The International System of Refugee Protection:

A Regime Analysis

Joanna Axelson

“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

Universal Declaration of Human Rights, Article 14(1)
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### Sammanfattning
The thesis examines the international refugee protection system in order to discover whether or not the system constitutes an international regime, as defined by international relations literature. To do so, it formulates a theoretical framework combining neoliberal and constructivist approaches to regime theory. It closely examines the legal documents that provide the normative and procedural framework of the protection system (such as the 1951 Convention Relating to the Status of Refugees, various regional agreements, as well as certain human rights documents) and discusses the legal, political, and moral obligation that these documents instill upon the member states of the protection system. It evaluates the principles, norms, rules, and decision-making procedures provided by the system, and compares them to the necessary criteria of an international regime in neoliberal theory. The purpose of trying to discover whether the refugee system constitutes an international regime is to show that if it is a regime, states are no longer afforded the full freedom of action and decision-making under the doctrine of sovereignty and that...
they have a certain level of obligation to abide by regime rules and help in the upkeep of the regime. After showing that the system constitutes a ‘strong promotional’ international regime, it discusses the importance of the regime within the international state system. It evaluates how it brings about cooperation and increased stability within the regime, and lowers the costs of bargaining in order to bring about mutual gains for regime members. The thesis then examines the pre- and post-entry restrictive measures used by countries and attempts to prove whether or not the use of the measures constitutes a change in, or of, the regime, or a potential weakening of the regime. The thesis concludes that while the refugee regime itself is not changing, there is increasing incoherence between the proscribed behaviour of the regime and state action, which translates into a weakening of the regime. The regime analysis discusses the role the refugee protection regime plays within the international system as a whole and how this role is evolving through the use of restrictive measures.

Nyckelord
Keyword
international regime; refugee; asylum-seeker; neoliberalism; constructivism; UNHCR; international system of refugee protection; humanitarianism
Abstract

The thesis examines the international refugee protection system in order to discover whether or not the system constitutes an international regime, as defined by international relations literature. To do so, it formulates a theoretical framework combining neoliberal and constructivist approaches to regime theory. It closely examines the legal documents that provide the normative and procedural framework of the protection system (such as the 1951 Convention Relating to the Status of Refugees, various regional agreements, as well as certain human rights documents) and discusses the legal, political, and moral obligation that these documents instill upon the member states of the protection system. It evaluates the principles, norms, rules, and decision-making procedures provided by the system, and compares them to the necessary criteria of an international regime in neoliberal theory. The thesis uses constructivism to show the importance of international norms and principles both within the regime itself, and the role they play within domestic asylum policy and in domestic acceptance of the regime components. The purpose of trying to discover whether the refugee system constitutes an international regime is to show that if it is a regime, states are no longer afforded the full freedom of action and decision-making under the doctrine of sovereignty and that they have a certain level of obligation to abide by regime rules and help in the upkeep of the regime. After showing that the system constitutes a ‘strong promotional’ international regime, it discusses the importance of the regime within the international state system. It evaluates how it brings about cooperation and increased stability within the regime, and lowers the costs of bargaining in order to bring about mutual gains for regime members. The thesis then examines the pre- and post-entry restrictive measures used by countries and attempts to prove, using neoliberal regime theory, whether or not the use of the measures constitutes a change in, or of, the regime, or a potential weakening of the regime. The thesis concludes that while the refugee regime itself is not changing, there is increasing incoherence between the proscribed behaviour of the regime and state action in reality, which translates into a weakening of the regime. The regime analysis discusses the role the refugee protection regime plays within the international system as a whole and how this role is evolving through the use of restrictive measures.
Dedication

I would like to dedicate this thesis to my parents, Dr. James Axelson and Mrs. Elizabeth Axelson, and to thank them for their amazing encouragement and support throughout my university education, and for urging me to take a Master’s Degree abroad. I would also like to give an enormous thank-you to Jesper Nilsson for supporting me throughout the whole process and for helping me through the rough moments.

—Joanna Axelson
Linköping, Sweden
January 2005
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Abbreviations

ATV  Airport Transit Visa
EU   European Union
ExCom (UNHCR’s) Executive Committee
FAO  Food and Agriculture Organization
ICRC International Committee of the Red Cross
IGCR Intergovernmental Committee on Refugees
IOM  International Organization for Migration
IR   International Relations
NGO  Non-governmental Organization
OAU  Organization of African Unity
OSCE Organization on Security and Cooperation in Europe
PARinAC Partnership in Action
UN   United Nations
UNHCR United Nations High Commissioner for Refugees
UNICEF United Nations Children’s Fund
UNRRA United Nations Relief and Rehabilitation Administration
UNRWA United Nations Relief and Works Agency for Palestine Refugees in the Near East
WHO  World Health Organization
1. Introduction

In the contemporary international state system the problems of border control and transboundary flows of refugees are ever relevant to states. Refugee-creating forces such as interstate warfare, ethnic cleansing, genocide and famine continue to occur with regularity. Thus, states that have a tradition of being immigrant nations, such as Canada\(^1\), the United States and Australia, are faced with the questions of how committed they are to the international system of refugee protection, and whether or not they are willing to open their borders to allow in a greater influx of foreign nationals who seek protection.

The problems associated with mass refugee creation and mass displacement were first addressed in response to the immense movements of peoples that came with the end of the Second World War. This meant that the main texts regarding international refugee protection, namely, the 1951 Convention Relating to the Status of Refugees (hereafter, the 1951 Convention) and the 1967 Protocol Relating to the Status of Refugees (hereafter, the 1967 Protocol) were heavily influenced by the dominant western member states in the United Nations (UN). These nations essentially shaped the nature of protection that the Convention was to afford using their political and strategic interests and this was obviously influenced by the post-WWII era politics. As such, Western, liberal democratic thought had heavy influence on the protection definition.\(^2\)

The refugee problem expanded as millions more refugees were produced throughout the 1970s and 1980s due to the Vietnam War and the Soviet invasion of Afghanistan. Over half a million Vietnamese boat people became refugees between 1975 and 1979.\(^3\) The contemporary ‘refugee crisis’, from the 1990s onwards, has largely been caused by the fall of the Soviet Union and the breakup of the Socialist Federal Republic of Yugoslavia. Conflict in the Middle East (such as the Iraqi invasion of Kuwait in 1991) and Africa (such as the 1994 Rwandan genocide) have led to the creation of vast numbers of refugees and displaced peoples.\(^4\) The past two decades have witnessed a huge climb in the number of official refugees from three million in 1978 to just less than fourteen million in 1997.\(^5\) This translates into making states, especially those with a history of immigration, face the question of whether or not they will widen their immigration and refugee policies to allow a greater influx of both people looking to better themselves economically (so-called economic immigrants) and people who are looking for protection from the state because their home government has failed to provide that protection (refugees and asylum seekers). All states, especially liberal democratic states that have a history of acting with humanitarian concerns in mind, are in a difficult position in which they have to balance out the traditional political concern for state sovereignty with the humanitarian concern for helping those in need of protection from persecution.

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1.1. Aim and Research Questions

The thesis examines the international refugee protection system that is made up of the various conventions, treaties and regional agreements, and domestic refugee policies, in order to determine whether or not the system constitutes an international regime. To do so, it uses regime theory found within the discipline of international relations (IR) as a theoretical framework. Specifically, it examines neorealist, neoliberal, and constructivist IR theory and the approaches to regime theory each hold, and then combines neoliberalism and constructivism to formulate the theoretical framework.

The purpose of trying to discover whether the refugee system does or does not constitute an international regime is to show that the members of the regime (i.e. signatory states to the 1951 Convention and 1967 Protocol, regional agreements, and those states that have enshrined the Convention into their domestic asylum policies) thus have their actions restricted considerably by the very fact that they are members of the regime. They are no longer allowed the full freedom of action and decision-making afforded to them under the doctrine of sovereignty. Regimes also have an important role in the international system as they bring about cooperation and stability. Thus, the thesis examines what kind of regime the international system of protection is, and what role it plays within the international system. It then examines the recent restrictive measures that are being instilled by many countries across the world (in an attempt to curb the transboundary flow of refugees and asylum seekers) and attempts to prove whether or not use of the measures constitutes a change within, or of, the regime, or a potential weakening of the regime. The regime analysis highlights the role the refugee protection regime plays within the international system as a whole and discusses whether that role is changing.

The paper thus addresses the following research questions:

1) Does the contemporary international refugee protection system constitute an international regime?
2) If the system of protection is an international regime, what kind of regime does the system represent? What are its characteristics and how is it important?
3) How do the restrictive measures affect the international protection regime? Specifically, do they represent a change within, or of, the regime, or a weakening of the regime?
4) What is the role of the regime within the international system as a whole, and how is this role evolving in face of the use of restrictive measures?

1.2. Delimitations

The thesis addresses the contemporary international system of refugee protection. The historical context focused on is from the post-World War Two system onwards to the current system of protection. The restrictive measures have for the most part been introduced within the past 25-30 years and thus only represent relatively recent state practices. As the purpose of the thesis is to address the contemporary refugee protection
system and the various restrictive measures practiced by states across the entire international system, it does not undertake a close examination of any specific state’s asylum policy. Moreover, the purpose is not to undertake an analysis of any specific state’s position within the international system of protection; instead, it is to address the system as a whole in an attempt to define and analyze its contents, discuss its importance in the international system, and to analyze the various changes that may be occurring within it and how these may affect the regime.

1.3. Structure of the Paper

Chapter 1. Introduction
This chapter introduces the aim of the thesis and formulates the research questions. The methodology of the thesis, a qualitative, interpretivist, constructivist approach, is outlined. Finally, the relevant theoretical and empirical literature is reviewed.

Chapter 2. Theoretical Framework
This chapter presents firstly the ‘rationalist’ approach to regime theory, including neorealist and neoliberal theories, and secondly presents the ‘reflectivist’ approach to regime theory, represented by constructivist approach to regime theory. Thirdly, the chapter presents the ‘theoretical middle ground’ (a combination of neoliberal and constructivist approaches to regime theory) chosen as the theoretical framework for the thesis, which will be used to evaluate the international system of refugee protection and discover whether or not it constitutes an international regime.

Chapter 3. The International System of Refugee Protection: an International Regime?
First, the chapter provides definitions of the key concepts that are discussed in the thesis. Then, it discusses the historical background of the protection system. It discusses the three major components of the international system of refugee protection: the legal documents (various conventions, treaties and regional agreements), the protection bodies (UN bodies, human rights organizations, among others), and finally domestic refugee policy. Finally, it shows how these three levels of protection are integrated to form the system of protection.

Chapter 4. The Refugee Protection System as an International Regime
This chapter discusses the various components of international regimes and the assorted types of regimes that exist in the international system. This discussion is then related to the international protection system in an attempt to prove whether or not the system constitutes an international regime, and what type of regime it is. It evaluates the role of the regime and its importance within the international system as a whole.

Chapter 5. Restrictive Measures
In this chapter a description of the various restrictive measures practiced by states in order to cut down the inflow of refugees across national borders is presented. The reasons for, and effects of, the restrictive policies are outlined. The concept of state
sovereignty is discussed and related to states’ reasoning for, and justification of, the use of the restrictive policies.

Chapter 6. Restrictive Policies and Regime Change
This chapter outlines neoliberal and constructivist explanations of regime change and transformation. It attempts to prove whether or not the use of restrictive measures by member states represents a change within, or of, the regime, or a weakening of the international regime of refugee protection. It then discusses the potential impact of the regime weakening for the regime itself, as well as for member states and refugees.

Chapter 7. Conclusion
This chapter presents the final conclusions. It addresses the research questions and attempts to answer them by providing a summary of the main conclusions about the refugee regime’s type, strength, and importance, and the role that it plays in the international system and how this is evolving.

1.4. Methodology

1.4.1. Method of Analysis: A Qualitative, Interpretivist and Constructivist Approach

The methodological framework of the thesis is a qualitative one. Qualitative and quantitative research methods have different epistemological and ontological views, meaning that they have different views about knowledge and the nature of the ‘real’ world. Ontology is “a theory of ‘being’” and it has to do with the question of “…whether there is a ‘real’ world ‘out there’ that is independent of our knowledge of it.” Ontology directly affects the epistemological position of the researcher, which reflects the researcher’s view “…of what we can know about the world and how we know it.” Thus, epistemology is a “theory of knowledge.” In contrast to quantitative research methods, which largely use a positivist epistemological position, qualitative research methods are based on an interpretivist epistemological position, which stresses “the understanding of the social world through an examination of the interpretation of that world by its participants.” Interpretivism holds a different logic of research procedure from positivism; it is based on hermeneutics, which seeks to understand human behaviour, instead of just explaining it, which is what positivism seeks to do. The ontology of qualitative methods is constructivist, which contends that social phenomenon is continually being accomplished by social actors; they are produced through social interaction and are thus constantly being revised.

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7 Ibid., p.19.
8 Ibid., pp.18-19.
10 Ibid., p. 13.
11 Ibid., pp. 17-18.
1.4.2. Criticisms

Qualitative research has been criticized on what some might say are crucial points. It is often dismissed as being “impressionistic, piecemeal and even idiosyncratic” because it is not seen as replicable, comparable, representative or reliable. Qualitative research is seen as “unrepresentative and atypical”. This is because to a large extent it is not comparable or replicable, thus generalizations cannot be made from it. There are four main criticisms of qualitative research; firstly, that it is too subjective; secondly, that it is difficult to replicate; thirdly, that it is difficult to draw generalizations from the research; and finally, that it lacks transparency. The first criticism is drawn from the fact that many consider the apparent subjectivity of qualitative research to be a problem; the findings of the research are visibly dependent on the researcher’s own views as to what is important and meaningful. However, in qualitative research, “the investigator is in the driving seat. The set of concerns that he or she brings to an investigation structures the investigation.” The second criticism holds that due to the lack of standard procedures for which researchers to follow and because the research is usually fairly unstructured and “reliant upon the qualitative researcher’s ingenuity, it is almost impossible to conduct a true replication.” However, the unstructured setting of qualitative research is put in place so that there is greater likelihood of understanding actors’ meanings and of getting concepts from the data.

The third criticism of the problems of generalization comes from the fact that qualitative research usually takes a small sample from a given population and it is therefore questionable as to whether it is representative of the entire given population. However, “the findings of qualitative research are to generalize to theory rather than to populations”, in other words generalization may not be the aim of the research. Finally, much qualitative research is characterized by a lack of transparency, meaning that it is hard to establish what was actually done by the researcher and how the conclusions were arrived at. The process of data analysis is also often unclear. Much of the problem of lack of transparency can be counteracted by the researcher: “the onus is on the qualitative researcher to make the interpretation of the data as explicit as possible in the development of an argument using systematically gathered data.”

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13 Ibid., p. 204.
15 Ibid., p. 282.
16 Ibid., p. 284.
17 Ibid., p. 282.
18 Ibid., p. 285.
19 Ibid., pp. 282-283.
1.5. Review of the Relevant Literature

The thesis undertakes an extensive review of the relevant theoretical and empirical literature on the subjects of refugee flow, asylum policy, border control, state sovereignty, international humanitarian and human rights law, and international refugee law. It does so to paint a picture of the contemporary refugee crisis, and to provide information as to how states deal with the problems of refugee flow. The empirical literature review is used in order to construct an analysis of the contemporary protection system. The theoretical literature review provides a framework through which the regime analysis is conducted.

1.5.1. Theoretical Literature Review

An essential book used in writing the thesis, which provides an overview of the rationalist and reflectivist approaches to regime theory, was *Theories of International Regimes* by Hasenclever, Mayer and Rittberger. Krasner’s book *International Regimes*, which includes articles by various authors on neorealist and neoliberal approaches to regimes, as well as criticisms of regime theory, was helpful. Krasner’s definition of ‘regime’ is used as the basis for discovering whether or not the protection system constitutes a regime. A journal article that was helpful in the formulation of both the rationalist and reflectivist approaches to regime theory was Keohane’s *International Institutions: Two Approaches*.

