rutinwa 1999: 5)

remains tied to the Refugee Convention and “complements and supplements the universal asylum instruments.” (Arboleda 1991: 193)⁴⁶¹

This change was advantageous for African states because it enabled them to engage in an open door policy towards refugees in keeping with their support for liberation movements. As Bonaventure Rutinwa has noted, “African countries readily admitted all those in search of security and safety, and refugees were hardly ever rejected at the frontier or returned to countries where they might face persecution or serious harm.” (1999: 1)⁴⁶²

Additionally, the Convention marked a victory for the UNHCR. The OAU worked closely with the UNHCR in drafting the text and the Convention, in Article VIII, establishes that “member states shall co-operate with the office of United Nations High Commissioner for Refugees.” The 1967 Protocol also helped the process, since prior to its enactment the OAU had been contemplating creating its own independent instrument. (Arboleda 1991: 193) In addition, the OAU had planned to create its own refugee agency and channel all international assistance to refugees in Africa through it, rather than the UNHCR. But when:

OAU states considered the establishment of a regional High Commissioner for Refugees, the UNHCR became alarmed. The Office felt that the Africans’ efforts to set-up their own refugee organization would duplicate and compete with their own agency and programmes. Most importantly, however, Schnyder felt that the UNHCR had a universal mandate and that refugees in Africa should remain the UN’s concern. Moreover, the UNHCR feared that the establishment of a separate OAU refugee office would unduly politicize the African refugee problem. (Loescher 2001: 125, see also Milner 2004: 13)

The other expansive regional definition, the Cartagena Declaration on Refugees was adopted by ten governments in the Central American region in 1984.⁴⁶³ This was

⁴⁶¹ The UNHCR also hoped that an instrument that was more liberal than the Refugee Convention might trigger efforts to bring the Convention up to the new standard. (Jackson 1999: 181)

⁴⁶² Milner is critical of this view. Such a hypothesis suggests the Convention “was motivated by a predominately humanitarian desire to case a wider net over the scope of refugees,” while issues of national security, domestic politics and international relations also played critical roles in this formulation. (Milner 2004: 10) This echoes the broader emergence of cooperative efforts within the refugee regime more generally.

⁴⁶³ These governments included Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela. (Arboleda 1991: 187)

necessitated by the dramatic growth in refugee numbers due to violence and state repression in Central America in the early 1980s. These flows differed considerably from earlier refugee movements, which had generally been small and often consisted of members of the social or political elites. These new flows, rather, “were mostly rural, ethnically mixed people, who concentrated in remote areas bordering their country of origin” and consequently required far greater amounts of assistance. But these larger groups could also not easily be accommodated within the existing legal instruments. (Arboleda 1991: 200-1, Hartigan 1992)

The Declaration, like the earlier OAU Convention, reiterated the need to enlarge the concept of a refugee to include those “who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”⁴⁶⁴ However, since it was non-binding, it merely “confirmed customary legal rules for defining refugees.” (Arboleda 1991: 187)

However these were regional agreements only and moreover regional agreements based in the developing world. As Dennis McNamara, a former UNHCR Director of International Protection, has noted, “a narrow interpretation of the refugee definition is applied exclusively by developed states...those in the south are expected to (and generally do) apply a much broader definition as in the OAU Convention. Unsuccessful asylum-seekers are not all bogus- many are victims of this restrictive interpretation.” (cited in Loescher 2001: 365)

The good offices protocol, the Refugee Protocol, and these regional definitions all provided the UNHCR with a global mandate to protect refugees and extend them assistance.

⁴⁶⁴ Cartagena Declaration on Refugees, Nov. 22, 1984. OAS Doc. OAE/Ser.L/V/II.66/doc.10, rev.1. Article 1

Yet, states did not accede to all UNHCR decisions - an attempt to create a draft convention on the right of asylum went nowhere because even limited requirements that contracting states would use their best endeavours to grant asylum and provide a provisional stay period pending a determination of refugee status “were too strong to be acceptable to governments. They remained jealous, as always, of any international supervision over decisions that touched on immigration.” (Gordenker 1987: 42) This was, at least so far, the last attempt by the UNHCR to negotiate a universal treaty on refugees. As Lewis notes, “the increasing regionalization of refugee problems and the growing membership of the United Nations have made it increasingly difficult to achieve the consensus necessary to develop new universal treaties on refugees.” (2005: 77) One avenue of action for the UNHCR, therefore, became closed off.⁴⁶⁵ This also demonstrated a clear pattern since the creation of the agency: governments in the developed world continued to accord the UNHCR a clear independent and authoritative role provided it did not seek to interfere with their domestic processes.

7.4.4 The UNHCR as a Global Organization: Its Capacities and Limits

UNHCR activities continued to expand in the 1970s and 1980s. In particular, the agency’s attention was focused on mass refugee situations, including Afghanistan, Vietnam, Cambodia, Somalia, El Salvador, and Mozambique.⁴⁶⁶ The Convention was no longer the constraint on the UNHCR’s activities. In Africa and Central America, it could rely on the broader regional definitions in order to avoid individual determinations under the 1951

⁴⁶⁵ Alternatively, other processes may be made use of. This has occurred with regard to internally displaced persons, where the former Representative of the Secretary-General on Internally Displaced Persons made use of existing humanitarian, human rights, and analogous refugee law in order to provide a set of guiding principles detailing the rights of IDPs. For a discussion of how these Principles have become authoritative in practice, if not in hard law, see (Kälin 2001, Phuong 2004, Bagshaw 2005, Orchard Forthcoming) The UNHCR, it should be noted, has also recently renewed its commitment to strengthening the basic refugee instruments, including by supporting the introduction of domestic legal instruments. (Feller 2007: 2, UNHCR 2007)

⁴⁶⁶ For details on these flows see (Jackson 1999: 143-414, Loescher 2001: Chapters 5-7)

Convention. Elsewhere, the UNHCR increasingly made prima facie determinations on the character of refugee groups by virtue of their composition in light of the Statute and 1951 Convention definition, which allowed them to avoid individual determination processes. (Jackson 1999: 459-60, Guest 1991: 585-6)

With little legal limitation on its activities, and with continued donor support, the UNHCR expanded its activities in the developing world dramatically. The agency, which had spent \$8.3 million per year at the beginning of the 1970s, spent \$69 million in 1975. (Loescher 2001: 151) Sadruddin Aga Khan set out a vision of the UNHCR's mandate which was markedly broad:

The High Commissioner's Office could take action on behalf of large groups of people who may not all conform to the conventional definition of a refugee but are in a situation analogous to that of refugees... The reasoning behind this evolution would appear to be that cut off from their origins and scattered or brought together again by circumstances in one place, or another, these displaced persons clearly need some form of international assistance. (Sadruddin 1976: 49-50)

Under his tenure, the agency became global, (Loescher 2001: 151) an expansion that continued under his successor, Poul Hartling, who by 1980 had increased annual government contributions to \$500 million.⁴⁶⁷ With these substantial resources, the agency became increasingly assistance-orientated, running more and more programs by itself and offering greater services to refugees. (Loescher 2001: 202)⁴⁶⁸ Yet expansion came to a halt in the 1980s. Increasingly, as refugee numbers continued to expand and as more and more asylum seekers made their way to the Western world, states began to question UNHCR's views on refugee protection. As its expert authority became compromised, donor governments sought

⁴⁶⁷ During his tenure, Hartling had to deal with several massive refugee movements, including the Vietnamese boat people and the Soviet invasion of Afghanistan.

⁴⁶⁸ The move to a more operational status reflected the difficulties of working through "voluntary agencies, and local government that were often corrupt. Lacking control, the UNHCR would find it hard to prevent waste and mismanagement." (Guest 1991: 590)

to minimize the agency's autonomy and to control its budget, even as the UNHCR sought to grapple with refugee flows in a changed world.

7.5 Decline of UNHCR Autonomy and the Erosion of Asylum Since the 1980s

In contrast to its first three decades of existence, the UNHCR's record since the 1980s has been decidedly mixed due to two major changes. The first was the decline of the UNHCR's financial autonomy and increasing inability to fund all of its activities, a process that began in the mid-1980s but continues. The second has been a shift in the agency, driven both by donor states and by its own internal dynamics, to move away from a resettlement and protection-oriented mandate in host countries to one focused on activities within countries of origin. The UNHCR has seen its independent source of authority as both an expert and moral actor significantly weakened. Equally, as states have questioned its ability to deal with ongoing changes in the refugee regime and, in particular, to limit the numbers of refugees that states in the developing world need to process and accommodate, the UNHCR has lost an important source of legitimacy rooted in its effective performance. Both of these elements point to the erosion of key norms of the regime - notably state support for international organizations and a clear right to leave. This is a theme which continues in the next chapter, which focuses on the restrictionist policies of countries in the developed world, in particular the United States and Great Britain.

7.5.1. The End of Financial Autonomy

The UNHCR's financial autonomy was, as Barnett and Finnemore have argued (2004), linked to its ability to exercise authority over a wide sphere of issues. By the 1980s, this authority was no longer unquestioned by governments. In particular, the governments of Western Europe, faced with increasingly large numbers of asylum seekers who did not fit

within the 1951 Convention (often fleeing situations of generalized violence rather than individual persecution), found that their individual-based asylum determination processes were becoming backlogged. (Gallagher 1989: 593) States were also “concerned about losing control of their borders, and being overwhelmed by large numbers of refugees, not all of them with genuine claims to asylum.” (McDowall 1989: 181, Cunliffe 1995)

At the same time, the UNHCR became increasingly critical of the policies of Western Europe. High Commissioner Poul Hartling directly suggested that these governments were violating the spirit of the refugee regime:

In Europe today, we face a critical situation where the concerns may be mainly regional but whose characteristics require a truly global response... States which have been champions of human rights are now finding it difficult to grant some of these basic right to asylum seekers; people who have in the past opened their doors and their hearts to refugees are now showing signs of greater reserve and even intolerance vis-à-vis asylum seekers and refugees... Is it too much to ask that this small number of bona fide asylum-seekers... should be received and treated in accordance with those international instruments and those humanitarian traditions which have their source in this continent? (Hartling 1985)

The UNHCR, however, was no longer the sole authoritative voice in these discussions. Whereas previously governments had acknowledged the UNHCR’s unrivalled specialized knowledge and expertise concerning refugee and asylum law, and allowed the UNHCR to “play an active role in refugee determination processes,” (Loescher 2001: 40) by the mid 1980s these governments sought to develop their “their own asylum administrative arrangements and were determined to reclaim sole authority over their borders and admissions policies.” (Loescher 2001: 238) Even as European governments were having pivotal debates about how to handle asylum seekers, the UNHCR was excluded from these discussions and its authority and legitimacy significantly reduced. (Loescher 2001: 240)

The next High Commissioner, Jean-Pierre Hocke, deliberately took the agency in a new direction. His appointment was pushed heavily by the United States, and he also had the support of many developing countries. Hocke previously served as the Director of

Operations at the ICRC and was seen as a relief operations-oriented manager who would focus less on legal issues and refugee protection. (Guest 1991: 591-2, Loescher 2001: 247-8) His focus was on the countries which produced refugees, with less concern over refugees in host countries and international protection. In particular, he felt that long-term solutions were necessary and, as such, the UNHCR had “to try to achieve voluntary repatriation under appropriate conditions.” (Hocke 1989: 42, 44) This shift required the agency to increasingly become involved in countries of origin, a policy continued under his successors.

While Hocke proved to be prescient, his management style was divisive and, a major concern to donors, the UNHCR continued to expand unsustainably - staff increased by 30 per cent and the budget by 27 per cent between 1986 and 1989. (Loescher 2001: 249) In 1989, the UNHCR forecasted that it would run a deficit for the first time.⁴⁶⁹ Donor governments used this to exert direct control over the agency.⁴⁷⁰ Following a financial scandal which furthered weakened Hocke’s position,⁴⁷¹ the Executive Committee established a working group to scrutinize all aspects of the UNHCR’s budget and allowed only a semi-annual budget with 18 per cent cuts in 1990. In the wake of this, Hocke resigned and was replaced by Thorvald Stoltenberg. (Loescher 2001: 262-4, Cunliffe 1995: 279)

Stoltenberg had to deal with the financial crisis, including a requirement from the Executive Committee that the UNHCR tailor its spending to available funds, as opposed to refugee needs. (Loescher 2001: 264) He argued that this placed an additional burden on

⁴⁶⁹ Adding to these difficulties, Hocke ended a practice of exaggerating the UNHCR’s budget needs for the following year, which had provided a cushion for the organization to deal with unexpected crisis. (Loescher 2001: 263)

⁴⁷⁰ While Hocke’s shift away from protection had reduced public protests of governments, to instead focus on behind the scenes solutions, it had alienated a number of the agency’s NGO allies who might otherwise have opposed these maneuvers. (Guest 1991: 592)

⁴⁷¹ Hocke and his wife had been using a special slush fund established by the Danish government for former High Commissioner Hartling to travel first class and on the Concorde.

refugees and on first asylum countries “which are in their own right generous donors.” (Stoltenberg 1990) He also suggested that it had undermined the organization, and complained about the:

crippling effect of the unstable and unpredictable nature of funding of our activities. Living almost on a month-to-month, sometimes week to-week basis, is not only uneconomic- and may I say not very dignified-but it also makes the UNHCR a much less responsible and effective organization. (cited in Cunliffe 1995: 285)

Nevertheless, within a short time Stoltenberg stabilized the UNHCR, in part because no major refugee crises occurred. However, only 11 months after assuming the office - in November 1990 - he resigned to return to Norwegian politics. (Loescher 2001: 268)

This budget crisis effectively ended the UNHCR’s financial autonomy for two linked reasons. The first was that donors increasingly sought to exercise control over the agency in order to ensure that its efforts reflected their priorities, rather than its own, by earmarking funds. The second was that donors began to make use of other avenues of distributing humanitarian assistance. Both of these changes not only challenged the UNHCR’s financial autonomy; they also undermined the norm of multilateral provision of assistance to refugees and represented an attempt by states in the developed world to limit their responsibilities to the international refugee regime.

As an organization, the UNHCR is heavily dependent on voluntary contributions, with only two percent of its budget coming from the United Nations. (Vayrynen 2001: 150) Thus, it requires substantial economic support from governments, and not surprisingly the top donors to the UNHCR in 2007 were all from the developed world⁴⁷² - moreover, just six donors provide the UNHCR with three quarters of its funds. (Macrae, et al. 2002: 16) As Vayrynen has commented, “the dependence of UNHCR on short-term voluntary funding is a

⁴⁷² The 2007 Top Donors to the UNHCR (as of 30 June) (\$US): USA, 223,623,397; Sweden, 80,976,033; Japan, 75,363,586; European Commission, 72,447,413; Netherlands, 69,498,036 Denmark, 51,062,064; Norway, 37,193,581; CERF, 28,567,120; Canada, 27,487,084; Germany, 24,036,445.

good breeding ground for the advocacy of national political interests. Sensing its vulnerability, the donor governments can easily persuade the High Commissioner to allocate funds for special countries or projects.” (2001: 164, see also Loescher 2001: 49, Loescher and Milner 2003: 7)⁴⁷³

Moreover, governments can directly control where their contributions go through the process of earmarking. Contributions are assigned either to general programs, such as basic projects for refugee aid and the promotion of durable solutions, or special programs which focus on specific programs and priorities including emergency appeals which can result in a substantially uneven distribution of support. (Cunliffe 1995: 284)⁴⁷⁴ As Loescher notes, the principal loser due to shortfalls has been Africa:

UNHCR programs in Africa [in the 1990s] were seriously underfunded, making it impossible for the Office to provide consistent and timely assistance there. By one estimate, in 1999 the UNHCR spent about \$0.11 per refugee per day in Africa, and spent ten times that amount- an average of \$1.23 per refugee per day- in the Balkans. (2001: 322)⁴⁷⁵

These contributions mean that the UNHCR’s role is often divided between policies advocated, and supported, by governments in the developed world, and supporting the governments of the developing world which host the majority of refugees. As Morris notes:

⁴⁷³ In addition, governments more recently have argued that their failure to adequately fund the UNHCR actually shows that the organization is efficient. As Caroline Flint, a British MP, argued: “Western states spend annually around \$10 billion on less than half a million asylum seekers, most of whom are not in need of international protection. By contrast, the UNHCR supports 12 million refugees and five million internally displaced persons in some of the poorest countries in the world on a budget of only \$900 million.” (cited in Betts 2006: 148) Betts notes, however that such arguments are: “broadly being used to imply that it is legitimate for European states to revert to what has in the past been called ‘the Japanese position’, of primarily making their contribution to the refugee regime at a financial level, while leaving the direct responsibility for physically hosting refugees to countries nearer the refugees’ region of origin.” (Betts 2006: 151) Thus, they represent another way in which western states are seeking to limit their responsibilities to refugees under the current regime.

⁴⁷⁴ Earmarking, as McCrae et al noted, can “protect funds for activities that might otherwise not secure adequate support... More commonly however, earmarking results in the concentration of spending on the most visible crises.” (2002: 4)

⁴⁷⁵ This pattern continues. As Antonio Guterres noted upon becoming High Commissioner in 2005, “the biggest shock I have received in the past few days was when reading in a protection report that food rations in many of our camps are substantially below what is needed. I must tell you I feel devastated, sitting here with you today, knowing that refugees we care for are not getting enough food.” (Guterres 2005)

While in theory UNHCR is assisting governments in their primary responsibility, in practice some of these governments cannot discharge that responsibility unaided. They may have the political will, but they do not have the resources. Conversely, others in the international community have the resources but they may lack the political will. (1990: 46)

These shifts also mean that the UNHCR is no longer always the primary agency involved in refugee assistance. Rather, the United Nations - with many of its agencies in positions to provide humanitarian assistance - has sought to coordinate fundraising in complex emergencies through the Consolidated Appeals Process (CAP). While the process seeks to create common strategies among different institutional actors, designed to play to donors' interests in ensuring more efficient and results-oriented delivery of aid, it has been criticized for being "more of an agency wish list cut and pasted into a single document, than as an actual effort toward coordination." (Martin, et al. 2005: 129, Porter 2002) The CAP has done little to limit the problems that already bedevil the UNHCR's contributions process. Contribution levels have been variable over time, and governments continue to make conflicting demands on UN humanitarian agencies and "tend to pick and choose what they consider to be priorities with the CAP, which results in some activities being well funded, even to the point of excess, while others are ignored." (Martin, et al. 2005: 132)

An additional constraint on the UNHCR has been the increased involvement of NGOs in the direct delivery of humanitarian assistance.⁴⁷⁶ Many of the UNHCR's own programs are implemented through NGOs - in 1999 the UNHCR channelled \$295 million through 545 NGOs. (Ferris 2003: 125, Reimann 2006: 49)⁴⁷⁷ At the same time, total

⁴⁷⁶ This shift within the regime is part of a larger process of increased support to NGOs, leading some commentators to suggest that since the 1980s there has been a new pro-NGO international norm. (see Reimann 2006: 46) Similarly, it has been argued that many official donors are reducing aid through multilateral channels "simply because the growing range of potential recipients means they can. As an increasingly strong NGO sector has emerged, so the pre-eminent position of the UN as a provider and coordinator of humanitarian assistance has been challenged... Donors see [NGOs] as much more flexible than UN agencies in anticipating and responding to concerns regarding performance and accountability." (Macrae, et al. 2002: 4)

⁴⁷⁷ The UNHCR has also focused these activities on domestic NGOs, particularly in the developing world, going so far as to create local NGOs to implement programs in some cases. (Donini 1996) But in so doing, the

humanitarian assistance provided to CAP projects has fallen by ten percent - from forty to thirty percent - over the last decade, and “it can be assumed that this ‘lost’ funding has migrated to the NGO sector. Figures from donors seem to confirm this, with ECHO’s [the European Community Humanitarian aid Office] NGO funding rising from 30 percent of its total budget in 1990 to 65 percent in 1999.” (Martin, et al. 2005: 131) This shift is another way in which governments have sought to limit their obligation to the regime - as Raper notes, governments use NGOs rather than the UNHCR because they are cheaper and more flexible, but also more malleable than the agency. (2003: 355)

The UNHCR can, of course, advocate for a change in these circumstances. High Commissioner Antonio Guterres did just that upon his appointment, noting to the Executive Committee that:

One of the figures which struck me the most is the concentrated nature of our support... Predictable funding and the flexibility afforded us by non-earmarked funds are rightly seen as essential principles of 'good donorship'. This is also where donors share in UNHCR's accountability, both to the people of our concern and to run an efficient organization. We also continue to rely on your generosity to respond to unanticipated gaps as a result of emergencies and currency fluctuations. Only this can ensure reliable protection of refugees...(Guterres 2005)

Beginning in the early 1990s, its circumscribed ability to raise funds began to limit the UNHCR’s operations. This also meant that it became more willing to engage in new areas of activities where funds were available. Thus, the UNHCR embraced a new operational pragmatism, and in particular increased involvement in countries of origin driven by state pressures. But such pragmatic coping strategies winnowed away at UNHCR’s moral authority and mandate to provide refugee protection. As Barnett cautions, “as UNHCR’s humanitarianism has extended, its ‘pragmatism’ has deepened. The challenge for UNHCR is to encourage a humanitarianism that does not widen the humanitarian space with one hand

UNHCR has replicated its own problems with governments- when the “UNHCR withdraws its support- because of budget difficulties or because it is not satisfied with the NGO - the NGO may go out of business. Indigenous NGOs are particularly vulnerable in this regard...” (Ferris 2003: 126)

and constrict it with the other so that humanitarianism would become the enemy of refugee rights.” (2001: 246) In particular, such pragmatism dangerously undermined its sources of authority as a moral actor. It is this issue which is explored in the next section.

7.5.2. Erosion of a Protection Mandate?

In 1991 under Sadako Ogata, the new High Commissioner, the UNHCR continued the pattern begun under Hocke of focusing on repatriation and countries of origin rather than on refugee resettlement, as well as of not directly criticizing the protection policies of Western governments. Ogata argued that government support, especially from donor states, was essential to ensure that the UNHCR functioned effectively. Thus, her approach was to “maintain a dialogue with government and to avoid direct confrontation. Ogata did not believe in lecturing governments or directly accusing them of bad behaviour.” (Loescher 2001: 274) As Ogata noted in 1995, the “UNHCR is not and should not be actively involved in investigatory activities... Humanitarian action must remain broadly non-judgmental....” (1995) Such “constructive dialogues” have been critiqued, both for their opaqueness but also because underlining them is a notion that the UNHCR needs to soften its criticisms of donor governments in order to be able to receive funding for protection elsewhere. (Roxström and Gibney 2003: 43) These changes also undermined the UNHCR’s ability to engage in independent action and its authority as an independent actor.

