

1 Introduction: a right to flee

When 200,000 Huguenots fled religious persecution in France in 1685, they had little idea that their plight would mark a major change in state practice. Because of this policy shift, the Huguenot flight remained synonymous with the term used to define these individuals into the nineteenth century: *refugees*.¹ Before this event, the flight and expulsion of religious minorities had been commonplace, whether they were Jews expelled from England in the twelfth century or Moors from Spain in the fifteenth century. The Huguenots – primarily merchants and artisans – would bring to their receiving states wealth and knowledge. But they represented an international problem: unlike the situation of earlier groups, Louis XIV forbade the Huguenots to leave France. This prohibition violated a normative understanding, reached in the Peace of Westphalia some forty years earlier, that allowed subjects whose religion differed from that of their prince to leave that territory with their property. The states to which the Huguenots fled faced a dilemma: how could they accommodate the Huguenots in a way that would express their concerns over Louis XIV's actions, but still avoid conflict with France?

The decision by their receiving states to accommodate and protect them under domestic law caused the Huguenots to be recognized as a distinct category of migrants, ones who, because they could no longer count on the protection of their own state, should be allowed to leave that state and receive protection elsewhere. It is this basic understanding that was codified in the 1951 *Convention Relating to the Status of Refugees*, which defines 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

¹ As late as 1796, the third edition of the *Encyclopaedia Britannica* noted that the term “refugee” had been applied to the expelled French Protestants and that only in recent times had the term “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).

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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.²

This understanding remains the basis for how we understand who a refugee is, even if it appears to be at odds with current state practice. Rhetorically, governments across the developed world acknowledge their commitment to refugee protection, asylum, and the refugee regime, yet they prioritize national interests such as immigration and border control over broader humanitarian interests, including refugee protection and acceptance. President George W. Bush could reaffirm the U.S. “commitment to protect and assist refugees, promote their right to seek asylum, and provide opportunities for their resettlement, as needed” (Bush 2002) while arguing that the United States will “turn back any [Haitian] refugee that attempts to reach our shore” (Bush 2004).

A simple interest-based explanation exists for this. Refugee admissions during the Cold War were in the interests of most developed states. As Teitelbaum (1984: 439) argued, “refugee admissions policies have been guided . . . by the belief that refugee outflows serve to embarrass and discredit adversary nations.” A generous U.S. refugee policy during this period could be viewed as nothing more than the result “of interest calculations in which international norms played no role” (Hartigan 1992: 711). Since the end of the Cold War, states have faced increased numbers of refugees requesting entrance and have therefore prioritized intake restrictions in order to maintain control over their borders.

The restrictionist practices that have developed over the past quarter-century led a number of commentators to conclude that the international refugee regime is today in crisis, unraveling, or split between the interests of the developed and developing worlds (see, among others, Keely 2001; Crisp 2003; Gibney 2004: 229; Betts 2009). Yet even while states challenge aspects of the regime, few challenge the refugee regime itself. No government has adopted the strategy advocated by former British Conservative Leader Michael Howard in 2004. Howard said that, if elected, “we will pull out of the 1951 Refugee Convention, as is our right. . . Its authors could not have imagined that it would come to be exploited by tens of thousands of people every year” (Howard 2004). Indeed, Gibney suggests that current responses to asylum seekers and refugees are schizophrenic: “great importance is attached to the principle of asylum but enormous efforts are made to ensure that refugees (and others with less pressing claims) never reach the territory of the state where they could receive its protection” (Gibney 2004: 2). Simply

² Article 1 A.(2), *Convention Relating to the Status of Refugees*.

concluding that changes in state interest have led to changes in refugee policy cannot explain the continued relevance of the regime.