In regards to the constructivist approach to IR theory and to regime theory, the book *Constructing the World Polity* by Ruggie was used. His outline of constructivism and its core assumptions was very helpful, as well as his critique of neorealism and his ideas on regime construction and analysis. Wendt’s article *Anarchy is What States Make of it* was useful in regards to formulating the constructivist approach to regime theory and in creating an alternative understanding to neorealism of how and why cooperation occurs in the international system of states. Hopf’s article *The Promise of Constructivism in International Relations Theory* was also used to guide the outline and explanation of constructivism and its approach to regime theory. Donnelly’s article *International Human Rights: A Regime Analysis* was used in order to discover what type of regime the system of protection is.

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1.5.2. Empirical Literature Review

Related to the issue of the international system of refugee protection is literature on international human rights law and international humanitarian law, regional and domestic asylum policy, and the UN protection system. The thesis has been greatly helped by Goodwin-Gill’s book *The Refugee in International Law*[^28], which provided an excellent overview of contemporary international refugee law, the three levels of protection, and the meanings and workings of the treaties and conventions on refugee protection. Noll’s book *Negotiating Asylum*[^29] provided an excellent overview of the asylum practices of the EU countries, including the various practices of exclusion of refugees. In order to understand the UN system of protection, Ziring, Riggs and Plano’s book *The United Nations. International Organization and World Politics*[^30] was referred to greatly. It outlined the make up and functions of the various organizations and institutions that are within the realm of UN protection, as well as highlighted the meaning behind the various conventions that make up the system of protection.

A variety of conventions, treaties, and agreements were reviewed and referred to, including the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, the Cartagena Declaration on Refugees, the 1990 Dublin Convention, the 1990 Schengen Convention, the 1977 Treaty of Amsterdam, the 1950 European Convention on Human Rights, and the 1948 Universal Declaration on Human Rights and its Protocols.

2. Theoretical Framework

Since the early 1970s, international regimes have come to be an important focal point of theoretical discourse and empirical research within the field of international relations. This new course of study came about because many theorists were dissatisfied with the dominant explanations of the potential for cooperative behaviour in the competitive, zero-sum anarchic international system of states.\footnote{Haggard, Stephan and Beth A. Simmons, “Theories of International Regimes” in International Organization, Vol. 41, No. 3 (Summer, 1987), 491-517, p.491.} Regime analysis has endeavored to fill the void between realist, liberal and idealist thought on cooperation by showing that state behaviour is influenced by norms and that “such norm-governed behaviour [is] wholly consistent with the pursuit of national interests. Hence, the regime literature can be viewed as an experiment in reconciling the idealist and realist traditions.”\footnote{Ibid., p.492.} There are two main approaches that can be found in regime theory literature, one of which can be further divided: first, the rationalist approach (which includes power-based, neorealist theories and interest-based, neoliberal theories), and second, the reflectivist approach, which includes the knowledge-based, constructivist theory. This section addresses the two approaches and constructs the theoretical framework of the thesis.

2.1. Regimes from a Rationalist Perspective

Rational choice theories such as neorealism and neoliberalism contend that the dominant actors within the international system are states, whose interests and identities are exogenously given. Security within the system is defined in “self-interested” terms. The focus of these theories is “…on how the behaviour of agents generates outcomes. As such, rationalism offers a fundamentally behavioural conception of both process and institutions: they change behaviour but not identities and interests.”\footnote{Wendt (Spring, 1992), pp. 391-392.}

Rationalistic theories of international institutions (regimes are considered to be institutions) “… view institutions as affecting patterns of costs. Specifically, institutions reduce certain forms of uncertainty and alter transaction costs: that is, the costs of specifying and enforcing the contracts that underlie exchange”\footnote{Keohane (Dec., 1988), p. 386.}. This is one of the main reasons why states may find the construction and maintenance of a regime in a specific issue-area to be in their favour. According to rationalistic theory, regimes “… provide information about actors’ compliance; they facilitate the development and maintenance of reputations; they can be incorporated into actors’ rules of thumb for responding to others’ actions; and they may even apportion responsibility for decentralized enforcement of rules.”\footnote{Axelrod, Robert and Robert O. Keohane “Achieving Cooperation under Anarchy: Strategies and Institutions” in World Politics, Vol. 38, No. 1 (Oct., 1985), 226-254. p. 237.} For these reasons regimes are upheld so that the self-interest of each member of the regime can continue to be met.
Thus, international regimes are put into place by states to further potential cooperation, which, in turn, brings about gains to all parties involved. Regimes lower the potential costs of interstate interaction by providing a relatively ‘safe’ platform for discussion, debate and compromise among states. This helps to create a relatively stable international environment in which states can negotiate more easily with one another. In situations where “…costs of communication, monitoring, and enforcement are relatively low compared to the benefits to be derived from political exchange”, international institutions are likely to appear. As long as members have incentives to preserve institutions they will in all likelihood persist. However, once the situation changes and it no longer makes political or economic sense for the individual state to be involved in the regime, it will most likely gradually back away from it.

**Rationalist Definition of ‘Regime’**

According to Krasner, ‘regimes’

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

This is likely the most widely used definition of regime. It will be the definition used in the theoretical framework of the thesis for this reason, and because it is the most clear-cut and all-encompassing definition of regimes found in regime literature.

**2.1.1. Neorealist Regime Theory Approach**

Power-based, neorealist theories of international regimes hold that states care about both relative and absolute gains. Power is of ultimate importance to neorealists and it is assumed that power is just as central in cooperation among states as in situations of conflict among states. A central explanatory variable for neorealists is thus relative power capabilities, and sensitivity of states to “distributional aspects of cooperation and regimes” is stressed. These distributional aspects of power resources directly affect the potential of effective regimes to come into existence and persevere. They also affect the very nature of the regime that will result. Neorealist approaches to regime theory are essentially structural explanations that “… relate the possibilities of cooperation to the

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39 Ibid., p. 84.
40 Ibid., pp. 3-4.
structure of the international system and more specifically to the existence of an hegemon or dominant power.”

Most neorealists “dismiss regimes as epiphenomena which reflect, but do not substantially affect, the crucial underlying patterns of power or ownership of means of production.” This is due to the fact that the neorealist approach to regimes is rooted in the classical characterization of international relations as taking place among sovereign states that look out only for their own preservation. However, most neorealists admit that regimes can and do arise in situations “…in which individualistic self-interested calculation leads [states] to prefer joint decision making because independent self-interested behaviour can result in undesirable or suboptimal outcomes.”

2.1.2. Neoliberal Regime Theory Approach

Interest-based, neoliberal theories of regimes hold states to be ‘rational egoists’ that are only interested in absolute gains. States are also considered to be ‘negative altruists’ in that they are not envious of other states’ gains; states are only out to further their own interests. Although construction of regimes entails the acceptance of certain behavioural restraints by all regime members, states overcome this apparent downside by virtue of the powerful incentives to maximize long-term gains through the institutional arrangements of regimes. According to neoliberal regime theory, regimes further cooperation among states. Cooperation is seen as the only way through which states can share common interests in an issue-area. Two of the leading neoliberal regime theorists, Robert Axelrod and Robert Keohane, state that “cooperation is not equivalent to harmony… cooperation occurs when actors adjust their behaviour to the actual or anticipated preferences of others.”

Thus, cooperation “requires that the actions of separate individuals or organizations—which are not in pre-existent harmony—be brought into conformity with one another through a process of policy coordination.” In the anarchic world system, which “lack[s] a common government… many international relationships [such as regimes] continue over time, and engender stable expectations about behaviour.” Essentially, regimes are a way for states to come together in order to realize common interests and in doing so, they bring about higher levels of stability among the actors of the regime.

42 Ibid., p. 23.
44 Ibid., p. 120.
Neoliberal approaches to the study of international regimes largely focus on the study of international economic institutions. As such, they engender economic games such as the Prisoners’ Dilemma and Stag Hunt to establish that “the payoff structure for a game affects the level of cooperation...” and that “the payoff structure that determines mutuality of interests is not based simply upon objective factors, but is grounded upon the actors’ perceptions of their own interests.” However, the neoliberal approach to regime theory may also be applied to non-economic contexts such as the system of refugee protection in order to discover how, and why, states have cooperated in order to construct the system.

### 2.2. Regimes from a Reflectivist Perspective

#### 2.2.1. Social Constructivist Theory

Conventional constructivism wishes “to discover identities and their associated reproductive social practices, and then offer an account of how those identities imply certain actions.” This section explores constructivism using the five main topics of discussion prevalent in IR theory: actors and structures; anarchy; identities and interests; power; and the possibilities for change.

**Actors and Structures**

A structure in the study of world politics is a set of relatively unchangeable constraints on the behaviour of states. An important area of study, according to conventional constructivists, is “how an action does or does not reproduce both the actor and the structure.” Constructivists stress the importance intersubjectivity in the social context, meaning that the media of norms and practices help actors to develop their understandings of, and relations with, others. Meaningful action can only occur within the intersubjective social context. According to Hopf, actors and structures are mutually constituted.

**Anarchy**

“Since structure is meaningless without some intersubjective set of norms and practices... anarchy, is meaningless”; it is nothing without a set of meaningful norms. Wendt attempts to prove that contrary to what rationalists believe, “self-help and power politics do not follow either logically or causally from anarchy and that if today we find ourselves in a self-help world, this is due to process, not structure.” As reflected by his famous statement that “anarchy is what states make of it”, Wendt means that structure and process are inevitably tied to one another: “structure has no existence or causal powers apart from process.” It follows that institutions are “fundamentally cognitive

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52 Hopf (Summer, 1998), p. 183.
53 Ibid., p. 172.
54 Ibid., pp. 172-173.
55 Ibid., p. 173.
entities that do not exist apart from actors’ ideas about how the world works.”\textsuperscript{58} Thus, anarchy contains institutions, and power politics and self-help are two examples of such institutions.

**Identities and Interests**

Setting itself apart from rationalist theory of international relations, constructivist theory (called “reflectivist” by Keohane\textsuperscript{59}) focuses on the issue of identity- and interest-formation; it focuses on “the social construction of subjectivity.”\textsuperscript{60} Constructivists “share a cognitive, intersubjective conception of process in which identities and interests are endogenous to interaction”\textsuperscript{61}, as opposed to being exogenous, as rationalists see them. Constructivists conjecture that the structures that organize the behaviour of actors within the states system are constituted by “collective meanings”, and by participating in such collective meanings actors acquire identities. Therefore, the intersubjective structure is the final arbiter of meaning, since identity is formulated through it.\textsuperscript{62} Identities are “relatively stable, role-specific understandings and expectations about self”\textsuperscript{63} which are inherently relational to the socially constructed context in which they are found. In turn, interests are based on identities. Actors “define their interests in the process of defining situations.”\textsuperscript{64} According to Hopf, identities perform three necessary functions in a society: “they tell you and others who you are and they tell you who others are. In telling you who you are, identities strongly imply a particular set of interests or preferences with respect to choices of action in particular domains, and with respect to particular actors.”\textsuperscript{65} State identities are a variable in that they likely depend on social, political, cultural, and historical context. They are constrained by social structures, which in turn have been created by structures and states through social practices.\textsuperscript{66}

**Power**

One of constructivist social theory’s fundamental principles is that “people act towards objects, including other actors, on the basis of the meanings that the objects have for them.”\textsuperscript{67} Simply put, actors (such as states) act differently towards friends than they do enemies because enemies are threatening and friends are not. Therefore, the power distribution in the system of states does affect calculations of state-interest, but “how it does so depends on the intersubjective understandings and expectations, on the ‘distribution of knowledge,’ that constitute their conceptions of self and other.”\textsuperscript{68} Contrary to neorealism and neoliberalism, which hold that material power (whether it be economic or military) is of utmost importance, constructivism holds that both material and discursive power are important. The power of discourse or practice includes

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\textsuperscript{58} Wendt (Spring, 1992), p. 399.
\textsuperscript{59} Keohane ((Dec., 1988).
\textsuperscript{60} Wendt (Spring, 1992), p. 393.
\textsuperscript{61} Ibid., p. 394.
\textsuperscript{62} Hopf (Summer, 1998), p.175.
\textsuperscript{63} Wendt (Spring, 1992), p. 397.
\textsuperscript{64} Ibid., p. 398.
\textsuperscript{65} Hopf (Summer, 1998), p. 175.
\textsuperscript{66} Ibid., pp. 176-177.
\textsuperscript{67} Wendt (Spring, 1992), pp. 396-397.
\textsuperscript{68} Ibid., p. 397.
knowledge, ideas, culture, language, and ideology. These social practices are capable of reproducing “the intersubjective meanings that constitute social structures and actors alike” and, most importantly, the capacity “to produce predictability and so, order.”

**The Possibility of Change**

Hopf states that “[c]onstructivism is agnostic about change in world politics... it does not offer any more hope for change in world politics than neorealism.” However, it does account for how and where change may occur. Although intersubjective structures may be hard to challenge, they are not unassailable because other actors holding alternative identities, practices, and material resources could potentially bring about change. The potential for change comes from the “continual contest for control over the power necessary to produce meaning in a social group.”

### 2.2.2. Constructivist Regime Theory

**Constructivist Definition of ‘Regime’**

Kratochwil and Ruggie broadly define regimes as

…governing arrangements constructed by states to coordinate their expectations and organize aspects of international behaviour in various issue-areas. They thus comprise a normative element, state practice, and organizational roles...

International regimes are international institutions; specifically, regimes are issue-specific institutions that do not hold the capacity to act. Wendt defines an ‘institution’ as

a relatively stable set or “structure” of identities and interests… [which] are often codified in formal rules and norms, but these have motivational force only in virtue of actors’ socialization to and participation in collective knowledge. Institutions are fundamentally cognitive entities that do not exist apart from actors’ ideas about how the world works.

Constructivism believes in the possibility for cooperation in an anarchic environment, but holds a different understanding from neoliberalism of how it comes about. They start by exploring how states understand their interests within a given issue area; the identity and interest distribution thus helps to account for whether it is possible for cooperation to occur in a given situation. In any given situation constructivists examine whether or not the ‘communities of identity’ that exist are conducive to cooperative behaviour in the first

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69 Hopf (Summer, 1998), pp. 177-178.
70 Ibid., p. 180.
71 Ibid., p. 180.
74 Wendt (Spring, 1992), p. 399.
75 Hopf (Summer, 1998), p. 189.
place. In a situation which is conducive to cooperation, a state “might see itself as a partner in pursuit of some value other than narrow strategic interest.”76 Hopf outlines the conditions that constructivists posit as necessary for cooperation in the case of institutions to persist:

if the identities being reproduced by the social practices constituting that institution have gone beyond the strategic game-playing self-regarding units posited by neoliberals, and have developed an understanding of each other as partners in some common enterprise, then the institution will persist, even if apparent underlying power and interests have shifted.77

2.3. Criticisms of Regime Theory

Probably the most famous critique of regime theory comes from Susan Strange. In her article *Cave! hic dragones: a critique of regime analysis*78, Strange insists that the term “regime” is “yet one more woolly concept that is a fertile source of discussion simply because people mean different things when they use it.”79 The concept of regime is, in Strange’s opinion, used by different theorists in different ways, and thus any substantial convergence of conclusions about regimes and regime analysis are difficult to come by.