In the 1990s, as states leaned towards increased repatriation, the UNHCR continued to shift its core priority away from being an agency of resettlement to one of repatriation. The UNHCR’s Executive Committee, in particular, encouraged this shift,⁴⁷⁸ as did other

⁴⁷⁸ The Executive Committee’s Conclusion No. 18 on Voluntary Repatriation (1980) “recognized the desirability of appropriate arrangements to establish the voluntary character of repatriation, both as regards the repatriation of individual refugees and in the case of large-scale repatriation movements, and for UNHCR, whenever necessary, to be associated with such arrangements... considering that when refugees express the

states which encouraged the UNHCR to increase operations in countries of origin because they had “tired of their obligations under refugee law and the principle of popular sovereignty.” (Barnett 2001: 246, Cunliffe 1995: 279) This change was also driven by the UNHCR itself as a reaction to the international realities it found itself within. As Loescher notes, “within the Office, there was a growing view that, with resettlement and asylum no longer realistic as a solution, refugees could not satisfactorily protected in camps where they were increasingly exposed to physical harm and were unwanted by host governments.” (Loescher 2001: 283, see also Barnett and Finnemore 2004: 94)⁴⁷⁹ But a shift towards repatriation was also what many refugees wanted. As one UNHCR official noted:

We were always interested in repatriation, but geopolitical factors prohibited it. So when the opportunity emerged to move toward repatriation, UNHCR jumped. And we always listened to what the refugees wanted during this period, and the difference is that now we were getting new refugees (not from the eastern bloc but from recently decolonized states) that wanted to repatriated. (cited in Barnett and Finnemore 2004: 96)

However this shift away from its exilic bias (Barnett and Finnemore 2004: 95) created two major problems. The first was that once the agency was heavily engaged in repatriation, the ‘voluntariness’ of it increasingly became a relative attribute subject to reinterpretation. As Loescher notes, facilitating return saw the creation of concepts such as ‘safe return,’ which did not require the situation in the home country to have improved “‘substantially’ but only ‘appreciably’...” In addition, this meant that rather than a strictly

wish to repatriate, both the government of their country of origin and the government of their country of asylum should... in co-operation with UNHCR take all requisite steps to assist them to do so...” (UNHCR Executive Committee 1980, see also Goodwin-Gill 1989)

⁴⁷⁹ The UNHCR’s 1986 Note on International Protection framed this dilemma: “It is the return of refugees to their own community or their integration in a new one which constitutes a permanent or durable solution... Action on the ground creates the conditions for the exercise of the protection function... simply intervening on behalf of refugees, while it may achieve immediate goals such as the prevention of refoulement or the identification of those in need of and entitled to assistance, is insufficient in itself. To be effective in the long term, ‘refugee law’ must remain linked to its objective - the re-establishment of the refugee within a community.” (UNHCR 1986)

voluntary decision on the part of refugees, it would be the “UNHCR who would make the assessment as to whether conditions presented a threat to their safety.” (2001: 284)

The second was that as the UNHCR increasingly focused on repatriation, it also increasingly became involved in countries of origin. This led to the agency reframing its mission away from protecting refugees who were outside their own state to protecting those who remained within their own state. Increasingly, the UNHCR’s priority was assistance.

The problem of internally displaced persons (IDPs) was effectively ignored during the Cold War. It was recognized, however the focus was on assistance rather than protection. As early as 1949, the Greek government approached the UN General Assembly for assistance to help its own population recovering from civil war. The government argued that people displaced internally by war should, like refugees, also have access to international aid even if they did not need or receive international protection.⁴⁸⁰ At the same time, India and Pakistan made similar arguments in favour of international assistance for those displaced by the 1947 partition of India. Both governments argued that “lack of legal protection was less of a problem for their internally displaced people than was sheer physical survival.” (OCHA Internal Displacement Unit 2003: 15) However, the focus on assistance, rather than protection, meant that the problems of the internally displaced were seen as different from those of refugees and therefore not of international concern. (Phuong 2004: 23)

Internal displacement re-emerged as an issue in the early 1970s, when UNHCR began to assume responsibility for some IDP situations under its ‘good offices’ protocol, which allowed for the agency to provide assistance to groups which did not fall within the Convention definition of refugees. Even so, this did not represent a substantial change in

⁴⁸⁰ GAOR, 4th Sess., Third Committee, Summary Record (1949), 110. (cited in Phuong 2004: 23, see also OCHA Internal Displacement Unit 2003: 15, Goodwin-Gill 1996: 264)

international practice. While UNHCR might have responsibility for providing assistance to IDPs in some situations, it was almost always within a broader mandate of assistance provision to refugees.⁴⁸¹ As a 1994 assessment of UNHCR activities towards IDPs noted, efforts generally fitted into one of three categories:

programs for internally displaced persons linked to UNHCR's assistance and protection functions towards repatriating refugees, or returnees; special operations not linked to returnee programs, to which UNHCR was requested to contribute its humanitarian expertise; and regional humanitarian arrangements designed to promote comprehensive solutions for refugees, returnees and displaced persons.(UNHCR 1994: 3)

There was no recognition of the need to provide a protection framework for the internally displaced. Ogata, however, increasingly framed the UNHCR as an agency for all displaced persons, both in their countries of origin and outside of them. She argued that all individuals had an inherent “right to remain” based in international law:

If I, as the High Commissioner for Refugees, emphasize the right not to become a refugee, it is because I know that the international protection that my Office, in cooperation with countries of asylum, can offer to refugees is not an adequate substitute for the protection that they should have received from their own Governments in their own countries. The generosity of asylum countries cannot fully replace the loss of a homeland or relieve the pain of exile. (Ogata 1993, see also Frelick 1990)

But accepting such a notion challenges a right to asylum. As Goodwin-Gill notes, “this is due to increasing acceptance of the internal, constitutional dimensions of freedom of movement, which itself has occurred simultaneously with a hardening of views with respect to the movement and admission of asylum seekers generally.” (1996: 103)

The ‘safe zones’ created in the Former Yugoslavia in response to such arguments “offered a poor alternative to the practice of facilitating the access of persons seeking

⁴⁸¹ The first UN resolution to approve such activities, passed by the UN Economic and Social Council (ECOSOC) and the General Assembly in 1972, approved UNHCR operations in Sudan with the goal of assisting “resettlement of refugees returning from abroad as well as of persons displaced within the country.” UN General Assembly Res. 2958 (XXVII), 12 December 1972 (see also Goodwin-Gill 1996: 264)

international protection to leave their own countries of origin.” (Gorlick 2003: 86)⁴⁸² In-country protection “contains several dangers that revolve around whether individuals might be discouraged from fleeing and thus exercising their right to seek asylum.” (Barnett 2001: 263)⁴⁸³ The UNHCR has acknowledged the limitations of such an approach, noting that:

All too often during the 1990s, humanitarian organizations such as UNHCR were left to deal with problems which were essentially political in nature. In each case, the limits of humanitarian action were clearly demonstrated. As High Commissioner Ogata emphasized with growing insistence throughout the decade, emergency relief operations should not be treated as a substitute for timely and firm political action to address the root causes of conflict. (UNHCR 2000: 243)

An additional challenge was posed by the large numbers of refugees from the former Yugoslavia and, subsequently, Kosovo. The major concern on the part of both potential host countries in Europe and the UNHCR was ensuring that these refugees could be offered protection without overwhelming the host state in question. The UNHCR argued that temporary protection offered: “A means of affording protection to persons involved in large-scale movements that could otherwise overwhelm established procedures for the determination of refugee status while privileging safe return as the most desirable solution to refugee problems.”⁴⁸⁴

Temporary protection was not a new concept - it had been offered to the Hungarian refugees in 1956. However, with the outbreak of conflict in the former Yugoslavia, it was

⁴⁸² The clearest failure of this policy was on 11 July 1995, when the Bosnian Serb army overran the safe zone of Srebrenica, which resulted in the flight of 40,000 people and the deaths of 7,000, virtually all Muslim men and boys. As Secretary-General Kofi Annan noted in a 1999 report, “when the international community makes a solemn promise to safeguard and protect innocent civilians from massacre, then it must be willing to back its promise with the necessary means. Otherwise, it is surely better not to raise hopes and expectations in the first place, and not to impede whatever capability they may be able to muster in their own defence.” (cited in UNHCR 2000: 224)

⁴⁸³ The UNHCR itself acknowledged this possibility, noting that “In-country protection, e.g., through the establishment of internationally guaranteed safe zones, however, needs to be weighed against the rights of individuals to leave their own country, to seek and enjoy asylum or return on a voluntary basis, and not be compelled to remain in a territory where life, liberty, or physical integrity is threatened” UNHCR. Note on International Protection. 9 September 1991. 10. (cited in Barnett 2001: 263)

⁴⁸⁴ UNHCR Background Note, Comprehensive Response to the Humanitarian Situation in Former Yugoslavia. 21 January 1993. (van Selm-Thorburn 1998: 36)

recast as “an alternative to asylum and generally premised on the understanding that the ‘exit strategy’ would be return rather than resettlement, and certainly rather than the longer-term residence that the future ultimately held for many Bosnians in spite of the reluctance of their hosts.” (van Selm 2003: 83) Thus, even though the UNHCR considered the vast majority of these refugees to fall within the bounds of the 1951 Convention, there concern was that “Western governments feared that the application of some of the provisions of the 1951 Convention would encourage integration in the receiving states that, in turn, would hamper repatriation.” (Roxström and Gibney 2003: 47)

This policy was problematic in two senses. First, it introduced ambiguity to the status of refugees in terms of the Convention and provided a mechanism to delegitimize the legal basis of refugee protection. (Fitzpatrick 2000: 281) Second, it was conceived primarily for the political interests of states, rather than refugees. As Roxstrom and Gibney note:

Underlying UNHCR’s conception of [temporary protection] was the idea that the preferred solution is for refugees to safely return to their country of origin. Since refugees can make up their own minds about what is in their best interest, the emphasis on repatriation essentially spoke to the presumed interest of receiving states to limit the number of foreigners...” (Roxström and Gibney 2003: 49, see also Hathaway and Neve 1997)

In seeking to assuage state concerns, the UNHCR allowed states to limit their obligations under the 1951 Convention towards certain groups of refugees and in so doing limited the rights of refugees. As Dennis McNamara has argued: “Temporary protection has generally been a positive response by states to the problem, but in some cases, it, too, has kept refugees for years in temporary, albeit safe, limbo...” (cited in Gorlick 2003: 287 fn 14) Moreover, it is suggested that the focus on return as soon as the conflict was over actually undermined international reconstruction efforts in Bosnia: “Host country governments falsely assumed that repatriation and minority returns could be made viable in the face of inadequate physical

and economic security. Therefore, and unfortunately, much funding in Bosnia was wasted.” (Martin, et al. 2005: 239)

These issues point to a disjuncture between the UNHCR’s role as an agency for refugee protection and as a humanitarian agency. As Barutciski argues, a focus on in-country humanitarian assistance not only left the agency ill-prepared for its core and primary asylum protection duties, but also politicized the agency. If it gives little deference to state sovereignty, governments in the developing world now have “legitimate reasons to fear its presence.” (2002: 368, 70) By the same token, such a position poses its own limitations as well - as Roberts notes:

A return to legal basics implies a return to a narrow definition of the refugee; and it does not respond to the real and strong pressure to take action to assist potential refugees before they leave their country of origin. That pressure has been powerful enough to trigger extensive action by other bodies, including the UN Security Council - further proof, if proof were needed, that the international refugee regime extends far beyond UNHCR, and is changing rapidly. (1998: 382)

7.5.3 The UNHCR as an Agency for Forced Migration?

Currently, the UNHCR appears to be navigating a course between these two opposing views, continuing its involvement in countries of origin - in particular by expanding its role in providing protection and assistance to IDPs - while renewing its focus on refugee protection. Through this focus, the UNHCR can position itself as a broad-based protection agency, thus once again seeking to establish its own moral authority. Equally, by focusing on solutions to long-running refugee situations, it can once again reclaim legitimacy as an important global actor through its performance. As High Commissioner Antonio Guterres has argued:

Protecting, assisting and helping to provide solutions for refugees, stressing the rights of stateless people and reducing statelessness are our core mandate. In everything we do, we can never forget our mandate, and nothing will distract us from it... We are a protection agency, and protection is at the centre of everything we do. All our actions must be protection minded... Protection is also a commitment to solutions. I think we all agree on the need for a comprehensive set of solutions, making use of voluntary repatriation in safety and dignity – always our preferred solution – but also of resettlement opportunities and of local integration possibilities. With one clear priority: to address in a

determined way the protracted situations that have been a dramatic problem for the beneficiaries themselves, for the refugees themselves, and for us as an agency. (Guterres 2007)

However, this does not necessarily limit the UNHCR to protecting only refugees. A continuing presence in states of origins to offer protection to IDPs is increasingly a vital part of its mandate.⁴⁸⁵ As a number of commentators have noted, other efforts to provide protection through inter-agency efforts have been at best ineffective and at worst complete failures. (Cohen 2006, Mooney 2005)⁴⁸⁶ Beginning in 2005, the United Nations reconceptualized its approach to IDPs around nine ‘clusters’⁴⁸⁷ and assigned the UNHCR the role as cluster lead for IDP protection, emergency shelter, camp management and coordination. However, in a dramatic change from its policies in the 1990s, the UNHCR has argued that while its involvement in internal situations “could be seized upon to ground measures on a national, bilateral or regional basis to keep internally displaced or other

⁴⁸⁵ This was established in General Assembly Resolution 53/125 (1998) which reaffirms “support for the role of the Office of the High Commissioner in providing humanitarian assistance and protection to internally displaced persons, on the basis of specific requests from the Secretary-General or the competent organs of the United Nations and with the consent of the State concerned, taking into account the complementarities of the mandates and expertise of other relevant organizations”, and emphasizes that “activities on behalf of internally displaced persons must not undermine the institution of asylum.”

⁴⁸⁶ Bagshaw and Paul note that “The UN’s approach to the protection of [IDPs] is still largely ad hoc and driven more by the personalities and convictions of individuals on the ground than by an institutional, system-wide agenda” (2004: 5) Throughout the 1990s, Francis Deng, the Representative of the Secretary-General for Internally Displaced Persons, had argued that there needed to be an effective institutional solution within the UN system to provide effective protection to IDPs. Deng had initially floated a proposal to create a new UN agency to deal with the problem. However, political will was against this option, in part because it would duplicate many existing arrangements, and costs would be substantial, but also because it would likely arouse opposition from governments and from within other agencies. (Cohen and Deng 1998: 169) It was also suggested that the best solution might be to assign responsibility to an existing agency, most likely UNHCR. However, the very idea “trigger[ed] a turf war among UN agencies unwilling to yield more power and responsibility to UNHCR.” (Cohen 2002: 40-43) The third option, which was undertaken between 1998 and 2004, was to strengthen collaborative relationships within the UN agencies system through the office of the Emergency Relief Coordinator and the Inter-Agency Standing Committee (IASC). (Cohen and Deng 1998: 170-72)

⁴⁸⁷ The identified clusters included: camp coordination and management; emergency shelter; telecommunications; health; logistics; nutrition; protection; early recovery; and water and sanitation. (UNHCR 2007)

persons otherwise seeking asylum in neighbouring countries strictly within national borders” it plans to systematically monitor all situations. (UNHCR 2007: 11)⁴⁸⁸

7. 6 Conclusions

The UNHCR has played a critical role at the international level in establishing the modern international refugee regime. The agency built on an existing normative foundation established in previous regimes to ensure that the regime was based on a clearly defined notion of who a refugee is, enshrined in international law; a clear right to leave their own state and seek asylum elsewhere, as well as a clear right of non-refoulement; and a collective responsibility among states to provide refugees with protection and assistance, managed at the international level by the UNHCR. The agency’s efforts created a coherent regime, one that successfully functioned through much of the Cold War and through tremendous changes not only in the form and geographic base of refugees, but also in their numbers.

Principles of humanitarianism provided the basis for this regime. But its success was not ordained. The agency that emerged through negotiations among states in 1950 was one with a limited mandate, scope, and no operational role. But, as we saw with the League HCR, it is possible for international organizations to dramatically alter how states perceive the regime. Thus, the UNHCR succeeded in expanding its role by proving its effectiveness, and by providing a mechanism through which states could deal with new refugee flows caused by the Cold War and, following decolonization, in the developing world. The UNHCR also was able to reframe its own source of legal authority by removing the dateline

⁴⁸⁸ The UNHCR has also produced a clear set of indicators that a risk to asylum exists, including: “Border closure; large-scale deployment of security or immigration personnel at frontiers; policies or measures restricting or preventing departure from the country; denial of admission at borders; refoulement; actions to create safe enclaves, with people fleeing the conflict being forced to move or return to these areas within a country of origin; denial of access of UNHCR to persons having crossed the border.” If any of these occur, the UNHCR pledges to “undertake strong representations to ensure that the option and ability to realise asylum is always available.” (UNHCR 2007: 11)

and geographic restrictions from the 1951 Refugee Convention and by assisting in the negotiations of regional agreements which offered expanded refugee definitions. The UNHCR played a key role as a norm entrepreneur by reframing the legal basis for refugee status and by shifting the focus of the regime away from its Eurocentric beginnings to encompass the world. Equally important, it established its own autonomy and independent sources of authority. This enabled it to react successfully to changes in the nature of refugee flows from the 1950s into the 1980s.

And yet, as refugee numbers began to substantially increase in the 1980s and, in particular, as increased refugees sought to reach the developed world, the UNHCR's role was increasingly constrained by states that effectively controlled its budget. These refugee flows are the most recent crisis event within the international refugee regime, and as states sought to alter their policies to adapt to this new situation, the UNHCR was often caught in the middle. The agency itself increasingly strayed from its original mandate, trying to pragmatically adapt to this new environment by focusing less on refugee protection as opposed to in-country and temporary protection mechanisms. These changes undermined the power of the 1951 Convention and the agency's sources of moral and expert authority as well as independent legitimacy based in reflecting humanitarian values and in its effective performance. The regime during this period was substantially weakened, both by the actions of the UNHCR and by those of the states of the developed world, whose policies focused on restrictionism at the expense of fundamental refugee rights. It is to this issue which I will now turn.

Chapter 8: Refugees and the Rise of Extraterritorial Restrictionism

8.1 Introduction

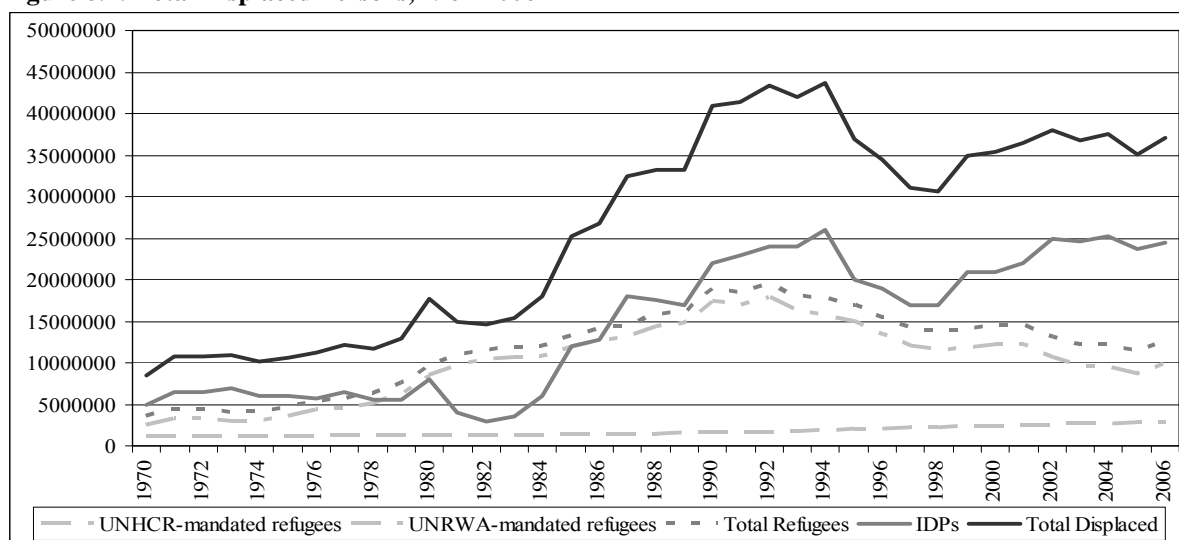
Since the end of the Cold War, the international refugee regime has been in crisis. This has occurred for two reasons. The first is the dramatic increase in the number of refugees and internally displaced persons, many of whom no longer fall within the Convention definition (see figure 8.1 below). Equally, the end of the Cold War meant that the effective frame which had created a harmonious congruence between states' refugee and security policies no longer exists and, as routes for labour immigration have been closed off, increasingly other migrants seek to gain entrance to states as refugees.