The shift to restrictionism that began in the early 1990s is not the first such crisis to affect refugee protection. When the modern refugee regime was created in the five years following the Second World War, states faced a far larger displaced population than today. The war had created more than 40 million refugees and displaced persons. New flows in the millions were generated by the partition of India, the creation of Israel, and the Korean War. By 1950, when thirteen governments met to negotiate the 1951 Refugee Convention, refugees were fleeing across the Iron Curtain into West Germany at a rate of 15,000 per month, a continuous refugee flow with little prospect of ending. Yet, rather than restricting refugee protection, that Convention strengthened what had been an ad hoc system of legal protections by introducing the first comprehensive definition of refugee status and establishing a new legal obligation for states to not “expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.”³

There is a puzzle here. Why did states in this earlier period agree to a regime now unacceptable to them? And why do these states seek to restrict asylum even while otherwise abiding by the Refugee Convention and acknowledging the importance of the refugee regime? An interest-based explanation may answer the first question, but not the second. One alternative explanation focuses on the possibility that refugees may pose an international problem – that they “may fall outside the state system and become a source of instability or a threat to state security” (Betts 2009: 7). The notion of the refugee regime providing stability and thus serving common interests and goals offers an explanation for ongoing international cooperation, but it fails to explain both the forms cooperation has taken and its durability.

I propose a third explanation, one reflected in the fact that the Refugee Convention, along with the associated creation of the United Nations High Commissioner for Refugees (UNHCR), reinforced a norm-governed view of refugees first established by the French Huguenots. Because refugees were outside their own state and could no longer count on its protection, they became a problem for the international community, one that could only be solved through international cooperation. And although creating the Convention was a watershed event, it was neither the beginnings of state cooperation nor a substantial break with past practice, a view contrary to “most conventional accounts [that]

³ Article 33.1, *Ibid.*

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identify the refugee ‘problem’ as a particularly twentieth century phenomenon” (Nyers 1999: 11; see also Haddad 2008: 65; Long 2009: 135). This is also at variance with an alternative explanation for the durability of refugee protection in the post-Cold War period that suggests it is associated with the wider growth in human rights norms since 1945 (Rosenblum and Salehyan 2004).

Instead, refugee protection marks a critical example of continuity and change in state practices. Some practices have been continuous. Since the Peace of Westphalia was signed in 1648, states have held intersubjective social understandings of refugees as different from other migrants; upheld that they should be allowed to leave their own state; and, crucially, recognized that they require some form of protection because they can no longer count on the protection of their state and are outside of its territory.

The basis for this entrenched normative understanding has been and remains law: as Helton has argued, when we speak of refugee protection, “we mean legal protection. The concept must be associated with entitlements under law and, for effective redress of grievances, mechanisms to vindicate claims in respect of those entitlements” (Helton 2003: 20). This core understanding of refugee protection is readily apparent in the 1951 Convention but also in earlier international conventions, such as the 1933 Refugee Convention.

This consistent basic understanding of who refugees are exists because refugees are part of a small set of actors in international society who do not conveniently fit into the Westphalian system based around the primacy of territorially based states. They are, in one sense, a transterritorial problem (see Ruggie 1998a: 191); the international system, Cronin has argued “is not equipped to deal with individuals or groups who are not under the authority or protection of a state” (2003: 152). This problem, however, does not arise as a consequence of a breakdown in international society. Rather, as Haddad suggests, refugees are an inevitable if unanticipated result of the Westphalian system: “as long as there are political borders constructing separate states and creating clear definitions of insiders and outsiders, there will be refugees” (Haddad 2008: 7; see also Keely 1996: 1046). In fact, refugees help solve a larger issue for international society. As Bull argued, in such a society:

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)

Refugees, in other words, are a relief valve for the state system. European history, as Hirschman suggests, 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; see also Dowty 1987: 50).

Although there are continuous understandings around refugees’ basic identities, there are also sweeping changes that have occurred in how states practice refugee protection. Although refugee protection may be anchored in law, this protection was initially provided at the domestic level, in documents such as the 1832 French law that defined refugees as “unprotected persons.”⁴ It was only over time that refugee protection shifted from the domestic level, to the bilateral level, and finally to the international level.