However, the apparent imprecision and ‘woolliness’ of the concept are admitted to by many regime theorists: Ruggie states that the problem cannot be helped for two reasons. First, the woolliness cannot be cleared away since definitions can only be refined up to a certain point and “there exists no external Archimedean point from which regimes can be viewed as they “truly” are.”80 Second, regime analysis is (problematically) based largely upon unreflective logical positivist premises in IR theory and this, in turn, produced epistemological anomalies. According to Ruggie, this positivist framework has been used regardless of whether it is appropriate to the context or not. Furthermore, clarity and precision that would otherwise lead to enhanced productive capacity as an analytical tool are difficult to reach because of these anomalies.81

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76 Hopf (Summer, 1998), p. 189.
77 Ibid., p. 191.
79 Ibid., pp. 342-343.
81 Ibid., p. 87.
2.4. Finding a Theoretical Middle Ground: Neoliberal Definition of ‘Regime’ from a Constructivist Perspective

2.4.1. Constructivist Critique of Rationalism

Wendt’s article *Anarchy is what States Make of it*\(^{82}\) is one of the leading critiques of mainstream rationalist theory. He holds that the principle of anarchy alone does not account for the self-help structure of identity and interest. Instead, “structure has no existence or causal powers apart from process”, meaning that self-help and power politics, which are taken as givens by rationalist theory, are in fact institutions within, instead of essential features of, anarchy.\(^{83}\)

Ruggie criticizes neorealism and neoliberalism for treating identity and interests of actors as being exogenous and given. First, Ruggie points out that rationalism does not answer the fundamental question of how constituent actors (in this context, states) acquired their current identity and the interests that assumedly go along with it in the first place. Moreover, rationalism cannot address any change in actor identity and interests, simply because they are treated as exogenous and given. Second, rationalism “has no analytical means for dealing with the fact that the specific identities of specific states shape their perceived interests and, thereby, patterns of international outcomes.”\(^{84}\) Finally, Ruggie shows that empirical evidence is beginning to prove that interests, and even behaviour, are not only shaped by identities, but also by normative factors in both the domestic and international environments.\(^{85}\)

According to constructivists, neorealists and neoliberals alike underestimate the importance of ideas in social life. For instance, Waltz’s model barely mentions ideational factors since the model is physicalist in character. In his famous book *Theory of International Relations* he mentions norms only once\(^{86}\) and he mentions the ideational process of socialization once in terms of states learning how to conform to the dictates of the system.\(^{87}\) For the most part neoliberals treat ideas as unimportant or epiphenomenal.\(^{88}\) It is because of this inattention of rationalists to the importance of ideational concepts that constructivists criticize their theories.

2.4.2. Finding a Theoretical Middle Ground in the Context of the Refugee Problem

The thesis attempts to find a middle ground between the rationalist and reflectivist perspectives on international regimes. In the context of the international refugee protection system (outlined in Chapter 3), in which humanitarian concerns for human rights must be balanced with state-centric concerns for sovereignty and control over

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82 Wendt (Spring, 1992).
83 Ibid., p. 395 and 424.
85 Ibid., p. 14
87 Ibid., p. 127.
borders, the most appropriate theoretical approach is a combination of neoliberal and constructivist approaches to international regime theory. In a situation where millions of innocent lives are at stake each year and states come together to attempt to solve the existing problem and potentially stop it from occurring in the future, it is not rational to assume that state action is driven by self-interest and power politics alone. In contrast, state behaviour within the international refugee protection regime largely comes from humanitarian concerns for people in need and from respect for international human rights law and international humanitarian law.

The thesis makes use of Krasner’s neoliberal definition of ‘regime’\(^{89}\) as the backdrop for examining the international refugee protection system to discover whether it constitutes a regime, and if so, what type of regime it is. At this point the thesis incorporates constructivist ideas about the nature of the international system. It will be shown that states have come together to create the refugee protection regime, not only out of self-interest, but also out of humanitarian concern for the plight of the world’s dispossessed people, and out of respect for international human rights law and international humanitarian law. Self-interest is relevant in this context in that states use the protection system in order to promote their humanitarian identity. However, norm creation and evolution also play a central role in the system. The thesis will also use neoliberalism and constructivism to help explain why states use restrictive measures to control refugee flow and to explain how the regime may be changing.

3. The International System of Refugee Protection

3.1. Defining the Concepts

3.1.1. Definition of ‘Asylum’

‘Asylum’ is the short-term status under which a refugee is allowed to stay in a safe country until he or she may return to his or her home without fear of persecution for reasons of race, religion, nationality, and/or membership of a particular social group or political opinion. It is generally viewed as a temporary, rather than durable solution for refugees.90 An asylum-seeker is a “person whose request or application for asylum has not been finally decided on by a prospective country of refuge.”91

3.1.2. Definition of ‘Refuge’

‘Refuge’ is a status of temporary refuge given to an individual either temporarily and provisionally while pending admission for resettlement in a third country, or when an individual does not qualify as a 1951 Convention or 1967 Protocol ‘refugee’.92

3.1.3. Definition of ‘Refugee’

Article 1(2) of the 1951 Convention Relating to the Status of Refugees 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 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 formal habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.93

3.1.4. Definition of ‘Non-Refoulement’

The word ‘refoulement’ derives from the French word ‘refouler’, meaning to drive back or to repel. In the immigration context, ‘refoulement’ “is a term of art covering, in

particular, summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers.” 94 It thus not the same act as expulsion or deportation. “The principle of non-refoulement prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or torture.” 95 Non-refoulement is also applied in situations where, if forcibly returned, asylum seekers would be exposed to civil disturbances, warfare or other conditions or disrupted social order, or to the hazard of the high seas. 96 Article 33(1) of the 1951 Convention states that

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. 97

There are, however, limitations to the principle of non-refoulement. Article 33(2) of the 1951 Convention states that

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. 98

Although at the time the Convention was drafted the definition of non-refoulement did not include non-rejection at the frontier, a broader interpretation of the principle has established itself over the past forty-five years. It is evident now by state practice and in their recorded views that non-refoulement applies to the moment at which asylum seekers present themselves for entry. Therefore, the principle now encompasses both non-return and non-rejection. 99

3.2. The UN Refugee Protection System

3.2.1. Historical Overview

It was during the League of Nations period of 1919-1946 that the refugee problem was first responded to in an organized fashion. By 1920 it became obvious that intergovernmental cooperation would be necessary to deal with the large scale

95 Ibid., p. 117.
movements of displaced peoples in Europe.\textsuperscript{100} There were large scale refugee flows from the Russian civil war, and Turkey produced streams of Assyrian, Armenian, and Greek refugees starting in 1922. The Nazi persecutions of the 1930s left thousands of people without state protection in the Saar, Austria and Czechoslovakia.\textsuperscript{101} One of the first bodies to address the refugee problem was the wartime agency UN Relief and Rehabilitation Administration (UNRRA), which worked alongside military authorities in order to repatriate five to six million refugees after Germany surrendered and to assist many others resettle or assimilate.\textsuperscript{102} The Nansen International Office for Refugees was established in order to deal with the problem of mass refugee flows, but was liquidated in 1938 when the Intergovernmental Committee on Refugees (IGCR) was established, which was an independent organization outside of the League of Nations framework.\textsuperscript{103} The approach under this system was towards groups or categories of people in need of protection, such as Russian refugees that no longer enjoyed protection of the government of the USSR.\textsuperscript{104} By 1947 the International Refugee Organization (IRO) took over the responsibilities of protecting refugees by providing supplies and living space and by establishing a resettlement program.\textsuperscript{105} The IRO was a field agency of the UN that worked with volunteers and local authorities from various countries throughout the world.\textsuperscript{106} The system of categories or groups of people to be protected continued to be used in the IRO. Thus, ‘refugees’ included victims of the Fascist, Nazi, or Quisling regimes, and certain persons of Jewish origin, among others.\textsuperscript{107} During its lifetime the IRO assisted well over 1,600,000 refugees in the Americas, Africa, Asia and Europe at a cost of almost $400 million. Nearly 73,000 refugees were repatriated and over 1 million were resettled abroad.\textsuperscript{108} However, “it was realized quite soon that this was an inadequate stopgap”\textsuperscript{109} and thus the United Nations High Commissioner for Refugees (UNHCR) was formed and took over and expanded the duties of the IRO. It became the most significant body of refugee protection in the international system.

3.2.2. Mandate of UNHCR

In 1951 the Office of UNHCR was established as the principal UN agency concerned with refugees (first as a sub-organization to the General Assembly, and later it had the mandate of a specialized agency).\textsuperscript{110} The General Assembly established UNHCR to provide ‘international protection’ and to seek ‘permanent solutions for the problem of

\textsuperscript{102} Ibid., p. 371.
\textsuperscript{104} Goodwin-Gill (1998), p. 4.
\textsuperscript{105} Chimni (ed) (2000), pp. 210-211.
\textsuperscript{107} For a complete list of protected groups and categories under the IRO system, see Goodwin-Gill (1998) \textit{The Refugee in International Law}, 2nd Edition, p. 6.
\textsuperscript{109} Whittaker (1997), p. 90.
\textsuperscript{110} Ibid., p. 90.
refugees.’ The primary purpose of UNHCR is “to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country.”[111] Chapter 1 of the Statute of UNHCR states that “[t]he work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.”[112] The framework for UNHCR’s humanitarian activities comes from international refugee law.[113]

The High Commissioner of UNHCR is advised regarding his/her functions by UNHCR’s Executive Committee (ExCom). “The annual Conclusions adopted by ExCom form part of the framework of the international refugee protection regime”[114] which are based on the Convention’s principles. ExCom approves the High Commissioner’s assistance programs, advises the High Commissioner in exercising his/her statutory functions, and scrutinizes all administrative and financial aspects of the agency.[115]

The UNHCR Statute contains three areas of UNHCR competence: firstly, it brings in refugees covered by various earlier arrangements and treaties; secondly, it includes refugees resulting from events occurring before 1 January 1951[116]; and finally, the Statute extends to

Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reasons of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.[117]

The above description of those who are able to qualify for refugee status under UNHCR is “of universal application, containing neither temporal nor geographical limitations.”[118]

The only group that is excluded from the UNHCR mandate are refugees falling under the mandate of other UN programs (such as Palestinian refugees, who are covered by the UN Relief and Works Agency for Palestine Refugees in the Near East, or UNRWA[119].)[120]

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[115] Ibid., p.33.
[119] Ibid., p. 220.
Assistance is given to refugees impartially, on the basis of their need. It is given irrespective of the refugee’s religion, race, gender or political opinion. In particular, UNHCR focuses on promoting the equal rights of women and girls and on the needs of children.\textsuperscript{121}

**Functions of UNHCR**

UNHCR has functional responsibility for administering international refugee assistance and it uses four approaches to do so. Firstly, it supplies emergency relief, whereby survival necessities such as food, shelter and medical supplies are sent to the areas of need. Secondly, UNHCR assists both individuals and large groups to voluntarily repatriate by providing help with travel or transport and subsistence. Thirdly, UNHCR assists countries with asylum reception processes. Although the level and type of assistance that can be provided is almost entirely dependent on the immigration policy of the admitting state, the UNHCR helps with the long-term processes of providing shelter and the ultimate integration into the new community. Finally, UNHCR helps refugees with permanent resettlement, including helping “refugees to help themselves towards self-sufficiency.”\textsuperscript{122}

In order to help find permanent solutions for the problems associated with mass refugee flows UNHCR provides international protection “by promoting the adoption and supervising the application of international conventions and by encouraging governments to take other measures for the benefit of refugees.”\textsuperscript{123} This especially includes the 1951 Convention and its 1967 Protocol. Material assistance provided for refugees is made available through voluntary contributions. Out of the 134 states party to the 1951 Convention and its 1967 Protocol, fifteen major donor countries provide approximately 95 percent of the total operating expenditures of UNHCR. The operating expenditures have risen dramatically from $3.5 million in 1965, $544 million in 1990, $900 million in 1991, and over $1 billion in 1992.\textsuperscript{124}

Essentially, UNHCR encourages states and other institutions to establish conditions conducive to human rights protection and peaceful dispute resolution. Moreover, UNHCR seeks to avoid the recurrence of refugee-producing situations, therefore it endeavours to amalgamate the reintegration of refugees voluntarily repatriating to their home country.\textsuperscript{125}

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\textsuperscript{122} Whittaker (1997), pp. 91-91.  
\textsuperscript{124} Ibid., p. 372.  
3.2.3. The 1951 Convention and 1967 Protocol

“The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger.”

Essentially, the 1951 Convention and its 1967 Protocol codify minimum rights of those protected by its mandate. These rights are in the areas of the right to education, work and social security, and freedom of religion and political opinion.\(^\text{127}\) The Convention and its Protocol are different from the UNHCR Statute because they include the criterion of ‘membership of a particular social group’ in addition to race, religion, nationality, or political opinion.\(^\text{128}\) The fact that every refugee would not be covered by the Convention definition was recognized from the beginning, and as such, the Conference of Plenipotentiaries therefore recommended “that States should apply the Convention beyond its strictly contractual scope, to other refugees within their territory.”\(^\text{129}\) The Convention provides the framework for refugee protection across all its signatory states. It is likely the most important document relating to the protection of refugees and asylum seekers.

3.3 Regional Agreements

The second part of the international system of refugee protection is made up by the various regional agreements and the statutes and treaties of various organizations and agencies. Many of them seek to add to the Convention definition of a refugee in order to expand the concept to include other groups of people seeking the protection of foreign governments. This was done to recognize that the refugee problem had expanded beyond the scope of the post-World War II, eurocentric definition of protection.

3.3.1. Organization of African Unity

The 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (hereafter, OAU Convention) was put in place because it was observed in Africa that the 1951 Convention clearly did not meet the needs of externally displaced persons in the developing world, specifically, Africa. The refugee definition in the 1951 Convention simply was seen to no longer be adequate to solve the problems of refugee flow within and from the African continent.\(^\text{130}\) The OAU definition, however, is much more generous and it more closely reflects “the realities of

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\(^{129}\) Ibid., p. 19.

Africa during a period of violent struggle for self-determination and national development.”

Article 1(2) of the OAU Convention states that along with the 1951 Convention definition of a refugee, 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.

The OAU definition responded to the urgency of the contemporary situation in Africa in which determining refugee status on an individual basis was no longer practical due to the massive migration occurring. It was largely unfeasible due to the lack of decision-making structures present in Africa to deal with asylum claimants on an individual basis. A more pragmatic, yet still humanitarian, approach was needed, and this is what the OAU sought to provide. In doing so, it established an important precedent in international law. By 31 December 1999, 45 out of 53 states in Africa were party to the Convention. Despite the fact that the OAU Convention was produced due to events in Africa, its norms and principles “have set important standards for the protection of refugees in general and have often been applied in other parts of the world.”

3.3.2. Latin America

The concept of asylum, asilado, has long been understood and practiced in Latin America, established via the 1889 Montevideo Treaty which acknowledged that “political refugees shall be accorded an inviolable asylum” and by the 1954 Caracas Convention on Territorial Asylum. The definition of refugee as used in the 1951 Convention was significantly expanded with the 1984 Cartagena Declaration, which was brought into being by an ad hoc group of experts and representatives from Central American governments. The Cartagena Declaration extends the definition to “persons who have fled their country because their lives, safety or freedom have been threatened by

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135 Ibid., p. 57.
137 Ibid., p. 21.
generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."  

Although the Declaration is not a binding treaty, it “represents endorsement by the States concerned of appropriate and applicable standards of protection and assistance.” Since it was adopted, the definition of refugee as found in the Declaration has become an established norm throughout Central America. It has frequently been endorsed by the General Assembly of the Organization of American States. The majority of Central and Latin American states apply the broader refugee definition found in the Cartagena Declaration in practice, and many have incorporated the definition into their national legislation.

3.3.3. Europe

The first essential European regional organization in refugee protection is the Council of Europe, which has generated instruments such as the 1950 European Convention on Human Rights, the 1959 European Agreement on the Abolition of Visas for Refugees, the 1967 European Agreement on Consular Functions, together with the protocol concerning the Protection of Refugees, and the 1980 European Agreement on Transfer of Responsibility for Refugees. The second essential element in creating and maintaining asylum policy in Europe is the European Union (EU). From the time of World War II to the late 1970s asylum policy in Europe was characterized by Cold War mentality, meaning that the commitment to protection of refugees was mainly focused on refugees from within Europe and from communist countries. From the 1970s onwards, however, the dynamics of refugee flow into Europe changed dramatically. Refugees and asylum seekers from other continents such as Latin America and Asia began flowing in, seeking protection. The 1980s saw unplanned movements the likes of which had never been witnessed before, due to serious human rights violations and internal conflicts in Asia, Africa, the Middle East, and Latin America. At this point Europe’s need for labour migration had been quelled and thereafter immigration policy ceased to encourage labour migrants, who then had to claim asylum instead.