The last chapter dealt with how the UNHCR has sought to grapple with this changed environment. This chapter focuses on the trends in the state response to refugees at the domestic and international level. States "strive to legitimize their behaviour by showing that it conforms to important rules, norms, or laws accepted as appropriate." (Cronin and Hurd 2008: 8, see also Hurd 2005) Increasingly, the states of the developed world have engaged in bifurcated policies: acknowledging in their commitment to asylum and the regime in rhetoric in the one hand; while prioritizing their national interests – particularly immigration and border control – over their humanitarian interests on the other. Yet, by exploring the domestic contexts in which these changes have occurred in both the United States and Britain, it becomes clear that these shifts in many ways are not deliberate. Rather, in the shifting international environment, anti-immigration forces were able to exercise a great deal of influence over immigration and refugee policy. Like the interwar period, therefore, refugee policy at the international level has been compromised by shifting interests at the domestic level: "the dominant States in this period," Andrew Shacknove argues, "are unsure

about their global interests and objectives and, therefore, the future design of the refugee regime remains largely inchoate.” (1993: 521) As the international environment is altered in ongoing and unforeseen ways through the process of globalization, migration legislation has become one of the bastions of state sovereignty. (Dauvergne 2004, Sassen 1996)

At the international level, these changes have meant that the basis for the regime – that states accept a collective responsibility for the world’s refugees, with the UNHCR acting as the conduit for state assistance and for refugee protection – has created a diffuse responsibility for individual states in the developed world. These states have sought to reframe the regime in stark terms that while refugees possess the right to seek asylum, they do not have the right to choose in which country, and extraterritorial measures in an attempt to prevent asylum seekers from being able to claim their internationally-legally protected status. Thus, this is a case of the relevant normative framework of the regime being “under siege.” (Andreopoulos 2008: 118)

Figure 8.1: Total Displaced Persons, 1967-2006



Sources: UNHCR, <http://www.unhcr.org/statistics/United Nations Relief Work Agency> (UNRWA - with responsibility for Palestinian refugees), <http://www.un.org/unrwa/publications/index.html>; Idean Salehyan, <http://www.cas.unt.edu/~idean/correction.txt> for 1970-2001; Norwegian Refugee Survey (1998). Internally Displaced Persons: A Global Survey. London: Earthscan Publications. 28; United States Committee for Refugees, World Refugee Survey 1997-2004; Internal Displacement Monitoring Center, Internal Displacement: Global Overview of Trends and Developments, 2005-2007. Geneva: Norwegian Refugee Council

This chapter therefore seeks to position these changes within the regime and explore the domestic context within both the United States and Great Britain that has led to these outcomes. As I argued in the last chapter, these changes have had detrimental effects within the regime, both in terms of the UNHCR's capacity as an independent actor but also in the ongoing plight of refugees in the developing world, many of whom are trapped in camps for years, subject to rights violations, and, at the extreme, to refoulement. Crucial to this is the question of whether the maintenance of order and stability in international society continues to rely on the need to provide a cooperation mechanism to deal with refugees and other forced migrations. (Shacknove 1993: 516)

8.2 The Undermining of a Protection-Oriented Regime

The previous chapters have focused on the origins of the current international refugee regime and its normative foundations. As we have seen, some norms – such as the right of refugees to leave their own state and seek asylum, and the provision of protection in law – have been longstanding, foundational practices. Other norms, while more recent – including interwar innovations that states needed to accept a collective responsibility to protect refugees through a formal multilateral framework; that refugee protection needed to be rooted in international rather than domestic law with states agreeing to the creation of the 1951 Refugee Convention and its 1967 Protocol; that refugees should possess a right of non-refoulement; and finally that states should provide assistance through a multilateral IO – have equally important roles in forming this regime. These norms have ensured that since its creation in the post-war era, this regime has been durable. It has been effective because its norms are coherent and the regime continues to serve a central purpose: ensuring that refugees receive protection and that states have an obligation rooted in a collective

responsibility towards this goal. The regime has been robust, primarily because of the UNHCR's role. The agency not only ensured the global expansion of the regime to accommodate new refugee exoduses (situations which would have triggered crises in previous regimes); it also successfully redefined how states understood the regime and created its own independent sources of authority. Equally, fundamental institutions – including multilateralism, international law, territoriality, and popular sovereignty – have served to create the basic rules through which states behaved within the issue area and have provided them with important sources of legitimation.

Yet, this regime when it emerged in the 1940s and 1950s reflected several implicit assumptions around the nature of refugee flows: refugees remaining displaced from the Second World War would be one of the major groups requiring protection; most new refugees would be those fleeing Communist countries; most refugees would need to be permanently resettled rather than repatriated, since Communism (appeared) to be here to stay; and finally, given tight border controls from those countries, that refugee flows would be small. The UNHCR could trust that states would be generous towards refugees, provide them entry, and provide them with long-term if not permanent residence. (Joly 2002: 1)⁴⁸⁹

Today, as the nature of refugee flows no longer reflects this implicit understanding, the norms of the regime are under challenge. As Gibney has commented, “if the provision of protection for refugees is its central goal, then the system of asylum offered by Western states is currently in deep crisis.” (2004: 229) The developed world has moved away from an exile-bias for the regime (Chimni 1998) towards one that stressed increased repatriation and

⁴⁸⁹ Though Keely notes that through much of the Cold War, these states lacked the institutionalized capacity to be countries of first asylum from which refugees would repatriate when able. Rather, in “Western Europe and North America, the de facto preferred durable solution for refugees was (and typically still is) permanent incorporation into the receiving society.” (2001: 305)

refugee warehousing in the developing world. Resettlement, these states argue, should not have “assumed such importance as a durable solution.” (Shacknove 1993: 523)⁴⁹⁰ When these states do accept refugees in large numbers, it tends to be under temporary protection schemes and limited to flows in their immediate vicinity. (Gibney 2003: 6, Martin 2000)

Even while these states argue that “a rising number of applicants for asylum... are not in genuine need of protection,”⁴⁹¹ refugees who do reach their territory are instead offered alternative forms of recognition, such as leave to stay on humanitarian grounds, and temporary stays against removal (Duke, et al. 1999: 106, Gibney 2004: 8) because as Neumeyer notes, “it is difficult to justify denying protection for these other ‘genuine’ refugees altogether...” (2005: 390) Low recognition rates also help to inflate the numbers of apparently ‘bogus’ asylum seekers. (Schuster 2003: 161) Thus between 1996 and 2005, Britain accorded Convention status to 16.9 percent of asylum claimants, but humanitarian status to 32.8 percent of claimants. (UNHCR 2006: 161-2)⁴⁹²

Their focus, instead, is on an increased ‘respect’ for the right to remain in one’s country, rather than the right to leave, and a focus on safe zones or havens in countries of origin. (Joly 2002: 3, see also Chimni 1998, Roberts 1998) Thus, the protection basis of the regime – in particular the right to seek asylum outside of one’s own state – is approaching “an impending fundamental breakdown.” (James Hathaway, cited in Joly 2002: 3) The issue,

⁴⁹⁰ This is reflected in the steady decline of resettlement. In 2005, the United States accepted 53,813 resettled refugees; Australia 11,654; Canada 10,400; Sweden 1,263; Finland 766; Norway 749; New Zealand 741; Denmark 483; Netherlands 419; United Kingdom 175; Ireland 117; Brazil 76; Chile 46; Argentina 34; Iceland 31; and Mexico accepted 29. UNHCR has been active at encouraging increased resettlement for humanitarian reasons, and has criticized a focus on resettlement as a cloaked immigration scheme, noting it “should remain a humanitarian protection tool.” (UNHCR 2007: 15)

⁴⁹¹ European Council “Resolution on Manifestly Unfounded Applications for Asylum.” 30 Nov 1992.

⁴⁹² Convention refugees generally receive full legal and social rights, whereas other classifications may not. Even so, the economic status of these refugees remains problematic, with unemployment rates remaining extremely high due to lack of appropriate qualifications, experience, knowledge of the local language, but also discrimination. (Liebaut and Hughes 1997)

here, as Gibney and Hansen suggest, is that these governments have been seeking (and struggling) to produce a system with the goal of ensuring “delivery to their borders of a manageable flow of asylum seekers and refugees that is stable in that it does not fluctuate dramatically upwards over time.” (Gibney and Hansen 2003: 14, see also Gibney 2004: 2) Western states find it problematic to deport even failed asylum seekers because deportation rests uneasily within the liberal principles of Western democracies which establishes a legal culture in which all asylum cases should be processed individually: “the longer individuals spend on national territory, the stronger the claim they can make against removal...the same rights culture that facilitates longer stays makes them the basis of a legitimate claim to remain.” (2003: 4, see also Ellerman 2006: 306)⁴⁹³

8.2.1 Deterrence, Negotiated Agreements and Extraterritorial Measures

This view has led to policies designed to curtail the ability of refugees to reach and claim asylum within these countries through deterrent strategies, border controls, legislative changes and extraterritorial measures. States justify this by arguing that limits can be applied “so long as that asylum-seeker has a full and fair opportunity to present a claim for protection, and to receive asylum if he or she is a refugee” in a country.⁴⁹⁴ In-country deterrent mechanisms offer the opportunity to refugees to prove that they should be granted

⁴⁹³ Deportation is often used more symbolically than as an effective strategy. President Nicolas Sarkozy of France, while Interior Minister, with great fan-fare announced that the deportation rate would increase from 5,000 to 25,000 per year. Yet the announcement triggered a flood of requests for residency papers and a backlash over fears that families would be split as well as suggestions that prefects had been given monthly deportation quotas. (Smith 2006) Air France workers have sought to block such measures arguing that the deportations, with individuals sometimes gagged or handcuffed, arguing they damage the image of the company and security of flights. (AFP 2007) Further, this marks France as the country to deport the most failed asylum seekers. In 2005, Great Britain removed 15,850 failed asylum seekers, while it received 52,000 new claims; Germany removed 16,865 by air (and received 42,000 new claims); and Spain removed 2,831 (while receiving 5,000 new claims). (European Council on Refugees and Exiles 2006, UNHCR 2006)

⁴⁹⁴ Joseph E. Langlois, Director, Asylum Program, Immigration and Naturalization Service. Statement regarding the U.S.-Canada Safe Third Country Agreement before the House Subcommittee on Immigration, Border Security, and Claims. 16 Oct 2002. 2

Table 8.1: Applications Received for Asylum in Europe, 1989-1997

| | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 |
|----------------|---------|---------|---------|---------|---------|---------|---------|---------|---------|
| Austria | 21,900 | 22,800 | 27,300 | 16,200 | 4,400 | N/A | N/A | N/A | N/A |
| Belgium | 8,100 | 13,000 | 15,200 | 17,800 | 26,900 | 14,300 | 11,400 | 12,200 | 11,600 |
| Denmark | 4,600 | 5,300 | 4,600 | 13,900 | 14,400 | 6,700 | 5,100 | 5,900 | 5,100 |
| Finland | 200 | 2,500 | 2,100 | 3,600 | 2,000 | 800 | 900 | 700 | 1,000 |
| France | 66,000 | 61,600 | 51,200 | 31,800 | 29,300 | 28,600 | 24,200 | 20,600 | 24,000 |
| Germany | 157,300 | 250,900 | 332,800 | 569,600 | 419,400 | 165,400 | 166,300 | 151,300 | 135,700 |
| Italy | 2,200 | 4,700 | 31,700 | 2,600 | 1,600 | 1,800 | 1,800 | 600 | 1,700 |
| Netherlands | 14,000 | 21,200 | 21,600 | 20,300 | 35,400 | 52,600 | 29,300 | 22,900 | 34,400 |
| Norway | 4,400 | 4,000 | 4,600 | 5,200 | 12,900 | 3,400 | 1,500 | 1,800 | 2,300 |
| Spain | 5,200 | 11,200 | 10,500 | 15,200 | 16,400 | 13,300 | 7,400 | 6,100 | 6,400 |
| Sweden | 32,000 | 29,000 | 27,300 | 84,000 | 37,600 | 18,600 | 9,000 | 5,800 | 9,600 |
| Switzerland | 24,500 | 36,000 | 41,600 | 18,000 | 24,700 | 16,100 | 17,000 | 18,100 | 23,900 |
| United Kingdom | 16,800 | 38,200 | 73,400 | 32,300 | 28,000 | 42,200 | 55,000 | 37,000 | 41,500 |
| Total | 357,200 | 500,400 | 643,900 | 830,500 | 652,900 | 363,900 | 328,000 | 283,000 | 297,200 |

(Source: Home Office 1998)

asylum under the Convention or, at the very least, humanitarian status and non-return to their country of origin. Extraterritorial measures, by contrast, focus primarily on preventing asylum seekers from being able to access this system at all.

Beginning in the 1990s⁴⁹⁵ as a reaction to dramatic increases in the number of asylum seekers, (see table 8.1 above) European states introduced a number of deterrent measures designed to make the costs of entry arbitrarily high and to discourage potential asylum seekers from attempting entry.⁴⁹⁶ These mechanisms include limitations on employment for

⁴⁹⁵ This had lagged other institutional innovations in the European context, in part because of German actions. Until its Basic Law was amended in July 1993, Germany provided that “persons persecuted on political grounds shall enjoy the right to asylum.” This right went beyond the principles of the 1951 Convention by allowing a person in to Germany as a matter of right. Bound in the Basic Law, this right was very difficult to amend, which meant that Germany was increasingly the destination of choice as other states sought to tighten their own immigration restrictions. (Gibney 2004: 88-9, 98, see also Joppke 1999: Chapter 3, Schuster 2003: Chapter 5)

⁴⁹⁶ The first stage of this was the 1985 Schengen Agreement, which created a common framework for the treatment of refugee and asylum seekers. It proposed that refugees would be treated like other aliens holding a residence permit from one of the contracting states - they would enjoy freedom of movement but have to declare themselves to the authorities within three days of entry, while asylum seekers would not have the right to move outside of their country of application. (Joly 1996: 51) This was not the only European action - the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America, and Australia (IGCARM), mentioned in the previous chapter, became a secret forum for discussion and policy formation, and it has since established an electronic database to track asylum-seekers’ movements. (Pirouet 2001: 128)

asylum seekers while their claims are processed, limitations on access to welfare or payment through in-kind benefits, and at the extreme policies of detention. In most cases, these policies are reversed once the refugee proves their bona fide status. (Gibney and Hansen 2003: 7-8)

An additional European innovation from the same period is Safe Third Country (STC) Agreements, which allow governments to send back asylum seekers to other countries through which they had travelled on route. This principle was first established in the Dublin Convention, signed in 1990, which established that within signatory countries, an asylum claimant must be examined by the first member state of the European Union they reach. Thus its primary aim was to “prevent multiple or serial applications.” (Levy 2005: 32)⁴⁹⁷ While states have generally been careful in defining what constitutes a safe third country,⁴⁹⁸ such agreements have been criticized due to the risk of ‘chain deportations,’ with asylum seekers being passed from one state to another. The UNHCR has argued these practices as ‘clearly contrary to basic protection principles’...” (UNHCR 2000: 161)⁴⁹⁹

⁴⁹⁷ Since 2003, the Dublin II convention has clarified transfer procedures and also introduced a computerized finger-print system in order to track asylum seekers. (Levy 2005: 32) Both agreements, as Pirouet notes, were deliberately created with no right to appeal to the EU Court of Justice for asylum-seekers, so they “have no means of appealing against decisions made under its rules” and while the European Parliament must be consulted, it has no powers to amend or veto legislation with respect to asylum or refugee policy (2001: 132)

⁴⁹⁸ The 1992 European Commission policy argued that safe third country agreements were both true to the 1951 Convention and that they were concerned “especially at the problem of refugees and asylum seekers unlawfully leaving countries where they have already been granted protection or have had a genuine opportunity to seek such protection...” Thus, it sought to reframe the issue by criminalizing refugees who had left the first country of asylum. The criteria for a country to be deemed ‘safe’ included that life or freedom of the asylum applicant could not be threatened, nor could they be exposed to torture or other mistreatment. European Commission “Resolution on a Harmonized Approach to Questions Concerning Host Third Countries” 1 December 1992. Even so, exceptions have been common. Until recently, “Germany denied asylum claims where non-state agents, such as the Taliban, carried out the persecution... Austrian law states that all countries that signed the Refugee Convention or Protocol are to be considered safe third countries...” (Martin, et al. 2005: 43-4)

⁴⁹⁹ Equally, concerns have been raised that countries with more restrictive asylum procedures may not qualify as safe. Following a STC agreement between Canada and the United States, Canadian NGOs alleged that US policies were more restrictive in four areas including: the exclusion of claims by asylum seekers who had been in the US over a year, a lower acceptance rate for gender-based persecution; concerns over how effectively the

Extraterritorial measures, by contrast, are designed to prevent asylum seekers from being able to access refugee determination processes and thereby asylum at all. (Gibney 2005: 4) As the UNHCR has recently warned:

Confronted with rising numbers of irregular arrivals, some States have resorted to undifferentiated interception practices resulting in refoulement. Many industrialized countries have increasingly “externalized” their border controls, including through interception in the territorial waters or territory of third States with the latter’s permission and/or involvement. (UNHCR 2007: 8)

One mechanism used by all Western countries is visa controls, which are designed to act as deterrents in two ways: the additional cost, hassle, and time of applying for a visa, and as a mechanism to deny entry to those who might seek asylum. (Neumayer 2005: 4) Even if an individual qualifies for a visa, the action of going to apply at embassies in their own country may be risky in and of itself. (Schuster 2003: 144) Britain led the way by introducing visa requirements for people from Sri Lanka and Turkey in the 1980s after there was a dramatic increase in asylum seekers from both countries. (Collinson 1996: 80) This was established as common practice throughout the EU in the Treaty on the European Union which stated that:

in the event of an emergency situation in a third country posing a threat of a sudden inflow of nationals from that country into the Community, the Council may... introduce a visa requirement for nationals from the country in question. (cited in Collinson 1996: 80)⁵⁰⁰

States also levy fines on air, land and sea carriers that bring foreign nationals without proper documentation to state territory, and include both a financial penalty (which can range

United States is following the Convention Against Torture, which includes a right of non-refoulement; and finally had a very broad restriction on refugee status for those ‘engaged in terrorist activity.’ (Canadian Council for Refugees 2006, see also Canadian Council for Refugees v. Canada, UNHCR 2006)

⁵⁰⁰ Thus, all European Union countries except for Ireland and Great Britain refer to an identical list of countries whose inhabitants require a valid visa to cross external borders, a list which included 132 countries in the 2001 regulation. (Neumayer 2005: 5) Similarly, in the United States, countries are added to the list of those requiring visas if their disqualification rate, the percentage of individuals who violate conditions of entry or are rejected or withdraw their application, is above two per cent. (Siskin 2004) The UNHCR argued ineffectually against the introduction of such policies, noting that “Some measures, such as the introduction of visa requirements and the imposition of sanctions against airlines transporting illegal immigrants, can be justified in relation to countries where a situation giving rise to refugee outflows does not exist. However, where such situations do exist in the country of origin, as a result of persecution or fear for one’s safety, such measures must give rise to legitimate apprehension to those working on behalf of refugees.” (UNHCR 1987)

as high as €10,000) as well as the ancillary costs of return. (UNHCR 2006: 35) These have also been introduced in European law, in the Schengen Implementing Convention. (Collinson 1996: 80)

Pre-inspection regimes are also used by a number of countries, where immigration staff based in foreign airports seeks to detect potential illegal migrants. In some cases international zones are created at major airports, where individuals arriving without documents can be held and are subjected to an accelerated determination process.⁵⁰¹ The issue with all these policies is that they do not take into account whether or not the individual is a refugee: there is little capacity within these systems to claim refugee status and, particularly with carrier sanctions, the asylum seeker will be dealing with a third party company employee who may have little or no immigration training. (Gibney and Hansen 2003: 5-7, Martin, et al. 2005: 40-3) Such policies continue even though the original justification for them - that without them Europe would be overwhelmed by asylum seekers - no longer exists (see table 8.2) In 2005, the 15 member European Union received only 212,709 asylum applications- half the number received in 2002 (394,973) and a quarter of those received in the high-water year of 1992 (830,500) (see table 8.2 below).

One question is whether these numbers are declining as a result of deterrence. Unfortunately, a much better indicator of flows of asylum seekers to Europe may be conflict in the international system. Thus, the largest number of asylum applicants in Europe in 2002 came from Iraq (50,309), though this number has since declined to 11,977 in 2005. Similarly, asylum seeker applications from a number of other countries have declined over this period,

⁵⁰¹ While individuals can claim asylum, rates of recognition vary substantially: at the international zone in Frankfurt airport, between July 1993 and July 1999 only 14 people received asylum. (Schuster 2003: 215)

Table 8.2: Asylum Applications in Europe and Selected other countries, 1997-2005.

| Country of | | | | | | | | | |
|----------------|---------|--------|--------|--------|--------|---------|--------|--------|--------|
| Asylum | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 |
| Australia | 9,312 | 8,156 | 9,451 | 13,065 | 12,366 | 5,863 | 4,295 | 3,201 | 3,204 |
| Austria | 6,719 | 13,805 | 20,096 | 18,284 | 30,135 | 39,354 | 32,359 | 24,634 | 22,461 |
| Belgium | 11,788 | 21,965 | 35,780 | 42,691 | 24,549 | 18,805 | 16,940 | 15,357 | 15,957 |
| Canada | 22,584 | 23,838 | 29,393 | 34,252 | 44,038 | 39,498 | 31,937 | 25,750 | 20,786 |
| Denmark | 5,092 | 9,370 | 12,331 | 12,200 | 12,512 | 6,068 | 4,593 | 3,235 | 2,260 |
| Finland | 973 | 1,272 | 3,106 | 3,170 | 1,651 | 3,443 | 3,221 | 3,861 | 3,574 |
| France | 21,416 | 22,375 | 30,907 | 38,747 | 54,291 | 58,971 | 59,768 | 58,545 | 49,733 |
| Germany | 104,353 | 98,644 | 95,113 | 78,564 | 88,287 | 71,127 | 50,563 | 35,607 | 28,914 |
| Italy | 1,858 | 11,122 | 33,364 | 15,564 | 9,620 | 16,015 | 13,455 | 9,722 | 9,548 |
| Netherlands | 34,443 | 45,217 | 42,733 | 43,895 | 32,579 | 18,667 | 13,402 | 9,782 | 12,347 |
| Norway | 2,271 | 8,373 | 10,160 | 10,842 | 14,782 | 17,480 | 15,959 | 7,945 | 5,402 |
| Spain | 4,975 | 6,654 | 8,405 | 7,926 | 9,489 | 6,309 | 5,918 | 5,535 | 5,254 |
| Sweden | 9,662 | 12,844 | 11,231 | 16,303 | 23,515 | 33,016 | 31,348 | 23,161 | 17,530 |
| Switzerland | 23,982 | 41,302 | 46,068 | 17,611 | 20,633 | 26,125 | 20,806 | 14,248 | 10,061 |
| United Kingdom | 41,500 | 58,500 | 91,200 | 98,900 | 91,600 | 103,080 | 60,050 | 40,620 | 30,840 |
| United States | 52,200 | 35,903 | 32,711 | 40,867 | 59,432 | 58,439 | 43,338 | 27,907 | 24,247 |

Source: (UNHCR 2006: 149)

along with perceived declines in the level of intrastate conflict. These include Turkey, Afghanistan, Somalia, and the Democratic Republic of the Congo. (see UNHCR 2006: 151)⁵⁰² While economic factors do matter in the choice of asylum seekers to travel to the developed world, so too do threats to the personal integrity of individuals “from human rights abuse, dissident political violence, civil/ethnic warfare, and state failure as well as possibly external conflict.” (Neumayer 2005: 405) Thus, the reasons why asylum seekers seek asylum in the developed world correlate closely to forced migration drivers in the developing world. (Davenport, et al. 2003, Schmeidl and Jenkins 1998) Additionally, tight restrictions will not necessarily deter them but force them underground. Current policies:

neither address the concerns of destination states nor ensure legal access to Europe for those in need of protection. This lack of legal access will, in turn, continue to increase the numbers of asylum seekers and migrants alike turning to smuggling and trafficking networks, fuelling the international criminal

⁵⁰² Similarly, throughout the 1990s, as the British government argued that they were seeking to limit multiple and fraudulent applications, the major increases in asylum seekers reflected “events such as the opening of East European borders in 1989, the start of the Yugoslav conflict (though there was a time lag), civil war, coups and changes of government in a number of African states such as Ethiopia, Nigeria and Somalia, and ongoing problems in Sri Lanka, Pakistan, and India.” (Schuster 2003: 156-7)

economy and pushing many migrants and asylum seekers to the margins of social and economic life. (Loescher and Milner 2003: 595)

States legitimate these practices by pointing to “the need to distinguish between ‘genuine’ and ‘bogus’ asylum seekers and, second, the importance of not carrying a disproportionately high portion of the European ‘asylum burden’” (Vink and Meijerink 2003: 300, Thielemann 2004: 2) and by arguing that these lead to more efficient asylum systems that help “genuine asylum seekers and deters abusive claimants.” (Home Office 1998: 1.8) More bleakly, these policies are also designed to save money, criminalize migrants, and “to convince the electorate that the government is dealing effectively with the ‘refugee problem.’” (Hassan 2002: 185, see also Hathaway 1993) Thus, deterrence plays two important roles: it enables governments to control borders while providing plausible justifications and to provide an alternative discourse in which refugees are reframed as ‘illegal migrants’ and therefore should not be accorded protection or even hospitality.

