UNIVERSITÉ DE GENÈVE

Archive ouverte UNIGE
https://archive-ouverte.unige.ch

Article scientifique | Article | 2024

Published version | Open Access

This is the published version of the publication, made available in accordance with the publisher's policy.

The International Refugee Regime and the Liberal International Order: Dialectics of Contestation

Lavenex, Sandra

How to cite

LAVENEX, Sandra. The International Refugee Regime and the Liberal International Order: Dialectics of Contestation. In: Global studies quarterly, 2024, vol. 4, n° 2, p. ksae029. doi: 10.1093/isagsq/ksae029

This publication URL: https://archive-ouverte.unige.ch/unige:176907
Publication DOI: 10.1093/isagsq/ksae029

© The author(s). This work is licensed under a Creative Commons Attribution (CC BY)
https://creativecommons.org/licenses/by/4.0

Global Studies Quarterly (2024) **4**, ksae029

The International Refugee Regime and the Liberal International Order: Dialectics of Contestation

Sandra Lavenex
University of Geneva , Switzerland

The international refugee regime finds itself in a delicate balance between two conflicting principles of the liberal order: the particularism of sovereign states and the universalism of human rights. This article proposes a theory of endogenous contestation, rooted in the dialectic of law, propelling liberal aspirations, and politics, vindicating sovereign control. In doing so, we identify three shifts in the international refugee regime. Following 1945, legal consolidation in a propitious geopolitical context engendered a phase of regime expansion. The provisional "triumph" of liberalism in the early 1990s bolstered the regime's geographical and normative clout but fueled political backlash. This set the stage for a new phase of regime contestation, where liberal democracies adapted political practices to ostensibly uphold the asylum norm while precluding access to it. The article concludes by exploring whether this subversion signals a gradual evolution or a fundamental shift in the nature of the liberal refugee regime.

El régimen internacional de refugiados se encuentra en un delicado equilibrio entre dos principios contradictorios del orden liberal: el particularismo de los Estados soberanos y el universalismo de los derechos humanos. Este artículo propone una teoría de la impugnación endógena, que se encuentra enraizada en la dialéctica del derecho, que impulsa las aspiraciones liberales, y las políticas, y que reivindica el control soberano. De esta forma, identificamos tres cambios en el régimen internacional de refugiados. A partir de 1945, la consolidación jurídica en un contexto geopolítico propicio dio lugar a una fase de expansión del régimen. El "triunfo" provisional del liberalismo a principios de la década de 1990 reforzó la influencia geográfica y normativa del régimen, pero alentó reacciones políticas contrarias. Esto preparó el escenario para una nueva fase de impugnación del régimen, en la que las democracias liberales adaptaron las prácticas políticas con el fin de defender ostensiblemente la norma de asilo al tiempo que se impedía el acceso a ella. El artículo concluye estudiando si esta subversión indica una evolución gradual o un cambio fundamental en la naturaleza del régimen liberal de refugiados

Le régime international des réfugiés se trouve dans un équilibre délicat entre deux principes contradictoires de l'ordre libéral : le particularisme des États souverains et l'universalisme des droits de l'homme. Cet article propose une théorie de la contestation endogène, enracinée dans la dialectique du droit, qui propulse les aspirations libérales, et de la politique, qui revendique le contrôle souverain. Ce faisant, nous identifions trois mutations dans le régime international des réfugiés. Après 1945, la consolidation juridique dans un contexte géopolitique favorable a engendré une phase d'expansion du régime. Le "triomphe" provisoire du libéralisme au début des années 1990 a renforcé l'influence géographique et normative du régime, mais a suscité des contre-mobilisations politiques. Cette situation a ouvert la voie à une nouvelle phase de contestation du régime, au cours de laquelle les démocraties libérales ont adapté leurs pratiques politiques afin de maintenir ostensiblement la norme d'asile tout en empêchant l'accès à celle-ci. L'article conclut en se demandant si cette subversion est le signe d'une évolution progressive ou d'un changement fondamental dans la nature du régime libéral des réfugiés.

Introduction

The codification of an international regime for the protection of refugees post-World War II played a pivotal role in shaping the Liberal International Order (LIO). Within this framework, states, particularly liberal democracies, acknowledged their responsibility toward individuals who have lost or cannot avail themselves of the protection of their home state. The institution of asylum, therefore, serves as a tool to rectify deficiencies in a state-based LIO, recognizing that certain individuals have been unjustly deprived of their previous political belongings—or, in the words of Hannah Arendt, their "right to have rights" (Arendt 1968: 388). By adhering to the 1951 Refugee Convention, other states committed to providing surrogate membership as a remedial measure (Owen 2020). The Convention has experienced a significant growth in the number of member states participating. On the occasion of its seventieth anniversary, however, Philippo Grandi, United Nations High Commissioner for Refugees, saw "no cause for celebration" (Grandi 2020): against initial expectations, the drivers of forced displacement have not waned but multiplied, governments fail to ensure displaced people's return in safety, solidarity in refugee resettlement is crumbling, and states increasingly fail to keep their obligations under the 1951 Refugee Convention and preclude access to their asylum systems.

This article examines the interplay between the LIO and the refugee regime from 1945 to the present day. In doing so, it addresses two questions: firstly, what explains the unabated contestation of refugee law and policy in liberal democracies? And secondly, what is the impact of contestation on the refugee regime and the international order—does contestation expand, subvert, or even revoke liberal ambitions, and under which conditions?

In short, we argue that the contestation of the refugee regime has its roots in the structural tension between the particularism of state sovereignty and the universalism of human rights that is at the core of the LIO (Simmons and Goemans 2021). This tension takes its most vivid expression in the figure of the refugee. In a world where states

Lavenex, Sandra (2024) The International Refugee Regime and the Liberal International Order: Dialectics of Contestation. *Global Studies Quarterly*, https://doi.org/10.1093/isagsq/ksae029
© The Author(s) (2024). Published by Oxford University Press on behalf of the International Studies Association. This is an Open Access article distributed under the terms of the Creative Commons Attribution License (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

persist in generating refugees, this structural tension translates in a gap between the political reality—other states' ability and willingness to provide protection, and normative ambition—human beings' legitimate quest for protection. Moderated by an altering geopolitical landscape, this gap initiates a cycle of endogenous contestation, where efforts to align state practices with normative aspirations give rise to political counter-movements. These, in turn, trigger further normative actions and political opposition, perpetually altering the equilibrium between humanitarian universalism and statist particularism within the international refugee regime.

Adopting a longitudinal perspective on the inherent dialectic of endogenous contestation and drawing from an extensive array of policy documents, legal texts, and secondary literature, this article delineates three distinct phases in the evolution of the international refugee regime. Initially, normative activism and a favorable geopolitical climate have expanded liberal aspirations well beyond the original geographic and temporal limitations of the 1951 Convention. The preliminary end of ideological rifts in the 1990s severed the refugee regime from its geopolitical moorings, and states started to gradually restrict and subvert refugees' access to their liberal asylum laws. The contemporary international landscape, marked by new ideological divides and an anti-liberal backlash in various Western democracies, signals the onset of a third phase, which may be less subversive and more overtly transformative. While predicting outcome of this phase proves challenging, developments in key liberal democracies—from Australia to Europe and the US—indicate not only the practical proliferation of illiberalism but also its encroachment into the legal norms governing the international refugee regime.

The article proceeds in five steps. We first introduce the theoretical argument of endogenous contestation rooted in a dialectic of legal expansion and political counter-reaction. After a brief recapitulation of the foundations of the international refugee regime, we retrace its evolution in three steps. The conclusion reflects on what we can learn from the evolution of the international refugee regime for the future of the LIO.

Theorizing Endogenous Contestation

International regimes can be challenged from without when the problem structure that underpinned their inception changes. Or they can be challenged from within when their ideational and institutional properties are self-undermining (Goddard et al. 2024; Zürn 2018). The multiplication of the causes of forced migration, humanitarian crises, and the revolution of communication and transportation facilities all challenge the international refugee regime from within. Its most fundamental challenge, however, rests in its ideational and institutional foundations, namely the structural conflict between the universalism of human rights and the particularism of the state order. The liberal order is defined by the fact that "state sovereignty... becomes secondary to the fulfilment of basic human rights" (Goddard et al. 2024: 4), yet the refugee regime has to strike a balance between the rights of individuals to find refuge in a safe state and the rights of states to discriminate who they admit on their territory. The consequence of this structural conflict is the absence of a stable equilibrium, which gives way to the dynamics of endogenous contestation.