In Europe’s system of refugee protection a new defensiveness appeared at the time of the fall of the Berlin wall. The existing capacity for protection was quickly overrun by the vast numbers of refugees arriving in Western Europe, and there was reluctance on the part of governments to commit the necessary resources to help solve the problem. At this point, the “channels to entry began to close” as the existing policy framework, which

focused on assessing individual claims, could no longer cope. Characterized by some as the ‘fortress Europe’ approach, new, restrictive measures (discussed in Chapter 5) began to be put in place in much of Western Europe, in an effort to prevent abuse of asylum systems and fight illegal immigration. The EU now seeks to achieve a common asylum policy throughout all its member states, in part a reflection of the economic and political integration that is being brought about via the single European market. Its aim is to control the movement of non-EU citizens. Harmonization of asylum policies is supposed to bring about coordination and tightening of policies. The new asylum regime that is in the process of being formulated in Europe is characterized by the changes in values that occurred with the end of the Cold War. In this situation, “values of solidarity were replaced by individualism and protectionism in reception countries.”

The contemporary EU asylum regime is solidified by a variety of agreements and conventions. Probably the most important is the 1990 Dublin Convention, which established common criteria for determining which state is responsible for examining an asylum request (this is meant to effectively stop the practice of ‘asylum shopping’ within the EU). This is because of the ‘one for all’ idea behind the convention, in which one Member State examines an asylum application on behalf of all other Member States. The Dublin Convention also “lays down readmission obligations incumbent on the responsible Member State.” The 1990 Schengen Convention instilled common visa policies and carrier sanctions, as well as strengthened police and judicial cooperation among the signatory states. Both of these conventions are binding to the states that have ratified them. The 1997 Treaty of Amsterdam was another step in the direction of harmonization of immigration policies, giving a five year deadline for the development of common immigration and asylum policies, with decision-making procedures coming under the Council of Ministers.

The final organ within the European system of refugee protection is the Organization on Security and Co-operation in Europe (OSCE), which plays a leading role in establishing the norm of cooperation, via repeated endorsement of basic principles by participating states. This is achieved despite the “formal, non-obligatory nature of much of the OSCE process” and despite the face that it falls short of the high normative character of an international treaty.

3.4. International and Intergovernmental Organizations and Agencies

Founded in 1946, the UN Children’s Fund (UNICEF) was originally intended to help children in countries which were threatened with aggression; and it now provides

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145 Ibid., pp. 161-162.
150 Ibid., p. 159.
children and mothers across the world with emergency and long-term help. Often this
means providing help in refugee situations, for instance by providing unaccompanied
children with aid and support and by establishing safe water supplies.\textsuperscript{152} Although it does
not operate projects of its own, UNICEF-aided projects are conducted frequently with
cooperation and advice from other UN agencies such as the World Health Organization
(WHO) and the Food and Agriculture Organization (FAO).\textsuperscript{153} The FAO provides
disaster assistance, while the WHO provides technical assistance, necessary aid, and the
advice and services of specialists in emergency situations.\textsuperscript{154}

The International Organization for Migration (IOM), founded outside the UN, is one of
the leading international organizations in terms of helping refugees. It is premised on the
basic human right of freedom of movement and its constitution recognizes that in order
for migration movements to be orderly and for settlement and integration to occur
properly, migration assistance is often needed at the international level. IOM assists
asylum seekers that have been accepted under third countries immigration programs or
have voluntarily elected to return home.\textsuperscript{155} Another key agency in the international
system of refugee protection is the International Committee of the Red Cross (ICRC). Its
mandate of protection and humanitarian objectives are similar to those of UNHCR,
however, it is placed under the system consolidated by the 1949 Geneva Convention and
the 1977 Additional Protocols.\textsuperscript{156}

3.5. Non-governmental Organizations

International and national NGOs, and decentralized NGO ‘families’ (such as World
Vision International and Save the Children Alliance) hold an important position in the
international system of protection. Some examples are Médecins sans Frontières, which
provides refugees in emergency settlements and camps with medical assistance and
health services; the European Council on Refugees and Exiles, a forum for cooperation
among sixty western European NGOs concerned with refugees and the right to asylum;
and the various Refugee Councils of European states, which provide counseling services
such as legal aid, and attempt at influencing national immigration policy with respect to
asylum seekers and refugees. A multitude of human rights organizations exist, which
report, monitor and lobby in order to help refugees and the persecuted.\textsuperscript{157} NGOs carry
out a variety of activities, including emergency relief work, long-term development, as
well as human rights advocacy and monitoring. The Statute of UNHCR expressly
provides that it should dispense aid and support to refugees via both private and public
agencies, which is why it has worked closely with NGOs since its inception; cooperation
has gradually increased over the years as governments increasingly give funding to
NGOs.\textsuperscript{158}

\textsuperscript{152} Goodwin-Gill (1998), p. 222.
\textsuperscript{154} Goodwin-Gill (1998), pp. 222-223.
\textsuperscript{155} Ibid., pp. 225-226.
\textsuperscript{156} Ibid., p. 227.
\textsuperscript{157} Ibid., pp. 230-231.
\textsuperscript{158} UNHCR (2000), p. 194.
3.6. Domestic Refugee Policy

The third part of the international system of refugee protection is domestic law within the refugee regime member states. There are enormous differences as to the extent and formulation taken of the application of the various international conventions and agreements across the member states of the international refugee regime. Much of this depends on the viewpoints of the government in question towards the issue of refugee influx; i.e. whether the government is open or not to the idea of relatively open borders.

3.6.1. Options for Governments in Response to Refugees

There are three options for governments in regards to accepting refugees and asylum seekers. The first option is to grant temporary asylum status, whereby the individual is let into the safe country on temporary terms. The individual is allowed to stay until the conditions in his or her home country or country of domicile have changed significantly enough so that the person will be able to return without fear of persecution. This is the second most ideal option for governments, because they do not feel the pressure to integrate the person into their society and use up resources protecting the person, and because the individual has the chance to return home, which is most always the best option for that person.

The second option, which is generally considered to be the most desirable for all people in need of protection, is voluntary repatriation. In order for voluntary repatriation of the refugee to their home country or country of origin to occur, the conditions in that country must change so that they no longer threaten the refugee with persecution. “Refugees make a free decision to return based on full knowledge of conditions in their home country and with sufficient international protection and assistance to return in safety and with dignity.,”159 In practice it is frequently difficult, if not impossible, to determine whether the circumstances in the country have in reality changed enough to be now considered safe for the refugee in question.160 It is for this reason that in many cases voluntary repatriation does not occur: situations of instability often continue for long periods of time, during which the refugee becomes settled in the safe country.

The third option is to grant permanent refugee status to the individual and ensure he or she becomes locally integrated in the new society. States are not legally obligated to grant asylum in this way, however in practice it often occurs as a local, lasting solution.161 Local integration entails permanent resettlement. Although it is oftentimes difficult to achieve because states fear the potential ‘burden’ of large numbers of refugees, it is the only solution available for those individuals who have nowhere else to go. Local integration in many cases is difficult to achieve; Singer and Singer state that it is most likely to occur in situations where ethnic and tribal links cross national

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159 Jastram (2001), p. 76.
161 Ibid., p. 31.
Traditional resettlement countries include Australia, Canada, Denmark, Finland, the Netherlands, New Zealand, Norway, Sweden, Switzerland, and the United States.

The final option for governments is third country resettlement. This option has two objectives: first, to obtain a lasting and durable solution for refugees who are unable to return to their country of domicile or to remain in the country of first refuge. Second, to relieve the burden that traditional countries of first refuge in many cases feel in face of large influxes of refugee populations.

3.6.2. Domestic Policy Supporting the International Protection System

The majority of member states of the protection system have not only enacted the conventions and treaties of the system, but sought to instill their principles, norms and rules within their immigration and asylum policies. A country which has a relatively good record of compliance with the refugee system and which attempts to instill its principles and norms to a high degree, is Canada. Canada is historically a country of immigration and has over the years accepted vast numbers of refugees and asylum-seekers. Humanitarian principles provide the basis for Canada’s immigration program, which seeks to enable family reunion and provide persecuted people protection. Its refugee policy is relatively open by global standards and has one of the highest rates of acceptance of refugees in the world. Canada is one of the few countries that has included gender-related persecution in its definition of refugee persecution. Canada, along with Australia, the United States, and the United Kingdom have “exhaustive guidelines relating to gender-related persecution, and there has been similar progress in Germany, the Netherlands and Switzerland.” Canada, France, and the United States have also broadened their definition of refugee to include women who fear genital mutilation. These are examples of states taking the initiative to apply a broad definition of ‘refugee’.

Another example of a state that has aided in the protection of refugees and supported the protection system is the small, impoverished and densely populated country of Malawi, which hosted 1.7 million refugees from Mozambique after that country had a civil war that lasted from the 1980s to 1992. There were 1.1 million Mozambican refugees (approximately 10 per cent of the Malawian population) in Malawi at the height of the
exodus. Even though the country was very poorly equipped to deal with the influx of refugees, “Malawi’s welcome rarely wavered.”

3.6.3. Domestic Policy Challenging the International Protection System

The international system of refugee protection also contains member states that attempt to shirk their responsibilities and duties toward the regime and to refugees themselves. This is done for a variety of reasons, such as fear of refugee ‘overload’, strain on national resources, xenophobia, racism, or fear of a ‘takeover’ of refugees that do not ‘mix’ with the nationals in terms of ethnic background, race, religion, or culture. It is for these reasons that countries develop ways to prevent asylum and refuge claims from being made at their borders, or to allow or force claims to be passed on to other states. “Problems of racism, discrimination, xenophobia and intolerance thwart international efforts to protect refugees.”

An example of a state shirking its responsibilities is found in the United States’ policy towards Haitian refugees. Between 1981 and 1991 over 22,000 Haitians were interdicted at sea, and out of those people only 28 were allowed to apply for asylum in the US. UNHCR, along with other humanitarian organizations and advocacy groups have argued that the US policy of interdiction and return of Haitian asylum seekers could lead to refoulement, which is prohibited under Article 33 of the 1951 Convention. In October 1998 the Haitian Refugee Immigration Fairness Act was passed by the US Congress, allowing Haitian asylum seekers (who had arrived before 1995) to apply for protection and permanent residence. However, the policy of interdiction at sea is still in operation, preventing most Haitian asylum seekers from ever reaching the shores of the US.

3.7. The Relationship between the Three Parts of the System

Essentially, the UN system of protection provides an umbrella under which the regional arrangements and domestic refugee policy function. The UN system of protection (made up of the conventions, treaties, and agreements, as well as the UN refugee and human rights bodies like UNHCR) provides a basis for the definition, scope, and application of refugee protection. The conventions and other documents provide a basis for an ideal system of refugee protection, and then the regional arrangements (such as EU asylum policy) and domestic policy enact the principles, norms, rules and decision-making procedures of the system to whatever extent they choose. Ideally, the domestic asylum policies of all member states should support the four components of the regime, however in reality this is often not the case, as will be discussed in Chapter 5.

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173 Ibid., p. 177.
4. The Refugee Protection System: an International Regime?

Regimes are social institutions, which govern the actions of units (in this context, sovereign states) in terms of meaningful sets of activities. Moreover, regimes are social structures, which “may be more or less formally articulated, and they may or may not be accompanied by explicit organizational arrangements.”\(^{174}\) As such, a degree of orderliness and organization is brought to the given activity which the regime governs. Although there is no “intrinsic metaphysical or teleological orientation” for regimes, their actors frequently have specific goals in mind while trying to shape their content.

4.1. Krasner’s Definition of ‘Regime’ Related to the Refugee Protection System

Krasner defines ‘regimes’ as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actor’s expectations converge in a given area of international relations.”\(^{175}\) Haas states that “[n]orms tell us why states collaborate; rules tell us what, substantively speaking, the collaboration is about; procedures answer the question of how the collaboration is to be carried out. Procedures, therefore, involve the choice of whether specific administrative arrangements should be set up to regulate the issue area.”\(^{176}\) This chapter explores the international system of refugee protection using Krasner’s definition of international regimes. Specifically, it addresses each of the four components of regimes and relates them to the refugee context by providing specific examples of each within the system.

4.1.1. Principles and Norms

In his neoliberal regime definition Krasner states that principles “are beliefs of fact, causation, and rectitude.”\(^{177}\) Essentially, principles are main beliefs or values held by the actors within the regime. They are codes and standards used by regime actors in order to help set out the regime rules. “The principles of regimes define, in general, the purposes that their members are expected to pursue… Norms contain somewhat clearer injunctions to members about legitimate and illegitimate behaviour…”\(^{178}\) “Norms are standards of behaviour defined in terms of rights and obligations.”\(^{179}\) In many cases it is difficult to differentiate between principles in norms. Norms often stem directly from principles, which place an obligation upon states to restrict the actions of their nationals in terms of performing harmful or detrimental activities within a given issue-area. In other words, norms may be developed in order to restrict certain generally harmful activities.


According to Krasner, mixing behaviour with principles and norms in regimes means that regime-governed behaviour is fundamentally different from conventional interstate activity. Short-term calculations of interest are not the only basis for activity within regimes because of the very presence of principles and norms. “Since regimes encompass principles and norms, the utility function that is being maximized must embody some sense of general obligation.”

Norms have two possible effects on the relevant actors: firstly, norms function as rules which help define actor identity and in turn “specify what actions will cause relevant others to recognize a particular identity.” This is their ‘constitutive effect’. “Constitutive norms… create new actors, interests, or categories of action.” Secondly, norms have ‘regulative’ effects whereby they “operate as standards that specify the proper enactment of an already defined identity… [and thereby] specify standards of proper behaviour.” Therefore, norms “either define (or constitute) identities or prescribe (or regulate) behaviour, or they do both.”

### 4.1.2. Principles and Norms of the System of Protection

**The Principle of Humanitarianism**

The principle of humanitarianism is a key component of the international system of refugee protection. Gibney describes humanitarianism as a principle that “affirms the existence of certain responsibilities owed by agents (individuals and states) to outsiders by virtue of their shared membership of a single human community.” Humanitarianism is owed to all simply on the basis of need, therefore it has no respect for distance. The humanitarianism principle is sometimes expressed by the parable of the Good Samaritan, whereby there exists “a duty incumbent upon each and every individual to assist those in great distress of suffering when the costs of doing so are low.” Essentially, it is a feeling of benevolence towards, and concern for, fellow human beings. Thus, humanitarianism is a moral principle held by people towards strangers with whom share only humanity. Many refer to humanitarianism as a universal phenomenon. In the context of the refugee problem, the appeal to the universality of human rights and respect for humanitarian law is reflective of an appreciation of humanity (specifically, the humanity of persons affected by life-threatening situations of war, civil strife, genocide, etc.).
The humanitarianism principle is backed up by international humanitarian law. The 1947 Geneva Convention and 1977 and 1994 Protocol are the basis of modern IHL. IHL is a primary authority for humanitarian assistance in situations where the persons in need of protection stay inside their home state. One of the main bodies of IHL is the International Committee of the Red Cross (ICRC), which is neutral and nonpolitical in character, and provides protection from conflict for civilians in their home state. The ICRC performs two main functions: firstly, it encourages the parties involved in conflicts to abide by the relevant provisions of the Geneva Convention, and secondly it attempts to provide assistance and protection to refugees.