Equally critical, although the basic understanding of a “refugee” as a person fleeing state persecution has been commonly understood for centuries, what state acts qualify as “persecution” and even who falls within the refugee category have been significantly redefined over this period. In the seventeenth and eighteenth centuries, states accepted that people fleeing religious persecution (and only religious persecution) in Europe qualified as refugees, whereas in the nineteenth century individual political exiles were added to this list. Since the 1951 Convention, states have accepted that refugees are those who flee individualized state-based persecution, although broader interpretations are included in regional international law (such as the Organization for African Unity [OAU] 1969 Refugee Convention) and in domestic policy. Other changes have seen the locus of primary responsibility for refugees shift from individual states to international organizations and refugee assistance move from being an ad hoc and voluntary activity to being enshrined as a critical norm in the current regime.

Explaining the origins and evolution of refugee protection

I have suggested that how states approach refugee protection reveals a mixture of continuity and change in their practice. This behavior exists not only because of collectively held interests on the part of states to ensure international order, but also because of deeply entrenched normative understandings. As such, my goal is to use the issue of refugee

⁴ *Loi Relative aux Etrangers Réfugiés Qui Résideront en France* (IX, Bull. LXXV, no. 165) passed on April 21, 1832.

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protection as a way to understand how state cooperation can be created and sustained by the interaction of structures and agents over a long historical period.

Although I lay out this argument in detail in Chapter 2, here I briefly summarize the interplay between those structures and agents that help to form international cooperation around refugee protection. First, I offer a framework of analysis that focuses on the mediating effects of three levels of international structure: fundamental institutions, regimes, and norms. Four fundamental institutions, elementary rules of practice within international society (Reus-Smit 1997: 557), play a key role in framing how states have responded to refugees. Initially, the institutions of territoriality and international law, and subsequently, popular sovereignty and multilateralism, provided commonly held understandings that created a political space offering incentives for states to cooperate to provide refugee protection.

Regimes reflect the basic understandings embodied within these 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). Norms are shared understandings of appropriate behavior for actors with a given identity that isolate a single strand of behavior (Jepperson et al. 1996: 52; Finnemore and Sikkink 1998: 891). Because a regime bundles together what might otherwise be disparate norms, it provides a clear sense of the scope of the international behavior and of how states within international society should deal with the problem. Thus, regimes provide a mechanism through which the appropriate standards of behavior suggested by the individual norms are linked together to create a response within the complexity of the issue area. In so doing, the regime brings increased regularity to state practices than would otherwise be the case.

State practices have not been static. Regimes contributed to the generation of state identities and the creation of notions of legitimate state behavior within international society that led to a level of stability. Yet these shared understandings between states have also changed dramatically over time, following a punctuated equilibrium framework. As such, I bring together constructivist and historical institutionalist approaches to make my argument.

I argue that a critical source of variance comes from crisis events caused by dramatic and sustained changes in either the number of refugees in the international system or the nature of refugees (such as the emergence of political refugees following the French Revolution). Crisis events disrupt policy stability by exposing new or preexisting contradictions within a refugee protection regime. This forces states to engage in an information

search in order to reconcile their normative beliefs to the changed reality of the situation (Berger 1996: 33; Checkel 1997: 125; Price 1998: 622). International and domestic norm entrepreneurs are therefore presented with an opportunity to introduce new norms that favor refugee protection and broader humanitarian interests or, alternatively, that favor restrictionist policies designed to protect state sovereignty.

The sets of norms that end up being internalized by states depend on the norms' congruence with domestic interests and culture, as well as with the ability of norm entrepreneurs to reframe their arguments within a context acceptable to domestic veto-playing or gatekeeping institutions (Finnemore and Sikkink 1998: 893; Checkel 1999; Risse and Sikkink 1999). This is successful when the new norm either reflects existing domestic understandings or is in an area in which there are no preexisting understandings. Thus, in 1920, states were "convinced" by the League of Nations and the International Committee of the Red Cross that a formal international organization was the best way to provide protection to refugees fleeing the Russian Revolution, whereas in the 1950s and 1960s the UNHCR successfully convinced states to expand the legal basis of refugee protection away from a Eurocentric to a global focus.