Structural Conflict in Liberal Migration Governance

Scholars interested in the normative dimension of migration governance have long underlined this tension and the trilemma implied in liberalism's attempt to reconcile openness for immigration with societal boundary-formation, including multicultural inclusion and social redistribution (Bauböck 2016: 1; see also Walzer 1983; Carens 1987; Kymlicka and Banting 2006). Contemporary debates on the challenges to the liberal order have brought these concerns to the core of IR scholarship. In their introduction to the special issue in International Organization on the topic, Lake, Martin, and Risse state that "The role of migration in the LIO has always been difficult, with inconsistent policies and messages" (idem. 2021: 239). These inconsistencies are at the heart of Goodman and Pepinsky's (2021) contribution to the special issue, which identified migration policy as a crucial element in the consolidation of embedded liberalism after World War II. According to them, openness toward immigration could only be maintained in conjuncture with exclusionary integration policies: "In a world of migration, states must either restrict the citizenship and membership rights of migrants, or expand their definition of "the people" to include them." They also state that "The latter choice. . .undermined embedded liberalism from below because "social purpose" had been maintained through selective, purposeful social closure" (idem: 413). This echoes the notion of a trilemma developed in the normative migration literature as well as empirical studies that state a "rights versus numbers trade-off" (Ruhs 2013) or a "liberal paradox" (Hollifield 1992) in liberal democracies. In short, these notions question liberal states' capacity to reconcile openness toward immigration ("numbers") with immigrants' economic, social, and political inclusion ("rights") or, more generally, to respond to both economic and humanitarian demands for openness and political demands for closure.

Migration thus poses an endogenous challenge to the LIO because it exposes the incompatibility of key ideational and institutional properties of that order (Goddard et al. 2024). Accordingly, the challenge rests in reconciling ideational principles based on openness, individual freedoms, and the primacy of human rights over state sovereignty on the one hand with institutional membership rules that prioritize the national democratic welfare state on the other (Goddard et al. 2024: 3–4). The endogenous challenge linked to migration is co-constitutive to the formation of the modern state and has intensified with the latter's "liberal" evolution (Lavenex 2018a). While the "territorial state" of late 19th century approached migration from the perspective of controls at the external borders (Torpey 2000), the "nation state" of the early 20th century added an intersubjective layer of identity formation and exclusion (Noiriel 1991). The "democratic welfare state" of the post-World War II period finally entailed a complex web of institutional boundaries of inclusion and exclusion in social, economic, and political rights (Bommes and Geddes 2000; Schierup et al. 2006), multiplying the endogenous challenges to the LIO.

These challenges are common to all forms of international migration, but the notion of refugees is particularly intricate. This is because the institutionalization of an international refugee regime, together with its domestic consolidation, adds an additional layer of legalized institutionalization on top of the structural tension between universalism and particularism. Legalized institutionalization occurs

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

when states have "codified rules with higher or lower "precision" and "obligation" and they have delegated the monitoring and implementation of these rules to third parties with more or less independence" (Goddard et al. 2024, referring to Abbott et al. 2000). Within the limits imposed by human rights law (Chetail 2019) and regional integration arrangements (Lavenex 2019), the constraints on liberal states vis-à-vis migrants are mainly self-imposed: "migration policy, particularly policy on migration into a country, is often regarded as the last major redoubt of unfettered national sovereignty" (Martin 1989: 547). This is different in the case of refugees, for whom the international community has established an international regime based on the 1951 Refugee Convention and whose principles and norms figure in the national constitutions and laws of liberal democracies.

Drivers and Mechanisms of Regime Change

A theory of endogenous contestation identifies the mechanisms that fuel change in the ideational and institutional properties of the regime and defines the conditions under which these changes imply obsolescence, modification, or replacement of the regime (Percy and Sandtholtz 2022). Constructivist IR theory and legal sociology underpin the momentum inherent in (legal) norms that flows from the interplay of norm entrepreneurs, validity claims, and processes of institutionalization and internalization (Teubner 1993; Finnemore and Sikkink 1998). Accordingly, once institutionalized norms develop a dynamic of their own, which sustains their diffusion (Risse-Kappen et al. 1999) and limits the scope for political retrenchment (Wendt 1999).

In line with this literature and drawing on the introduction to this special issue, we posit that the inherent gap between humanitarian aspiration and state sovereignty in the refugee regime unleashes an expansive dynamic whereby liberal norm entrepreneurs (NGOs, courts, and international organizations), pointing at this incoherence, will seek to widen the scope of states' legal commitments toward refugees. While early constructivist literature proposed a predominantly linear vision of norm emergence and internalization (Finnemore and Sikkink 1998), scholars have soon underlined the ubiquity of conflict and "contestation" over the meaning of norms. "Contestation" thereby does not necessarily weaken the norms, most of the time, it will strengthen them by clarifying their scope and enhancing their legitimacy (Wiener 2004; 2018). Drawing on these approaches, we propose that the formalization of the refugee regime in the post-World War II period triggered a wave of "order-consistent contestation" (Goddard et al. 2024), which—in a geopolitically propitious context—gradually expanded liberal (human rights) commitments beyond the scope of the original political agreement. The geopolitical context of the Cold War assured consistency between the division of power, state interests, and the value of refugee protection in the liberal hemisphere as refugee admission became part and parcel of the ideational contest (Teitelbaum 1984; Zolberg 1988; Barnett 2002). Normative expansion thereby takes two dimensions: it widens the substantive scope of states' legal obligations and it enhances the legal authority of these obligations. The substantive scope is widened when agreed norms gain validity over hitherto omitted grounds. Legal authority, in contrast, is strengthened via processes of legalization, whereby norms gain more obligation, precision, and means of enforcement (Abbott et al. 2000). Whereas formal international commitments in the refugee regime fit into the category of a "weakly institutionalised liberal order" (Goddard et al. 2024: 6), legal developments at the regional and national level and spill-overs into other fields of international law such as tort law or the law of the seas have gradually strengthened its level of institutionalization (Figure 1).

A distinct sequence of contestations emerges when the defenders of the sovereignty norm start counteracting liberal expansion. Such "order-challenging contestation" (Goddard et al. 2024) gets more likely the more institutionalized and legalized the universalist elements of the regime become. This assumption echoes research on the legitimacy of international institutions, which posits that a gain in authority entails a need for increased legitimation (Tallberg and Zürn 2019: 583). A similar argument comes from the literature on securitization, which posits that "Ironically, it is the very success of the liberal project that now gives rise to the demand for a wider security agenda, for a reinvention of security in terms other than military" (Buzan 1997: 23). With regard to migration, this process has been retraced under the notion of "societal security" (Huysmans 2006).

If increased authority is not met by enhanced legitimation, states will seek to circumvent their expanding obligations by circumscribing the application of the norm (Deitelhoff and Zimmermann 2020: 57) or by engaging in non-compliance. Importantly, such "order-challenging contestation" does not question the validity of the norm (ibid.)—actors rather "modify" the norm "in ways that preserve the fundamental rule but further specify or qualify it" (Percy and Sandholtz 2022: 942). A typical strategy is "organized hypocrisy" (Brunsson 1989; Krasner 1999; Lavenex 2018b): the dissociation of words (what actors claim to be doing) and deeds. In the literature, this strategy has also been coined as norm "evasion" or "hyper-legalism" whereby agents comply with the letter of the law but violate its purpose (Búzás 2017; Ghezelbash 2020).

This understanding of regime subversion echoes the newer IR literature on the resilience of international norms. As Percy and Sandholtz (2022: 935) argue, norms are more resilient than some earlier writings on the death of international norms suggest (i.e., McKeown 2009; Panke and Peterssohn 2012) because norms are "embedded in larger normative structures." These larger normative structures connect to what we refer to as the geopolitical context, i.e., the interplay between divisions of power and ideas in the wider international system. As argued above, the Cold War context added a strategic element to regime expansion, which eroded once the ideational contest over liberalism seemed resolved. The discontinuity of this strategic element gives support to order-challenging contestation. However, the so-called "triumph" of the LIO in the 1990s also stabilized the congruence of power and ideational structures. In this constellation, norm entrepreneurs like lawyers or human rights groups and institutions, in particular, courts, mobilize to counter illiberal retrenchment. Paradoxically, this action often results in a further expansion of the regimes' substantive scope and legal authority to close identified loopholes—for instance, via court rulings that abolish certain evasive practices or the recognition of new bodies of law constraining political subterfuge, such as in our case, for instance, tort law or the law of the seas. This sets up a vicious circle in which regime-challenging actors will turn to new evasive strategies, eventually spurring new normative expansion, thereby widening the gap between legal authority and political support in the regime. In sum, liberal ambition is maintained but challenged in practice (Figure 2).

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

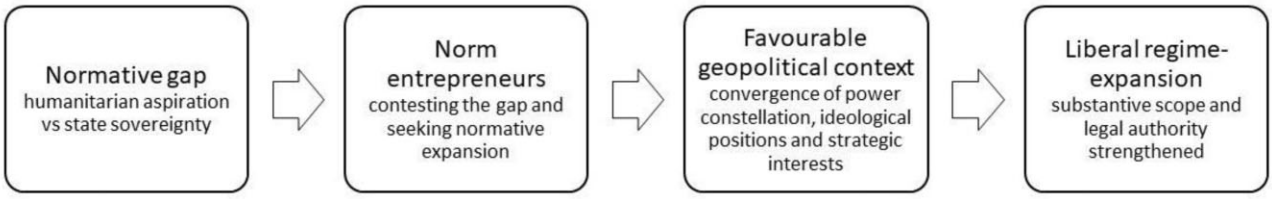

Figure 1. First sequence of order-consistent contestation: regime expansion.