The Principle of Non-Discrimination

Article 3 of the 1951 Convention states that “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or country of origin.” The non-discrimination principle is one of the strongest principles in international human rights law, and it is also strong in the refugee protection system. The conventions, treaties, and protection bodies that make up the system of protection are all based upon an ethical foundation, “…characterized by an overriding concern with individual dignity and autonomy.” UNHCR is affected by the principle; because of concern for equality and non-discrimination, it “…should not trade the rights of some refugees for the perceived benefits to many.” The principle of non-discrimination thereby restricts UNHCR and states from formulating a policy that would allow refugees to be selected on the basis of ethnicity, race, language, culture, and so forth, even if doing so might bring about large numbers of acceptance within a particular country.

The Principle of Non-Refoulement

The legal obligation of states to provide protection for refugees and asylum seekers starts with the principle of non-refoulement. Non-refoulement encompasses the individual right of a refugee not to be returned by force to a country where that person has fear of persecution. A narrow interpretation of the principle holds that it does not require a state to accept people in flight who attempt to enter the safe country’s territory. It holds that states are required to review refugee applications only when the individual has already arrived in the country; in other words, states need not let in refugee claimants who wait at the border or port of entry. The narrow interpretation is often used by states to limit the potential number of refugees that could perhaps require and be granted protection. It is linked to the argument based on state sovereignty that holds that it is both legal and within a sovereign state’s right to engage in ‘non-acceptance’ of a refugee at its border.

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189 Ibid., pp. 150-151.
192 Ibid., p.39
An expansive interpretation of the principle of non-refoulement is based upon the legal framework of the 1951 Convention, which creates a legal obligation of states to receive asylum seekers and refugees, even in circumstances where formal determination procedures have not been completed. In this interpretation, non-refoulement disallows states to block admission or in any way turn away refugees at the border solely on the oft-used reason that there has not been any determination procedures conducted yet and therefore the person can not yet be considered a refugee. The expansive interpretation of non-refoulement has become so widespread that most countries accept that the principle becomes enacted as soon as the refugee presents him or herself at the border. As the principle is part of customary international law, it is therefore binding on all states, regardless of whether they are parties to the 1951 Convention.

The Universal Declaration, the 1951 Convention, and the European Convention all formally recognize the fundamental right of every person (and, indeed, every refugee) to be free from persecution on account of race, religion, nationality or affiliation with a particular social group or political opinion. Instead of being dependent on a statute or contract associated with domestic law, it is contingent on universal standards of behaviour encapsulated in international law.

This conception is based, in turn, on the universal ethical precept that all human beings are obliged to act in a certain way towards other human beings and that all have a moral responsibility to abide by this duty. In short, the notion of refugees is indicative (with certain qualifications) of a humanitarian, as opposed to a purely pragmatic, dimension of interstate relations.

The Norm of Respect for Human Rights

A primary example of regulative norms in the refugee protection system is norms related to human rights, which are backed up by international human rights law. Although the notion of human rights norms inherently includes a number of norms, this paper will take them together as a one norm: the norm of respect for human rights. A principal document in terms of the basic human rights governing the refugee system is the 1948 Universal Declaration of Human Rights. The norms of the human rights regime are, according to Donnelly, illustrated most importantly by the Universal Declaration and by the International Human Rights Covenants. They do so by outlining the personal, legal, subsistence, economic, social and cultural, and political rights, as well as the civil liberties, which are to be afforded to all people under the human rights regime. A “right is anything to which an actor (individual or otherwise) is entitled by virtue of occupying a

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recognized role” although the possession of such does not guarantee that the actor will in reality receive what he is entitled to under the terms of the right.\textsuperscript{199}

Articles 2-7 and 15 of the Universal Declaration outline \textit{personal rights}, including rights to life; nationality; recognition before the law; protection against cruel, degrading, or inhumane treatment or punishment; and protection against racial, ethnic, sexual, or religious discrimination. The \textit{legal rights}, outlined by Articles 8-12, include access to remedies for violations of basic rights; the presumption of innocence; the guarantee of fair and impartial public trials; prohibition against ex post facto laws; and protection against arbitrary arrest, detention, or exile, and the arbitrary interference with one’s family, home, or reputation. Article 25 sets out the \textit{subsistence rights} to be afforded to all, in particular the rights to food and a living standard sufficient for health and well-being of oneself and one’s family. \textit{Economic rights} are outlined in Articles 22-24, including the rights to work, social security, rest, and leisure. The rights to education and cultural life are outlined in Articles 26 and 27, which are the \textit{social and cultural rights}. Article 21 outlines the \textit{political rights}, most importantly the rights to participate in government and elections. Finally, \textit{civil liberties} are outlined by Articles 13, 18-20, including especially the rights to freedom of religion, thought and conscience, expression and opinion, movement and residence, and peaceful association and assembly.\textsuperscript{200}

The Universal Declaration and the two International Covenants (as well as a variety of declarations and single-issue treaties, whose description is beyond the scope of the thesis) thus contain norms, which, in turn, are spoken of and treated in a certain sense by states as international norms. The rights outlined above have evolved into being essentially binding international standards and therefore the norms have become fully internationalized.\textsuperscript{201} The Universal Declaration and the Covenants are standard-setting documents. The Universal Declaration declares rules of behaviour in order to set down its norms. However, stating these rules produce no legal obligation, it “simply expresses a goal, an aspiration, a guide to conduct, and perhaps a moral imperative.”\textsuperscript{202}

The second reflection of the norm of respect for human rights is outlined by the 1951 Convention, which includes a number of articles directly related to the protection of the basic human rights of refugees and asylum seekers. Much of this protection mirrors the protection outlined by the Universal Declaration. The \textit{personal and legal rights} are outlined in Articles 3, 4, 5, 12-16 and 31-33. For instance, Article 3 of the Convention states that refugees should not be subjected to discrimination on the grounds of race, religion or country of origin in terms of the application of the Convention provisions. Article 16 states that refugees shall have free access to the courts of law and enjoy the same treatment as a national in matters pertaining to access to the courts. Articles 32 and 33 protect refugees from unlawful expulsion and from expulsion or return in the case in which his life or freedom would be threatened (non-refoulement). The \textit{subsistence rights} are outlined by Articles 20 and 21, especially the right to equal access to rations and

\textsuperscript{199} Young (Apr., 1980), pp. 333-334.
\textsuperscript{200} Description of rights taken from Donnelly (Summer, 1986), p. 607.
\textsuperscript{201} Donnelly (Summer, 1986), p. 608.
favourable access to housing in the event of state regulation. Articles 17-19 and 23 and 24 outline the *economic rights*, including especially the rights to wage-earning employment, public relief and assistance, and social security. The *social and cultural rights* are outlined by Article 22, specifically the right to public education. Finally, Article 15 outlines the *civil liberties* in terms of the right of association.\(^{203}\) The Convention is part of the UN system of implementation and standard-setting.

The third reflection of the norm of respect for human rights is manifested in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The essay of the European Convention was the first international agreement to be given specific legal content to human rights. It established machinery for supervision and enforcement.\(^{204}\) The European Convention established the fundamental right to be free from torture and cruel treatment. It also established the right of protection from refoulement.\(^{205}\)

Another reflection of the norm of respect for human rights is found in the 1969 OAU Convention. The OAU Convention outlines a much broader definition of ‘refugee’ than that used in the 1950 Convention. Like the other conventions and agreements the OAU Convention includes an article on non-discrimination (Article IV), and Article II protects refugees from such “measures as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened…”\(^{206}\) The norm of respect for human rights is also reflected in the 1992 Declaration on Protection of Refugees in Arab World and the 1994 Arab Charter on Human Rights, as well as a number of other conventions, treaties and agreements in other parts of the world, a discussion of which is beyond the scope of the thesis. All of these documents, taken as a cohesive unit of commitment to the protection of refugees, inherently reflect a commitment to the norm of respect for human rights.

McGuinness states that human rights law has gradually been developed into “a broad norm-setting regime that provides the foundations for individual rights as expressed in refugee law and humanitarian law.”\(^{207}\) Human rights principles, such as individual’s right to movement, autonomy, and freedom, are all included within the protection system and they are applicable to all people in need of protection, regardless of their current position in the conflict zone or whether they are a Convention refugee or not.\(^{208}\)

While the above aspects of the norm of respect for human rights were regulative in character, there is also a constitutive aspect of the norm. This comes from the fact that

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\(^{208}\) Ibid., 135-166. p. 154-155.
human rights norms prescribe rules for appropriate behaviour and also help to define the identities of the actors (states) involved in the system. The constitutive effects of human rights norms originate from the fact that if a state performs ‘well’ in terms of respect for human rights, this performance is a crucial signal to other states to identify it as a member of the human rights community, and, in the context of the refugee problem, a member of the refugee protection regime.209

Summary of Principles and Norms in the Protection System
The principles and norms described above are a part of the foundation upon which the system is built, and they provide the guidelines for state behaviour regarding the treatment of refugees and structuring domestic refugee policy. The principles and norms have evolved into being international in character and are normative in nature; they represent how states should act. In many cases they reflect how states actually do act.

4.1.3. Rules

“Rules are specific prescriptions or proscriptions for action.”210 According to Haas, rules “are injunctions to the member governments committed to some norm. They tell the participants what to do under specified circumstances, and what not to do. Rules mediate between the purpose of a regime and the procedures selected for implementing the purpose.”211 There are three features of rules: (a) an indication of a relevant subject group, (b) a behavioural prescription, and (c) a specification of the circumstances under which the rule is operative. Rules may be directed towards a certain group or focus on a specific activity. As with rights, rules are not a guarantee: there is no promise that the actors will follow the rules.212 Vogler states that rules “constitute particular applications of general regime norms and principles.”213 Rules are in most cases expressed through multilateral legal agreements; however, there are varying levels of formality in regards to rules.

4.1.4. Rules of the Protection System

The international refugee protection system upholds a variety of rules, which are both prescriptive and proscriptive for state action. Standard setting rules are those designed to promote desirable actions and prohibit undesirable actions. Therefore, they either limit certain actions of choice available to states (proscriptive rules), or promote certain other actions (prescriptive rules).214 For example, there are rules in the refugee agreements which limit how the safe countries’ governments may treat refugees and asylum seekers, such as refraining from discriminating against them215 or unduly punishing them216.

212 Young, (April, 1980), p. 335.
214 Ibid., p. 40.
Other examples include the use of the principle of non-refoulement\textsuperscript{217}, under which refugees may not be forcibly sent back to their country of origin if it is likely that they will face persecution. These are \textit{proscriptive} rules. \textit{Prescriptive} rules include rules that are designed to promote the fair and equal treatment of refugees in comparison to how nationals are treated, fair and equal treatment of all refugees, and fair and equal access to refugee determination procedures and courts\textsuperscript{218}.

There are also \textit{information} rules in international regimes, which cover reporting and monitoring arrangements, as well as transparent information sharing among the regime member states. By the very existence of an international regime there is a relatively inherent commitment by members to abide by the collective decisions within the regime; however, this is dependent upon the adequate assurance that other members are also abiding by the rules and decisions. Hence, information rules help to bring about higher levels of compliance among member states\textsuperscript{219}. In the protection system, the UN and UNHCR carry out information sharing functions and monitoring functions. UNHCR often collaborates with humanitarian relief and human rights agencies and shares information with them. Global consultations, meetings, and various action programs have been formed to bring about more effective collaboration\textsuperscript{220}.

\textit{Enforcement and compliance} rules exist in international regimes, which are linked to the monitoring function of information rules. In order to bring about higher levels of compliance among regime members these rules use threats of reciprocity and horizontal enforcement. In turn, these may “rest heavily upon a national concern to preserve international status and reputation.”\textsuperscript{221} The implementation component of international regimes refers to evaluating the effectiveness of regimes, specifically, evaluating the compliance mechanisms of regimes. Compliance is directly related to incentives, i.e. the costs and benefits of compliance or non-compliance with the rights and rules of a regime. In order to bring about higher levels of compliance, regimes install compliance mechanisms, which are “…any institution or set of institutions publicly authorized to pursue compliance with the substantive provisions of a regime, or with the outcomes generated by its social choice mechanisms.”\textsuperscript{222} They may be more or less formally articulated; they range from formal governmental agencies to less formal compliance mechanisms that occur commonly in highly decentralized social systems (such as the international system).

\textsuperscript{221} Vogler (1995, pp. 40-41.
\textsuperscript{222} Young (April, 1980), p. 339.
Enforcement and compliance rules are set out and enforced both internationally and nationally in the system of refugee protection. At the international level the UN treaty bodies (such as the various Committees established by the main human rights treaties and by non-treaty based bodies such as the UN Commission on Human Rights) monitor the compliance of the member states of the protection regime. These UN treaty bodies have widespread field presence and UNHCR, as well as other organizations having mandates to assist refugees, are responsible for cooperating with them.\textsuperscript{223}

“UNHCR’s primary responsibility of providing international protection is carried out by promoting the adoption and supervising the application of international conventions and by encouraging governments to take other measures for the benefit of refugees.”\textsuperscript{224} UNHCR has a supervisory role and state bodies are obligated to cooperate with its office. It has a monitoring function whereby it thoroughly supervises matters of status, as well as entry and removal of asylum seekers and refugees. However, the national administration and judicial framework of the countries involved has an effect on these procedures, as will they effect the nature and degree of UNHCR involvement.\textsuperscript{225}

The Office of the UN High Commissioner for Human Rights (established in 1993) has an important presence at the national level of regime rule implementation by emphasizing to governments the importance of national human rights structures. It encourages the construction of national human rights bodies that in turn support and apply international standards of human rights.\textsuperscript{226} At the national level, independent ombudsmen and national human rights commissions in many cases have the ability to enquire into and examine cases of human rights violations where refugees and asylum seekers have potentially been affected.\textsuperscript{227}

It is important to note here that compliance in international regimes is difficult to assure, and regimes rarely have the power to enforce rules. However, since countries with good reputations can make agreements more easily than countries with bad reputations, regimes “can help facilitate cooperation by making it both easier and more desirable to acquire a good reputation.”\textsuperscript{228}

Summary of Rules in the Protection System
Rules make up the second part of the system of protection. They provide a framework for appropriate state behaviour in response to possible choices within the system. They are both proscriptive and prescriptive in character. Many of the rules are provided by the UN system of refugee protection, specifically by UNHCR, which also performs functions of monitoring, information sharing, and implementation.

\begin{itemize}
\item \textsuperscript{223} UNHCR (2000), p.150.
\item \textsuperscript{225} Goodwin-Gill (1996), p. 327.
\item \textsuperscript{226} UNHCR (2000), p.150.
\item \textsuperscript{227} Ibid., p.150.
\item \textsuperscript{228} Axelrod and Keohane (Oct., 1985), p. 250.
\end{itemize}
4.1.5. Decision-making Procedures

“Decision-making procedures are prevailing practices for making and implementing collective choice.”\(^{229}\) These procedures govern how choices are made in varying situations, from day to day activities to the more complicated evaluation of possible rule change and even change in principles and norms that define the regime.\(^{230}\) The procedural component of regimes “encompasses recognized arrangements for resolving situations requiring social or collective choices. Situations of this type arise whenever it is necessary or desirable to aggregate the (non-identical) preferences of two or more individual actors into a group choice.”\(^{231}\) There are a variety of problem-types that occur in international regimes, which require social choices to be made, examples being issues relating to the allocation of factors of production, to the explicit distributive implications, and to dispute settlement. Social choice mechanisms are wide-ranging institutional arrangements (more or less formally articulated) that are specially formulated to solve problems of social choice that come about in international regimes. Examples include administrative decision making, bargaining, and unilateral action backed by coercion. Not all international regimes possess their own social choice mechanisms, and instead they share with other regimes or rely upon the larger social structures’ institutional arrangements.\(^{232}\)

4.1.6. Decision-making Procedures of the Protection system

Donnelly identifies six types of decision-making procedures of regimes, which are used in various combinations by each type of regime.\(^{233}\) These decision-making procedures will be related to the international system of refugee protection.