At the same time, the UNHCR has increasingly sought to work with them to improve their own processes⁵⁰³ and the agency has been supportive of EU efforts to draft a common asylum policy, arguing that “a common system enhances, rather than diminishes, refugee rights and that we become more, rather than less, integrated in a new structure.” (Guterres 2007) Loescher and Milner similarly echo these arguments, arguing that:

the apparent contradiction between a refugee’s right to seek asylum and states’ right to control their borders could be better addressed by fairer, faster, and more efficient asylum procedures and through a more harmonized and integrated EU asylum system that eliminates differing interpretations of the concept of ‘the refugee’ among EU member states. (2003: 595)

Given this, it is not surprising that the individual norms created in the 1940s and 1950s as an integral part of this regime - that primary responsibility for refugees would lie with an international organization, and that refugee protection would be enshrined in

⁵⁰³ One example of this is the recent 10-Point Plan of Action negotiated at a Euro-African ministerial meeting in July 2006 and seeks to ensure asylum seekers are channelled into appropriate procedures. (UNHCR 2007: 8-9)

international law with a clear right against refoulement - have come under significant challenge. In order to show how these patterns have evolved within the domestic policy arena, and in particular the role played by domestic structures in creating varying responses, the next two sections will briefly sketch out the changing policies of the United States and Great Britain. As we will see below, in both countries, domestic considerations have trumped humanitarian considerations in the enactment of these regulations.

8.3 The Ongoing Cold War Frame: American Refugee Policies and Domestic Interests

American policy towards refugees since the late 1940s was rooted both in the Cold War confrontation and in its own national interests. During the Cold War, American government admissions policies demonstrated a clear ideological bent focused on accepting refugees from Communist regimes. (Loescher and Scanlan 1986: 70) This led a number of commentators⁵⁰⁴ to suggest that:

the UNHCR and the norms it promotes have been largely dismissed as irrelevant by students of U.S. refugee policy. These scholars have explained variation in U.S. policy toward different refugee groups as the result of interest calculations in which international norms played no role. (Hartigan 1992: 711)

Engstrom argues that the United States never applied universally the humanitarian goals of assisting refugees because to do so “would run counter to the US foreign policy interests” (Engstrom 1997: 4, see also Rosenblum 2004: 11).⁵⁰⁵

While domestic interests may have played a role, it is difficult to see the effects of the international norms of the international refugee regime on American domestic refugee policy. The United States is a hard case particularly because of the Cold War fixation of American policymakers on Communist exiles. This led to a bipolar policy, one which easily accommodated refugees from those countries, while denying access to those fleeing

⁵⁰⁴ These include Loescher and Scanlan (1986), Zucker and Zucker (1987) and Michael S. Teitelbaum (1984).

⁵⁰⁵ By the same token, others suggest that “the very existence of a humanitarian admissions policy implies that norms matter.” (Rosenblum and Salehyan 2004: 684)

persecution from right wing or ‘allied’ governments in Central America and the Caribbean. US policy, as Teitelbaum argued, was driven by the belief that “refugee outflows serve to embarrass and discredit adversary nations.” (1984: 439)⁵⁰⁶

This ambivalence has been marked in how the United States has approached the norms of the refugee regime, particularly those established in international law. In 1968, the United States ratified the Refugee Protocol. However, as Loescher and Scanlan note, Congressional ratification of the Protocol was:

primarily a symbolic gesture, a manifestation of solidarity to coincide with the ‘International Year for Human Rights,’ which both the US and the UN had proclaimed... Certainly, the Department of State, in its testimony advocating ratification of the protocol, believed that nothing in it would significantly alter the nation’s obligations to refugees or require any changes in US administrative practice. (1986: 83-4, see also LeMaster and Zall 1983: 453)⁵⁰⁷

In submitting it to the Senate, President Johnson argued not only that it was “decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those fleeing persecution” but that most refugees in the United States already enjoyed the protection and rights offered in the Protocol. In addition, US accession would set an example at the international level, as it would “help advance acceptance of the Protocol and observance of its humane standards by States in which, presently, guarantees and practices relating to protection and other rights for refugees are less liberal than in our own country.” (Johnson 1968) Thus, the American

⁵⁰⁶ This view, while dominated during the Cold War, has been challenged more recently. Newman notes that “as a political safety valve and economic crutch, the US cold war policy of encouraging refugee flows from ‘enemy’ states may have done more to stabilize than to destabilize unfriendly regimes.” (1995: 191) Engstrom argues that this occurred with Cuba, since those who fled were opponents of the revolution and permitting them to leave “was easier than trying to monitor and curtail their political activity. (1997: 15)

⁵⁰⁷ At the time that the Convention was negotiated, the United States has noted that “it could be asserted that the measures laid down in the convention were not required in order to ensure the protection of refugees in the United States; very few articles of the convention covered problems which might arise in that country and few of them could add anything whatever to the protection already granted to refugees. The United States Government had nevertheless participated in the preparation of the convention, because it was vitally interested in everything relating to the protection of refugees wherever they might be...” Louis Henkin (United States Delegate) Ad Hoc Committee on Refugees and Stateless Persons, 1st Session, 23 February 1950. E/AC.32/SR.26

government endorsed the principles of the Protocol, but primarily saw it as a measure to promote the norms internationally, not as affecting their own domestic policies. Successive American administrations supported the international refugee regime and the UNHCR, however throughout much of the Cold War, the government refused to endorse a view that it was domestically bound by the legal and social norms of the regime. Rather, refugee admissions (as noted in chapter 6) were securitized as an issue, linked directly to the geopolitical conflict inherent in the Cold War. As this section will show, the government fully endorsed the norms of the regime, and provided support to the UNHCR so that it would protect refugees globally.

As we have seen, by the early 1950s, the United States no longer fully supported UN efforts to protect refugees, preferring IOs that it could create and control, including the US Escapee Program and the ICEM. Equally, the American government refused to accept “oversight by international organizations regarding admissions on its own territory because of persistent opposition within the political class to anything that might be construed as an abandonment of national sovereignty.” (Zolberg 2006: 345) However, this break was short-lived. As the UNHCR proved its value during the Berlin and Hungarian refugee exoduses, however, and created its own performance-based legitimacy, the American government increasingly supported it financially. Consequently, the government was able to have an exceptionally ideological and unique refugee policy which excluded refugees from the non-Communist world during the Cold War period (Avery 1984) in part because the UNHCR did exist. This allowed the government to perceive itself as having a limited obligation to all refugees, provided that it supported the UNHCR, and could focus on flows which most affected its perceived national interests. Domestic refugee policies were focused on

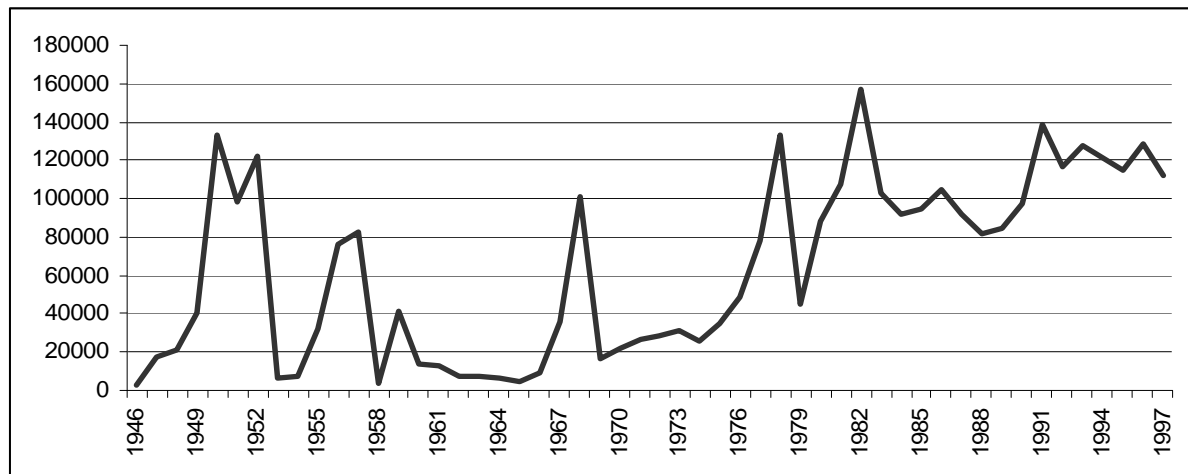
admissions from Communist countries and were tempered by different domestic constituencies.

Congress dominated US refugee policy throughout the interwar period and after the Second World War, with the executive and judicial branches being content to allow this dominance. (Gibney 2004: 141, Morris 1985: 34) Truman sought to influence policy primarily through the adoption of new legislation, rather than through the powers of the executive branch. The limitations to such a strategy, however, were clear in that Congressional members were quick to focus on the potential domestic costs of immigration and internationally found “evidence to support its fears of inundation or subversion.” (Morris 1985: 36) By 1956, with the Hungarian exodus, the Eisenhower administration was unwilling to work within Congressional which continued to reflect the quota acts. Over a longer period, successive presidents continued to call “for major immigration reform and by taking independent executive action to provide relief to refugees outside the dictates of existing legal restrictions.” (Tichenor 2002: 178) Consequently, from this period on, the executive branch generally controlled refugee policy, though with tacit Congressional support.

Thus, we can see two different periods of interest. The first, from 1956 until 1980, saw executive control of refugee policy. The main focus was on resettling refugees from Communist countries within the US, tempered by a concern to ensure domestic public opinion remained supportive. Thus over this period, there was a steady low level of refugee admissions, punctuated by large flows triggered by global events, most notably the Cuban revolution in 1959 and the fall of South Vietnam in 1975. After 1980, successive administrations tried to continue similar policies. But with the Refugee Act, they were increasingly bound by the American domestic courts in order to ensure the rights of refugees

were upheld. This was increasingly a problem because the US was also becoming a country of first asylum, especially due to migrants flows from Haiti and Cuba (see figure 8.2). In the 1990s, the United States sought to deter would-be refugees from reaching their shores, even while continuing a resettlement program, but one that would continue to be based on the Cold War legacy.

Figure 8.2: Refugee Admissions to the United States, 1946-1997



(Source data: Sutch and Carter 2006)

8.3.1 Executive Dominance of Refugee Policy 1956-1980

Given the then-existing McCarran-Walter Immigration Act, how did the Executive manage to take control of refugee policy and successfully avoid the limitations which were embodied in that Act? Part of the problem lay with those very limitations. When the Hungarian exodus began in 1956, the quota was already oversubscribed and Congress was out of session. However, the Act had granted the Attorney-General a power to ‘parole’ or temporarily release aliens for entry into the United States. (Gibney 2004: 147) Congressman Francis Walter, then the most powerful voice in Congress on immigration matters, approached the President to suggest that this power be used to allow all Hungarians seeking

entry to be paroled in as freedom fighters fleeing Communist aggression,⁵⁰⁸ a view echoed by other members of Congress interested in welcoming the Hungarian refugees. (Loescher and Scanlan 1986: 56, Markowitz 1973)⁵⁰⁹ Eisenhower himself argued that “our position of world leadership demands that, in partnership with the other nations of the free world, we be in a position to grant that asylum [to the Hungarians].”⁵¹⁰ Similarly, following a trip to Austria, Vice-President Richard Nixon argued to Congress that America needed to “take our full share of those escapees from Communist tyranny... we should not... place a ceiling on what we will do in fulfilling our traditional natural mission of providing a haven of refuge for victims of oppression.” (cited in Markowitz 1973: 51) As a result, the United States accepted

⁵⁰⁸ His support, however, was short lived: “after a trip to Austria where he claimed he saw refugees destroying their Communist Party cards, [Walter] developed a sudden change of heart, [and] began asserting that the use of RRA visas and the parole provision were both illegal and demanded that the United States ‘close the crack in the Iron Curtain’ through which thousands of people he regarded as potential security risks continued to stream.” (Loescher and Scanlan 1986: 58, Markowitz 1973: 52) Thus he and James O. Eastland (D-MS), the Chair of the Senate Judiciary Committee, demanded that the White House “discontinue forthwith the exercise of discretionary power...in behalf of Hungarian refugees.” (cited in Tichenor 2002: 203) This shift also led them to block any legislative reform. (Markowitz 1973: 55) However, this raised concerns with the State Department, which felt that a number of European states needed help with resettlement of refugees. As Secretary of State Dulles noted, “during the period when public emotion and sympathy was running high the Department of Justice was liberal in regard to the parole system. Now that Congress is back in session and emotions have calmed down, Justice does not find it possible to use this system to the same extent... The committees which are responsible for working this out are not liberal.” Verbatim Minutes of the Western European Chiefs of Mission Conference. 6 May 1957. FRUS 1955-7 Western European Security and Integration. Vol IV. 596

⁵⁰⁹ The government also hired a public relations firm in an effort to create a positive image for the Hungarians, due to lukewarm public support. A Roper poll conducted in the spring of 1957, which asked “what do you think the effect of the refugees will be on this country?” found that 24 percent were undecided, 21 percent that they would have no appreciable effect, 32 percent that they would be a bad influence, and only 26 percent that the country would be better off. (Loescher and Scanlan 1986: 58)

⁵¹⁰ Dwight D. Eisenhower. Special Message to the Congress on Immigration Matters. 31 Jan 1957. (In Wolley and Peters 2007) The White House also made a statement noting that the “flight of refugees into Austria had created an emergency problem which the United States should share with the other countries of the free world.” White House Statement Concerning the Admission of Additional Hungarian Refugees. 1 Dec 1956. (In Wolley and Peters 2007) Finally, Eisenhower also argued that the US needed to change immigration laws to accept more refugees “in light of our world responsibilities. The cost of peace is something we must face boldly, fearlessly. Beyond money, it involves changes in attitudes, the renunciation of old prejudices, even the sacrifice of some seeming self-interest.” Dwight D. Eisenhower. Annual Message to the Congress on the State of the Union. 10 Jan 1957. (In Wolley and Peters 2007)

over 30,000 refugees outside of existing legislation.⁵¹¹ The State Department also took an active role in providing assistance to other refugees, including direct assistance to Austria as well as supplementary services through the USEP. It also worked with the ICEM to resettle 10,000 Hungarian refugees who were in Yugoslavia to other countries.⁵¹²

This change did not occur in isolation. The Eisenhower administration, like the Truman administration before it, believed that American refugee policies were a crucial part of the Cold War. As General Walter Bedell Smith, the Acting Secretary of State, told a House of Representatives Committee in 1953, refugee relief had “an important impact upon the health and stability of friendly countries in Europe” and Congressional inaction would “gravely endanger the objectives of American foreign policy.” This led to the adoption of the Refugee Relief Act (RRA) of 1953, which extended 209,000 special visas to European refugees outside the quota system. (Tichenor 2002: 201, see also Zolberg 1995: 123-4) However, there was opposition to any broader programs. As Patrick McCarran argued:

with the idea of using refugees as chips in an international poker game, to achieve some advantage for ourselves, I am not in sympathy. If we are going to help refugees because they are refugees, because they are homeless and hungry and ill-clothed, that is one thing; if we are going to make a show of helping refugees in order to win an election in some European country, or get an agreement out of some European government, or try to win the friendship of the people of some country of Europe, I say the objective is primarily a selfish one, and unworthy of the traditions of the United States...⁵¹³

⁵¹¹ This concern had been raised by President Truman in his veto of the 1952 Immigration and Nationality Act, where he noted that “the inadequacy of the present quota system has been demonstrated since the end of the war, when we were compelled to resort to emergency legislation to admit displaced persons. If the quota system remains unchanged, we shall be compelled to resort to similar emergency legislation again, in order to admit any substantial portion of the refugees from communism...” (cited in LeMaster and Zall 1983: 451)

⁵¹² “US Policy on Developments in Poland and Hungary.” 31 Oct 1956. FRUS 1955-7 Eastern Europe (Vol. XXV). 357; “Progress Report on Austria.” 29 Jan 1958. FRUS 1959-1960 Germany, Austria (Vol. IX).766; “Progress Report on ‘United States Policy Toward Yugoslavia’ (NSC 5601” 24 April 1957. FRUS 1955-7 Central and Southeastern Europe (Vol. XXVI): Yugoslavia. 771 The State Department argued in favour of accepting more refugees, especially from Yugoslavia: It was “in the political interest of the United States to admit a considerably increased number of the Hungarian refugees remaining in Yugoslavia... By increasing the number we admit... we would encourage other Western countries also to accept greater numbers...” Memorandum from the Acting Secretary of State to the President. 13 August 1957 FRUS 1955-7 Eastern Europe (Vol. XXV). 651

⁵¹³ Patrick McCarran (D-NV), CR v. 99 (83C/1S) 28 July 1953. (cited in Shanks 2001: 147)

By 1956, the Republican Party platform included an argument that it supported an immigration policy “which is in keeping with the traditions of America in providing a haven for oppressed peoples...”⁵¹⁴ This theme also continued throughout Eisenhower’s Presidency.

In his final State of the Union address, he noted:

The Administration also has made legislative recommendations to liberalize existing restrictions upon immigration while still safeguarding the national interest. It is imperative that our immigration policy be in the finest American tradition of providing a haven for oppressed peoples and fully in accord with our obligation as a leader of the free world.⁵¹⁵

Consequently, after the Hungarian refugee flow, the parole power was increasingly used by the Executive branch in order to accept refugees without Congressional consent. As Gibney notes, this change heralded a confluence of a number of factors:

a newly compliant Congress, a novel institutional mechanism for escaping the strictures of immigration law and an ideology in the Cold War battle with the Soviet Union that could be used to justify refugee entry. Refugee policy had now been liberated from immigration policy. (2004: 147-8)

It also meant that most admission decisions were made within the State Department and the executive to meet specific foreign policy concerns, only after which were the decisions “submitted to key Congressional leaders for rubber-stamp approval. No votes were taken.” (Loescher and Scanlan 1986: 68)

New refugee movements showed that this system, while ad hoc, was durable.⁵¹⁶

Refugees from Cuba, in particular, would become a permanent fixture of American politics.