By contrast, when discordance exists between the new international norm and prior normative understandings at the domestic level, norm internalization will be more difficult. Either the international norm will not be internalized at the domestic level, or it may be only rhetorically supported and weakly internalized. Thus, although states may rhetorically support norms at the international level, until they are internalized domestically by veto-playing institutions they may be subject to violation or avoidance even when supported by elite decision makers (Müller 2004; Krebs and Jackson 2007). Thus, in the 1930s, the League of Nations, the United States, and the United Kingdom all argued in favor of some mechanisms to protect the Jews fleeing Nazi Germany. However, the domestic immigration policies of both the United States and the United Kingdom created substantial barriers to entry for these same refugees. Rhetorical commitments led to inaction not accompanied by domestic policy change.

Even in this pattern, however, successful internalization can occur through active persuasion on the part of domestic norm entrepreneurs who can reframe the new norm within the domestic context. For example, following the Second World War, American President Harry S. Truman successfully convinced the U.S. Congress that providing a broad-based refugee resettlement program was not only in the interests of the United States, but also served as an important weapon in the Cold War.

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This is not a progressive history; not all emergent norms are positive in their impacts on refugees. New norms introduced since the end of the Cold War have focused on the regionalization and restriction of refugee movement and rights. During other periods, most notably the 1930s, international cooperation unraveled entirely. As domestic-level factors change, in particular as states mediate between their humanitarian impulse to protect refugees and the need to protect national interests and sovereignty, even established international norms can quickly be challenged and replaced.

Norm content, state interests, and practices

Norm breakdowns do not point to an inability by international actors to bring about normative change (Moravcsik 1999), nor do they indicate either domestic interests or a logic of consequences trumping international norms (Krasner 1999). Both of these patterns of action do represent norm-governed behavior. The issue, then, lies in the content of those norms. Many norms proscribe behaviors that states should not undertake (Price 1997; Percy 2007), such as not blocking people from fleeing the state or not returning (refouling) refugees to their state of origin. By contrast, within the area of refugee protection, there are relatively few prescriptive norms – those that require a positive duty or action on part of states (Glanville 2006: 154–56). Positive duties in the refugee regime would include offering asylum to refugees who are not within a state’s territory and providing assistance and protection to refugees who remain beyond the state’s borders. Equivalently, we could frame this within the conception of responsibilities. A direct responsibility exists to refugees who have reached the state’s territory. By contrast, a broader, diffuse responsibility exists toward refugees as a whole, created (and interpreted in different ways) by successive international refugee regimes.⁵

Because of this issue of positive action, there exists a gulf between bare observance of the international norms that constitute the international refugee regime at any one time and the states accepting that they have an active obligation to provide protection to all refugees globally and acting on that obligation. This gulf, as Weiner (1996: 171) has noted, is brought about by a moral contradiction “between the notion that emigration is

⁵ By responsibility, I follow Erskine (2003: 7) that “to be responsible for some act, event or set of circumstances is to be answerable for it.” Diffuse responsibilities, as Welsh and Banda (2010: 219) note, “can make it easier for states and international organizations to shirk their obligations.”

widely regarded as a matter of human rights ... while immigration is regarded as a matter of national sovereignty.” Developed states today argue that they support refugees and fulfill their international legal obligations by providing support to the UNHCR, even while providing only token resettlement opportunities and minimizing their own obligations to accept refugees as much as possible. Thus, the main costs of refugee admissions are borne by countries of first asylum, which are almost exclusively in the developing world (Loescher and Milner 2005; Betts 2009).