1) Authoritative international decision making: institutionalized, binding decision making, including generally effective enforcement powers.

Although the system of protection has become relatively institutionalized in that its norms and principles have become internationalized and in some instances binding, its decision making is not highly institutionalized. It is largely left up to domestic governments to decide where or not, and to what degree, it will implement the various components of the protection system. Enforcement powers are not found within the refugee protection system for the same reason; national governments have been left in charge of whether or not they comply with the regime. As will be explored later in this section, the UN and its bodies, as well as the regional organizations and the various human rights organizations, all do not have the power to enforce the norms, rules, principles and decision-making procedures of the system. In terms of human rights enforcement, which is directly related to the protection of refugees, the UN only has an indirect role in promotion. “Even the treaty guarantees formulated through the UN

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\(^{231}\) Young (April, 1980), p. 336.

\(^{232}\) Ibid., p. 337.

\(^{233}\) All 6 examples of decision-making procedures are taken from Donnelly (Summer, 1986), p. 604.
system and by other international organizations are not directly enforceable over a state’s objection.”

2) **International monitoring**: formal international review of state practice but no authoritative enforcement procedures. Monitoring activities can be further categorized in terms of the powers allowed to monitors to carry out independent investigations and make judgments of compliance with international norms.

The international system of refugee protection does have some monitoring activities (discussed above), which are performed by UNHCR, various human rights organizations, and other governmental and non-governmental organizations. No authoritative enforcement procedures exist because this is largely left up to domestic governments to decide how and when to implement the components of the regime. With respect to human rights, monitoring activities have been established by some of the UN treaties, which provide significant incentives for states to honour their treaty obligations. “To the extent that human rights treaties have become part of the domestic law of the signatories, they then become enforceable through internal legal processes.”

UNHCR supervises the application of the 1951 Convention in a number of ways, depending on available resources, local conditions, and the legal structures of the country involved. “As a minimum, UNHCR should have full access to information on asylum-seekers and to the proceedings.”

3) **International policy coordination**: regular and expected use of an international forum to achieve greater coordination of national policies but no significant international review of state practice.

Although there are cases in which states within a region have gradually aligned their refugee policies (such as happened in the EU), there are no forces within the system of protection to ensure that states achieve coordination of national policies. As well, because decision-making is left largely in the hands of domestic governments and they cannot be forced to provide specific behaviour with respect to refugees, there exist no measures to significantly review state practice by outside organs.

4) **International information exchange**: obligatory or strongly expected use of international channels to inform other states of one’s practice with respect to regime norms.

There exist a variety of channels through which states in the system of refugee protection can exchange information with one another. Governments are able to consult with other countries facing similar problems in terms of refugees via the international forum provided by UNHCR. States thus are given the ability to see the possible implications of

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235 Ibid., p. 329.
their decision making around refugee problems, both for themselves and the international community.\footnote{Chalk, (July 1998), p. 149.}

UNHCR cooperates with NGOs via the Partnership in Action (PARinAC) process, whereby meetings are held in countries in which they operate in order to build partnership structures. This permits the participation of NGOs in UNHCR’s policy development and planning.\footnote{UNHCR (2000), p. 194.} Two of the main roles of the UN in the refugee regime is to supply information to its’ member states and to provide forums for exchange of views on human rights and issues of refugee protection.\footnote{Ziring, et. al., (2000), p. 328.}

5) **International promotion or assistance**: institutionalized international promotion of or assistance in the national implementation of international norms.

The origins of international norms often times lie in strongly held principled ideas and the desire to convert others to those ideas. ‘Transnational moral entrepreneurs’ who carry our ‘moral proselytizing’ carry out promotional activities “involved promoting norms governing the way states treat individuals, or how individuals treat each other.”\footnote{Sikkink, (Sep., 1998), p. 518.} This is especially important in terms of promoting human rights norms. ‘Norms entrepreneurs’ inside governments, international organizations, and nongovernmental actors often work together to produce and promote norms. Transnational campaigns are conducted by networks of individuals or transnational coalitions to help spread their reasons of why the norm is valued and important, and to bring about widespread acceptance of the norm. Persuasion is a powerful actor in this process, especially in terms of securing support from powerful state actors.\footnote{Ibid., pp. 518-519.}

Promotion of and assistance in implementing international norms is carried out by UNHCR, various human rights organizations, governmental organizations, and international and national NGOs. The role of the UN in the refugee regime is to formulate standards, encourage conformity to them, and to sometimes condemn egregious lapses in terms of civil and political rights. The UN encourages greater compliance and observance of the norms, principles and rules of the refugee regime.\footnote{Ziring, et. al., (2000) , p. 328.} UNHCR can only advise and persuade states regarding the decisions of when, how, and how many refugees each state will take in. In order to persuade states to take on asylum seekers and refugees for resettlement, UNHCR often relies upon diplomacy and whatever political power it can marshal in order to influence state decision making.\footnote{Hans and Suhrke, “Responsibility Sharing” in James Hathaway (ed) (1997) Reconceiving International Refugee Law, The Hague: Martinus Mijhoff Publishers, 83-109, p. 85.} The influential powers of UNHCR are most strongly felt in poor countries which receive large numbers of refugees and therefore become more dependent upon UNHCR for channeling international relief to help deal with the refugee problem. It is because of these reasons
that to a large extent, UNHCR has acted primarily as an agenda-setter and a broker in international sharing mechanisms.\footnote{Hans and Suhrke, in Hathway (ed) (1997), p. 85.}

6) **National decision making**: full state sovereignty in decision making for the issue area.

In the system of refugee protection, after the member states have become signatories to the conventions, treaties and agreements that make up the system, much of the decision making is left up to national governments. For instance, resettlement issues are in most cases under the mandate of domestic immigration laws.\footnote{Ibid., p. 85.} Decision-making procedures are located most importantly in domestic jurisdiction over asylum policy and application of human rights principles and law. The location of the central procedural principle of the system is directly linked to the principle of national sovereignty (discussed in Chapter 6) under which states are their own ultimate authority.\footnote{Donnelly (Summer, 1986), p. 608.} Decisions regarding the granting of asylum and resettlement to refugees are often left up to individual states, acting independently of UNHCR. This largely comes from the fact that the 1951 Convention has no provision requiring legislative incorporation or any other formal implementing step. It does not include obligations as such for states to incorporate its provisions into domestic law, although that “...the general duty of a party to a treaty is to ensure that its domestic law is in conformity with its international obligations is beyond contradiction.”\footnote{Goodwin-Gill (1996), pp. 234-235.}

**The Role of Refugees in Decision Making**

In discussing the context of decision making in the refugee system, the individual in question, the refugee, is often lost. This is because refugees themselves have, in most cases, very little control in whether, where, when, and how they obtain refugee status in a safe country. In fact, “the refugee has almost totally renounced any active role in decision making governing his or her own living conditions and is virtually dependent upon an authority over which he or she has no control.”\footnote{Whittaker (1997), p. 97.}

**Summary of Decision-making Procedures in the Protection System**

Decision-making procedures are the least coherent component of the international system of protection of refugees. This is largely due to the fact that national governments hold most of the responsibility for making decisions in the context of refugee policy formation and implementation. However, UNHCR has a strong role in assisting information sharing, international norm promotion and assistance, and monitoring the member states’ compliance to the system.
4.2. The International System of Protection: Is it a Regime?

When the components, characteristics, and practices of the international system of refugee protection are compared with the necessary criteria of international regimes found in Krasner’s neoliberal regime theory, it quickly becomes apparent that the system is an example of an international regime, both theoretically and in reality. It not only has strong and in some cases essentially universally accepted principles and international norms, it also has rules which are largely complied to by the member states of the regime. The only aspect of international regimes found in the theory that the protection regime could be said to lack to some degree are decision-making procedures, simply because, as discussed above, these procedures largely remain domestic in nature. However, despite this noticeable lack in formalized, international measures of decision-making, the regime can be shown to be effectively functioning. By and large, states across the world abide by the components of the regime in that they obey the international human rights law, humanitarian law, and refugee law that make up the regime.

4.3. Donnelly’s Typology of Regime Types Applied to the System of Refugee Protection

This section asks the following questions: which type of regime is the international system of refugee protection? What are its characteristics? What role does the regime play in the international arena? What is the regime’s significance?

4.3.1. International Refugee Protection Regime: ‘Strong Promotional’?

In his article *International Human Rights: A Regime Analysis* Jack Donnelly formulates the four types of international regimes existent in the international system. International *enforcement* regimes involve the stronger forms of international monitoring, and international decision making. International *implementation* regimes include some forms of informational exchange, policy coordination, and weaker monitoring procedures. International *promotional* regimes involve weak monitoring of international guidelines, and international information exchange, promotion, or assistance. International *declaratory* regimes include international norms but no international decision making, except in the creation of norms. These regime types can further be described as ‘weak’ or ‘strong’, depending on the regime’s normative and procedural scope and its coherence.250

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249 Donnelly (Summer, 1986).
250 Ibid., pp. 604-605.
Donnelly's typology of international regimes may be used in order to ascertain which type of regime the refugee protection regime represents. To help establish this, it is useful to use the human rights regime as a point of comparison. Donnelly states that the UN-centered ("universal") international human rights regime "is a relatively strong promotional regime, composed of widely accepted substantive norms, largely institutionalized standard-setting procedures, some general promotional activity, but very limited international implementation... There is no international enforcement." This description is closely mirrored by the international regime of refugee protection. Like the human rights regime, it is comprised of widely accepted substantive norms (and principles), largely internationalized standard-setting procedures (including generally binding rules), promotional activities, and some limited international implementation (such as information exchange and international assistance for implementing international norms nationally). Finally, it also lacks international enforcement procedures. The above analysis of the principles, norms, rules, and decision-making procedures of the system indicates that it is an example of a 'promotional' regime.

The next step in identifying what type of regime the system of protection is, entails evaluating the strength and coherence of the regime. 'Strength' increases, roughly, with the normative and procedural scope of the regime. Like the human rights regime, the refugee regime allows self-selected national exemptions and in some ways represents only broad collective aspirations. One can thus say of both the regimes: "they are, in effect, born weak." The refugee regime is in some sense 'weak' for the same reason as

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251 Figure 1. adapted from Donnelly (Summer, 1986), p. 603.
252 Donnelly (Summer, 1986), pp. 613-614.
253 Ibid., p. 605.
254 Haggard and Simmons, (Summer, 1987), p. 514.
the human rights regime; it is because of conscious political decisions by the member states so that they could retain high levels of national decision making within the regime. The main justification for retaining political decision making control over immigration and refugee policy is the endorsement of the principle of state sovereignty, which essentially holds that each state (potentially) has absolute control over who enters its territory.

The strength of the refugee regime thus does not come procedurally, it comes from the fact that it has detailed, highly evolved and highly entrenched principles and norms, and well-developed, widely applied rules. Moreover, although much of the decision making procedures are national in character and action, there are quite strong decision-making procedures at the international level (i.e. weak international monitoring procedures; relatively high levels of information exchange procedures; and procedures for international promotion and assistance of national implementation of international norms). In sum, the regime is normatively very strong, but procedurally fairly weak.

‘Coherence’ refers to how much the states abide by and use the procedures and norms that are part of the regime, and the extent to which the different parts of the regime operate cohesively. Internal contradictions are common in international regimes, an example of which arises “between the alleged requirements of indivisible state sovereignty and the obligations imposed by the rules of international regimes.” Coherence in the international refugee regime can be said to be relatively high firstly because of the sheer numbers of states which have ratified its’ conventions and other documents of international law. To include the most important ones, the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol have both been ratified by 134 states. There are 45 states party to the 1969 OAU Refugee Convention eighteen Latin American countries are party to the 1984 Cartagena Declaration on Refugees. Coherence can also be found to be high by the fact that many of the principles and norms that make up the regime have become internationalized. This means that a vast number of states across the globe have taken the principles and norms to be valid and have instilled them in their national immigration and refugee policies and in their respect for human rights and humanitarianism.

The two final characteristics of regimes are the degree to which they are formalized and directed. The ‘formality’ of a regime refers to the extent to which it is laid out in treaties, conventions, or formal agreements. The refugee regime is highly formal in terms of agreements among its members. There are multiple conventions and treaties addressing specifically the problem of refugee flow. These are backed up by a variety of human

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259 “Latin America Renew Commitment to Cartagena Refugee Declaration” on UNHCR: News, 16 November 2004. [Available Online] http://www.unhcr.ch/cgi-bin/texis/vtx/home/+OwwBmMQeFtnwwwwwwwwwwwwwFqnN0blFqnDni5AFqnN0blcFqVqwGBwtnDwannqcwGwBodDDzmxwwwwwwwwFtnwwwwwwwwwwwwwwwwwFqnN0blFqnDni5AFqnN0blcFqVqwGBwtnDwannqcwGwBodDDzmxwwwwwwwFtnwwwwwwwwwwwwwwwwwFtnwwwwwwwwwwwwwwwwwFtnwwwwwwwwwwwwwwwww
rights and humanitarian treaties and conventions, and international human rights and humanitarian law. The ‘direction’ of a regime refers to the extent to which “they exert pressure on their regime members to act in conformity with some clear-cut social goal.”261 While the refugee regime has actors such as UNHCR which exert moral and political pressure on the member states by trying to get them to instill its principles and norms and conform to its rules, this pressure is largely diplomatic in nature. There are little formal powers of exertion present within the regime. In Hathaway’s words, the refugee regime “…will therefore be respected only to the extent that receiving states believe that it fairly reconciles humanitarian objectives to their national interests.”262

**Summary of Refugee Regime’s Characteristics**

Donnelly says of the human rights regime that “[s]uch normative strength and procedural weakness, however, is the result of conscious political decisions.”263 This is the same in the refugee regime: the member states have made conscious political decisions in constructing the regime in order to retain national sovereignty over their borders. Thus, the refugee regime is procedurally weak because national interest still guides members’ decision making procedures and their levels of commitment in practice. However, this does not mean that the regime as a whole can be called weak. The regime lies in the upper middle section of Figure 1 because it has information exchange and international norms, therefore it is a ‘strong promotional’ regime.

### 4.4. Importance of the International Regime of Refugee Protection

“The international community has developed, within the political context of the day, a regime premised upon a particularly strong conception of human worth, on the individual’s entitlement to respect for his or her dignity and integrity as a human being.”264

There is much academic debate around the question of whether international regimes ‘matter’ in the international system.265 Krasner holds that although they are dismissed by many as merely epiphenomenal, regimes do matter because “…they do not arise of their own accord. They are not regarded as ends in themselves. Once in place they do affect related behaviour and outcomes. They are not merely epiphenomenal.”266 Through the construction of norms, principles, rules and procedures, regimes bring about patterned behaviour among the actors, which, in turn, generate convergent expectations. Conventionalized behaviour of this kind denotes that “…there is some expectation of rebuke for deviating from ongoing practices.”267

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265 For a review of three main but opposing viewpoints on the significance of international regimes, see Krasner, in Krasner (ed) (1989), pp. 5-10.
267 Ibid., p. 9.
Regimes are a “pervasive and significant phenomenon in the international system... regimes [are] a fundamental part of all patterned human interaction...”268 They have a variety of functions which reduce uncertainty and insecurity among their actors: regimes stabilize mutual expectations concerning future actor behaviour; reduce transaction costs; they generate information that in other circumstances would not have been available (or only so at high costs); they ensure that interactions will repeat frequently by providing a frame of reference for the actors. 269

Regimes can be shown to be important simply because, in many cases, they “display a persistence or robustness that cannot be explained fully in terms of the conditions under which they formed in the first place.”270 That is, even when overall relations among the member states deteriorate, regimes are likely to persist if they perform their prescribed functions. Part of this comes from the high costs necessary to create the regime in the first place. The difficulty in creating a regime that will bring about mutually beneficial agreements in an issue area is an important part of why regimes persist even after satisfaction among regime members declines. 271

The domestic structures and organization of member states can in many cases be deeply affected by regime rules that develop out of cooperation within the regime framework. These rules formulate certain rights and duties for the individuals and groups of the regime, and in the case of the refugee regime, they “seek to embody some notion of a common good”272. Hurrell states that the rules and norms surrounding human rights exist not because of direct interplay of state interests or because of potential benefits; in fact they exist because of a “common moral awareness that works directly on the minds and emotions of individuals within states.”273 The same can be said of the refugee regime: interstate cooperation (of which human rights is an essential component) is reinforced by the common moral purpose of the regime members to help persons in need of protection. The international regime of refugee protection is an important actor within the international system because it brings about the spread of international norms and principles that have benefits for all states involved, as well as for individual refugees and asylum-seekers. Member states gain international recognition as being committed to the regime and to the upkeep of human rights, and refugees gain protection from persecution. Constructivists hold that the “international structure is determined by the international distribution of ideas. Shared ideas, expectations, and beliefs about appropriate behaviour are what give the world structure, order, stability.”274 Moreover, the refugee regime

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270 Ibid., p. 287.
273 Ibid., p. 218.
provides a framework for state action in regard to the treatment of refugees and answers specific human rights questions in the context of the refugee problem. To maintain this framework, the member states have an obligation to work together and comply by the regime principles, norms, rules, and decision-making procedures. Goodwin-Gill states that “…international solidarity and cooperation [are] key fixtures in a regime oriented to protection and solutions.”