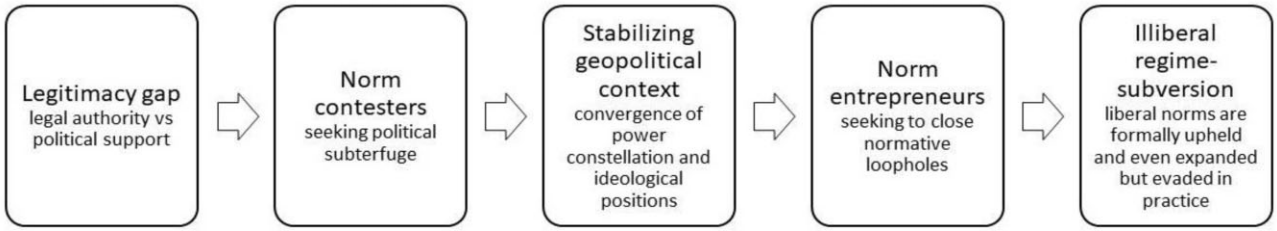

Figure 2. Second sequence of order-challenging contestation: regime subversion.

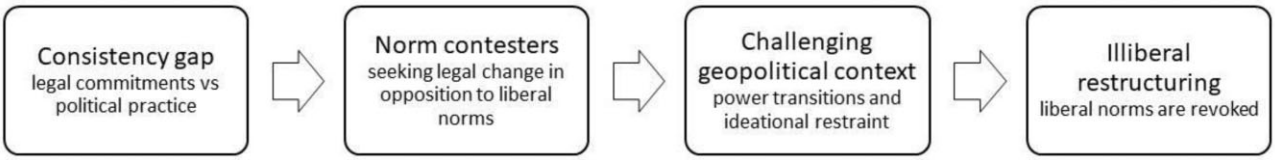

Figure 3. Third sequence of order-transforming contestation: regime revocation.

Accordingly, studies on the resilience of international norms conclude that in most cases, challenges lead to the "modification" of the norms' "robustness and content" without affecting their substantive claim (Percy and Sandholtz 2022: 935). Norm change, however, "is continual" and can lead to the norm's replacement when actors stop to "preserve the fundamental rule" and "replace it by a contrary norm" (ibid: 942). In this case, it is not only the "application" but the very "validity" of the norm that is revoked (Deitelhoff and Zimmermann 2020). The securitization literature contributes a different angle on this question. A move away from liberal order-consistent contestation occurs when the de-legitimation of military force that accompanied "societal securitization" (Buzan 1997: 23) is revoked and a societal issue such as migration enters the field of geopolitics. The scope conditions for such transformative change are little explored and theory-formation faces a moving target. The precise identification of such transformative moments is also a challenge, as normative change is, as stated above, continuous and not categorical. Extrapolating from the models of order-consistent and order-challenging contestation, however, one may expect illiberal reordering to need at least two conditions to unfold. Firstly, norm contesters must gain influence by challenging established norms and proposing alternatives. Secondly, the extent to which they succeed in doing so will depend on the resilience of liberal institutions and, above all, the legal system protecting the values of human rights and refugee protection. While we can expect differences in legal systems to play a role (for instance, the presence and influence of constitutional courts and commitment to supranational institutions such as the European Convention of Human Rights and its Court of Justice), geopolitical shifts should equally matter. For most of the 20th century, we have come to think of the existence of the LIO in conjunction with the dominance of the "West" in the international system. In a constellation of power transitions, we may expect liberal democracies to uphold refugee norms when this contributes to ongoing struggles over identity and influence. However, the claim of refugees can also lose much of its support if western societies and governments distance themselves from the idea of an international society that forms the basis of solidarity and turn inwardly concerned with their individual survival (Figure 3).

As indicated, the observation of an eventual shift from order-challenging to order-transforming contestation is demanding, in particular in today's uncertain times. In terms of indicators, we posit that "illiberal subversion" of the refugee regime turns into "illiberal re-ordering" (Goddard et al. 2024) when states develop new norms that overtly contest the validity of refugee law, and when these new norms are endorsed by courts, international organizations, and other actors, altering the wider normative structures of the regime. As with Finnemore/Sikkink's (1998) model of norm emergence, the mere codification of illiberal norms in domestic jurisdiction does not per se amount to the restructuring of the regime, but one needs to observe also the "cascade" and the "internalization" of such norms in the institutions governing the regime. Such a process will necessarily be gradual and may encounter change and diversions at multiple points.

Foundations of the Refugee Regime

Though the contemporary international refugee regime is most closely associated with the 1951 Refugee Convention and implementing agency, the organization of the United Nations High Commissioner for Refugees (UNHCR), the

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

concept of asylum is much older and has roots in most of the world's major religions (Zolberg 1988; Haddad 2003). This notwithstanding, the establishment of the international refugee regime in the inter-war period and its further codification and geographic expansion after 1945 are a milestones in the development of a LIO. The institution of asylum can be seen as a correction mechanism designed to redress the values of the LIO where it fails: by granting refugee status, a state becomes responsible for safeguarding the rights of an individual that another state has failed.

State Sovereignty Vs Human Rights

Although the notion of asylum and the international refugee regime are firmly rooted in liberal principles, the tension between the universal aspiration of human rights and the principle of state sovereignty runs through the entire evolution of the regime. Applying the classification of Goddard et al. (2024), the regime established with the 1951 Convention and the mandate of the UNHCR corresponds to a form of "weakly institutionalised international order": its substantive scope privileges state sovereignty and its legal authority at the international level is limited: although the Geneva Convention and some refugee norms enjoy a high degree of obligation and precision, the regime disposes of no enforcement mechanisms apart from the elusive opportunity for states to bring claims against other states under the International Court of Justice. The Convention does not even provide for a system of state reporting.

Developed in the inter-war and post-World War II period under the influence of both humanitarian and security challenges emanating from forced displacement, international refugee law has been considered as doctrinally distinct from international human rights law (Goodwin-Gill and Mc Adam 2007). Even though the 1951 Refugee Convention places responsibility with the country where the refugee seeks asylum, this responsibility is not a duty of the state, but a right, to grant asylum. This right to grant asylum derives from states' sovereign right to control admission into their territory (ibid: 172ff). This contrast with the letter of the 1948 Universal Declaration of Human Rights, which famously provides that "everyone has the right to seek and enjoy in other countries asylum from persecution" (article 14). Despite several attempts, this right to seek asylum has never been included in a legally binding instrument, nor has it been matched with a right to obtain asylum.[1] Asylum law thus does not give clear precedence to human rights over state sovereignty.

Refugees Vs Individual Persecution

A second tension rests in the definition of a refugee in Art. 1A of the 1951 Convention. Accordingly, a refugee is defined as a person who is unable or unwilling to return to his or her country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. This individual definition contrasts with the earlier practice under the League of Nations, which categorized refugee groups according to their place of origin. The individualist definition clearly allowed for a more law-based approach than the "ad hoc and state-centric" (Barnett 2002: 241) practice under the League of Nations, which gave way to geopolitical priorities (Loescher 1993: 39) and allowed states to accept refugees depending on their potential economic contribution (Long 2013a). However, the negotiation of the refugee definition in the late 1940s/1950s was marked by a cleavage between West and East. (Newly established) Western democracies insisted on a narrow definition based on individual state persecution, justifying a complex legal status determination procedure and entailing comprehensive legal entitlements upon recognition of status. Marked by their own massive displacements, countries of the "Global South," led by India and Pakistan, argued in favor of a wider definition, including flight from generalized violence and entailing less far-reaching legal and procedural safeguards (Oberroi 2001). In consequence, the majority of Asian countries never joined the Geneva Convention, and many grounds for seeking protection remained outside the ambit of the Convention.

Although the individual definition of a refugee allowed for a firm anchoring of asylum determination criteria in national laws and, frequently, constitutions, political interests have always compromised the practice of granting asylum. For one, the importance of the Cold War context for the recognition of individual political persecution cannot be overstated (Teitelbaum 1984; Zolberg 1988; Barnett 2002). The ideological contestation provided a sounding board within which the act of granting asylum could be legitimized. Asylum seekers who did not fit the image of the anti-communist dissident always found it harder to find recognition as refugees in the West. Also, the act of granting refugee status has always been delicate, as it implicitly accuses the country of origin of persecution. The presumed end of the Cold War revealed in two ways the fragility of the LIO for refugees: the fading of the image of the political dissident questioned the basis for legitimate protection; and the attenuation of the overarching ideological confrontation disclosed the myriad of grounds for which individuals seek and need protection—both within and beyond the scope of the Convention.

In sum, from a normative perspective, it has been argued that "by pledging to grant asylum to the persecuted, liberal countries simultaneously reaffirm the fundamental values of freedom, human rights, and justice on which they are founded" (Nantermoz 2020: 258). From a more realist perspective, however, the "weakly institutionalised" liberal foundations (Goddard et al. 2024) of the international refugee regime circumscribe the reach of liberal ideals. It is this gap between liberal ambitions and political realities that has engendered the first evolution of the international refugee regime, which, in line with our theoretical approach, can be classified as expansive, order-consistent contestation.