⁵¹⁴ They also noted that “this Republican Administration sponsored the Refugee Relief Act to provide asylum for thousands of refugees, expellees and displaced persons, and undertook in the face of Democrat opposition to correct the inequities in existing law and to bring our immigration policies in line with the dynamic needs of the country and principles of equity and justice.” The Republican Party Platform of 1956. (In Wolley and Peters 2007)

⁵¹⁵ Dwight Eisenhower “Annual Message to the Congress on the State of the Union.” 12 January 1961. (In Wolley and Peters 2007)

⁵¹⁶ This system also lowered pressure on existing legislation. As Briggs notes, the parole power meant that openings for refugees within legislation were often ignored. Between 1952 and 1965, only 61 percent of possible quota visas were issued, and only one-third of all immigrants entered under the national origins system. The rest, almost a half a million, were admitted as refugees from Communist states in Eastern Europe or China and Cuba. (2003: 120)

These also represented one of the most significant groups of refugees, with almost one quarter of a million refugees entering between 1959 and 1962, after which Fidel Castro suspended flights to the US and began to exercise tighter border controls. (Loescher and Scanlan 1986: 70) President Eisenhower, replicating the framing of the Hungarian refugees four years earlier, argued that they were an “exodus of persons fleeing from Communist oppression,” and that granting asylum to them “is in accordance with the long standing traditions of the United States.”⁵¹⁷ President Kennedy also framed the Cuban refugees as a clear sign of reaction against Castro’s, and communist, rule: “More than 100,000 refugees have recently fled from Cuba into neighbouring countries...These are unmistakable signs that Cubans find intolerable the denial of democratic liberties...”⁵¹⁸

In 1962, the Kennedy administration ensured passage of the Migration and Refugee Assistance Act, which established ongoing assistance for refugees from Cuba and an emergency fund to meet new and unexpected flows, as well as establishing annual contributions for the UNHCR and the ICEM. (Loescher and Scanlan 1986: 71, Zucker and Zucker 1987: 35, Holborn 1975: 572)⁵¹⁹ President Kennedy argued that:

With this expression of approval for the Administration's proposals to continue our assistance to refugees, the American people will be assured that this Government's leadership will be maintained in the great humanitarian endeavour of helping the world's stateless and homeless people. In continuing this endeavour, we will be carrying forward a great American tradition which is as well-known as the generosity of our people in coming to the aid of those in need. (Kennedy 1962)

⁵¹⁷ Dwight Eisenhower. Statement by the President on Releasing a Report on Cuban Refugee Problems. 18 Jan 1961. (In Wolley and Peters 2007)

⁵¹⁸ John F. Kennedy. Message to Chairman Khrushchev Concerning the Meaning of Events in Cuba. 18 Apr 1961. (In Wolley and Peters 2007)

⁵¹⁹ The Senate Committee on Foreign Relations endorsed the provision, noting that “experience since World War II teaches that international tensions and Communist efforts to increase such tensions will result in escapee and refugee problems. These situations may rise suddenly and it is impossible to predict where trouble may come. The bill recognizes the necessity of being prepared for such eventualities...” (cited in Loescher and Scanlan 1986: 71) In addition, Senator Jacob Javits (R-NY) argued that American “preparation must at least be equal to the confidence of the refugees. The archaic and discriminatory immigration laws fall far short of the mark in this respect.” CR v. 107, pt. 11 (87C/1S) 9 Aug 1961. (cited in Shanks 2001: 173)

This was followed three years later by a far more sweeping Congressional change. The 1965 Immigration Act (which amended the 1952 Immigration and Naturalization Act) finally abolished the quota policies which had governed American immigration policy for over forty years, with significant pro-immigration forces in Congress and the executive outnumbering the remaining restrictionists in Congress. (Zucker and Zucker 1987: 36, Hutchinson 1981: 368-9)⁵²⁰ This change was driven by an acceptance within Congress that ad hoc legislation would never be enough: “A bill to provide suitably for refugees and escapees needs to recognize also that the problem is recurrent” and “the fact of the refugees is an inescapable fact of contemporary history.”⁵²¹ This move was intended not only to remove the racial overtones of existing US policy, (Rudolph 2006: 57)⁵²² but to also replace it with a system based on skilled immigration and on family reunification. Family reunification would be the most significant source of immigration and was accorded some 74 percent of the annual visas. (Briggs 2003: 124-7, Kennedy 1966)⁵²³

Along with the six preference categories created by this system, a seventh was also created which reserved six percent of visa for: “Aliens who... because of persecution or fear of persecution on account of race, religion, or political opinion have fled from any Communist or Communist-dominated country or area or... from any country within the general area of the Middle East...” (Loescher and Scanlan 1986: 73) Refugees once again

⁵²⁰ For details on the debate in Congress, see Kennedy (1966) and Gimpel and Edwards (1999: 103-6)

⁵²¹ Jacob Javits (R-NY), CR v. 104, pt. 1 (85C/2S), 16 Jan 1957 and Emanuel Celler (D-NY) CR v. 104, pt. 1 (85C/2S) 16 Jan 1958. (both cited in Shanks 2001: 173)

⁵²² President Johnson, in advocating for the Act, argued that “the present statute has overtones of discrimination.” (Johnson 1964)

⁵²³ This continues to be the main source of immigration to the United States, constituting 75 to 80 percent. Newland has found that similar numbers apply to the European Union. Employment related immigration is a distant second, constituting 13 percent of immigration to the US and 7 percent to the EU. Humanitarian immigration is an even more distant third. Yet, she notes this latter one “is the one part of the immigration stream over which governments have deliberately relinquished a considerable degree of control.” (Newland)

had a place in American legislation, yet it was a limited space: “political ideology and political influence, rather than persecution per se, were the dominant features of this new venture in public policymaking.” (Briggs 2003: 130)⁵²⁴ Between 1971 and 1980, 96.8 percent of all refugees granted permanent resident status came from Communist countries or the Middle East. (Rudolph 2006: 64)

Refugees from Communist countries continued to be welcomed with little inquiry into the cause of their flight. This occurred with growing numbers of Cubans after 1965, who were not only welcomed with little examination but also received preference over other refugees through an ‘open door’ to the United States which was designed to deliberately starve Cuba of human and economic capital. The result was that between the passage of the 1962 Migration and Refugee Assistance Act and 1994, when the door was closed,⁵²⁵ over 1 million Cubans entered the US. (Nackerud, et al. 1999: 177, 83)⁵²⁶ This openness was primarily for symbolic purposes with the arrival of Cuban refugees seen as an indicator of “repression of a Communist regime and was treated as a ‘ballot for freedom.’” (Loescher and Scanlan 1986: 75) Refugees from Indochina, particularly following the fall of Saigon in 1975, were also welcomed warmly by the American government which also sought to ensure

⁵²⁴ Congress also argued for limiting the parole power. The reports on the Act stated: “Inasmuch as a definite provision has now been made for refugees, it is the express intent of the Committee that the parole provisions of the Immigration and Nationality Act, which remain unchanged by this bill, be administered in accordance with the original intention of the drafters of that legislation. The parole provisions were designed to authorize the Attorney-General to act only in emergent, individual, and isolated situations... not for the immigration of classes or groups outside of the limit of the law.” (cited in Zucker and Zucker 1987: 37)

⁵²⁵ The Clinton administration repealed the 1966 Cuban Adjustment Act, which had granted eligibility for legal status to Cuban refugees and also began to return Cubans interdicted at sea. (Nackerud, et al. 1999: 177)

⁵²⁶ Cuban migration to the United States occurred in four waves. The first included some 200,000 individuals from the upper-middle class. A smaller group, primarily political and religious refugees, were pushed out of Cuba during the 1960s. The second wave, between 1965 and 1973, occurred through a memorandum of understanding between the two governments which allowed for freedom flights from Cuba. The third wave, the Mariel crisis in 1980, was initiated after Cuban officials relaxed all border controls. The fourth wave, in 1994, was triggered by economic factors. (Pedraza 1996, Nackerud, et al. 1999)

that they were identified as refugees by the UNHCR. (Robinson 1998: 21-2)⁵²⁷

Domestically, there was little opposition to the 130,000 refugees who ended up being resettled in the United States. (Zolberg 2006: 346) In perhaps one of the clearest statements of US policy concerns at the international level, Secretary of State Henry Kissinger noted that the:

U.S. does not... assume responsibility for other Indochinese refugees... in accordance with generally accepted international practice, these are in first instance the responsibility of the countries in which they have sought refuge. It makes no difference whether those countries are parties to the Convention or Protocol on the status of refugees. Quite apart from this, however, simple humanitarianism would require that countries of first asylum would give aid and temporary asylum to such refugees [sic] and refrain from forcing them into situations of danger to their lives... We recognize that [the] burden of self-evacuated refugees falls most heavily on countries in the immediate vicinity... the international community is presently called upon to relieve the burden on countries of first asylum. This can be facilitated if countries of initial asylum will request assistance of UNHCR and ICEM.⁵²⁸

Other groups, however, were not granted such advantages. Haitian refugees were the only other substantial refugee group during this period with the ability to reach the United States in large numbers. Yet the United States tolerated the Duvalier regime, one of the most abusive in the world, and sought to limit their obligations to provide refugee protection to Haitians. There was “no sense that it was in the U.S. national interest to characterize Haitians as victims of persecution.” (Loescher and Scanlan 1986: 79) Haitian refugees, consequently, were treated capriciously and in a manner inconsistent with international refugee law. The

⁵²⁷ President Ford directly associated these flows to earlier US generosity: “After World War II, the United States offered a new life to 400,000 displaced persons. The generosity of the American people showed again following the Hungarian uprising of 1956, when more than 50,000 Hungarian refugees fled here for sanctuary. And we welcomed more than a half million Cubans fleeing tyranny in their country. Now, other refugees have fled from the Communist takeover in Vietnam. These refugees chose freedom. They do not ask that we be their keepers, but only, for a time, that we be their helpers.” (cited in Loescher and Scanlan 1986: 112-3)

⁵²⁸ Secretary of State (Kissinger) to American Embassies in Canberra, Wellington, and Seoul. 9 May 1975. State Department, Document Number 1975STATE107160. From 1979 onwards, UNHCR played a key role in developing a Orderly Departure Program in cooperation with the Vietnamese government and the United States as well as other resettlement countries. As Elie notes: “Bringing together the positions of the Vietnamese and Western countries and reaching compromises or working positions allow[ed] for the program to be implemented. The UNHCR then played a role in regularly organizing multilateral meetings. During such visits... the UNHCR acted as a direct mediator between the United States and the Socialist Republic of Vietnam, sometimes going as far as to be a vector for bilateral negotiations and ‘back-channel’ diplomacy between the two ‘enemies.’” (2007: 19)

Immigration and Naturalization Service (INS) generally denied Haitians who were apprehended in water or immediately after reaching shore the right to a formal hearing on asylum claims, and return to Haiti was often automatic and immediate. (Loescher and Scanlan 1986: 80-1)

These limitations were also often challenged domestically by an emerging coalition of human rights organizations, churches, ethnic groups, and lawyers who allied themselves with members of Congress concerned over human rights abuses abroad. (Loescher and Scanlan 1986: 87) Yet, at the same time there was a steady shift in public opinion towards decreased immigration. Public opinion:

...reflected a growing sense of societal insecurity associated with demographic changes. Roper Centre and Gallup polls revealed that the percentage of Americans who favoured decreasing existing levels of immigration increased from 33 percent in 1965 to 42 percent by 1977. By 1993, this percentage increased to 65 percent. (Rudolph 2006: 58)

In addition, the quotas established by the 1965 Act were frequently overwhelmed. Up until 1972, the visas available were generally adequate because, apart from the Cubans, the only other major refugee group accepted in to the United States during this period were Czechoslovakian refugees in 1968. (Loescher and Scanlan 1986: 87) After 1972, however, the parole power was once again used by the executive to admit in large flows of refugees. Between 1975 and 1979, at least ten separate paroles were used to admit in over 300,000 Indochinese refugees. But, the problems with such a system were still apparent: "Each parole was limited in duration and numbers and responded to a specific crisis. Each parole was in turn overwhelmed by a new crisis, and required a successor." (Loescher and Scanlan 1986: 153) The United States was also dealing with increased refugee flows from the Soviet Union in the late 1970s who also needed to be accommodated, particularly as the Soviet government issued more exit visas "in the expectation that concessions on the issue of

emigration would make Congress more receptive to ratifying the SALT [Strategic Arms Limitation Treaty] II agreement...” (Loescher and Scanlan 1986: 154, see also Bundy 1998)⁵²⁹

Therefore, throughout this period, the executive branch of the United States government remained focused on admitting refugees from the Communist world. To do so, they were willing to circumvent Congressional restrictions. Strategic interests, particularly geopolitical competition, played a role. But so too did humanitarian considerations: successive presidents did believe that people were suffering in Communist countries and should be welcomed and protected if they were able to escape.

8.3.2. An Ideological Refugee Policy and the role of Congress and the Courts

By the late 1970s, executive dominance of refugee policy was increasingly unsustainable. The United States government was accepting in larger and larger numbers of refugees while Congress was increasingly assertive. With the Refugee Act of 1980, the Carter administration sought to deal with these concerns while also enshrining the Refugee Protocol in American law. As a result, refugee policy would be increasingly subject to domestic pressures including from the American judiciary and human rights groups focused on more egalitarian admission policies.

This shift began when Congressional representatives began to accuse the executive of overusing the parole mechanism and failing to plan for refugee flows, with Senator Edward Kennedy arguing that “the Executive was put in the position of waiting repeatedly until the numbers of refugees in the countries of first asylum reached crisis proportions and then declaring an emergency which required yet another special program.” (cited in Loescher and

⁵²⁹ The United States also supported UNHCR “in providing refugee assistance” in Afghanistan. James Carter. The State of the Union Annual Message to the Congress. 16 January 1981; “Assistance for Afghan Refugees in Pakistan Announcement of U.S. Measures.” 31 January 1981. (In Wolley and Peters 2007)

Scanlan 1986: 153) These concerns forced the Carter administration into the position of revisiting existing refugee legislation. This would culminate in the Refugee Act of 1980, which finally brought the United States' legal definition of refugees into conformity with the Convention and Protocol. This eliminated questions about the admissibility of people not from the Middle East or Communist states, and also ended the presumption that all people fleeing from Communist states were refugees. It provided three mechanisms for refugee admittance: a quota of 50,000 refugees per year, seen as a 'normal flow'; a consultation process through which the President could admit an unlimited number of refugees by declaring that additional admissions were justified for humanitarian concerns or otherwise in the national interest; and finally an emergency clause, which allowed for unlimited admissions at any time. (LeMaster and Zall 1983: 457-8, Russell 1995) The Act stipulated that Congress should have "a limited but definite role in determining allocations or changing the quota." (Loescher and Scanlan 1986: 154-5) It also ensured a steady admission of refugees to the United States, thereby replacing the largely ad hoc legislative system dating back to the Displaced Persons Act of 1948, and attempted yet again to ban the use of the parole authority for large numbers of refugees. (Leibowitz 1983: 164-5)⁵³⁰

The 1980 Act was also seen as a mechanism to introduce both a humanitarian and universal outlook to American refugee admissions. (Feen 1985: 107, Scanlan 1981: 619-20) Critics were divided on how successful the Act was in doing this, however. While some hailed the Act, suggesting it was "one of the most carefully considered and constructed

⁵³⁰ Difficulties in implementing the asylum provisions meant that just six weeks after the Act passed, President Carter again used the parole power to admit in Cubans and Haitians as 'Cuban/Haitians entrants', "a term not found in immigration law and obviously used to avoid the restrictions on parole imposed by the Refugee Act." (LeMaster and Zall 1983: 458) Scanlan notes that "such ad hoc processing... had engendered a widespread belief that the United States has no refugee policy, that refugee admissions are completely out of control, and that Congress lacks effective means of regulating administrative discretion." (1981: 622)

pieces of legislation in the post-World War II era, the result of a consensus that evolved over four decades...” (Anker 1982: 90) criticisms also abounded. In particular, as LeMaster and Zall suggest, the Act created inherently “unlimited presidential power to admit aliens without numerical limitation, and without regard to other immigration laws.” (1983: 448)

The major issue was that the 50,000 per year quota established by the Act proved immediately insufficient, with refugee admissions running over 150,000 persons per year in the first three years of the Act. Senator Walter Huddleston (D-Kentucky) argued that the Act had not kept refugee numbers from expanding nor had it improved the consultative process:

[It] has failed to keep refugee admissions under control. Instead, it has created a vague open-ended admission process that has never come close to keeping refugee flows anywhere near the 50,000 per year normal flow... we are running at over 300% of the so-called normal flow. (Leibowitz 1983: 166)

And yet Huddleston’s solution, to once again rely on an overall immigration quota which would have included refugees, was soundly opposed by those who supported clearly differentiating the two flows. As Senator Alan Simpson (R-Wyoming), the chairman of the Immigration Subcommittee, argued, “refugees and immigrants are two distinct groups” and noted not only that the policy had a clear humanitarian purpose which would be marginalized if the two groups had to compete, but also that the executive feared that it would place severe limitations “on the flexibility that it requires in addressing domestic and foreign policy interests.” (Leibowitz 1983: 166-7, see also LeMaster and Zall 1983: 470-2) Separation served both American humanitarian and foreign policy interests.

From this point on, the executive branch increasingly found that its ability to control who should be admitted to the United States was tempered by other domestic actors and law which reflected international normative standards. In particular, following the 1980 election, the Reagan administration once again sought to use refugee policy as a Cold War tool. And yet, the 1980 Act set an important normative threshold by not only establishing a

humanitarian basis for US policy, but also by legally enacting that view. Increasingly, therefore, actions that deviated from this existing normative framework were challenged at the domestic level, albeit not always successfully.

In 1981 Secretary of State Alexander Haig sought to embarrass and discredit the Vietnamese regime by declaring that all migrants from Vietnam, Laos and Cambodia were refugees, suggesting that the administration would continue to ignore existing legislation. In this case, however, Congress replied quickly, with Senator Huddleston introducing legislation calling for Congressional investigation of the policy. In addition, the Department of Justice issued an opinion that concluded that the Attorney-General (who had made the declaration on Haig's urging) did not have the authority to do so: "the Office of Legal Counsel determined that refugee status had to be decided on a case-by-case basis rather than by presuming a class of persons are refugees." The result of this pressure was that the decision was reversed. (LeMaster and Zall 1983: 465, see also Feen 1985: 113-4)

Even with this defeat, the Reagan administration continued to cast the 'refugee factor' in terms of the Cold War. But rather than arguing that the US should accept in these refugees, as previous presidents had done, the issue was instead that a defeat of administration policies in Central America "could result in a communist takeover of the region and a flood of refugees headed toward the US border." (Feen 1985: 113) President Reagan himself suggested that:

We must not listen to those who would disarm our friends and allow Central America to be turned into a string of anti-American Marxist dictatorships. The result could be a tidal wave of refugees – and this time they'll be 'feet people' and not 'boat people' – swarming into our country seeking safe haven from communist repression to our south. (Cannon 1983: A1)

Haig similarly argued that these potential flows "would make the Cuban influx look like child's play" while an Army general warned that the situation could deteriorate to the

point that U.S. troops would have to leave NATO in order to halt refugees at the Mexican border. Needless to say, few, especially in Congress, took these claims at face value. They pointed to the fact that the leftist Sandinista takeover of Nicaragua in 1979 had led to few refugees. (Feen 1985: 113) Even so Reagan officials effectively “reversed the traditional rhetoric by implying that the spread of Communism poses a new immigration threat to the United States.” (Loescher and Scanlan 1986: 192)

Thus, within the Reagan administration, ideological resettlement was no longer a priority; instead refugee admission numbers were cast as being out of control, and increasingly the American public did not want substantial refugee immigration, in particular after the Mariel boatlife in 1980, when 130,000 Cuban refugees flooded the United States. (Nackerud, et al. 1999)⁵³¹ The administration used this as a pretext to implement restrictive policies, including authorizing the Coast Guard to intercept boats coming from Haiti and to tow them back, a process known as “interdiction at sea,” as well as detaining asylum seekers from Central America.⁵³² (Loescher and Scanlan 1986: 188-9, Martin 1990: 1250) Thus, the administration increasingly deported Haitians and other Central Americans, while also dramatically increasing the number of asylum seekers who were detained.

But the administration also did not want to be bound by the 1980 Act. Even while raising the spectre of uncontrolled immigration, Reagan officials were circumventing the Act to increase refugee admissions from some countries. In 1986, aides for Attorney-General Edwin Meese told the New York Times that he “found it difficult to accept the view that the

⁵³¹ A 1982 poll found that only 20 percent of respondents thought Vietnamese immigration had been a good thing for the country, and only 9 percent thought Cuban immigration had been. 66 percent wanted to see immigration decreased. (Feen 1985: 111)

⁵³² Following the detention policy of 1981, substantial litigation ensued. Generally, the government won important victories, but the plaintiffs succeeded in delaying asylum processing for lengthy periods. (Martin 1990: 1251)

refugee law and the asylum rules permitted no distinction between aliens fleeing communist and non-communist countries.” (cited in Zucker and Zucker 1989: 360) Following this, Nicaraguans, fleeing from a leftist regime, were favoured while refugees from non-Communist countries, including El Salvador and Guatemala, continued to be ignored.⁵³³ Yet, within two years the numbers of Nicaraguans applying for asylum had expanded threefold, public opinion was growing hostile to the refugees, and both the Administration and Congress wanted to once again ensure control. The Meese order was rescinded, and the INS created new, restrictive, criteria in order to discourage asylum applications. (Zucker and Zucker 1989: 361-3)⁵³⁴ In summary, while the 1980 Act had attempted to end the ideological nature of US refugee admissions, refugees from Communist countries continued to be given preferential treatment, while claimants from countries in Central America which were not Communist were blocked through a progressively expanding set of restrictions.

Increasingly, another actor became involved in this process: the US courts, which were generally favourable towards refugees based on the international and domestic legal obligations inherent on the government. Court challenges were a new issue for the

⁵³³ In 1986, 27 percent of Nicaraguans who had applied for asylum in the United States received it. The next year, following this shift, 82 percent received asylum. In the same period, the approval rate for Salvadorans was less than 3 percent and for Guatemalans about 2 percent. (Zucker and Zucker 1989: 361) The Reagan Administration justified deporting Salvadorans by arguing that they did not fear persecution upon their return. UNHCR found the situation to be quite different: “There are sufficient reports to indicate that several forcibly returned persons were killed the day of their arrival. Others were disposed of later... In the situation of chaos and general violence that prevails in El Salvador, extreme caution is called for.” Memorandum from the Regional Representative for Northern Latin America to Headquarters on “Forcible Return of Salvadoreans from US” dated April 15, 1981; Folio 8 (cited in Elie 2007: 29) Thereafter, the UNHCR began to intervene with US authorities on specific cases and noted their concerns to the American government in a 1981 Aide-Memoiré, though its efforts were generally unsuccessful at stopping returns. (Elie 2007: 30-2)

⁵³⁴ Increasingly on-the-spot adjudication was used for asylum claims from Central America, and claims were deemed to be frivolous if the claimant was “from a country where the government does not have a pattern of government-sponsored persecution, does endeavour to prevent private persecution, and has a judicial system which is equitable and fair” or if “the individual is unable to specify any of the five grounds for persecution.” But, as Zucker and Zucker note, without documentation to support their claim in such a process, most refugees will be detained and deported under such a system. (1989: 363)

government to deal with. Prior to the 1980 Act, American courts had generally held that domestic immigrations laws had not been affected by its ratification of the Refugee Protocol. (LeMaster and Zall 1983: 454) However, starting in 1975, class-action suits over Haitian asylum seekers began to move through the courts, focused primarily on inequalities in the procedures for considering claims. (Martin 1990: 1251) By 1980, in Haitian Refugee Center v Civiletti, this process led to a stinging critique of administration policy. Federal District Judge Lawrence King found that “the decision was made among high INS officials to expel Haitians, despite whatever claims to asylum individual Haitians might have had. A Program was set up to accomplish this goal. The Program resulted in wholesale violations of due process and only Haitians were affected.” (cited in Loescher and Scanlan 1986: 176) Similarly, a 1982 court ruling with respect to Salvadoran refugees found that they “had been illegally placed in solitary confinement as part of a national campaign to guarantee their mass deportation, regardless of the merits of their individual applications.”⁵³⁵ With these victories, advocates used the courts to curb expulsions. But this strategy had its limits:

Although the courts would often temporarily halt deportations, governmental agencies made a number of regulatory changes that had the effect of frustrating refugee advocates by administratively negating those rulings. As a result, accelerated mass hearings, detention, denial of work authorization, and other deterrent measures to keep Haitians and others out of the US were customarily reimposed. (Loescher and Scanlan 1986: 177)

The Reagan administration also moved to increase interdiction at sea policies and expanded detention policies beyond Haitian refugees. While the Supreme Court may have upheld non-refoulement, Tolley notes, interdiction policies prevented many Haitians from being able to successfully access the US system: “from 1981 to 1984 perfunctory interviews of 1,700 applicants on board seventy ships did not identify any eligible asylum applicants.”