The refugee protection regime plays an important role on the international stage for the very reason that it bring together states with vastly different statuses (economic, political, social, cultural) and forms a bond of legal, moral, and political obligation among them to attempt to decrease, if not solve, the refugee problem. The statutes and conventions discussed in Chapter 3 bring about the legal obligation of states to admit refugees and to practice the principle of non-refoulement. Although this principle is applied at differing levels in different states, it is still an essential principle of the regime of protection. Morally, the member states are obligated by the humanitarianism principle to let in refugees and asylum seekers in order to help alleviate their suffering and to offer them a safe place to reside. Finally, the member states of the refugee protection regime are obligated on some level to allow in refugees so that they can show other states that they are in practice committed to the regime and to signal to them that they must also be committed. Much of this obligation comes from the international principles and norms that help make up the regime. The focus of constructivism on the importance of norms within the international system helps make this clear. Essentially, norm evolution and persistence plays an important role (along with state identity) in defining state interests and behaviour.

The refugee regime “is supported by states to provide the protection and relief to persons who cannot obtain normal protection a state should provide its members. Thus the refugee regime… stems from states’ failures to act as states are supposed to act.”

What this means is that the protection regime, which is a collective action at the international level, was constructed in response to vast flows of refugees and asylum seekers from countries in which a system failure has occurred. The refugee regime is imperative in the international system because it attempts to bring the system back to equilibrium “in which all people belong somewhere and in fact receive the protection of the state to which they belong.” The refugee regime, headed by UNHCR, and prescribed by the various conventions and treaties, creates a sort of international society in relation to helping refugees. UNHCR acts as “one of the ‘gatekeepers’ in determining which governments [are] worthy of membership in international society.” It is in this way that it, to some degree, takes on the role of a higher power within the context of the refugee problem.

278 Ibid., p.55.
5. Restrictive Measures and the System of Refugee Protection

This chapter addresses the measures taken by states within the international refugee protection regime that directly affect the ability for asylum-seekers and refugee claimants to either enter the safe country in the first place, or to claim asylum once they have crossed the borders. The effects of the restrictive policies are discussed. There are a variety of reasons behind states’ actions to restrict the inflow of potential refugee claimants, and these are examined. How these policies could potentially affect the strength and validity of the international refugee protection regime is then addressed. Finally, the concept of sovereignty and its role in the use of restrictive measures is discussed.

5.1. Discussion of the Restrictive Measures

“States pay lip service to the importance of honouring the right to seek asylum, but in practice devote significant resources to keep refugees away from their borders.”

5.1.1. Pre-entry Measures

Pre-entry measures are the first opportunity for states partner to the international refugee protection regime to shirk their responsibility of protection. Amongst these available measures, visa requirements for nationals of refugee-producing states are have probably the most negative affect on asylum claimants and people in search of refuge outside their country of origin. In most countries, a visa is an entry permit issued by the government for a specified time period of stay, usually up to three months. As visas are temporary, they are thus not considered immigration. Yet countries across the world, notably in Europe and North America, which have traditionally been home to great numbers of asylum seekers, have introduced visa requirements for nationals from ‘asylum-producing’ states. However, seeking asylum in a safe country does not require a claimant to carry a visa. Article 31 of the 1951 Convention states that claimants shall not be restricted from movement or receive penalties because of entering illegally (i.e. without the proper papers and identification), as long as “their life or freedom was threatened in the sense of Article 1… provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” Therefore the imposition of visa requirements on refugee claimants and asylum seekers is in blatant contradiction with the meaning and purpose of visas.

Many countries have instilled airport transit visas (ATVs) in an effort to stop the entry of refugee claimants who have entered the country via another country that did not require

the person to carry a visa. This is considered to be illegal entry and ATVs attempt to
cast the flow of these persons; thus, nationals of specific (refugee-producing) states
are exempted from the principle of free transit. The meaning behind the instrument is to
curb ‘visa shopping’ whereby a refugee claimant would file applications for refuge in
many states simultaneously in order to increase their chances of acceptance. ATVs
directly affect the possibility of claimants to be received in safe countries, especially
since many desperate refugees use ‘visa shopping’ and hold false documents because
these were the only available avenues to protection left for them.

Carrier sanctions are fines levied on airlines and shipping companies on a per capita basis
that allow the arrival of passengers who do not carry the necessary papers. They require
pre-boarding documentation checks in both countries of origin and transit and people
who lack the required documentation are prevented from disembarking and are sent back
home. In many countries these people are thereafter detained in centers in international
airports and in some cases denied the right of appeal. Sanctions against human
smugglers are penalties imposed on people who assist or attempt to assist aliens to enter
or reside within a country (contrary to the laws of that country on the entry and residence
of aliens) for purposes of gain.

Another measure used by states in order to prevent, disrupt, or halt the movement of
refugees and asylum seekers across international borders is interception. Interception
appears in three forms, including interdiction in territorial waters or on the high seas; pre-
inspection at airports; and providing payment to transit countries for them to return
individuals before they can reach the destination country. Essentially, interception is
meant to create barriers to protection for refugees and asylum seekers. These barriers
occur in different forms. Firstly, interception can bring about the denial of access to
refugee determination procedures, as the aliens are often returned with a low level of
screening or without any scrutiny at all. Secondly, refugees are sometimes denied the
access to screening procedures via UNHCR or NGOs. Thirdly, often people lacking
expertise in refugee determination procedures (such as coast guards or law enforcement
officials) end up screening the refugees instead of personnel from official agencies.
Fourthly, refugees may be sent to safe third countries that in reality lack an effective
protection policy. Fifthly, procedural protection of refugees may be lacking in the
country providing screening and protection. Sixthly, interdiction is by its very nature
quite chaotic, due to the potential for intimidation, trauma, fatigue, and other factors
which may threaten the refugee’s ability to articulate his or her claim for protection.
Finally, populations at risk (such as women and children) are often denied help and
protection because of the use of interception measures.

285 Ibid. p. 169.
288 Young, Wendy, “NGOs Call on UNHCR Executive Committee to Oppose Interception” in Refugee
Reports, Vol. 21, No. 5 (July, 2000) [Available Online]
289 Ibid.
5.1.2. Post-entry Measures

One of the problems with respect to these restrictive measures used by asylum-giving states is that it is perfectly rational for refugee claimants to seek protection in a country with higher recognition rates than other states. If given the chance, they will rationally choose among potential host countries in order to find one which is more likely to receive them. These actions have been labeled ‘asylum shopping’. Safe third country agreements are another way for asylum receiving states to avoid having ‘asylum shoppers’ gain access to their system of protection. They are based upon the idea that “where a number of formal criteria indicate that the protection seeker could have sought protection in a third country through which she passed, her claim shall be rejected, and she shall be asked to turn to that country.” Instead of by personal choice, each asylum claimant’s respective host country is determined either by the travel route or other allocation criteria. Asylum claimants thus are denied the right to choose among various potential host countries. Countries regularly justify the practices described above by asserting that only one single state should have the responsibility of examining an asylum application. However, the “grounds for refusing access to asylum procedures, tend, however, to be based on a mere presumption that the relevant third country will offer protection to refugees.” It is obvious that in many cases this presumption could potentially lead to the refugee being denied protection by the supposedly ‘safe’ third country because that country could have stricter asylum application rules or for a variety of other reasons.

Many states carry out the practice of detaining refugee claimants, if for varying lengths of time. Australia has a controversial policy of mandatory detention of all unauthorized arrivals, and asylum seekers are no exception to the rule. Expulsion occurs when a refugee is immediately sent back to wherever they came from (be it their country of origin or a transit state) as soon as they reach the frontier of a given country. Expulsion or deportation is “the more formal process whereby a lawfully resident alien may be required to leave a State, or be forcibly removed.”

5.2. The Reasons for, and the Effects of, the Restrictive Measures

The international system of refugee protection is changing; countries that have a history of hosting large numbers of refugees are gradually turning away from their commitment to the regime. This is due in part to the failure of the international community to share the responsibility of protecting refugees. All of the measures to prevent access of refugees to safe countries described above represent a trend of states towards ‘en bloc

denials of access’. They represent a refusal to ‘balance the claims of refugees with those of receiving states’. Hathaway states that such measures are a response to the breakdown of the political and social conditions that previously existed and helped industrialized states to assimilate refugees.

The restrictive measures accomplish two goals for countries that would have perhaps otherwise had to let in the asylum claimants had it not implemented the measures: firstly, by reducing the number of asylum claim applications, they directly reduce the expenses involved with treating large numbers of applications that would have otherwise had to processed. Secondly, the measures allow states to avoid processing applications that would have otherwise potentially satisfied criteria for refugee status as laid out in the Geneva Convention and domestic asylum law. The moral and legal duties of states that are laid out by the international regime of refugee protection are thus minimized as much as possible, as states use sovereignty as an excuse to commit themselves to minimum levels of obligation to nationals of refugee-producing states. In a situation described as “the system of international refugee protection in crisis” by Gorlick, states use the aforementioned measures in order to place restrictions on the international protection regime. This, in turn, has meant that legal protection of refugees is quickly losing ground, as legislative and inter-state arrangements change and there takes place “a pull back from the legal foundation on which effective protection rests.”

5.3. Border Control and the Concept of State Sovereignty

5.3.1. Sovereignty and Refugee Protection

The doctrine of national sovereignty can be defined as a principle “… which reserves to each sovereign state the exclusive right to take any action it thinks fit, provided only that the action does not interfere with the rights of other states, and is not prohibited by international law on that or any other ground.” Under this definition every sovereign state is free in international law to do what it wants with its own nationals and territory, as well as to enter into legal relationships with other sovereign states, to use the public domain, to enter into international organizations, and even to make war, although this right has been limited to the use of force in self-defense. Thus, whatever happens within a state’s boundaries is under the jurisdiction of that state’s government. Interference in the domestic affairs of a state is considered unwarranted and in many cases illegal.

300 Ibid. p. 2.
Countries with histories of immigration and refugee protection have largely favoured the restrictive and for the most part regressive measures, as they claim to be overburdened with applications for asylum.\(^{303}\) The developed world has used the concept of sovereignty as a defense mechanism against the influx of aliens, including refugee and asylum claimants. It is a well-known fact that one of the foundations of immigration policy, including refugee policy, is the concept of state sovereignty. Indeed, immigration policy is “considered to be sacrosanct to the maintenance of state sovereignty.”\(^{304}\) State sovereignty is used by states to support their belief that the act of granting asylum is at the discretion of the state, instead of as a matter of an individual’s right to asylum.\(^{305}\)

The concept of sovereignty is in most cases used to back up restrictive viewpoints on immigration and refugee policy. Essentially, it is used by virtually all states as an excuse to not only restrict the flow of ‘normal’ migrants, but also desperate people in search of safety and refuge. There are varying degrees of strictness in terms of the application of the concept of sovereignty in reality (i.e. in terms of refugee policy). At the ‘strictest’ end of the spectrum, some theorists believe that no legal or moral obligations for nations to accept any refugees exist. This standpoint holds that states that do let in refugees are acting generously and in a humanitarian fashion.\(^{306}\) A key aspect posited in respect to this argument is that there exists no moral right for every person to immigrate into states in which they are not nationals.\(^{307}\)

At the other end of the spectrum, a more ‘open’ version of sovereignty holds that states, although sovereign and able to control how they respond to their internal and external issues, have the obligation to accept refugees. Many theorists believe that discussion on the issue of refugee flow across international boundaries should begin from the fundamental equality of all persons, which is a plausible basic moral principle upheld by the various conventions, treaties and arrangements that constitute the international refugee protection regime. From this fundamental equality comes the belief that the interests of all parties involved in refugee flow (i.e. the refugees and the residents of recipient nations) need to be taken into account equally. Equal consideration of all interests must occur when there is conflict between the interests of the parties involved, however the most important or pressing interests must take precedence.\(^{308}\) This stance on the issue of sovereignty and refugee policy essentially means that receiving states must not only consider the potential outcomes of accepting refugees in the domestic sense; receiving states must also take into consideration the interests and needs of the refugees themselves. Thus, different states within the protection regime will thus hold different views on the concept of sovereignty and, in turn, these views will directly affect their views on immigration policy, specifically, refugee policy.

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305 Ibid. p. 237.
In sum, different actors within the regime hold different views on border control and state sovereignty. This is one of the main reasons that the regime has low levels of enforcement; the member states have recognized their differing views on the issues and have created a regime that allows states to hold these differing views. The sanctity of the notion of sovereignty is reinforced by the refugee regime’s procedural weakness.
6. Restrictive Measures and Regime Change

This chapter addresses the issues surrounding the use of restrictive measures by states to cut down or stop the influx of refugees and asylum-seekers. It uses neoliberal and constructivist theory in order to discern whether the use of these measures represents a regime change or a weakening of the regime.

6.1. Regime Change and Transformation

In the highly decentralized international system, social institutions such as regimes “...frequently prove resistant to change, even when they generate outcomes that are widely regarded as undesirable.”\(^\text{309}\) Since regime change requires learning of new procedures and acceptance of (initially) unknown outcomes, destruction of existing institutions, and expectation-coordination around a new focal point, “a convergence of expectations around new institutional arrangements will often be slow in coming.”\(^\text{310}\) However, social institutions such as regimes are never static; the economic, political, and social environments in which they are placed ensure that regimes experience continuous transformation. Regime rights, rules, decision-making procedures, and compliance mechanisms all may experience change. Neorealist theory makes use of structural explanations for regime change, such as the ‘hegemonic stability’ theory, which attributes “…the rise and maintenance of regimes to the power of an hegemonic state.”\(^\text{311}\) However, as the thesis has undertaken a neoliberal and constructivist approach to the issue of regime analysis, these same theories will be used in regards to examining regime change.

Krasner states that changes “…in rules and decision-making procedures are changes within regimes, provided that principles and norms are unaltered.”\(^\text{312}\) This means that rules and procedures may be altered within a regime but may still align themselves with the prevailing principles and norms of the regime. In this case, no fundamental change in the regime has occurred. In the case of the refugee protection regime, there has been gradual evolution in terms of the rules and procedures by which the regime is run. An example is found within UNHCR. Before the 1980s, states often deferred to the Office on asylum matters since it had specialized knowledge and expertise about refugee law. Thus, before the 1980s UNHCR had a monopoly on information about refugee law and refugee movements and it “…enjoyed maximum legitimacy as it simultaneously tried to define the refugee issue for states, to convince governments that refugee problems were soluble, to prescribe solutions, and to monitor their implementation.”\(^\text{313}\) However, this changed when states began practicing increasing restrictionism; UNHCR lost its monopoly on information and expertise. “Consequently, its authority and legitimacy in

\(^{310}\) Ibid., p. 348.
the realm of asylum has declined." This is an example of a change within the refugee regime, but not a change in the regime itself.