Liberal Expansion

Paradoxically, efforts to fill liberal gaps in the normative framework of the newly established international refugee regime have contributed to widening rather than reducing the gap between liberal aspirations and political realities. Norm entrepreneurs such as in particular the UNHCR but also national and international courts and human rights lawyers have played a central role in this process. The most visible expansions relate to the universalization of the 1951 Convention with its 1967 Protocol; the expansion of *non-refoulement* obligations under human rights treaties, the widening of the UNHCR's mandate beyond the scope of

[1]For failed attempts to enshrine a right to asylum in the negotiations leading to the 1951 Geneva Convention and later in the 1967 Declaration of the UN General Assembly on Territorial Asylum and the ensuing 1977 UN Conference on Territorial Asylum see Goodwin-Gill and Mc Adam 2007: 172ff.

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

refugees as defined in the 1951 Geneva Convention, and the consolidation of national asylum systems.

Abolishing Geographic and Temporal Limitations

Drafted in the aftermath of World War II and under the lead of Western countries (see above), the Refugee Convention originally limited the definition of a refugee to people who had been displaced as a result of events occurring before January 1, 1951. This was widely understood to mean events occurring in Europe prior to that date—and countries ratifying the Convention could choose to restrict its application even further, so that it applied only to refugees displaced by events *within Europe* before January 1, 1951. The advent of many new refugee situations after 1951 within and beyond Europe created a protection gap, inciting the UNHCR Director General of the time, Snyder, as well as governments from developing countries to demand the lifting of geographical and temporal limitations. This was achieved with the 1967 Protocol (Davies 2007).

Widening Non-Refoulement

Apart from this temporal and geographic extension, obligations under the refugee regime were significantly expanded through the interpretation and further codification of the principle of non-refoulement. Contained in article 33 of the 1951 Convention, this principle constitutes, according to UNHCR, "the cornerstone of international protection" (UNHCR 2007). Article 33.1 of the Convention states: "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." Norm entrepreneurs have subsequently achieved its further codification and expansion in numerous international human rights treaties, including the 1984 UN Convention against Torture (article 3); the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearance (article 16); and various regional conventions (Chetail 2019: 194ff.). In result, and under consideration of international human rights law, the prohibition of refoulement today applies to any form of removal or transfer of persons, regardless of their status, where there are substantial grounds for believing that the returnee would be at risk of irreparable harm upon return on account of torture, ill-treatment, or other serious breaches of human rights obligations (OHCHR 2018).

Referred to as the "principle of civilization" (Grahl-Madsen 1982: 438), the principle of non-refoulement has, moreover, progressively become considered to be part of customary international law (Chetail 2019: 120; Goodwin-Gill and McAdam 2007: 345ff.). In the absence of a right to be granted asylum, this principle has come to play a pivotal role in the international refugee regime. It has progressively been interpreted as implicitly requiring from states "a de facto duty to admit the refugee" on their territory (Hathaway 2005: 301; Goodwin-Gill and Mc Adam 2007: 384)—and herewith access to the liberal safeguards of its territorial jurisdiction.

Including Other Populations of Concern

The third major liberal expansion consists in the widening of the UNHCR's mandate and the development of alternative protection status. Whereas the rather limited definition of a refugee in the 1951 Convention has remained unchanged, the agency has gradually come to cover a variety of so-called "persons of concern" based on resolutions by its executive committee. This notion has come to include, next to refugees who have been accorded this status under the 1951 Convention, also stateless and internally displaced people—who today make up the vast majority of forcefully displaced. One consequence of this is that the UNHCR has moved closer to the profile of a humanitarian actor, leading to an overstretch of its resources and, as some have observed, a weakening of its authority on the core of the 1951 Convention (Loescher 2001; Betts et al. 2008). At the national level too, the increasing number of asylum seekers who did not fulfill the criteria of individual persecution of the Convention and who could not be sent back due to the norm of non-refoulement has confronted liberal states with the need to find alternative modes of protection. While during the Cold War many of these refugees fleeing, for instance, generalized violence were nevertheless recognized under the Convention, from 1990 onwards, less encompassing forms of temporary humanitarian protection came to supplement traditional asylum regimes.

Increasing Legalization

A fourth dynamic spurring the expansion of liberal aspirations is the consolidation of national asylum systems with the introduction of national asylum frameworks (Rausis 2023), the development of specialized asylum determination agencies, and in particular the establishment, especially after the 1990s, of independent review mechanisms. Coupled with the proliferation of epistemic communities (specialized lawyers and NGOs), these developments have contributed to strengthening the primacy of the individual and of rule of law standards vis-à-vis state sovereignty. Analyses of the relationship between first-instance executive decisions on asylum cases and second-instance decisions by independent bodies show that "appeal bodies overturn the somewhat more restrictive initial decisions the executive adopt and liberalize case processing procedures" (Thielemann and Hobolth 2016: 656). In several world regions, states have "locked in" domestic commitments via regional conventions covering refugees (Lavenex 2019). In Southern America, the Inter-American Commission on Human Rights and the Court have engaged into an active jurisprudence developing the concept of asylum from a human rights perspective and advancing the notion of burden sharing for the region (Cantor 2015). This juridical process has been paralleled by the legally non-binding Cartegena Process, starting with the 1984 Declaration on Refugees, which expanded the refugee definition of the 1951 Geneva Convention to persons fleeing generalized violence and Internally Displaced Persons. The Organization of African Unity OAU too adopted in 1969 a Refugee Convention that formulates a broader definition of protection grounds than the 1951 Geneva Convention (Mathew and Harley 2016). Commitment to asylum was reiterated in the African (Banjul) Charter on Human and Peoples' Rights of 1981 containing the right to "seek and obtain asylum" (Article 12(3)), and its adjacent Commission and Court have developed an active jurisprudence in the matter (Sharpe 2013). Finally, a rather detailed set of directives and regulations have been adopted in the framework of the European Union regarding the reception of asylum seekers, the asylum procedure, and status determination—enforceable by the supranational Court of Justice. In parallel, the European Court of Human Rights has developed an active jurisdiction on asylum (Lambert 1999).

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

Backed by the supportive ideological context of Cold War geopolitics, the first sequence of feed-back effects has thus indeed been dominated by distinctively pro-liberal, LIO-consistent reforms. These reforms were proposed by norm-entrepreneurs in international organizations and national jurisdictions with the purpose to close the gaps between the humanitarian ambitions of the refugee regime and the statist compromise reached with the 1951 Convention. This liberal shift in the ideational properties of the international refugee regime has been accompanied by the enhancement of legalization and institutionalization primarily at the domestic level, supplemented, in the EU, by supranational obligations, and, in other world regions, conventions and declarations with lower degrees of legalization. According to Goddard et al. (2024), this process amounts to one of "liberal reform," in which institutional properties are adapted in accordance with liberal norms and principles. Rather than closing the gap between liberal aspirations and sovereign prerogatives, however, this first period of order-consistent contestation has turned into a second sequence of order-challenging contestation. As a result of this countermovement, widening normative aspirations have been met by intensifying political subversion.

Political Subversion

At the same time as the international refugee regime has expanded and national asylum legislation has become more legalized, Western governments have progressively restricted access to their liberal asylum regimes (Dastyari et al. 2022; FitzGerald 2019). This process is characterized by a dialectical evolution whereby political practices, seeking to bypass normative constraints, have at the same time spurred an expansion of the latter. This second sequence of order-challenging contestation consists in a pattern of "illiberal subversion," whereby existing institutional practices are adapted in a way that contradicts liberal principles and norms—without the latter being overtly abandoned (Goddard et al. 2024). Contestation thus consists in an evasion from the liberal constraints that states officially embrace. Mourad and Norman (2020) refer to this as a case of "policy conversion," whereby governments enter into policy practices that gradually blur the line between refugees and other migrants and progressively "subvert the original purpose of the regime" (ibid.: 689). While it is true that external factors such as the multiplication of the grounds for seeking asylum and the stark augmentation of the number of refugees and asylum-seekers worldwide have certainly played a role, progressive subterfuge has also been driven by an endogenous, genuinely liberal dialectic between legalization and political evasion. This dialectic proposes that the acts of political evasion can only be understood in the light of prior steps of legal consolidation. As long as the wider institutional apparatus of the liberal order prevails (i.e., the wider normative environment, Percy and Sandholtz 2022: 935), political evasion will continue spurring new legal counter-reaction. "Illiberal reordering" starts when this dialectic is broken and the legal system no longer seeks to remedy the normative erosion.

Precluding Access to Liberal Norms

Political subterfuge started in the late 1980s when Western states imposed **unilateral policies of non-admission**, including visas, safe country rules, carrier sanctions, and border practices precluding access to their territory and the attached liberal entitlements. These policies were usually introduced in the follow-up to an intensification of legal commitments toward refugees. The United States acceded to the international refugee regime with the ratification of the 1967 Protocol to the 1951 Convention in 1968, and in 1980, adopted the Refugee Act, which provides the basis for today's US Refugee Admissions Program. Already soon after adoption of the Refugee Act, the United States started with policies of interdiction on the high seas preventing Haitian and Cuban asylum-seekers from reaching US shores (Ghezelbash 2018: 79f.). In Europe, the introduction of safe third country rules allowing states to deny access to the formal asylum procedure on the ground that the asylum applicant can be returned to another safe country started being introduced in the context of the 1990 Dublin Convention determining the state responsible for examining applications for asylum and in parallel with the development of common minimum standards on the treatment of asylum seekers in the European Union (Lavenex 1999).