⁵³⁵ Memorandum from the UNHCR Liaison Office in Washington, 3 May 1982. (cited in Elie 2007: 32)

(1990: 636)⁵³⁶ Such a discriminatory process could not be maintained in the long run, however. These limitations were met with protests and additional legal actions by religious and human rights organizations. By 1990, the Bush administration agreed in an out-of-court settlement to grant asylum hearings for 250,000 Guatemalans and Salvadorans who had been denied asylum. (Rosenblum and Salehyan 2004: 684, see also Hildreth 1994, Tolley Jr 1990, Russell 1995) Based on similar human rights arguments, Congress also moved to accord temporary protected status to Salvadorans. (Rudolph 2006: 69)

As the Cold War ended, American refugee policy was increasingly bifurcated, with its resettlement policy and its asylum policy - how the government responds to refugee claimants at or within US borders - governed by different and distinctive dynamics. (Gibney 2004: 158-9, see also Teitelbaum, et al. 1995: 15)

8.3.3 American Resettlement Policy in the Post-Cold War Era

Resettlement policy continued, and continues, to be based on accepting refugees from Communist and formerly Communist countries. In particular, the Lautenberg Amendment, introduced in the US Senate in 1989, ensures that certain groups of individuals from countries “presently or formerly under Communist rule from having to show that they had personally suffered persecution.”⁵³⁷ Attempts to decrease these admittances ran into pressure

⁵³⁶ In INS v Cardoza-Fonseca, the Supreme Court based its decision on the 1967 Protocol. (Tolley Jr 1990: 618)

⁵³⁷ The Lautenberg Amendment applies to religious categories - including Jews, Evangelicals, and certain members of the Ukrainian Catholic or Ukrainian Orthodox Churches - who have qualifying relatives in the US. Since 1989, 470,000 people have entered the US under the program, representing over 35 percent of total admissions. (State Department 2004, Violet 1999) US policy during the Cold War had been to accept these refugees with little question, but due to tight Soviet control over exit, their numbers usually did not amount to more than 1,000 per year. By 1988, and with numbers rising quickly, concerns were raised about whether these were in fact persecuted individuals, or rather just searching for freedom and a better life. These concerns, raised both in Congress, by prominent NGOs, and in the media, led the Reagan administration to decide to create a separate, emergency provision for their immigration, however the program was quickly suspended in July 1988 due to budgetary problems, though the controversy also drove the decision. When the program was reinstated a few months later, with individual claimants being processed by the INS officers at the US embassy in Moscow determining whether legitimate grounds existed, new outcries were raised in the US by the Jewish community.

from Congress and domestic interest groups with the result that “in resettlement policy to expunge political preferences to correspond with the attempt to expunge political preferences from asylum policy...” (Gibney 2004: 160, see also Wasem 2007) Because of this, there is little connection between American resettlement policy and actual persecution or human rights abuses in countries of origin. (Gibney 2002: 19)⁵³⁸

Thus, while American resettlement programs continue to be the primary mechanism of entry for refugees (see Table 8.3 below), American resettlement programs continue to focus on particular groups of refugees who are of “special humanitarian concern” to the United States. This includes specific foreign policy interests as well as:

Table 8.3: Total Refugees Admitted or Granted Asylum by the United States, 1990-2006

| Year | Refugees Admitted through resettlement | Total Asylees | Total Refugees Admitted | Granted Asylum Through Application | Granted Asylum Through an Immigration Judge |
|------|--|---------------|-------------------------|------------------------------------|---|
| 1990 | 122,066 | 8,472 | 130,538 | 5,672 | 2,800 |
| 1991 | 113,389 | 5,035 | 118,424 | 2,908 | 2,127 |
| 1992 | 115,548 | 6,143 | 121,691 | 3,959 | 2,184 |
| 1993 | 114,181 | 9,378 | 123,559 | 7,344 | 2,034 |
| 1994 | 111,680 | 13,697 | 125,377 | 11,644 | 2,053 |
| 1995 | 98,973 | 20,504 | 119,477 | 17,374 | 3,130 |
| 1996 | 74,791 | 23,502 | 98,293 | 18,594 | 4,908 |
| 1997 | 69,276 | 22,822 | 92,098 | 16,263 | 6,559 |
| 1998 | 76,181 | 20,369 | 96,550 | 13,078 | 7,291 |
| 1999 | 85,076 | 26,365 | 111,441 | 17,944 | 8,421 |
| 2000 | 72,143 | 32,213 | 104,356 | 22,977 | 9,236 |
| 2001 | 68,925 | 38,825 | 107,750 | 28,824 | 10,001 |
| 2002 | 26,773 | 36,733 | 63,506 | 25,756 | 10,977 |
| 2003 | 28,304 | 28,668 | 56,972 | 15,292 | 13,376 |
| 2004 | 52,837 | 27,218 | 80,055 | 14,203 | 13,015 |
| 2005 | 53,738 | 25,160 | 78,898 | 13,423 | 11,737 |
| 2006 | 41,150 | 26,113 | 67,263 | 12,873 | 13,240 |

Under this pressure, Congress passed the Amendment. (Beyer 1991, Zucker and Zucker 1989) But, as Arthur Helton argued, Congress had “succumbed to the temptation to respond in an ad hoc fashion when... [it] enacted temporary legislation to presume the eligibility of certain refugee claimants from the Soviet Union and Indochina,” (Helton 1990: 3) an ad hoc response that remains today.

⁵³⁸ Approval rates have declined, but only slowly over time. In 1998, applications from Cubans had only a 14 percent acceptance rate. (Rudolph 2006: 69)

Note: Asylee is a term of art introduced in the 1980 Refugee Act. They are individuals who satisfy the definition of refugee but are already present in the United States and therefore must undergo an asylum adjudication procedure. (Russell 1995: 49, McBride 1999: 5)

Source: Department of Homeland Security, Yearbook of Immigration Statistics: 2006 Table 13, 16

historical ties, a sense of obligation or guilt, a sense of fairness, a sense of urgency about some human rights violations, and a desire to bolster first asylum opportunities in states neighbouring refugees' countries of origin are all factors which can cause the US to see the resettlement of certain refugees to be of 'special humanitarian concern.' (Noll and van Selm 2003: 10)

Beyond former Communist countries, the other main source of refugee resettlement during the 1990s was from countries where the US had deployed troops. (Gibney 2004: 160)

However, it is unclear whether this pattern continues to hold: While the US continues to resettle over 50,000 refugees per year, from 2003 until early 2007, the American government resettled only 466 Iraqis, with plans to resettle 7,000 in 2007. (Younes 2007) Thus, while the United States does continue to resettle far more refugees than other countries in the developed world, their policies remain subject to ideological and domestic pressures. The main beneficiaries of US resettlement policies continue to be admitted from a relative handful of countries reflecting these twin pressures (see table 8.4 below).

8.3.4 American Asylum Policy

American asylum policy has also been fraught with complexity, and views today are divided between those who are concerned that the asylum route could be used by potential terrorists, those who see it being abused as an alternative pathway to immigration, those who fear it is increasingly difficult to distinguish the persecuted from persecutors, and finally those who argue that US policy currently does not offer adequate protection for people fleeing human rights abuses. (Wasem 2007: 2) With opinion so divided, it is not surprising that successive administrators have continued with, and expanded, the pattern set during the Reagan administration of limiting the ability of asylum seekers to reach the United States.

By the late 1980s, United States policy increasingly reflected a view that while refugees had a right to seek asylum, they did not have a right to choose the country of

asylum. Thus, Secretary of State George Shultz argued that: “International human rights standards recognize the right to emigrate and to return to one’s country, but not to immigrate into any country of one’s choosing. Standards and limits to immigration are determined by national decision and legislation.” (cited in Beyer 1991: 38-9)⁵³⁹ The INS similarly argued in

Table 8.4: US Refugee Admissions by Selected Countries

| | Afghanistan | Bosnia-Herzegovina | Burma | Cambodia | Cuba | Ethiopia | Haiti | Iran | Iraq | Laos | Liberia | Ukraine | Russia | Somalia | Sudan | Vietnam |
|------|-------------|--------------------|-------|----------|------|----------|-------|------|------|-------|---------|---------|--------|---------|-------|---------|
| 1982 | 4282 | NA | NA | 19832 | 453 | 3050 | NA | 16 | 1986 | 9215 | NA | NA | 2747 | NA | NA | 40604 |
| 1983 | 2475 | NA | NA | 11161 | 723 | 2275 | NA | 1017 | 1577 | 2631 | NA | NA | 1363 | NA | NA | 21463 |
| 1984 | 2231 | NA | NA | 17785 | 81 | 2347 | NA | 2812 | 152 | 7423 | NA | NA | 803 | NA | NA | 23372 |
| 1985 | 2094 | NA | NA | 16674 | 158 | 1773 | NA | 3292 | 244 | 4724 | NA | NA | 643 | NA | NA | 22831 |
| 1986 | 2478 | NA | NA | 9133 | 43 | 1248 | NA | 3246 | 311 | 11130 | NA | NA | 744 | NA | NA | 20821 |
| 1987 | 3241 | NA | NA | 1772 | 314 | 1858 | NA | 7075 | 186 | 15508 | 7 | NA | 3652 | 4 | 3 | 22320 |
| 1988 | 2380 | NA | NA | 2802 | 3006 | 1539 | NA | 6920 | 37 | 14561 | 10 | NA | 20533 | 13 | 0 | 17626 |
| 1989 | 1991 | NA | NA | 2110 | 3742 | 1750 | NA | 5466 | 115 | 12779 | 13 | NA | 39076 | 68 | 6 | 21865 |
| 1990 | 1594 | NA | NA | 2166 | 4753 | 3228 | 0 | 3329 | 67 | 8771 | 3 | NA | 50716 | 25 | 7 | 27378 |
| 1991 | 1480 | NA | NA | 38 | 3933 | 3948 | 0 | 2692 | 842 | 9249 | 1 | NA | 38661 | 192 | 24 | 27957 |
| 1992 | 1452 | NA | NA | 141 | 3720 | 2972 | 54 | 1949 | 3442 | 7315 | 637 | NA | 61298 | 1570 | 113 | 26690 |
| 1993 | 1233 | 1887 | NA | 22 | 2065 | 2765 | 1307 | 1161 | 4605 | 6967 | 961 | NA | 48627 | 2753 | 244 | 31219 |
| 1994 | 21 | 7088 | NA | 6 | 2670 | 328 | 3766 | 851 | 4984 | 6272 | 610 | NA | 43470 | 3555 | 1220 | 34248 |
| 1995 | 4 | 9870 | NA | 1 | 6133 | 239 | 1485 | 978 | 3482 | 3675 | 52 | NA | 35716 | 2506 | 1705 | 32244 |
| 1996 | 0 | 12030 | NA | 0 | 3498 | 194 | 39 | 1256 | 2528 | 2201 | 46 | NA | 29536 | 6436 | 575 | 16130 |
| 1997 | 0 | 21357 | 182 | - | 2911 | 197 | 75 | 1305 | 2679 | 939 | 231 | NA | 27072 | 4974 | 277 | 6660 |
| 1998 | 88 | 30906 | 186 | - | 1587 | 152 | - | 1699 | 1407 | - | 1494 | NA | 23349 | 2951 | 1252 | 10288 |
| 1999 | 365 | 22699 | 295 | - | 2018 | 1873 | 91 | 1750 | 1955 | 19 | 2495 | 8649 | 4386 | 4320 | 2393 | 9622 |
| 2000 | 1709 | 19033 | 637 | - | 3184 | 1347 | 49 | 5145 | 3158 | 64 | 2620 | 7334 | 3723 | 6026 | 3833 | 2841 |
| 2001 | 2930 | 14593 | 543 | 23 | 2944 | 1429 | 24 | 6590 | 2473 | 22 | 3429 | 7172 | 4454 | 4951 | 5959 | 2730 |
| 2002 | 1683 | 3461 | 128 | 4 | 1919 | 330 | 5 | 1540 | 471 | 18 | 559 | 5216 | 2105 | 237 | 897 | 2988 |
| 2003 | 1453 | 525 | 203 | 7 | 305 | 1702 | - | 2471 | 298 | 13 | 2957 | 5065 | 1394 | 1994 | 2139 | 1354 |
| 2004 | 959 | 244 | 1056 | 3 | 2980 | 2689 | 17 | 1786 | 66 | 6005 | 7140 | 3482 | 1446 | 13331 | 3500 | 974 |
| 2005 | 902 | 61 | 1447 | 9 | 6360 | 1663 | 8 | 1856 | 198 | 8517 | 4289 | 2889 | 5982 | 10405 | 2205 | 2009 |
| 2006 | 651 | 16 | 1612 | 9 | 3143 | 1271 | - | 2792 | 202 | 830 | 2402 | 2483 | 6003 | 10357 | 1848 | 3039 |

Note: Prior to 1997, Russia figure includes refugees from the former Soviet Union.

Data for 1982-1989 was drawn by the INS from the 'Nonimmigrant Information System' of the Immigration and Naturalization Service. Data for 1990-2006 is drawn by the INS and DHS from the Bureau for Refugee Programs, Department of State. The 1996 Statistical Yearbook notes that this change was because the previous system did not meet statistical standards for 1996, however, this means that "any comparison of refugee arrival data from this and any previous edition of the Yearbook must be made with caution." (76)

⁵³⁹ A year later, with respect to Soviet Jewish emigration, Shultz argued the opposite view: “we feel there is a fundamental principle involved in the human rights field, namely, the principle of ‘freedom of choice.’ Persons given permission to emigrate from the Soviet Union should have the freedom of choice as to where they want to go . . . If you are against ‘freedom of choice,’ you are inconsistent with the Universal Declaration of Human Rights.” (cited in Beyer 1991: 40)

Sources: Immigration and Naturalization Service, Statistical Yearbook (1987, 1990, 1994, 1996, 1997; Department of Homeland Security Statistical Yearbook, 2002,2003,2004.)

1989 that “while the right to emigrate is a right guaranteed by the Universal Declaration of Human Rights, there is no corollary right of immigrant entry into, for instance, the United States... [W]hile emigration is an internationally recognized right, immigration is a privilege...” (cited in Beyer 1991: 39)⁵⁴⁰

The European Union had responded to such pressures by introducing deterrent measures and safe third country agreements. The United States, by contrast, focused on detention as a deterrent and increased the practice of interdiction at sea to prevent asylum claims. This precedent was problematic in the UNHCR’s eyes, which noted in an internal memorandum that:

Whether or not the measures can be challenged from a legal point of view is not certain. The newly introduced interdiction measures, of course, deprive asylum seekers at sea of access to counsel and of the appeal possibilities which they would have had had they entered the USA... The new interdiction measures could certainly constitute an undesirable precedent for other areas of the world (e.g. South East Asia) where UNHCR has sought to prevent asylum seekers being towed out to sea. (cited in Loescher and Scanlan 1986: 194)

In the early 1990s, as Haitian and Cuban refugee flows to the US once again increased, both the Bush and Clinton administrations encouraged the use of interdiction at sea. Following the military coup which removed President Jean-Bertrand Aristide from office in Haiti in 1991, thousands of Haitians fled towards the United States. The Bush administration decided to interdict the boat people at sea and send them directly to the US naval base at Guantanamo Bay to screen them, with most being deported. By May 1992, as numbers of refugees continued to increase, President Bush issued an executive order

⁵⁴⁰ During the 1980s, the State Department also had significant access to individual asylum cases. An ongoing promotion of foreign policy goals by the Department “resulted in differential treatment in adjudications. Administrative jurisprudence in the United States has come recently to accept a distinction in terms of worthiness for refugee protection based on the form of government the claimant has fled from - whether totalitarian, e.g., Afghanistan, or at least nominally democratic, e.g., El Salvador.” (Helton 1990: 3)

terminating the screening process and ensuring that all Haitian migrants interdicted at sea would be repatriated without recourse to apply for asylum. While Bill Clinton campaigned against this policy, he continued it once he came to office. (Jones 1994, Rudolph 2006: 72)

This policy led to a substantial court battle between the government and a number of non-profit organizations assisting Haitian refugees, which ended in the Supreme Court's Sale v. Haitian Centers Council, Inc. (1993). In its decision, the court framed the issue narrowly and ruled 8 to 1 that Article 33 of the Refugee Convention (the non-refoulement article) did not have an extraterritorial effect. (Jones 1994) Based on this ruling, President Clinton continued the policy of ensuring a safe haven at Guantanamo Bay for the Haitian refugees and transferring interdicted refugees there. (Morris 2003: 24) By 1994, the refugee flows were significant enough that President Clinton included it as one of the reasons for the deployment of US and UN peacekeeping forces, arguing that:

the fundamental interests of the U.S. justified an attack if it was the only method to restore democracy in Haiti. If the U.S. did not lead this effort, the nation faced both the continuation of gross human rights violations in a neighbouring island and the continued refugee problems bringing more Haitians who fled whether for political or economic reasons. (cited in Brune 1998: 55)

At the same time, the Clinton administration also began to intercept and detain Cuban migrants at sea, who were sent to Guantanamo Bay and detained there for eight months. (Nackerud, et al. 1999: 187) In September 1994, the government reached agreement with Cuba “to prevent unsafe departures using mainly persuasive means.” As McBride notes:

While this new approach appeared to limit the numbers fleeing Cuba to a manageable size and may have appeased public concern over mass influxes of refugees or immigrants, refugee and human rights organizations expressed concern that the US policy did not meet the needs of those who may have had a genuine fear of persecution, or uphold the USA's international obligations ... In effect, the US Government had reached agreement with another country to deny people their ‘right to leave.’ (1999: 6)

These practices continue. In 2002, President George W. Bush reaffirmed the interdiction at sea of asylum seekers, with no requirement that they be screened to determine if they are in need of protection. (Bush 2002) He also noted in a press conference that:

I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore. And that message needs to be very clear, as well, to the Haitian people. We will have a robust presence with an effective strategy. And so we encourage, strongly encourage the Haitian people to stay home as we work to reach a peaceful solution to this problem. (Bush 2004)⁵⁴¹

Detention of asylum seekers also continues, even though such policies are against the spirit of the Refugee Convention.⁵⁴² As the UNHCR's Executive Committee Conclusion 44 of 1986 noted, "detention should normally be avoided" and resorted to only in order to verify identity and elements of the claim for refugee status." Frelick suggests that the conditions of detention must be humane and that "detention of asylum seekers is understood to be the exception, not the rule." (2005) In the United States, asylum seekers who arrive without valid travel documents are automatically put into an expedited removals process, by which they are detained until it is determined whether there is a credible fear of persecution. Only if there is such a fear, and the person has some form of community ties in the United States, are they paroled. (Acer and Pyati 2004: 7-8)⁵⁴³

⁵⁴¹ The Bush Administration has also argued that paroling Haitians who manage to reach US territory "may encourage other Haitians to embark on the risky sea travel and potentially trigger a mass migration from Haiti to the United States. The Administration further argues that all migrants who arrive by sea pose a risk to national security and warns that terrorists may pose as Haitian asylum seekers." (Wasem 2007: 22)

⁵⁴² Article 31(2) of the Refugee Convention, which limits restrictions on movements of refugees to those which are "necessary" and these restrictions shall only be applied until their status is regularized.

⁵⁴³ This system has also been subject to several recent scathing reviews. Amnesty International has complained that "detention conditions are frequently described as "inhuman," with concerns raised about the health and well-being of the asylum seekers who are detained" and that "once in detention, asylum seekers face a barrage of measures that cut them off from many of their basic rights, including access to legal counsel and other visitors, means of communication, and access to the supports of NGOs and other care-givers." (van Selm 2003: 71) Additionally, "detention standards are not specific to asylum seekers, but rather apply to all immigrant detainees. They, therefore, do not take into account the special needs of asylum seekers, particularly those among them who might be suffering the effects of torture." (Frelick 2005)

Within American policy, there is a disconnect between support for asylum and the international regime on the one hand, and domestic restrictionism on the other, brought about by a mixture of competing pressures within the executive, Congress, and interest groups. As George W. Bush noted on World Refugee Day in 2002 “today I reaffirm our commitment to protect and assist refugees, promote their right to seek asylum, and provide opportunities for their resettlement, as needed.”⁵⁴⁴ At the same time, resettlement policies remain burdened with the legacies of the Cold War and asylum procedures – motivated by fears of mass migration from Haiti, Cuba, and Central America – remain restrictive with interdiction and detention the norm. During the Cold War, an effective refugee policy emerged when the executive branch – less susceptible to domestic pressures – took control and isolated refugee admissions from broader immigration policies. Since the end of the Cold War, no similar leadership has been displayed in order to repair the inherent contradictions in policy and even interdiction and detention policies are primarily reactive, rather than a concerted effort with the result that humanitarianism continues to take a backseat to control.