This mix of proscriptive and prescriptive international norms leads to two distinct forms of state practice. Within the state, refugee admittance falls within the realm of domestic policy and hence interacts with other domestic interests and the myriad numbers of pressures that governments face from their own citizens. Outside the state, seeking to ensure that refugees in general receive protection at the international level falls within the goals of foreign policy and hence not only reflects the state’s role in the world, but is also affected by a range of collective and humanitarian interests within international society. For norm entrepreneurs who favor increased refugee protection, these variant forms of state practice mean they can find themselves playing a modified two-level game (Putnam 1988), trying both to diffuse new norms at the international level while simultaneously convincing domestic actors of the importance of those norms and situating them within domestic interests.

With refugees, and with broader immigration policy, these two forms of practice overlap. Immigration policy can be a “symbol that can be used to pursue a state’s interests” (Fitzgerald 1996: 9; see also Greenhill 2010). But immigration admissions go beyond mere interest and sovereignty to echo, as Walzer argues, “the shape of the community that acts in the world” (1983: 61–62). As Shacknove notes, “refugee policy has always been at least one part State interest and at most one part compassion. . . . When interests of State are fundamentally at odds with other values, as is increasingly the case with asylum, then it is unlikely that compassion, solidarity, or human rights will prevail” (Shacknove 1993: 517–18). Interests are at play, however, in different ways and at different times.

Traditional rationalist explanations see cooperation through the lens of state interests. States cooperate when it is in their interests to do so. Realists would go further, arguing that when it is not in the state’s interests, cooperative regimes will be allowed to wither away (for the extreme variant of this, see Mearsheimer 1994). But if one of the justifications for the regime is stability, with the primary issue being a problem of collective action and the provision of public goods, then defecting states will result in an iterative suboptimal outcome: the regime will erode over time due to trust issues.

An alternative to the realist explanation is provided in the notion that states can be motivated by common political interests to ensure the preservation of the values and institutions of international society (Wolfers 1962; Cox 1969: 207; Cronin 2003: 12). Thus, within a neoliberal perspective, Cronin (2003) argues in favor of international protection regimes designed to protect clearly defined classes of people. But the neoliberal perspective creates two weaknesses here. First, for Cronin (2003: 154), formal cooperation alone is important; tacit or informal understandings are not examined. Second, although Cronin can explain why international protection regimes emerge, it is unclear how they change once established. As he notes, states' individual preferences will gradually aggregate "in ways that produce a consensus around a common good. . . . Over time, international order can become durable and self-sustaining through both domestic and international processes" (Cronin 2003: 40–41). Thus, whereas in Cronin's view collectively held interests may lead to the creation of protection regimes and arguably to the creation of normatively held beliefs, analytically, his model does not explain how these regimes change or are replaced.

Within my constructivist justification of regime formation, change, and replacement within state provision of refugee protection, interests remain important but are subject to two important limitations. The first, as Müller (2004: 416) notes, is that in negotiations (and, by analogy, in other forms of behavior), "it is appropriate for actors to pursue their self-interest unless it collides with a valid norm that prescribes different behaviour." The simple presence of self-interest by itself does not presume that states are acting against existing norms or the broader logics of appropriateness.

The second is that interests are not fixed but are instead fluid and depend in part on the state's identity within a given context. Weldes argues that national interests "are social constructions created as meaningful objects out of the intersubjective and culturally established meanings within which the world, particularly the international system and the place of the state within it, is understood" (1999: 10; see also Finnemore 1996; Adler 1997: 337; Wendt 1999: 96–97). Classical realism advanced a similar contextual understanding of interests – as Morgenthau noted – whereas the "idea of interest is indeed of the essence of politics and is unaffected by circumstances of time and place . . . the kind of interest determining political action in a particular period of history depends upon the political and cultural context within which foreign policy is formulated" (1978: 8–9). Fluid interests introduce an element of contestation and perception into any claim made around the state's interests. Furthermore, this suggests that how states respond to refugees, how refugees are perceived as a problem,