The risk of refoulement to places where migrants and asylum seekers would be at risk did not remain unnoticed, and courts, such as the German Constitutional Court in a ruling on the safe third country rule in 1996[2] demanded legal safeguards that required cooperation with the countries to which these persons were returned.

The second stage was therefore **collaborative policies of non-arrival** conducted by the (liberal) destination country in shared authority with a (less liberal) third country of transit, either on the territory of that country or on the high seas. These collaborative policies include the negotiation of formal readmission agreements facilitating the return of irregular migrants but also more operational cooperation in the strengthening of border management, for instance via joint patrols. Again, these practices have met normative limits by an expansionist interpretation of liberal norms. In a much-regarded case, the European Court of Human Rights (ECtHR) held in its so-called Hirsi judgment[3] that the norm of non-refoulement applies also extra-territorially in international waters. In the concrete case, Italy was found liable under the European Convention of Human Rights even though it was operating the pushbacks in international waters with cooperation of Libyan officials. This is because the migrants were under the "de facto and de jure control of Italian authorities." With this dissociation of the functional scope of the norm of non-refoulement from the territorial scope of member states' jurisdiction, the ECtHR went beyond an earlier US judgment that in 1993 denied the extraterritorial applicability of the norm.[4]

The fact that the ECtHR's normative expansionism was not shared by other liberal jurisdictions points at the limits of liberal order-consistent contestation in the face of political subterfuge. The US Supreme Court's 1993 "Sale" ruling found that the US policy to send back all undocumented aliens coming from Haïti intercepted in the high seas regardless of their potential status as refugees was not limited by the Immigration and Nationality Act of 1952 or Article 33 of the 1951 Convention unless they landed and made an entry into the territory of the United States. The dissenting opinion by Justice Blackmun criticizing the argumentative sophistry of his fellow judges is worth a read, especially in the light of today's carefree handling of the non-refoulement principle.[5]

[2] E.g. the German Constitutional Court in 2BvR 1938,2315/93 of 14.5.1996.
[3] Hirsi Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97,
[4] Sale v. Haitian Cntrs. Council, Inc., 509 U.S. 155 (1993).
[5] https://www.law.cornell.edu/supct/html/92-344.ZD.html .

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

Another liberal democracy lacking a comparable level of judicial constraint is Australia. Collaborative non-arrival policies started with the "Pacific Solution" adopted between 2001 and 2007, and again since 2013 (Netherty and Gordyn 2014; Dastyari and Hirsch 2019). The "Pacific Solution" departs from earlier forms of pushback conducted by the US or European countries in so far as it forcibly transfers all asylum seekers and migrants seeking to join Australia by boat to other sovereign countries, in particular Indonesia, Nauru, and Papua New Guinea, but in some cases also Malaysia and other countries. Since no prior connection between the asylum seekers with these countries is required, the practice can be termed (safe) "fourth country" policy (Bar-Tuvia 2018). While Australia has being paying Indonesia to detain asylum seekers on its territory, in Nauru and Papua New Guinea, it has established so-called asylum processing centers itself. Established as closed facilities already between 2001 and 2008, since 2012 these centers have been processing cases pursuant to Nauruan and Papua New Guinean law, "purportedly placing the procedures completely outside the scope of Australian legislative and constitution legal protections" (Ghezelbash 2020: 10), and under the administration of private companies paid by Australia (O'Brien 2016). In September 2013, the newly elected Coalition Government introduced "Operation Sovereign Borders," a military-led border-security initiative that incorporates offshore processing of asylum seekers, activities to disrupt and deter people-smuggling, and interception of boats. This includes "turn-backs," where vessels are returned to just outside the territorial seas of the country of departure (e.g., Indonesia), and "takebacks," where Australia works with a country of departure (e.g., Sri Lanka and Vietnam) to return those aboard, either by plane or an at-sea transfer. Accusations of gross human rights violations under the "Pacific Solution" and "Operation Sovereign Borders" are numerous; however, the High Court of Australia repeatedly maintained the legality of the arrangements.[6] In the absence of a supranational court comparable to the European Court of Human Rights and due to limited human rights protection under the Australian Constitution (Dastyari and O'Sullivan 2016), in the case of extraterritorial detention centers, it was finally the Papua New Guinea Supreme Court that put an end to this practice by unanimously declaring them to be unconstitutional and depriving the detainees of their personal liberty.[7] This ruling is remarkable in so far as it stems from a country that has acceded to the 1951 Convention only in 1986, has no working asylum legislation, and has never ratified central human right treaties such as the International Covenant on Civil and Political Rights or the Anti-Torture Convention.

"Breaking the Legal link"

Perhaps inspired by the Australian example, the next stage in the politics of subterfuge are **delegated policies of non-arrival**, whereby authority over the asylum seeker is delegated to the third country on its territory (or the high seas), beyond the jurisdiction of the destination country. The shift from cooperative to delegated non-arrival policies is most visible in the Italian and EU reactions to the Hirsi judgment. Rather than stopping the illegal pushbacks, Italy and allegedly also Malta have gone over to indirect techniques of financial, logistical, legal, and technical assistance and training of Libyan authorities and militias, thereby moving to "contactless control" (Moreno-Lax and Giuffré 2019) and "breaking the legal link" with their own jurisdiction (Müller and Slominski 2021). These bilateral practices receive support from EU institutions in the form of material capabilities and training, including through the Frontex operation "Sophia"; the EU Border Assistance Mission in Libya (EUBAM), the Trust Fund for Africa, the "Seahorse Mediterranean Network program," and support for the establishment of a Libyan search and rescue (SAR) region, involving the creation of a Libyan Maritime Rescue Operation Centre. Hereby, the EU also helped establishing the legal requirements for granting Libyan forces authority over maritime operation in their SAR region, allowing at the same time EU member states to gradually suspend their direct involvement in extraterritorial maritime operations. Additional measures to "break the legal link" with European (liberal) destinations include manipulation of the ship's flags, place of registration, and ownership. In parallel, states have started obstructing private safe and rescue operations by civilian actors and have passed legislation criminalizing the action of humanitarian NGOs.

Importantly, these practices not only circumvent the legal reach of liberal human rights norms, they also eschew fundamental principles of the rule of law and evade parliamentary and judicial control. Arrangements with Libya are purely soft law, based on a non-legally binding Memorandum of Understanding (MoU) signed between Italy and the Libyan Government of National Accord in 2017. Unlike its predecessor, the 2008 Treaty of Friendship, the MoU is not legally binding and was adopted without the formal approval of the Italian parliament. The legal contestability of the Memorandum is further undermined by its rather generic and imprecise language, which further reduced the potential accountability of Italian actors. While the EU is not party to the agreement, it has endorsed the MoU in its legally non-binding Malta Declaration of the same year and sustains its implementation with various activities mentioned above. Cooperation with Libya has several parallels with the EU-Turkey deal of 2016, which provides that asylum seekers who enter Greece via Turkey shall be returned to Turkey on the ground that it is a "safe third country." Also, this deal has been concluded without the involvement of the European or national parliaments, and it is not legally binding, thereby limiting the reach of judicial control. What is more, the deal has been found by the EU Court of Justice to be "not attributable" to an EU institution—despite being recurrently presented by the EU Commission and the Council as an "EU" deal.[8] Hereby, the deal is shielded from the jurisprudence of the EU court.

These developments at Europe's borders have many parallels with the Australian case. As pointed out by Ghezelbash (2022) the Australian government distinguishes between "turn-backs" and "take-backs," whereby the latter "involve the direct transfer of intercepted asylum seekers to the sovereign authority of the country of departure." In the absence of supranational jurisprudence, the "legal link" with Australian authorities has not been undermined as Australian government vessels remain involved and Australian authorities participate, together with military and coast guard officials from the third countries, in the returns. An interesting practice has developed with Indonesia that is motivated less by legal than by political constrains. As Indonesia

[6]Plaintiff S156/2013 v Minister for Immigration and Border Protection and Anor (2014) 254 CLR 28, [2014] HCA 22 (18 June 2014); CPCF v Minister for Immigration and Border Protection and Anor (2015) 255 CLR 514, [2015] HCA 1 (28 January 2015) ; Plaintiff M68-2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42, [2016] HCA 1 (3 February 2016).

[7]Namah v Pato [2016] PGSC 13 (26 April 2016).

[8]Orders of the General Court of the EU in Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v European Council of 28 February 2017.

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

has refused admit returned boats, Australian border guards have gone over to return asylum seekers only to the edge of Indonesian territorial waters, "where they are directed to make their own way back to Indonesia" (Ghezelbash 2022).

In sum, the practice of non-arrival policies via cooperative *pushbacks* that followed judicial constraints on unilateral return policies was transformed into a practice of delegated *pullbacks* after new judicial constraints emerged. As a result, non-liberal "third countries" assume responsibility for obviating access to liberal asylum systems and the legal link activating liberal safeguards is broken.