8.4: Great Britain and Refugee Restrictionism through Domestic Legislation

Great Britain has taken a similar route to that of the United States at the domestic level. As we have seen, following the Second World War, Britain no longer took a leadership role in creating the current refugee regime, minimizing its activities primarily due to financial concerns. Its asylum policies went through no major changes: in the immediate Post-war period, Britain had no state policy on asylum which meant that the decision-making process was shrouded in secrecy. The 1920 Aliens Order, which had continued the restrictive processes adopted during the First World War, was not replaced until 1953 with a new

⁵⁴⁴ George W. Bush “Statement on World Refugee Day.” 20 June 2002. (In Wolley and Peters 2007)

Aliens Order. Even then, there was no mention of the Refugee Convention.⁵⁴⁵ (Stevens 2004: 70) Moreover, discretion remained absolutely with the Home Department and the courts generally deferred to its authority (Rudolph 2006: 188):

The Aliens Order gives the Secretary of State power to deport at discretion and the entire responsibility rests with him. He takes the decision himself... and it has become the practice for the Secretary of State not to discuss the reasons and to ask the House of Commons to trust him.⁵⁴⁶

Even so, in 1949, the Under-Secretary of State for the Home Department had reassured the House that:

It is still the practice, as always, not to send back to countries where they would be in danger of persecution people [who]... are political refugees... A number of people – largely stowaways - come here direct from countries where they claim to be in danger of persecution. We do not send them back if we are satisfied there is any real ground for their claim, but the House will appreciate that when somebody arrives without any documents whatever... we have to guard against being made fools of...⁵⁴⁷

In the immediate Post-war period, asylum was not an issue: “the post-war labour shortage and the humanitarian desire to accommodate refugees were both instrumental in ensuring the settlement of 200,000 immigrants, about half of whom were former members of the Polish armed forces.” (Plender 1988: 81, Rudolph 2006: 171) Britain also accepted about 75,000 DPs, however, they entered not as quota refugees (and included only 2,000 Jews) but as ‘European Volunteer Workers’ and were admitted only for limited periods with no protection from the International Refugee Organization. (Schuster 2003: 135) Britain also

⁵⁴⁵ Britain ratified the Convention in 1954, however it made no efforts to introduce it into statute law. Instead, both the Convention and Protocol “were simply acknowledged in the less binding statement of guiding principles for immigration admittance, the Immigration Rules, and then only in 1971.” (Gibney 2004: 114) These noted only reasons of persecution as a reason for granting leave to appeal against refusal of entry clearance, and did not change the discretionary nature of British policy. (Schuster 2003: 139) The powers of the Home Secretary to make immigration rules and hence the criteria to recognize asylum seekers was confirmed in the 1971 Immigration Act, which also gave the Home Office “extraordinarily and largely unrestrained powers to detain asylum seekers... these powers were originally intended to apply to would-be visitors... [but] since the 1980s, they are routinely being used against asylum seekers.” (Schuster and Solomos 1999: 59, see also Stevens 2004: 77-8, Bloch 2002: 46)

⁵⁴⁶ House of Commons Debates. Vol 548, 2 Feb 1956, col. 1209. cited in Stevens (2004: 70)

⁵⁴⁷ Hansard, Parliamentary Debates, House of Commons (hereafter HC Deb) Vol 469, 4 Nov 1948, cols. 810-11. cited in Stevens (2004: 71)

accepted some 20,000 Hungarian refugees in 1956 (Kushner and Knox 1999: 248) and offered asylum to other refugees fleeing from the Communist world. (Schuster 2003: 138)

Such relative ease, however, did not extend to other refugee groups. In the British Nationality Act of 1948,⁵⁴⁸ the government had “invested some 800,000,000 subjects of the crumbling empire... with the equal right of entry and settlement in Britain.” (Joppke 1999: 101) When large numbers of East Asian Africans sought to flee to Britain from Kenya, however, the House of Commons passed the Commonwealth Immigration Act (1968) in three days which removed the right of these refugees to enter “the territory of the state whose passports they held.”⁵⁴⁹ As Schuster goes on to note, a clear distinction had emerged between ‘immigrants,’ who were “black and came from former colonies and the Commonwealth (regardless of their motives for leaving)” and refugees, who were “white and came from communist regimes (regardless of their motives for leaving)” and who possessed propaganda value. (Schuster 2003: 138, Hansen 2000)⁵⁵⁰ As Joppke notes, “asylum policy became

⁵⁴⁸ It has also been suggested that the 1948 Act “created an institutional structure that limited subsequent policy options and militated against its own replacement. In doing so, it led governments to adopt alternative, and flawed policy instruments, which themselves led to migration-related crises...” This leads Hansen to suggest the migration policy since the Second World War in Britain has exhibited both path dependency and policy feedback. (2000: 30, see also Rudolph 2006: 168)

⁵⁴⁹ In an effort to control immigration from the ‘New Commonwealth,’ Britain had introduced entrance requirements, including work vouchers for immigrants, in 1962. They delayed until then from reluctance to alienate the ‘Old Commonwealth,’ including countries such as Canada and Australia, and so instead applied pressure on the other countries of origin to prevent departures. Public opinion favoured the change, with race riots occurring in the 1950s as immigration became perceived as a societal threat. (Hansen 2000: 100, Gibney 2004: 117-8, Rudolph 2006: 180)

⁵⁵⁰ Joppke adds that in taking such action, Britain “came close to violating one of the fundamental norms of the international state system: the obligation of states to accept their own nationals.” (Joppke 1999: 109) Within the UNHCR, this situation led to a ‘discussion over their refugee status: “If we take the strictly legal view, that these are United Kingdom citizens prevented from entering their home country, [they can be considered as refugees]. If, however, we take the whole picture of a disintegrating empire into account and assume that the nationality conferred on them was... a rash act of kindness... we could not possibly consider them as refugees vis-à-vis the United Kingdom. There is, however, no doubt that most of these people, even temporarily, find themselves in a de facto condition of statelessness and are subject to what amounts to persecution.” Note for the file dated April 9, 1970 (cited in Elie 2007: 11)

infected with the racially loaded control mentality of British immigration law and practice.”

(1998: 133) This is a frame that continues:

The government felt that good race relations were dependent on strict immigration controls and that the host population needed to be reassured that the influx from overseas was restricted to manageable numbers. If Britain was successfully to maintain its ability to receive everyone genuinely entitled to enter, it must strengthen its system for controlling and excluding people not entitled to enter. (Layton-Henry 1994: 279)

While Britain accepted 3,000 refugees from Chile following the coup against the Allende government, in part due to Labour sympathies to the former government, the new Conservative government was less willing to accept refugees from Vietnam, accepting only 10,000 from Hong Kong and those only in the face of pressure from the United Nations. Similarly, when Idi Amin expelled East Asian Africans from Uganda in 1972, the government persuaded other Commonwealth countries to share the burden, with Britain receiving 28,000 out of a total 50,000 refugees. (Schuster 2003: 141-2, Stevens 2004: 86)

Starting in the mid-1980s, the refugees whom Britain faced were increasingly “third world in origin; they had less in common culturally with Europeans than previous asylum movements; and they arrived, often illegally, through the use of traffickers and/or false documentation.” (Hassen and King 2000: 400) These new flows, moreover, were arriving at a time of economic slowdown in Britain. Additional concerns were created with the end of the Cold War, with Kenneth Baker, then Home Secretary, warning that “there could be 7 million people seeking exit visas from Russia.” (cited in Schuster 2003: 156)⁵⁵¹ To deal with these potential flows at the domestic level, the British government began taking two forms of action. The first was to limit the ability of potential asylum seekers (and hence refugees) to reach British territory through the use of stricter visa restrictions and, in 1987, the Carrier’s Liability Act, which made carriers liable for passengers who travelled without adequate

⁵⁵¹ At the 1991 Conservative Party Conference, Douglas Hurd similarly suggested that “Britain would be swamped unless European leaders acted fast to close real borders.” (cited in Schuster 2003: 146)

documentation. (Schuster 2003: 144) Like in the United States, other forms of restriction were designed to deter asylum seekers through stricter rules once in Britain. The primary mechanism of deterrence has been through expanded immigration restrictions. What had been a fairly reactive and decentralized system into the 1980s (Cohen 1994: 81)⁵⁵² has been dramatically expanded as the government has sought to control Britain's borders.

This change has generally gained widespread public support due to government arguments that asylum seekers were illegal immigrants seeking to take advantage of a lax immigration system. (Schuster 2003: 147) A succession of new Immigration Acts (the Asylum and Immigration Appeals Act, 1993; the Asylum and Immigration Act, 1996; and the Immigration and Asylum Act, 1999), passed under both Conservative and Labour governments, sought to serve this purpose by limiting asylum seekers' access to social services and to appeal processes. Therefore, while the British government continues to offer rhetorical support to the international refugee regime by framing their responsibility to 'legitimate' refugees within the scope of the Refugee Convention,⁵⁵³ at the domestic level the focus has been on preventing access to the British asylum system for both refugees and asylum seekers. The government justifies such controls as necessary to preserve 'national values.'

As Schuster notes, throughout this process, "none of the representatives of the different parties suggested that Britain cease to grant asylum. All agreed that the granting of

⁵⁵² As the Home Secretary, Peter Lloyd, argued in 1991, "we have not previously experienced similar pressures but now the numbers coming to the UK are reaching a level where we must respond with speed and firmness." (cited in Kaye 1992: 54)

⁵⁵³ In introducing the bill, Kenneth Clarke, the Home Secretary, argued that "we all willingly accept in this country the obligations laid on us by the 1951 Geneva Convention. We have a long and honourable tradition in the United Kingdom of offering political asylum to those who flee to this country from their country where they face individual persecution because of their political opinions, religious beliefs or ethnic origins..." HC Deb, 2 Nov 1992, C. 21

asylum was the mark of a civilized and liberal state and that Britain had certain legal and humanitarian obligations.” (2003: 146) However, deterrence is presented as justified because most asylum seekers are not legitimate: thus, as the Conservative government argued in proposing the 1993 Act, the preservation of “civilized values” required immigration controls to be strengthened to exclude economic migrants.⁵⁵⁴ The Act was designed to streamline procedures, establish an appeals process, and ensure the “rapid rejection of a large number of unfounded claims.”⁵⁵⁵ It also stated the primacy of the 1951 Convention over conflicting immigration rules for the first time.⁵⁵⁶

However, while the government was arguing in favour of control in order to preserve national values, the legislative effects were limited. By 1995, the Act that had been passed two years earlier was already seen as obsolete and having little deterrent effect.⁵⁵⁷ As the Home Secretary, Michael Howard, argued, “the relentless rise in claims has outstripped the improvements in our ability to process them. By claiming asylum, those who have no basis to remain here can not only substantially prolong their stay, but gain access to benefits and

⁵⁵⁴ HC Deb, 2 Nov 1992, C. 21 Clarke also suggested that people were using asylum to evade port controls and requirements to leave. Ibid. C. 22

⁵⁵⁵ Home Secretary Kenneth Baker, HC Deb, 2 July 1991, c. 167. While the Act granted a right of appeal to all rejected asylum claimants, with cases that were deemed to be either without foundation or frivolous and vexatious an accelerated appeals process was used. (Stevens 2004: 164-9, Fiddick 1999: 15) The majority of these cases involved safe third countries, and Amnesty International condemned the regulations as a “cynical attempt by the government to pass on the responsibility for asylum determination to a neighbouring country.” (Stevens 1997: 209)

⁵⁵⁶ Though, as Stevens notes, during the debate, the government was urged to incorporate all relevant Conventions, including the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the European Convention on Human Rights, and the Convention Against Torture. By including only the Convention, the government adopted “the lowest common denominator.” (1993: 93)

⁵⁵⁷ This is in spite of the fact that the Act did have a substantial impact on limiting asylum claims - while the Home Office had taken 13,335 asylum decisions in the six months before the Act, with 86 per cent being granted either asylum or exceptional leave to remain, in the six months after the Act 72 percent of cases were rejected. The rate of detention of asylum seekers also doubled, from 300 in 1993 to 600 in 1994. (Stevens 1997: 209, Rudolph 2006: 190)

housing at public expense.”⁵⁵⁸ He argued that only four percent of applicants were initially granted asylum, and only four percent of appeals were allowed. Even so, the asylum applicant numbers “has now reached 75,000. The annual cost in benefits alone is more than £200 million.”⁵⁵⁹ Thus, “Britain has a proud record of giving refuge to those fleeing genuine persecution, but we cannot ignore the fact that our procedures are being abused.”⁵⁶⁰ The result was that another, more restrictive Act was introduced.⁵⁶¹

Once again, while asylum seekers were initially deterred, numbers began to rise again in 1997 and 1998. The new Labour government, which while in opposition had suggested it would repeal most of the 1996 Act, continued the process of introducing further deterrents to would-be asylum seekers.⁵⁶² In July 1998 Home Secretary Jack Straw continued pointing to

⁵⁵⁸ HC Deb, 20 Nov. 1995, C. 335

⁵⁵⁹ HC Deb, 20 Nov. 1995, C. 336

⁵⁶⁰ HC Deb, 11 Dec. 1995, C. 699

⁵⁶¹ The 1996 Act further tightened the accelerated appeals process by including asylum seekers who were without passports, those who failed to show fear of persecution with the Convention definition, or who had an unfounded fear. In addition, in cases where an asylum seeker came through a safe third country, they could be returned without substantive consideration of the case. If the third country was an EU member state, or otherwise designated, the asylum seeker had no right of in-country appeal. The Act also excluded social benefits from any applicant who did not claim asylum within three days. (Stevens 1997, Harvey 1997) More controversially, it also created a category of ‘white-listed’ countries, which gave the Home Secretary the power to designate countries in which it appeared to him that there is in general no serious risk of persecution. “In general,” however, suggests that there may be some risk of persecution and, as Stevens notes, “runs counter to the spirit of the 1951 Convention, which anticipates that refugee status should be determined on an individual basis.” (Stevens 1997: 212)

⁵⁶² Public opposition to both the 1993 and 1996 Acts did exist, particularly among NGOs working with refugees. Eight different refugee organizations formed the Asylum Rights Campaign in an effort to amend aspects of the 1993 Act, particularly concerned over procedures that increased fines on airlines and allowed for document checks overseas, as well as the removal of some types of legal aid and the introduction of fast track procedures. As they argued in a press release, “the likelihood that victims of persecution will be denied sanctuary is greater today than yesterday.” (Pirouet 2001: 145) Greater efforts were organized around the 1996 Act, particularly in light of a move in 1995 by the government to restrict asylum seekers from social security benefits, left many of them destitute (a move eventually overturned by the Courts). Even so, in terms of the bill, they had “no effect on the Bill at all.” (Jan Shaw, cited in Schuster 2003: 171) For further details on these efforts, see Pirouet (2001: Chapter 8) UNHCR also argued in vain against the bill, with the agency noting its concerns that the proposals “focus on restricting access to asylum procedures in a way that may make it just as difficult for genuine refugees to enter the process as it would for fraudulent applicants... The combined effect of the measures does not really address the root problems at issue. By dealing only in a piecemeal way with this

abuse of the asylum process: “I am seeing a great growth of people abusing the asylum system simply to evade immigration control or because they are economic migrants in this country.” (cited in Rudolph 2006: 191) The new government made it clear that policy would not change: as a 1998 White Paper noted, “this government will not allow our controls to be abused with impunity...” (Home Office 1998)

The 1999 Immigration and Asylum Act, while preserving many of the elements of the two previous acts, did end the ‘white list’ process. (Stevens 2004: 178) But it further targeted social services for refugees. As Schuster notes, both parties as well as the media “believe that welfare is a major factor in the decision to come to Britain” (2003: 149)⁵⁶³ even though there is little support for this view. (Bloch and Schuster 2002: 401) However, asylum seekers are also prohibited from seeking employment, which meant that the government increasingly expected that “the voluntary sector will meet the basic needs of asylum seekers.” (Bloch and Schuster 2002: 398)

But this has meant that the burden of proof lies increasingly on the refugee. As former Home Secretary Mike O’Brien noted: “Refugees are always genuine, asylum seekers may or may not be. They may be abusive or they may be genuine. Once they are accepted as a refugee they are genuine.” (cited in Hassan 2002: 195) British policy itself, however, does not reflect such a black and white view: not granting asylum based on the restrictive

complex issue, there is a real risk that the delicate humanitarian balance inherent in a functional and credible asylum regime, may be disturbed.” (UNHCR Branch Office for the United Kingdom and Ireland 1996)

⁵⁶³ As the Home Office argued in a 1998 White Paper, “the Government believes that it must start from the position that people who have not established their right to be in the UK should not have access to welfare provision on the same basis as those whose citizenship or status here gives them an entitlement to benefits when in need. Any support for asylum seekers should operate on a separate basis, with provision offered as a last resort to those who have no other means including support from relatives or friends to which they can turn.” (Home Office 1998) As part of the 1999 Act, a voucher system was created instead, which provided asylum seekers only 70 percent of income support, calculated as the minimum for a British citizen to survive. However, the program was extraordinarily costly- “in one year it cost £41.7 million, of which only £26.1 million was dispensed as vouchers.” (Schuster 2003: 149) The program was ended in 2002.

Convention definition does not mean a person may not face threats in their country of origin. Increasingly, therefore, Britain made use of a separate category of status, Exceptional Leave to Remain (ELV), which:

without granting either refugee status or asylum, it allows an asylum applicant, or those fleeing events such as civil war (who are not eligible for refugee status) to remain temporarily until conditions in their country of origin improve sufficiently to permit their return. The government originally claimed that it was granted on compassionate grounds, but then, in the debates leading up to the 1993 Act, changed tack and said it was granted to those whose length of stay in Britain made it difficult to remove them. In this way, it attempted to remove the moral obligation which might be owed to such people, and justified granting it to far fewer. (Schuster 2003: 144-5, see also Hassan 2002: 195)

Critical to this process has been language. As Kaye notes, “the frequent use of such terms as ‘bogus’, ‘phoney’, or ‘economic migrant’ socializes the readers [of the media] to think that the use of such terms is normal political discourse, and it also gives credence to the notion that ‘bogus’ refugees and asylum seekers represent a problem.”(1998: 168) Thus, asylum seekers are stigmatized in order to allow “politicians to justify limiting their responsibilities to such people.” (Hassan 2002: 196) Even as the number of asylum seekers has fallen, however, restrictions continue to mount. As Gibney suggests, British officials:

are wedded to the idea that the result of a less harsh regime would be increasing ethnic tension, disruptive for social order and fatal for their own political prospects... They raise the question of whether British officials attach any real value to asylum... What seems lacking... is a dedication to the principle of asylum that is founded on an ethical commitment to alleviating the plight of refugees rather than simply a legal obligation to the minimal requirements of inherited international agreements. (2004: 130)

The British government has expanded restrictionist policies since 9-11. However, suggestions of a substantive change were already forecast in the 2001 election when Jack Straw went so far as to suggest that the government would introduce a ceiling on the number of people to be granted asylum, arguing that “there is a limit on the number of applicants, however genuine, that you can take.” (cited in Ahmed and Burke 2001) While no such draconian action was taken, the British government has increasingly sought to extend its deterrent policies beyond its own border. The Nationality, Immigration, and Asylum Bill,

passed in 2002, further sought to deter asylum seekers by restricting the appeals period and allowed for asylum seekers to be detained for up to six months. It also increased the existing carrier and employment sanctions law.

However, in 2003, as asylum claims appeared to be on the increase, the British government focused on a radical new strategy: Prime Minister Tony Blair proposed a new system of ‘safe havens’ to process asylum claims within the European Union, which would be outside of Great Britain and administered by the UNHCR. (Rudolph 2006: 194) Safe havens, Home Secretary David Blunkett argued, would “rapidly reduce the number of economic immigrants using asylum applications as a migration route.” (Migration News 2003)⁵⁶⁴ By mid-2003, however, it was clear that Great Britain did not have enough support within the European Union to implement the system, as it was opposed by a number of states including Sweden, Germany, and France. (UNHCR 2006: 37, see also Betts 2004)⁵⁶⁵ In an effort to beat even this level of restrictionism, Conservative leader Michael Howard argued in 2004 that if his party gained power, he would introduce a ceiling on immigration and withdraw from the 1951 Convention. He argued that:

To get here most asylum seekers must undertake a long, dangerous and expensive journey, often at the hands of people smugglers. Genuine refugees who cannot afford the cost – or are not strong enough to make that journey - cannot apply. The current system is helping to sustain an international people smuggling network... We will pull out of the 1951 Refugee Convention, as is our right, by giving twelve month's notice to the Secretary General. The Convention is now thoroughly outdated. It was agreed during the Cold War when a relatively few number of people were able to escape from behind the Iron Curtain. Its authors could not have imagined that it would come to be exploited by tens of thousands of people every year.” (Howard 2004)

⁵⁶⁴ While this was being debated within the British government and with the governments of Denmark and the Netherlands, UNHCR sought to influence the debate by arguing in favour of a three-pronged model to deal with the issue within the region, including improved domestic asylum procedures and processing of manifestly-unfounded cases within the EU’s borders. These policies, as UNHCR notes “were met with little enthusiasm by European governments.” (UNHCR 2006: 38)

⁵⁶⁵ Betts suggests that this proposal fits within an increased number of projects falling within a conception of “extraterritorial protection,” defined as the “raft of refugee policies initiated by OECD countries aimed at de-territorializing the provision of protection to refugees in such a way that temporary protection and the processing of asylum claims take place outside of the given nation-state.” (2004: 59)

The shadow Home Secretary, David Davis, also argued that “uncontrolled immigration endangers the values that we in Britain rightly treasure.” The comments, however, were criticized from those within and outside of the party. (Travis and Watt 2004)

Thus, it appeared that both the government and opposition were prepared to move in directions that would either implicitly or explicitly violate the Refugee Convention. Neither policy, however, was adopted because of significant declines in asylum applications. In 2002, of 85,865 asylum applicants, only 8,100 were granted refugee status. (Rudolph 2006: 194) Four years later, in 2006, Britain received only 42,714 applications, and recognized 6,330 as refugees, a decline of half. (UNHCR 2007: 47)

There has been a concerted effort by the British government to restrict asylum seekers through domestic legislation and, increasingly, extraterritorial measures. The government has undertaken these measures by framing asylum seekers as primarily being economic migrants seeking to abuse the advantages of a humanitarian-based refugee system. And yet evidence suggests that not only are these measures counterproductive, but that many asylum seekers either qualify as Convention refugees or do have a legitimate fear of persecution. In both the United States and Great Britain, moves towards extraterritorial restrictions are increasingly seen as a mechanism whereby they can avoid the refugee determination process altogether. Similarly, safe third country agreements are used to return legitimate refugees back to UNHCR and to the developing world. At the same time, as these states challenged basic norms of the regime – including the right to seek asylum and, effectively, to not be refouled – they continue to schizophrenically support the regime.

8.5 Conclusions: Is the Post-War Refugee Regime Still in Operation?

How do states in the developed world justify such policies? The primary argument these states make is that there is a right to leave their own state and to seek asylum elsewhere, but that refugees do not have a claim to seek asylum in a particular state; to do so, it is argued, merely reflects asylum shopping. Under such a logic, these states are free to enact strict barriers against entry, though this does affect asylum: since policies designed to prevent entry often do not have determination systems attached; or if they do the numbers allowed in through such systems are very restrictive.