There is a difference between when a rule change occurs there has taken place a change within the regime, or a change between regimes. “The difference hinges on assessments of whether principles and norms have changed as well.” However, this is often difficult to assess because the changes cannot be based on objective behavioural observations. A leading constructivist thinker, Ruggie, states that “we know deviations from regimes not simply by acts that are undertaken, but by the intentionality and acceptability attributed to those acts in the context of an intersubjective framework of meaning.” Fundamental changes within a regime must involve alteration of the principles and norms. As the basic characteristics of a regime are provided by the principles and norms, changes “...in principles and norms are changes of the regime itself.” In the case of the refugee regime, there has been little alteration in the principles and norms themselves. The majority of member states still claim commitment to the regime and to humanitarian protection of refugees and asylum seekers. The principles and norms of respect for human rights, non-refoulement, non-discrimination, and humanitarianism all remain in existence within the protection regime. There has been some evolution in terms of the degree to which the principles and norms have been implemented, however, as shown in the case of different states applying different definitions of the principle of non-refoulement. Moreover, different states implement the principles and norms of the regime to different degrees, depending on the government’s makeup, and on the economic, social, and political culture of the individual state.

6.2. Weakening of the Refugee Regime

Krasner makes a distinction between changes within or between regimes and weakening of regimes: “If the principles, norms, rules, and decision-making procedures of a regime become less coherent, or if actual practice is increasingly inconsistent with principles, norms, rules, and procedures, then a regime has weakened.” This statement highlights the importance of regime coherence. In the context of the international refugee protection regime, the somewhat newly introduced restrictive measures represent a decrease in coherence between actual state practice and how states should act within the regime. The norms and principles of the refugee regime posit that states should be committed to humanitarianism, respect for human rights, and proper application of the principles of non-refoulement and non-discrimination. However, the restrictive measures often are designed to allow states to get around their responsibilities that are inherent in accepting the components of the regime.

318 Ibid., p. 5. Emphasis existent.
Incoherence is often planned by member states in a regime. The “lack of acceptance of formally agreed-to norms or procedures is a standard strategy of states that feel a need or desire to participate in a regime, but only a weak regime.”\(^{319}\) In the case of the refugee regime, in recent decades there has been a marked change in actor’s behaviour within the regime. Restrictionism is increasing quite rapidly. An example of this is that since 1985, many countries have begun stating that non-Convention refugees are not covered by the principle of non-refoulement, and if they are allowed to stay, it is solely on humanitarian grounds. Many countries say that practices such as carrier sanctions, visa policies and normal immigration controls, do not amount to refoulement.\(^{320}\) ATM’s, safe third country agreements, and other measures which are meant to control ‘asylum shopping’, to some degree run counter to Article 14 of the Universal Declaration, which states “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”\(^{321}\) They do so in that individual refugee’s choices are severely restricted and they lose control over personal choice over which country they apply to (which, in most cases would be a country where they would most likely gain admission). Several of the restrictive measures such as the imposition of carrier sanctions, interdiction on the high seas, the imposition of airport regulations, and the use of visa restrictions and inspection of travelers in foreign airports, constitute a restriction of the rights of refugees.\(^{322}\)

By using these restrictive measures states are acting in contradiction to the meanings behind the norms, principles, and rules of the refugee regime and thus are ensuring that the coherence between their actions and the components of the regime is decreased. All of these examples show that the use of restrictive measures represents a weakening in the regime because its components are becoming less coherent (i.e. there is increasing incoherence between the regime components and related behaviour they prescribe –how states should act- and how states actually do act). Therefore, even though the principles, norms, rules, and decision-making procedures of the regime remain coherent, the regime itself is weakening as state practice moves more and more out of line with them.

### 6.2.1. Why is the Refugee Regime Weakening?

Both neoliberal and constructivist approaches to regime theory help explain why the international refugee protection regime is gradually weakening. Although outwardly committed to the four components of the regime, states are gradually bringing about increased incoherence within the regime. This is partly out of self-interest. Although membership in the regime has benefits for states in that they gain international recognition for being committed to human rights, humanitarianism, and to solving the refugee problem, in the view of many states these benefits are increasingly being outweighed by the burden and the costs of accepting large numbers of refugees. Neoliberalism shows that the refugee regime reduces transaction costs, increases the

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likelihood of cooperation among regime members, helps states realize common interests, and brings about a higher level of stability among the regime actors. However, the use of restrictive measures indicates that many states are attempting to reduce the costs associated with operating within the regime and with accepting refugees by effectively cutting down or off the inflow of refugees. Therefore, the regime is weakening because many states no longer believe the regime to be cost effective. It is no longer providing incentives enough for them to continue acting in coherence with the regime structure. Many member states are finding it more beneficial to outwardly display commitment to the regime, while inwardly acting out of alignment with the principles, norms, rules, and decision-making procedures of the regime.

The second part of why the regime is weakening has to do with identities and interests of the actors. Constructivism treats identities and interests as endogenous to interaction. Institutions can help bring about identity formation among actors, and interests are then based on those identities. In the refugee regime the ‘communities of identity’ that existed were conducive to cooperative behaviour in the first place. Cooperation has, in turn, led actors to reconstruct their interests in terms of shared commitments to social norms. The actors’ interests may be changing as their identities change, and these changes may not necessarily support the regime. The actor’s identities as humanitarian states committed to the norms, principles, and rules of the refugee regime are changing (specifically, identities of states that have introduced high levels of pre- and post-entry restrictive measures). By making steps towards abandoning the components of the regime, their identities of being regime members are being altered and potentially the identities may reflect their position that upholding the regime is no longer of utmost importance to the member states. Constructivism posits that actors and structures mutually constitute each other; the same can be said to describe the situation of the refugee regime. The actors and the structure of the regime are both changing. The actor’s interests and identities are evolving as the nature of the refugee regime is changing. The context of the first stage of the regime (pre-WWII time period, dealing with mainly European asylum-seekers) no longer exists and the “reasons that induced openness to arrival of refugees have largely withered away.”

The third part of explaining why the regime is weakening is linked to sovereignty. Many states use the guise of state sovereignty as an explanation and justification for their restrictionism. States are turning back to the age-old justification of holding sovereign control over who crosses their borders. Through this, states can more easily explain why they are turning away from the obligation to help persons in need of protection from persecution. The fourth part of the explanation is that, as is the case with the human rights regime, the problem with maintaining a strong refugee protection regime is that it “…does not rest on any perceived material interest of a state or coalition willing and able to supply it. In the absence of a power capable of compelling compliance, states participate in or increase their commitment to international regimes more or less

Moral interests play an important role in the refugee regime and this is partly why the regime is weakening, because “moral interests such as human rights may be no less ‘real’ than material interests. They are, however, less tangible, and policy, for better or worse, tends to be made in response to relatively tangible national objectives.” In sum, because the refugee regime lacks a power capable of enforcing its principles, norms, and rules, it cannot completely overcome the intangibility of the moral interests that make up a large part of the regime. The costs of the regime no longer outweigh the benefits, and this has led many states to reevaluate their position in the regime.

6.3. How will the Refugee Regime be Affected?

The weakening of the refugee regime has a vast array of potential effects for its three levels of protection. UNHCR is losing effectiveness as states step away from their commitment. Even though UNHCR’s activities are supposed to be non-political in nature, it is “a highly political actor and is clearly shaped by the interests of major governments… UNHCR is often at the mercy of its donor and host governments.” This means that UNHCR will only be effective to the degree that the most important states in the regime (i.e. the states that make the largest financial contributions and accept the largest amounts of refugees) remain committed to it, both financially and ideologically.

Increasingly, states within regional arrangements are using measures to deflect responsibility of refugee protection onto other states. An example is the 2002 United States and Canada Safe Third Country Agreement, whereby Canada is allowed to return asylum seekers who make their applications at land border ports of entry back to the US, and vice versa. The agreement will have vast implications for refugees who seek to gain access to Canadian protection via the US (in 2001 35% of asylum claims made in Canada were made by claimants who arrived in Canada from the US). The Canadian government to deflect thousands of refugees back to the US each year via the agreement.

On the domestic level numerous governments have, at least to some degree, stepped away from their commitment to the protection of refugees and have moved in the direction of restricting the flow of refugees into their countries. Many of these measures are carried out in an effort to control illegal immigration and ‘asylum-shopping’, however, multitudes of bone fida refugees are being negatively affected and will continue to be affected in the future. If the international refugee protection regime continues to

328 Ibid., p. 616.
weaken and lose coherence, the problem of refugee protection, which affects millions of people across the world each year, will only worsen. The very aim of the regime, to provide protection to refugees and asylum-seekers, will not be reached. In sum, the “treatment of asylum-seekers everywhere has been marked by exclusion and expulsion and there exists a worldwide asylum crisis.”\textsuperscript{332}

\textsuperscript{332} Loescher (2001), p. 351.
7. Conclusion

A close examination of the various legal documents of the refugee protection system, including the 1951 Convention and 1967 Protocol, the 1948 Universal Declaration, the OAU Convention, and the European documents (among others) has led to the conclusion that there does in fact exist an international regime of refugee protection. In brief, the regime of refugee protection is composed first of the legal documents (UN, regional, and other conventions and treaties) that prescribe and proscribe certain actor behaviour; and second, the various bodies (UNHCR, regional bodies, human rights bodies, intergovernmental organizations and NGOs) that assist states in acting out the prescribed behaviour and that provide refugees with protection; and finally, the domestic asylum policies of each member state. These three layers of protection taken as a relatively cohesive unit constitute an international regime as defined by neoliberal IR theory.\footnote{The definition of ‘international regime’ that was used in the thesis is found in Krasner, in Krasner (ed) (1989), p. 2.}

The refugee protection regime thus satisfies the four requirements necessary to create and maintain a regime: it contains norms, principles, rules, and decision-making procedures. The norms and principles include a commitment to the norm of respect for human rights, and respect for the principles of non-refoulement, non-discrimination, and humanitarianism. The significance of the regime principles and international norms (which play an extremely important role within the refugee regime) that are meant to uphold human rights and humanitarianism, is highlighted by the constructivist approach to regime theory. Norms are of utmost importance for constructivists; the role international norms play in regimes is important and influential, and in the case of the refugee regime, the norms and principles are key ingredients in ‘gluing’ the regime components together. Norms shape both the goals of states (their interest perceptions) and the means they use to achieve those goals.\footnote{Florini, Ann, “The Evolution of International Norms” in International Studies Quarterly, Vol. 40, No. 3, Special Issue: Evolutionary Paradigms in the Social Sciences (Sept., 1996), 369-389.} It is in this way that international norms play an especially important role in the refugee regime: they have helped shape the humanitarian nature of the regime and its commitment to human rights protection. Norms and principles help construct the backbone of the regime, and this is helped by the fact that the majority of the regime’s norms and principles are international in character and virtually universally applied.

There are also a variety of prescriptive and prescriptive rules, as well as information-sharing, enforcement and compliance rules, in the refugee regime. These rules provide a framework for member state action: they tell states what to do and what not to do in respect to treatment of refugees and formulation of domestic asylum policy. Rules essentially construct a framework through which states may carry out the goals of the regime’s principles and norms. Many of the rules are imparted by the UN system of refugee protection, specifically by UNHCR, and they are the second most important and cohesive component of the refugee regime.
The final aspect of the regime, decision-making procedures, exists both on the international and national level. Some international monitoring takes place, performed by UNHCR, human rights organizations, governmental organizations and NGOs, and international information exchange takes place among UNHCR and member states. There is also international promotion and assistance of international norm implementation through the use of norms entrepreneurs, UNHCR, human rights organization, NGOs, and governmental organizations. National decision-making, however, is also very important in the regime, as governments retain most of the powers of decision-making and hold control over their domestic refugee policies. This framework was specifically chosen by the member states, partly in an effort to hold on to sovereign control over their borders, and partly so that no other state or body would have the power to force any one state to take on refugees. The structure of the regime is the result of conscious political decisions by the member states. In the end, the humanitarian identity of the member states has come in conflict with their national interests and commitment to upholding the concept of state sovereignty. During the formation of the regime, while states were “…willing to protect refugees against return to persecution, states demanded the right ultimately to decide which, if any, refugees would be allowed to resettle in their territories.”

Individual refugees have therefore been left with relatively little control over where they find protection from persecution.

The international refugee protection regime plays essentially three vital roles in the international arena; firstly, it helps save millions of lives each year by providing safe places where displaced persons can turn to seek protection. Although the international system lacks a higher power that could act to effectively solve problems such as the creation of refugees, the refugee regime in some sense takes on the role of a higher power in the context of the refugee problem. It enables states to come together and perform the humanitarian and life-saving duties as a relatively cohesive unit.

Secondly, the regime helps promote stability within the international system as a whole. As posited by neoliberalism, the refugee regime lowers the costs associated with interstate bargaining and allows states that perhaps would not normally have interacted to bring about cooperation. Cooperation, in turn, helps bring about increased stability. In effect, the states cooperated and established a mutually-beneficial system of protection and to a large extent continue to cooperate to maintain the regime (although this is gradually changing as states reevaluate the costs and benefits associated with regime membership). The third role of the regime, led by UNHCR, is that it provides a sort of ‘international club’, whose membership allows individual states to project a humanitarian identity that is committed to human rights. Regimes “help to shape the reputations of their members”, which helps further cooperation and, in turn, stability among regime members. This is related to the second role because stability is increased as states understand their own identities and interests and have an avenue through which they can understand other states’ identities and interests as well. In the modern states system, where liberal democracies for the most part guide the creation of international norms (just as they guided the creation of UNHCR and the definition of ‘refugee’), the refugee

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regime helps states establish their identities and highlights their commitment (at least on the outside) to humanitarianism.

When the characteristics of the refugee regime are related to those of Figure 1. (p. 48), it can be said to be a ‘strong promotional’ regime; however, recently this has begun changing as more states choose to implement restrictive measures that minimize or stop the influx of refugees claimants and asylum-seekers. What this means for the regime is that its coherence is decreasing; the aims of the regime and the state behaviour it prescribes increasingly are not being reflected by actual state behaviour. The interests of the member states are changing as their identities change: in effect, many states no longer view human rights and humanitarian protection of refugees and asylum-seekers to be of utmost importance. The potential economic, social, and political costs of accepting large numbers of refugees seem to be making many states reevaluate their role in the regime and change their behaviour, and in turn, their commitment to the regime. Thus, the interests and identities of regime members are not fixed and exogenous; they are evolving as the regime itself evolves.

As the regime becomes weaker, its importance within the international system could potentially decrease; this, in turn, could have detrimental effects for refugees themselves and for the upkeep of human rights and worldwide commitment to humanitarianism. No strong and formalized mechanisms for enforcement exist, and this regime configuration was chosen, on purpose, by the regime members. It seems likely that states may incrementally abandon their responsibilities of protection. This is especially likely to occur if individual states observe that many other states are doing the same, since state’s identities are reinforced by what others are doing. Nevertheless, if regime weakening continues to occur, the refugee problem will only intensify and involve thousands more people each year, in turn affecting not only refugees themselves, but states and the protection regime as a whole. In the end, the regime’s work is “frequently characterised by tension between the national and international arms of protection, between sovereignty and international responsibility… we are confronted with refugee movements in all their humanitarian dimensions; and humanitarian need, it seems, may not be enough.”

8. Bibliography

8.1. Theoretical and Empirical Literature


8.2. Internet References


8.3. Conventions and Statutes


Thesis Word Count (excluding Title, Contents, Dedication, Bibliography): 24,590.