Although these developments clearly affect the substance of the international regime, one can argue that they can still be optimistically associated with a second-order contestation sequence in which political contestation does not openly invalidate liberal ambition. Rather, the widening gap between legal liberal expansion and political repression can be interpreted as intensifying organized hypocrisy: a situation in which states (and the EU) officially embrace expanding liberal norms while, at the same time, accepting, if not encouraging, their circumvention in practice (Brunsson 1989; Lavenex 2018b).

Most recently, however, certain developments point at a potential tilt to a third-order sequence of contestation, whereby states openly discredit their constraints under the LIO.

Demolition Or transformation?

Organized hypocrisy can be overcome either by bringing deeds in line with normative aspirations or by adapting normative aspirations to the deeds. In the latter case, the liberal order gives way to illiberal practice. Today's situation resonates in many ways with Goddard et al. (2024) notion of second endogenous feed-back sequence in which contestation is no longer only circumventing or undercutting but more and more overtly challenging liberal migration norms. This points toward a possible transformation of the international refugee regime towards "illiberal re-ordering" (Goddard et al. 2024). As recent studies on the decay of international norms underline, norms rarely just "die" or disappear, in most of the cases their normativity is upheld by "larger normative structures" (Percy and Sandholtz 2022: 935) even if the norms are violated in practice. A more fundamental change occurs when the "fundamental rule(s)" are replaced (ibid: 942). Although it would be difficult to retrace any direct causality, the current geopolitical context of power shifts and the rise of authoritarian ideologies provides a propitious context for such fundamental change. Referring to the dialectic of legal expansionism and political retrenchment, illiberal contestation turns into illiberal reordering when the law turns its back on liberal aspirations and privileges state sovereignty instead. Such a change should show in the adoption of illiberal laws and in the empowerment of actors and institutions who prioritize state interests over human rights. In the following, we discuss indications for such a tendency at two levels: the "de-legalization" of protection practices and the adoption of illiberal asylum laws.

De-legalizing Protection

As with the regime-expanding effect of legalization identified for the first sequence of order-consistent contestation, de-legalization has two dimensions: the compression of the substantive scope of protection and the downscaling of legal authority. Both these developments are very much in the continuation of the externalization process retraced above.

The compression of the substantive scope manifests itself both in external and internal refugee policies practiced by liberal democracies. Externally, it is most visible in what, in continuation of the policies of non-arrival, can be termed **outsourced policies of non-departure**. Such policies apply when asylum seekers are kept in closed detention camps (such as, e.g., on the Greek islands), in their region of origin in so-called countries of first asylum, or within "safe zones" in their home country. With each stage, the relationship between legal rights, liberal safeguards against abusive authority, and state responsibility based on territory becomes weaker. The original "corrective effect" of liberal asylum policy, i.e., the idea to re-establish people's individual rights via protection by another state, and herewith the substance of protection, gets lost.

In the case of the detention of asylum seekers, liberal democracies have exploited legal ambiguity in the 1951 Convention, which postulates freedom of movement for refugees within the territory (Article 26 and Article 31 (2)) but does not explicitly regulate the situation of asylum seekers. This legal gap has subsequently been closed by rulings referring to the ICCPR, the ECHR, and other instruments of human rights law that clearly circumscribe the scope within which detention may be lawful (Goodwin-Gill and McAdam 2007:467). In practice, however, detention decisions in liberal democracies are often taken by administrative decree, with a relatively wide scope of discretion, and hence in a weakly legalized manner (Coen 2021:347). When basic human rights conditions are violated, as documented for detention facilities in Europe and, in even more blatantly, in adjacent countries such as Libya, the idea of "protection" conveys into "cruelty" (Barnes 2022; Sajjad 2022).

Another, more subtle transformation of protection advances with other policies of non-departure that privilege refugee admission in countries of first asylum or so-called "safe zones" within the country of origin via development assistance, operational support, and humanitarian aid, while promoting host societies' and refugees' self-reliance. In doing so, these policies shift the notion of refugee protection away from one in which state authorities re-establish a person's individual rights based on legal status and judicially enforceable entitlements toward a more general policy of humanitarian and development support for host communities and refugees alike. The EU's migration "compacts" signed with Jordan, Lebanon, or Ethiopia since 2016 put this approach into practice, and so does the Global Compact for Refugees signed within the framework of the United Nations in 2018 (Khan and Sackeyfio 2018; Fakhoury 2019). A further, more contested example is the establishment of "safe areas" within countries of origin of refugees (Alhborn 2011), such famously propagated by Turkish President Erdogan in Syria, and the concomitant adoption of the "internal protection alternative" in national asylum systems (Ghrainne 2020), providing another basis for dismissing asylum applications from such countries. This shift toward protection "in the region" does not violate international refugee or human rights law. It weakens, however, the liberal fundaments of the regime by relying on informal mechanisms favoring political discretion over legal entitlements and hollowing out the scope of protection.

The trend toward de-legalization in terms of modes of governance and substance of protection also shows in liberal democracies' internal policies. Paradoxically, the perhaps most salient manifestation of this trend is one that is often seen as a case of geopolitical or racially motivated favoritism:

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

liberal democracies' admission of Ukrainian refugees (Sow 2022). While it is true that European countries have welcomed Ukrainian refugees fleeing Russia's war of aggression in comparatively generous terms, giving protection to persons that would not necessarily fulfill the narrow definition of the 1951 Convention, it is important to note that the humanitarian status offered by the EU's Temporary Protection Directive falls well below the scope of legal protection and social, economic, and political entitlement guaranteed under the Convention. Contrary to the highly legalized individual refugee status determination procedure, the admission of Ukrainian refugees constitutes a return to the institutional practice of the inter-war period under the League of Nations, when refugees were admitted "prima facie" on the basis of group determination (Long 2013a). As in the 1920s and 1930s, such group determination is ad hoc and subject to political choice, thereby conflating liberal and geopolitical motives. This contrasts strongly with the universalist rule of law foundations of the post-World War II refugee regime.

Legalizing Illiberalism

While de-legalization can be seen as a way to establish alternative, less encompassing, and less resilient norms, we refer to legalized illiberalism when states change their asylum laws in ways that openly contradict international refugee law—and when these new laws are upheld by the courts. Illiberal laws criminalizing humanitarian rescue and, more generally, civil support for refugees have been passed in several European countries (Basaran 2015). Hungary, Denmark, and the UK have passed legislation that invalidates their obligations under the Geneva Convention by shifting responsibility for examining asylum claims to not further defined "fourth countries" (i.e., countries with which an asylum seeker needs not have had contact before; see UNHCR 2021). Declaring any asylum claim submitted by a person lacking the necessary documentation[9] inadmissible, justifying immediate pushback and dismantling reception capabilities, Hungary is seen to have practically "suspended its asylum system" both in its "legal framework" and "practical implementation" since 2020 (Hungarian Helsinki Committee 2023). The UK's "Illegal Migration Bill" submitted to Parliament in March 2023, too, "if passed, would amount to an asylum ban—extinguishing the right to seek refugee protection in the United Kingdom for those who arrive irregularly, no matter how compelling their claim may be" (UNHCR 2023).

These laws go beyond earlier attempts at illiberal subversion by legalizing refoulement. To identify effective illiberal reordering, however, it will be key to examine counteraction by the judiciary and its effects. In the case of Hungary, both the ECHR and the CJEU have condemned breaches of European and international law. So far, however, these judgements have remained inconsequential, indicating a possible erosion of judicial authority in Europe. The same may be true in the UK, where the deal with Rwanda has received contrasting judgments by the High Court (approving) and the Appeal Court (disapproving)—motivating the government to seek redress with the Supreme Court and to announce the intention to leave the ECHR should the latter seek to constrain UK policy.[10] The fact that these developments take place in parallel with a more general move towards "supranational politics of forbearance" in the EU, entailing "the deliberate under-enforcement of the law" (Keleman and Pavone 2022), may indicated a possibility of illiberal reordering .

The decline of liberalism finally not only mirrors in the laws, it also appears in the wider normative environment, regulating the balance between liberal values and state sovereignty. Whereas refugee movements have always been associated with war and geopolitics (Zolberg 1988), the instrumentalization of refugees in violent conflicts has taken a new dimension after the end of the Cold War. Greenhill has famously captured this development with the notion of "weapons of mass migration" (Greenhill 2010). The strategic provocation of refugee flows has become common practice by authoritarian governments in Belarus, Russia, Turkey, and elsewhere. Yet it is the vulnerability of liberal values in western societies that turns these challenges into threats. The "societal securitization" of migration in liberal societies has prepared a fertile ground against which such militarized violence operates (Buzan 1997). The use of force, however, is not only imposed on western societies from the outside. Coercive violence against immigrants has also emerged from the inside and appears in detention, deportation, and border practices and laws (Mourad and Norman 2020). The use of force, coupled with the decline of legal safeguards, criminalization of humanitarian action and rescue operations, yield a sense of "strategic cruelty" (Sajjad 2022) that runs counter to liberal standards and contributes to a culture of moral "indifference," "unsettling bonds of solidarity and humanity" (Basaran 2015:215).

Conclusion

It has been argued that the institution of asylum functions as a corrective mechanism, aiming to rectify inherent deficiencies in a state-based LIO. Consequently, delving into the factors that uphold or restrict refugee policy enables us to apprehend the condition of the LIO from its margins.