Do the norms of the postwar regime continue to carry normative weight? On one hand, state practice has altered considerably. The developed world has focused on restrictions, on control rather than asylum, while states in the developing world have become less receptive to refugee flows and has begun to close their borders. On the other hand, many of these challenges have occurred at the margins. While the United States prevents asylum seekers from reaching its borders through interdiction, it does continue to allow resettlement, albeit biased towards ex-Communist countries. Britain, similarly, argues that controls are not meant to prevent refugees from receiving asylum, but rather to prevent economic migrants from abusing the system. Even the extraterritorial processing system the country proposed would maintain a determination system. Thus, where the norms are being violated it tends to be on the margins - such as the use of restrictive refugee definitions and through low recognition rates - rather than overt defection. Moreover, as the discussion of deportation shows, much as the populations of the Western states seek to limit 'asylum seekers,' when it comes to actually removing them in any numbers, liberal democratic norms do tend to prevail. Similarly, when it comes to refugees themselves, these countries generally do remain supportive of the Refugee Convention and of the important role played by UNHCR.

This cycle does have two historical antecedents: the movements towards restrictionism at the end of the 19th Century, though tempered by continued open migration to the United States, and the widespread policies of restrictionism in the interwar period. In those cases, the regime became compromised due to shifts at the domestic level which favoured restrictionism. As these changes occurred, both regimes failed to provide a linking mechanism between the international and domestic levels and between the norms of the regime and the broader norms and fundamental institutions of international society. Further, in the interwar period, states sought to restrict the autonomy and independent sources of legitimacy for the IOs within the regime and also no longer supported an international legal foundation for protection. Thus, the interwar regime found not only that its robustness (or linking) ability was compromised, so too was its effectiveness (or the internal and external coherency of its norms and its ability to fulfill its principles objectives. In both cases, the regime was unable to weather these challenges and collapsed. Equally, in both cases norm entrepreneurs at the international and domestic levels successfully constructed a new regime, using pre-existing norms as its base and by reinterpreting the basic rules of behaviour provided by fundamental institutions.

The current state of the international refugee regime does not suggest such a fundamental breakdown. As shown by the increasing use of restrictionist policies at the domestic level, the regime's ability to link the norms of the regime to domestic structures has been weakened. This only encompasses the area of border controls and admissions, however. Domestic support remains strong for other normative elements of the regime, most notably the role of international law and the Refugee Convention. Equally, while the regime is in danger of becoming regionalized – most notably as the views of the developed and

developing world continue to split – at present it continues to create shared understandings among states: they continue to perceive a common purpose and common goals within the regime.

The danger, here is the ongoing attempts by states in the developing world to lessen their obligations to the regime, as I have argued occurred in both the United States and Great Britain. States, while continuing to rhetorically support the norms of the regime, have sought to off-load their individual responsibilities on to the UNHCR and the developing world. Thus, even as the UNHCR's funding has declined, the role the agency is expected to play has expanded. Similarly, the developing world today bears a disproportionate cost of the regime by providing asylum - even if in restrictive camps - to the vast majority of the world's refugees. Here, the role of the UNHCR remains critical. Its recent efforts have sought to bridge the North-South divide. (Betts 2008) However, many of the pressures on the regime remain. States in both the developed and developing world need to ensure that they respect the rights of refugees to receive protection both in international law and through the work of UNHCR. In other words, states today need once again to ensure that their actions respect the normative obligations inherent in the refugee regime.

Chapter 9: Refugees and State Cooperation in International Society

9.1 Introduction

Since the 17th century, the state response to refugees has reflected a mixture of national and humanitarian interests. A consistent feature of this response, however, has been its framing within international normative obligations, starting with the crucial notion that refugees are separate from other migrants and have a right to leave their own state. Refugees, because they are outside of their own state and devoid of its protection, took on the guise of an international problem as doctrines of territoriality were entrenched. As a transterritorial problem, any potential solution had to be based in some form of international cooperation between states and other actors in international society.

Yet state practice regarding refugees has varied significantly over this period. Changes included which individuals or groups were accepted as part of the category of refugees; 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. Other norms, however, have remained remarkably consistent, including a clear distinction between refugees and other migrants and the principle that refugees possess a right to leave their own state. These understandings, once entrenched, have proven exceptionally durable, evidence that the sequence in which states have adopted norms does matter. State cooperation towards refugees has been marked by a fascinating pattern of change and consistency.

Crucial to understanding this is the mutually constitutive role of structures and agents in framing and altering the state response. State policies over time have tended to be relatively

stable, rooted in normative beliefs that become institutionalized within a regime, and have varied significantly only after major crisis events. These are defined in this case as dramatic and sustained changes in the nature or numbers of refugees fleeing their own country that causes states to question pre-existing norms and policies. Following such an event, this dissertation has confirmed that windows of opportunity exist for norm entrepreneurs at both the international and domestic levels to articulate new normative understandings. Through this process, existing regimes can be transformed or replaced as they are no longer seen to provide an effective cooperative solution to the refugee problem.

These new normative understandings can vary significantly depending on how refugee protection is framed in terms of the state's sovereignty and other national interests. Thus, domestic norms, interests, and institutions can be crucial in determining whether states accept or reject new international norms. If discord exists between the domestic and the international level, international norms will be internalized only through active persuasion on the part of domestic norm entrepreneurs. This process can take years, and even strong rhetorical commitments to norms at the international level can be blocked or undermined by domestic institutions. By the same token, once a new norm is internalized, this process can reverse, with the state itself serving as a norm entrepreneur to argue in favour of a normative position already accepted as correct by the state's domestic institutions and public.

Which norms have mattered? The first critical step was the recognition that refugees did have a right to leave their own state, recognized in international legal doctrines, in peace agreements (particular Augsburg and Westphalia) and, following the Revocation of the Edict of Nantes, in state practice. From that point on, a growing set of norms identified how these individuals outside of their own states could be provided with protection. These norms

recognized that individual states had a responsibility towards refugees that reached their frontiers, a responsibility which was subsequently transferred to the collective level through formal state negotiations. Crucial to this transition was recognition that individual states could not be expected to deal with large refugee flows by themselves; thus states accepted that there needed to be international cooperation facilitated by an institutional framework. Equally critical has been the role of law, accepted by states as the best mechanism to provide refugee protection. This occurred first at the domestic, then the bilateral, and finally international level. As a corollary to international legal protection, states also accepted in the post-Second World War period that refugees should not be refouled to states where they would be subject to the persecution.

However, this is not a progressive history: not all emergent norms are positive in their impacts on refugees. During some periods, most notably the 1920s and 1930s, norms reflecting restrictionism at the domestic level significantly curtailed the willingness of states to engage in refugee protection, causing international cooperation to unravel. New norms introduced since the end of the Cold War have focused on the regionalization and restriction of refugee movement and rights. Historically, states recognized refugees as those that fled state-based persecution, an understanding that remains the basis for the international regime. And yet, since the 1960s, refugee flows have increasingly included those fleeing persecution by non-state actors and situations of generalized violence, neither of which are adequately reflected in this view. Each new regime over this period, while it embodied a clear right to leave, also ensured that refugees had an obligation to seek asylum, not to automatically receive it. The introduction of the legal doctrine of non-refoulement meant that states had to provide such protections not only to refugees who were in their territories, but also to those

who reached their frontiers. States were concerned that they might be subject to uncontrolled refugee flows; therefore increased restrictions enabled them to limit their individual responsibility and, if refugee numbers grew too large, to count on the support of other states to deal with the problem.

By the same token, states balanced restrictiveness on the one hand with a willingness to accept, or to even encourage, refugee resettlement. This was clearest during the early decades of the Cold War, when Western states routinely accepted in large numbers of refugees from the Communist world. It is less true today, as these same states seek to prevent not only entry of refugees (or, in the new parlance, asylum-seekers) but to also restrict the numbers of refugees they resettle. This means that since the 1980s, the vast majority of refugees remain in the developing world. These states, lacking support from the developed world, are increasingly unwilling to engage in permanent resettlement. The result is that most refugees today are in limbo, trapped in camps with no solution to their plight in sight. The normative obligations accepted by states have been tempered by an increased focus on restrictionism and border controls, a switch which has undermined the basis of the regime rooted in a collective responsibility for refugees. In this final chapter, I focus on the implications of this argument for both theory and policy. In particular, I show how these mechanisms have functioned over time and review the important roles that both structures and actors have played within the international refugee issue area.

9.2 The Historical Development of Refugee Protection

The origins of state cooperation towards refugees began in the decades following the Peace of Westphalia in 1648. In Chapter 3, I showed that the Peace marked an important transition as individuals were provided with the right of jus emigrandi to leave their own

state if their religion differed from that of their Prince. This doctrinal evolution occurred due to the interplay of two fundamental institutions: territoriality and international law. The flight of the Huguenots from France in 1685 marked a key development. What had been a thin normative order was expanded to incorporate the principle that allowing refugees to emigrate was a hallmark of a legitimate state and that France, under Louis XIV, had violated it. Equally, states were willing to not only accommodate the Huguenot refugees, but moved to offer them protection in domestic law. While few other refugee movements during this period were offered similar protections, individual states did seek to accommodate them for religious and economic reasons. State practice, however, was not institutionalized at the international level; states accepted no concurrent responsibility for refugees, but rather accommodated them on a case by case basis.

A cooperative, albeit informal, regime emerged only in the 19th century following the French Revolution. As Chapter 4 showed, this required the emergence of doctrines of popular sovereignty, which argued that political as well as religious refugees should be accepted as a duty for states in European society: hospitality and humanitarianism required it. Refugees were no longer accepted because of state interests; rather, in many cases, offering protection ran against these interests and on some even occasions risked war. As norms in international society, these doctrines emerged in Great Britain, the United States, and France as decision-makers and the domestic population accepted that accommodating refugees and not returning them to states where they might be persecuted was morally just. These states then successfully transmitted these new norms across European society through the mechanism of bilateral extradition treaties so that by the 1870s non-return of political

fugitives was considered to be a universal practice. Legalization of refugee protection thereby served a crucial role as a mechanism to create shared understandings among states.

Such informal mechanisms worked as long as refugee numbers were relatively low and as long as open immigration remained a principle of the system. As Chapter 5 showed, during the interwar period much larger numbers of refugees caused this regime to fail. At the same time immigration control was recast at the domestic level as an important aspect of state sovereignty. Norm entrepreneurs at the international level successfully created a new regime by convincing states that an effective solution to the refugee problem was formal multilateral cooperation and the entrenching of refugee protection in international, rather than domestic, law. This regime provided a successful cooperative mechanism for states during the 1920s. In the 1930s, however, the discordance between state support for the regime at the international level and domestic norms favouring restrictionism proved too much. In particular, states were unwilling to provide a succession of IOs with strong mandates due to fears that the IOs might seek to challenge their domestic immigration policies. Equally, domestic decision-makers who favoured a humanitarian response to refugees – including, from 1938 onwards, Franklin Roosevelt – were unable to challenge this domestic consensus.

The interwar period, while a failure for cooperative efforts to protect refugees, did create important norms reflecting the need for states to cooperate through formal multilateral structures and to provide protections in international law. As Chapter 6 showed, this provided a basis for a new regime to emerge in the post-war period, driven by American leadership. The United States government, and Harry Truman in particular, committed to new cooperative efforts and were willing to provide significant support to these IOs both

because of concerns that the large refugee population might endanger European stability and, notably, for humanitarian reasons. Two separate events – the forced repatriation of millions of Soviet citizens and the plight of refugees in European camps – triggered this shift and recast the American government as a norm entrepreneur. Following it, while the American government sought to create an IO – the International Refugee Organization – in cooperation with the Soviet Union, they were unwilling to compromise on the crucial point of non-refoulement. The IRO, therefore, provided refugee protection primarily through resettlement activities supported in large part by the United States government. Equally, Truman fought to ensure that the United States also welcomed refugees at the domestic level. He succeeded in altering the position of Congress, but only by securitizing refugees as a Cold War issue; a frame that continues to play a role today.

As the Cold War deepened, the United States increasingly sought to avoid IOs within the United Nations system for ones that they could create and control. This meant, as Chapter 7 showed, that the United States was unwilling to support the United Nations High Commissioner for Refugees. In spite of this, and in spite of a very limited and non-operational mandate, the UNHCR prospered because of its moral and expert authority and because it proved its effectiveness as a protection and assistance oriented organization. At the international level, the UNHCR played a key role as a norm entrepreneur by reframing the legal basis for refugee status and by moving the regime away from its Eurocentric origins to encompass the world. Yet, as refugee flows to the developed world increased in the 1980s and 1990s, the UNHCR found its authority and autonomy challenged by states. As it pragmatically sought to cope with this changing environment, it began to focus less on

refugee protection with the result that it undermined the power of the 1951 Convention and the agency's sources of moral and expert authority.

At the same time, the United States and Great Britain have increasingly engaged in bifurcated policies, supporting the UNHCR and the international refugee regime at the international level while prioritizing national interests and immigration control at the domestic level. As Chapter 8 showed, this change has been driven primarily by anti-immigration forces, and as both states seek to grapple with their role in a globalized world a humanitarian basis for their refugee policies has been allowed to drift. In particular, while both continue to reflect the key norms of the regime – support for multilateral cooperation; for refugee protection in international law, and for non-refoulement – they compromise these norms on a day to day basis through policies of refugee deterrence, detention and extraterritorial processes including interdiction at sea. These changes have had a detrimental effect on the regime because it has undermined the collective basis of the regime. While these states may provide rhetorical support for refugee protection and asylum, it is the UNHCR and the developing world that bear a disproportionate share of the regime's costs.

9.3 A Mutually Constitutive Framework of Explanation

I have argued that critical to explaining the pattern of state response to refugees has been the mutually constitutive role played by structures – including fundamental institutions, regime, and norms – and by actors including states, IOs, NGOs, and norm entrepreneurs at the international level.

Fundamental institutions, including territoriality, international law, popular sovereignty, and multilateralism, provided the basic rules which states have followed to govern their behaviour and assist cooperation. Equally, they have provided important

international sources of legitimation for states which have been reflected back domestically. Finally, they have served to constitute actors' identities and who should be recognized as an actor in international society. Initially, these institutions emerged out of individual state identities, through their practices, and through formal negotiations which became legitimated as a set of rules which enable cooperation to occur and allowed for order to be preserved. These institutions served to first problematize refugees as a transterritorial issue – a view not prevalent prior to the 17th century - and provided the political space in which state cooperation was possible to protect refugees. As these institutions have periodically changed – as international law increasingly defined the roles of the sovereign and citizen with respect to each other and to international society, as popular sovereignty was introduced following the age of revolutions, as formal multilateralism was accepted, as popular sovereignty was redefined to incorporate a norm of sovereign equality, and finally as states increased accepted the role of extraterritorial practices within a globalizing world – states altered their basic cooperative practices towards refugees.

Regimes served to link these fundamental institutions with individual issue-specific norms and in so doing provided a clear sense of the scope of international behaviour and through what mechanisms states should deal with the problem. Regimes thereby introduced regularity to state practices. I have argued that three independent regimes have functioned within the refugee issue-area: the laissez-faire, informal regime of the 19th century; the interwar regime; and the post-war regime. All three regimes have embodied different normative understandings and hence had different goals and purposes. The laissez-faire regime was based in the notion that individual states had a responsibility to not return refugees who entered their territory, and this understanding was framed by protections in

domestic and bilateral extradition law. The interwar regime was based in the notion that certain groups of refugees required protections through formal multilateral cooperation, and this understanding was anchored in the creation of a succession of IOs and the gradual development of international law. The postwar regime is based in the notion that all refugees require protection and to not be returned to their own countries, with protection anchored in international law and in the ongoing efforts of the UNHCR.

Change within and between regimes has occurred as they have been challenged by crises which redefined the scope of the problem. How durable a regime is, in other words how well it can cope with these crises, depends on its robustness – its ability to create shared understandings between actors and to link its understandings to other structures in international society and to domestic structures – and its effectiveness – whether its norms are internally and externally coherent and whether the regimes fulfills its principled objectives. The two previous regimes collapsed when they could no longer provide a linking mechanism between the international and domestic levels and between the norms of the regime and the broader norms and fundamental institutions of international society.

Crisis events, I have argued, provide opportunities to norm entrepreneurs to redefine the norms within the regime and hence to trigger regime transformation or replacement. Following such events, norm entrepreneurs played crucial roles in proselytizing new normative understandings at both the international and domestic levels. Critical to this process is the ability to successfully frame these new norms in ways that correspond to existing normative understandings and domestic structures. These efforts can occur at the international level (as occurred in 1921) or at the domestic level (as in 1685 and the 19th Century) but work best when efforts simultaneously occur at the domestic and international

levels (1945-1951). Different types of norm entrepreneurs have succeeded in bringing about change, whether individuals or NGOs at the international level (Gustave Ador and the ICRC in 1921), IOs (the UNHCR's expansion of its mandate in the 1951-1967 period), or domestic entrepreneurs able to work within domestic structures, often by framing new norms within the broader national interest (most notably President Truman in the 1945-1951 period).

Two elements are important here. First is that my findings reinforce recent arguments about the ability of IOs to not only reflect state interests but also, through independent sources of authority and legitimacy, to create new norms. Such an argument has already been made in terms of the UNHCR. (Barnett and Finnemore 2004, Loescher 2001) Other IOs within this issue-area, most notably the League HCR, played similar roles. However, an additional finding is that not all IOs are created equally. During the process surrounding their creation, states have tried to limit the scope and mandate of refugee IOs. The difference between success and failure in expanding their mandates and scope has been how IOs were able to influence states within a context driven by crisis events. This finding is a fruitful area for future research.

Second is the role of norm entrepreneurs at the domestic level. Constructivist accounts have often ignored or limited the role that domestic institutions and norms play in affecting state internalization of new norms. Efforts to bring about normative change at the domestic level succeed when these new norms either emerge within a novel issue area, or when they are successfully framed to fit with existing normative understandings at the international and domestic levels. Domestic institutions, particularly those with a veto power, did play crucial roles in blocking new norms. Thus, one of the major failures of the United States in the 1930s was the inability of concerned norm entrepreneurs working within the

Roosevelt administration to bring about a change in either the State Department or the United States Congress. Conversely, Truman, in supporting broadly similar norms, succeeded because he was able to bring this latter, and crucial, domestic institution on board while ensuring he also had support within the State Department. By the same token, Congress also played an important role in ensuring that the government continued to abide by new norms once they were internalized in domestic law.

Crucial to this process has been the mechanisms which have framed the refugee problem: whether it is seen as a responsibility of states to protect refugees within broader international principles of humanitarianism, or whether states perceive refugees as a challenge to their sovereignty and national interests. Thus, debates over immigration law in the United States in the 1920s cited refugee and migrant admissions as allowing other countries to violate the U.S.'s sovereignty. The important point, here, is that these are not necessarily mutually exclusive. They can be mutually reinforcing, such as in the late 1940s and early 1950s as refugee admissions were framed within the United States as being a vital element of Cold War strategy and hence state preservation.

Policies towards refugees have been most effective at providing protection when international norms governing how refugees should be treated are in accordance with these domestic norms. Policies become discordant when these norms differ or reflect alternative understandings. By the same token, increased admittances of refugees and increased support at the international level, while it ensures better protection, may seem like a negative outcome for the states concerned. And yet it is not. It is during these times that the most robust regimes are created, when refugees are most effectively dealt with at the international level, and when states are confident in not only protecting their interests, but also in ensuring

order in the international system. Conversely, restrictionism, while it may appear to better limit the state's obligations, has invariably led to the destabilization and weakening of the regime. In the long-run, this triggers a new search for an effective solution, often requiring new structures and new IOs. 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.

Finally, this dissertation has pointed to the diverse roles that norm entrepreneurs can play as proselytizers of new understandings. Not all norm entrepreneurs are created equal. Of particular importance is the need to disaggregate true entrepreneurs (those proposing new ideas) from other groups or states determined to ensure international adoption of norms they have committed to at the domestic level. This latter category suggests instead an important role for 'norm consolidators,' another potential area for future research.

9.4 Whither the international refugee regime?

The regime, today, is at a turning point. The stresses that have been building up within it - the divide between states, and the focus on restrictionism rather than humanitarianism - are similar to those experienced by the interwar regime, a set of circumstances which it did not survive. There is hope on the horizon: the UNHCR is once again actively arguing in favour of refugee protection, and states in the developed world, motivated by declining numbers of asylum seekers, are starting to limit some of their more restrictionist practices.

Significantly, throughout this history of regime change and adaptation, a strong foundation of normative understandings has remained, including the right of refugees to leave their own states, to be protected in international law, and to have protection and

assistance provided by an international organization. This provides support to arguments which suggest that many normative understandings are path dependent or sequence-based, and that once new understandings are created and internalized by actors, it is difficult to alter them. Many of these norms today, like the concept of the right of leave, are so deeply sedimented within state practice that they are seldom, if ever, challenged.

These normative understandings in many cases have taken centuries to evolve and mark significant portions of a state's identity. When they are challenged, they are challenged at the margins. Similarly, this confirms the view that the introduction of new norms is easiest in two situations: when the norms frame a novel issue area in which a coherent response has not been developed, or when norms are framed to reflect existing norms at the domestic level and fit within the state's identity. As time passes, these norms are increasingly reflected within that state's identity. Thus, while these norms may be altered at the margins, states remain committed to the right to seek asylum and to not refoule refugees from within their own borders.

Even as the state response to refugees, and the refugee problem itself, has grown more complex, states have continued a process of cooperation in order to ensure that refugees do receive some measure of protection. In this, state cooperation towards refugees marks an ongoing pattern of continuity and change which can only be understood by examining different structural elements of international society and the role played by agents working at the international and domestic level. Refugee protection constitutes an obligation for states in international society. Having fled their own states, having been persecuted, injured, and forced to abandon their home, property, and possessions, it is critical that they receive some form of protection. Equally critical is that states continue to accept this

obligation, for without it refugees cease to be protected and once again become faceless. At the same time, there are practical reasons to ensure that cooperation continues, for without it, refugees become a destabilizing factor within international society. If history is any judge, these obligations are not to be taken lightly. Refugees will definitely be a major problem for the future, as they have been in the past and present. And yet, states have been too quick to forget this history. Hopefully, this time, we may all learn.

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