Aligned with the theme of this Special Issue, this article examined the endogenous factors fuelling contestation within the international refugee regime. This focus helps taking a distance from overt external factors such as rising numbers of asylum seekers and refugees worldwide. Instead, it highlights subtle, structural forces that generate tensions from within. In essence, this perspective has unveiled inherent conflicts within the normative foundations of the refugee regime, fostering a dialectic of normative and political contestation from its inception. These contestations underscore the dynamic interplay between an evolving geopolitical landscape and the shifting normative equilibria in the LIO.

In summary, our analysis has disclosed three interlinked sequences of endogenous contestation and regime transformation. Originating from the inherent tension between state particularism and human rights universalism, the codification of the right for states to grant asylum without a corresponding right for individuals to be granted asylum in the 1951 Convention served as a source of order-consistent contestation, ushering in a first sequence of liberal regime expansion. Propelled by legal activists, courts, and international organizations and benefiting from a favorable geopolitical context, this expansion not only broad-

[9] That is, not possessing a valid visa, passport etc., hence being an "irregular" or "illegal" migrant.

[10] https://www.reuters.com/world/uk/uks-rwanda-deportation-plan-is-lawful-court-rules-2022-12-19/ and https://www.politico.eu/article/rwanda-ruling-migrant-uk-court/. It is notable that the Court of Appeal does not invalidate the illiberal policy of forcefully sending asylum seekers to "fourth countries," but only the conditions under which this is done—concretely arguing that Rwanda is not a safe country for refugees.

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

ened the regime substantially but also fortified its legal authority.

The subsequent phase of order-challenging contestation can be characterized as a sovereigntist counter-reaction to the preceding legal expansion, manifesting as a form of political subterfuge. We traced this subterfuge as a dialectic process wherein policies devised to circumvent legal challenges are caught up by new legal constraints, prompting new political evasions, and so forth. Facilitated by the waning influence of geopolitical motives for offering protection, these dynamics have led to a spiral of externalization. In this spiral, the act of granting protection has progressively shifted beyond the purview of liberal jurisdictions, compressed the substantive scope of protection and downscaled legal authority, with the legal system struggling to catch up.

This falling apart of liberal ambition and political practice has been characterized as a form of organized hypocrisy, wherein Western states formally uphold the norm of asylum but undermine it in practice (Lavenex 2018b, 2022). Does this trend signify an illiberal dismantling of the international refugee regime? Or is the refugee regime more resilient than current developments suggest? Linking up with recent literature on the death of international norms, we argued that a critical shift toward illiberal reordering occurs when states and erstwhile norm champions, including courts, cease to affirm the validity of liberal norms.

Amidst the backdrop of domestic politicization and securitization, the realm of asylum law and practice has significantly deviated from its liberal foundations. Legislation barring access to asylum, the externalization of protection duties through legal constructs like "safe fourth countries" or "safe zones" in crisis regions, and the endorsement of detention both within and outside liberal democracies collectively erode the substantive standards of protection. While Australian and US courts have validated such measures, European jurisprudence, partly echoing UNHCR positions, has hitherto maintained a more critical stance. However, this distinction loses relevance in the face of the proliferation of informal practices evading both national and supranational jurisdictions. This evasion not only undermines the foundational principle of the rule of law but also corrodes the authority of legal systems. These developments reveal the vulnerability inherent within liberal democracies, a fragility that adversaries have started capitalizing on in geopolitical conflicts.

In conclusion, these unfolding developments are intricately connected to broader shifts in the international order. The inquiry into whether we are witnessing the breakdown of the refugee regime or its metamorphosis lacks a clear-cut answer. The Western world's open reception of refugees escaping Ukraine reflects the ongoing intertwining of humanitarian efforts with geopolitical considerations. Simultaneously, it signifies a shift toward a more sovereign and non-universalist approach in refugee policy, privileging the political logic over that of individual rights. Such a trend may lead to a regime marked by rising inequalities in rights and status, further solidifying rather than alleviating disparities in power, ideology, and belonging in the international order.

Funding

This *research* was supported by the *nccr*—on the *move funded* by the *Swiss National Science Foundation grant* 205605.

References

Abbott, K. W., R. O. Keohane, A. Moravcsik, A. M. Slaughter, and D Snidal. 2000."The Concept of Legalization." *International Organization* 54 (3): 401–19.

Ahlborn, C. (2011). The normative erosion of international refugee protection through UN Security Council practice. *Leiden Journal of International Law*, 24 (4), 1009–1027.

Arendt, H. 1968. *Imperialism. The Origins of Totalitarianism*Vol. 2. New York: Houghton Mifflin Harcourt.

Bar-Tuvia, S. 2018. "Australian and Israeli Agreements for the Permanent Transfer of Refugees: Stretching Further the (Il) Legality and (Im) Morality of Western Externalization Policies." *International Journal of Refugee Law* 30 (3): 474–511.

Barnes, J. 2022."Torturous Journeys: Cruelty, International Law, and Push-backs and Pullbacks over the Mediterranean Sea." *Review of International Studies* 48 (3): 441–60.

Barnett, L. 2002. "Global Governance and the Evolution of the International Refugee Regime." *International Journal of Refugee Law* 14 (2_and_3): 238–62.

Basaran, T. 2015."The Saved and the Drowned: Governing Indifference in the Name of Security," *Security Dialogue* 46 (3): 205–20.

Bauböck, R. 2016. "Why Liberal Nationalism Does Not Resolve the Progressive's Trilemma: Comment on Will Kymlicka's Article:"Solidarity in Diverse Societies." *Comparative Migration Studies* 4 (1): 1–6.

Betts, A., G. Loescher, and J Milner. 2008. *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the 21st Century*. London: Routledge.

Bommes, M., and A. Geddes. 2000. *Immigration and Welfare: Challenging the Borders of the Welfare State*. London: Routledge.

Brunsson, N. 1989. *The Organization of Hypocrisy: Talk, Decisions and Actions in Organizations*, New York: John Wiley & Sons.

Buzan, B. 1997. "Rethinking Security after the Cold War." *Cooperation and conflict* 32 (1): 5–28.

Búzás, Z.I. 2017."Evading International Law: How Agents Comply with the Letter of the Law but Violate Its Purpose," *European Journal of International Relations* 23 (4): 857–83.

Cantor, D. J. (2015). Reframing relationships: revisiting the procedural standards for refugee status determination in light of recent human rights treaty body jurisprudence. *Refugee Survey Quarterly*, 34 (1), 79–106.

Carens, J. H. 1987. "Aliens and Citizens: The Case for Open Borders." *The review of politics* 49 (2): 251–73.

Chetail, V. 2019. *International Migration Law*. Oxford: OUP.

Coen, A. (2021). Can't be held responsible: Weak norms and refugee protection evasion. *International relations*, 35 (2): 341–62.

Dastyari, A., and A. Hirsch. 2019. "The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy," *Human Rights Law Review* 19 (3): 435–65.

Dastyari, A., A. Nethery and A Hirsch, eds. 2022. *Refugee Externalisation Policies: Responsibility, Legitimacy and Accountability*. London: Taylor & Francis.

Dastyari, A., and M O'Sullivan. 2016."Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah (2016)." *Monash University Law Review* 42 (2): 308–228.

Davies, S. E. 2007. Redundant or essential? How politics shaped the outcome of the 1967 protocol. *International Journal of Refugee Law*, 19 (4), 703–728.

Deitelhoff, N., and L. Zimmermann. 2020. "Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms." *International Studies Review* 22 (1): 51–76.

Fakhoury, T. 2019. "Multi-level Governance and Migration Politics in the Arab World: The Case of Syria's Displacement." *Journal of Ethnic and Migration Studies* 45 (8): 1310–26.

Finnemore, M., and K. Sikkink. 1998. "International Norm Dynamics and Political Change." *International Organization* 52 (4): 887–917.

FitzGerald, D. S. 2019. *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers*. Oxford: Oxford University Press.

Ghezelbash, D. 2018. *Refuge Lost: Asylum Law in an Interdependent World*. New York: Cambridge University Press.

———. 2020."Hyper-Legalism and Obfuscation: How States Evade Their International Obligations towards Refugees." *The American Journal of Comparative Law* 68 (3): 479–516.

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

———. 2022."Chapter 3: Australia's Boat Push-Back Policy and 'Enhanced Screening': Hyper-legalism and Obfuscation in Action," *In Refugee Externalization Poicies*, edited by A. Dastyari, A. Nethery and A. Hirsch; London: Taylor and Francis.

Ghráinne, B. N. 2020. "Safe Zones and the Internal Protection Alternative." *International & Comparative Law Quarterly* 69 (2): 335–64.

Goddard, S., R. R. Kerbs, C. Kreuder-Sonnen, and B Rittberger. 2024. "Contestation in a World of Liberal Order." *Global Studies Quarterly*, 4 (2), Special Forum: "Its own worst enemy: Liberal order and endogenous sources of contestation."

Goodman, S. W., and T. B. Pepinsky 2021. "The Exclusionary Foundations of Embedded Liberalism." *International Organization* 75 (2): 411–39.

Goodwin-Gill, G., and J. Mc Adam 2007. *The Refugee in International Law*, Oxford: Oxford University Press.

Grahl-Madsen, A. 1982."International Refugee Law Today and Tomorrow," *Archiv des Völkerrechts* 20 (3): 411–67.

Grandi, P. 2020. UNHCR's anniversary is no cause for celebration, online at https://www.unhcr.org/neu/48989-unhcrs-70th-anniversary-is-no-cause-for-celebration.html (last visited on 11.7.2023).

Greenhill, K. M. 2010. "Weapons of Mass migration." In *Weapons of Mass Migration*. Ithaka NY: Cornell University Press.

Haddad, E. 2003. "The Refugee: The Individual between Sovereigns." *Global Society* 17 (3): 297–322.

Hathaway, J. 2005. *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press.

Hollifield, J. F. 1992. *Immigrants, Markets, and States: The Political Economy of Postwar Europe*. Boston: Harvard University Press.

Hungarian Helsinki Committee. 2023. No access to asylum. Information note of 13 June 2023, online at https://helsinki.hu/en/ (last visited 13.7.2023).

Huysmans, J. 2006. *The Politics of Insecurity: Fear, Migration and Asylum in the EU*. London: Routledge.

Kelemen, R. D., and T. Pavone. 2022. "Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union." World Politics. 75 (4): 779–825.

Khan, F., and C. Sackeyfio. 2018. "What Promise Does the Global Compact on Refugees Hold for African Refugees?." *International Journal of Refugee Law* 30 (4): 696–8.

Krasner, S. D. 1999. *Sovereignty: Organized Hypocrisy*, Princeton, NJ: Princeton University Press.

Kymlicka, W., and K. Banting. 2006. "Immigration, Multiculturalism, and the Welfare state." *Ethics & International Affairs* 20 (3): 281–304.

Lake, D. A., L. L. Martin, and T. Risse. 2021. "Challenges to the Liberal Order: Reflections on International Organization." *International organization* 75 (2): 225–57.

Lambert, H. 1999."The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion." *International Journal of Refugee Law* 11 (3): 427–50.

Lavenex, S. 1999. *Safe Third Countries. Extending the EU Asylum and Immigration Policies to Central and Eastern Europe*. Budapest: CEU Press.

———. 2018a."Migration." in T. Risse, A. Börzel and A. Draude (eds.), *The Oxford Handbook of Governance and Limited Statehood*, Oxford: OUP.

———. 2018b. "Failing Forward'towads Which Europe? Organized Hypocrisy in the Common European Asylum System." *JCMS: Journal of Common Market Studies* 56 (5): 1195–212.

———. 2019. "Regional Migration Governance–building Block of Global Initiatives?." *Journal of Ethnic and Migration Studies* 45 (8): 1275–93.

———. 2022."The Cat and Mouse Game of Refugee Policy Externalization: Between Law and Politics." in A. Dastyari, A. Nethery and A. Hirsch (eds.), *Refugee Externalization Policies. Responsibility, Legitimacy, and Accountability*. London: Routledge.

Loescher, G. 1993. *Beyond Charity. International Cooperation and the Global Refugee Crisis*, Oxford: OUP.

———. 2001. *The UNHCR and World Politics: a Perilous Path*. OUP Oxford.

Long, K.. 2013a. "when Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection." *Migration Studies* 1 (1): 4–26.

Martin, D.A. 1989. "Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy." *International Migration Review* 23 (3): 547–78.

Mathew, P., and T. Harley 2016. *Refugees, regionalism and responsibility*. London: Edward Elgar Publishing.

McKeown, R. 2009."Norm Regress: US Revisionism and the Slow Death of the Torture Norm." *International Relations* 23 (1): 5–25.

Moreno-Lax, V., and M. Giuffré. 2019. "The Rise of Consensual Containment: from 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows," in S. Juss (ed.) *Research Handbook on International Refugee Law*, Cheltenham: Edward Elgar.

Mourad, L., and K. P. Norman. 2020. "Transforming Refugees into Migrants: Institutional Change and the Politics of International Protection." *European Journal of International Relations* 26 (3): 687–713.

Müller, P., and P. Slominski. 2021."Breaking the Legal Link but Not the Law? The Externalization of EU Migration Control through Orchestration in the Central Mediterranean," *Journal of European Public Policy* 28 (6): 801–20.

Nantermoz, Olivia 2020. "International Refugee Protection and the Primary Institutions of International Society." *Review of International Studies* 46 (2): 256–77.

Nethery, Amy, and Gordyn. 2014."Australia–Indonesia Cooperation on Asylum-Seekers: a Case of "Incentivised Policy Transfer." *Australian Journal of International Affairs* 68 (1): 177–96.

Noiriel, Gérard 1991. *La tyrannie du national. Le Droit D'asile En Europe 1793-1993*, Paris: Calman Lévy.

O'Brien, B. 2016. "Extraterritorial Detention Contracting in Australia and the UN Guiding Principles on Business and Human Rights." *Business and Human Rights Journal* 1 (2): 333–40. doi:10.1017/bhj.2016.12.

Oberoi, P. 2001. "South Asia and the Creation of the International Refugee Regime." *Refuge: Canada's Journal on Refugees* 19 (5): 36–45.

Office of the High Commissioner for Human Rights (OHCHR). 2018. The principle of *non-refoulement* under international human rights law, online at www.ohchr.org.

Owen, D. 2020. *What Do We Owe to Refugees?* London: Polity.

Panke, D., and U. Petersohn. 2012."Why International Norms Disappear Sometimes." *European Journal of International Relations* 18 (4): 719–42.

Percy, S. V., and W. Sandholtz. 2022. "Why Norms Rarely Die." *European Journal of International Relations* 28 (4): 934–54.

Rausis, F. 2023. Restrictive North versus Permissive South? Revisiting Dominant Narratives on the Evolution of the Refugee Regime. *Journal of Immigrant and Refugee Studies*, 1–16.

T. Risse-Kappen, S. C., and K. RoppSikkink (eds) 1999. *The Power of Human Rights: International Norms and Domestic Change*. New York: Cambridge University Press.

Ruhs, M. 2013. "The Price of rights." In *The Price of Rights*. Princeton: Princeton University Press.

Sajjad, T. 2022. Strategic Cruelty: Legitimizing Violence in the European Union's Border Regime. *Global Studies Quarterly*, 2 (2): ksac008.

Schierup, C. U., P. Hansen, and S. Castles. 2006. *Migration, Citizenship, and the European Welfare state: a European Dilemma*. OUP Oxford.

Sharpe, M. 2013. Organization of African Unity and African Union Engagement with Refugee Protection: 1963–2011. *African Journal of International and Comparative Law*, 21 (1), 50–94.

Simmons, B. A., and H. E. Goemans. 2021. "Built on Borders: Tensions with the Institution Liberalism (thought it) Left behind." *International Organization* 75 (2): 387–410.

Sow, M. J. 2022. "Ukrainian Refugees, Race, and International Law's Choice between Order and Justice." *American Journal of International Law* 116 (4): 698–709.

Tallberg, J., and M. Zürn. 2019. "The Legitimacy and Legitimation of International Organizations: Introduction and Framework." *The Review of International Organizations* 14: 581–606.

Teitelbaum, M. S. 1984. "Immigration, Refugees, and Foreign Policy." *International organization* 38 (3): 429–50.

Teubner, G. 1993. *Law as an Autopoietic System*. London: Blackwell.

Thielemann, E., and Mogens Hobolth. 2016."Trading Numbers vs. rights? Accounting for Liberal and Restrictive Dynamics in the Evolution of Asylum and Refugee Policies," *Journal of Ethnic and Migration Studies* 42 (4): 643–64.

Torpey, John. 2000. *The Invention of the Passport*. Cambridge: Cambridge University Press.

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

UNHCR. 2007. *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*. Geneva: UNHCR.

———. 2021. *Note on Externalization*. Geneva: UNHCR.

———. 2023. UK asylum and policy and the Illegal Migration Bill, 7.3.2023, online at https://www.unhcr.org/uk/what-we-do/uk-asylum-and-policy/uk-asylum-and-policy-and-illegal-migration-bill

Walzer, M. 1983. *Spheres of Justice. A Defense of Pluralism and Equality*, Oxford: OUP.

Wendt, A. 1999. *Social Theory of International Politics*. Cambridge: Cambridge University Press.

Wiener, A. 2004. Contested compliance: Interventions on the normative structure of world politics. *European journal of international relations*, 10 (2), 189–234.

Wiener, A. 2018. *European citizenship practice: building institutions of a non-state*. London: Routledge.

Zolberg, A. R. 1988. "The Roots of American Refugee Policy." *Social Research* 55 (4): 649–78.

Zürn, M. 2018. *A Theory of Global Governance: Authority, Legitimacy, and Contestation*. Oxford: OUP.

Downloaded from https://academic.oup.com/isagsq/article/4/2/ksae029/7659924 by Universite de Geneve user on 03 May 2024

Lavenex, Sandra (2024) The International Refugee Regime and the Liberal International Order: Dialectics of Contestation. *Global Studies Quarterly*, https://doi.org/10.1093/isagsq/ksae029

© The Author(s) (2024). Published by Oxford University Press on behalf of the International Studies Association. This is an Open Access article distributed under the terms of the Creative Commons Attribution License (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.