

The Limits of the Limits of Idealism: Rethinking American Refugee Policy in an Insecure World

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[I]deals can be pursued effectively only if decisionmakers are alert to the distribution of power, national interests, and the consequences of their policies.

—Jack Goldsmith & Stephen D. Krasner¹

Any honest depiction of the human condition around the world is marred by the existence of millions of refugees who have fled their homes in response to persecution and conflict.² Hundreds of thousands of Sudanese citizens now live in camps across the border in Chad, where bandits and Janjaweed guerrillas subject them to frequent attacks and endanger their food supply.³ About 50,000 Iraqis flee their country in any given month,⁴ joining millions of other forced migrants from Asia and Africa in an uncertain search for safety.⁵ Although the global refugee population has

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¹ Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47, 48 (2003).

² Scholars, policymakers, and civil society groups often use the term “refugee” to describe individuals fleeing from conflict who have crossed national borders. See ARISTIDE R. ZOLBERG, ASTRI SUHRKE & SERGIO AGUAYO, *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* 33 (1989) (defining refugees as “persons whose presence abroad is attributable to a well-founded fear of violence.”). Nonetheless, the precise legal definition of a refugee applying in any given situation tends to be somewhat more technical. The United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, and the associated Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, require that refugees prove certain grounds of persecution in a process of individual adjudication. In mass influx situations, the United Nations High Commissioner for Refugees (UNHCR) applies a more expansive definition which generally requires group determinations. Similarly, states draw upon regional instruments with wide definitions in defining individuals fleeing from violence as refugees. For further discussion, see *infra* Part II. See also Mariano-Florentino Cuéllar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 GEO. J. INT’L L. 583, 611 (2006).

³ See Travis Fox, *At a Camp in Chad, Hope Wanes*, WASH. POST, Mar. 8, 2007, at A16.

⁴ See Sudarsan Raghavan, *War in Iraq Propelling a Massive Migration*, WASH. POST, Feb. 4, 2007, at A1.

⁵ See U.N. HIGH COMM’R FOR REFUGEES, *REFUGEES BY NUMBERS 2006 EDITION* (2006)

dropped by a third since 1980, to 8.4 million, serious refugee-related problems continue to fester throughout the world.⁶ Most refugees live a marginal existence in sprawling camps in the developing world where they are subject to the threat of violent attacks from combatants, coercion, and banditry.⁷ The civil strife, official brutality, persecution, and ethnic cleansing currently fueling refugee flows show no signs of abating.⁸ Because of this, and despite recent drops, the refugee population can still fluctuate wildly in response to humanitarian disasters such as the Rwandan genocide of the 1990s.⁹ Indeed, the relatively low number of refugees currently reported by the United Nations High Commissioner for Refugees (UNHCR) understates the size of the problem, because it does not include the millions of internally displaced people who simply have yet to cross a national border or who face the threat of persecution but have yet to flee from it.¹⁰ Even the worldwide population of people who qualify as refugees under narrow, technical definitions remains unacceptably high and includes large numbers of “protracted refugees,” who have been living in camps for decades—and in some cases, as with the Palestinian population, generations—with no end in sight.¹¹

U.S. refugee policy constitutes a major part of the global response to these conditions. But that response is itself limited. On the one hand, American generosity to refugees is evident in the size of the nation’s contributions to UNHCR, the United Nations’ global refugee advocate.¹² Americans also operate the largest program for resettling refugees in an advanced industrialized country¹³ and have historically demonstrated significant concern about the underlying roots of refugee problems.¹⁴ On the other hand, certain features of U.S. policy should trouble those with genuine concern for refugees, particularly those who feel the nation’s responsibility is greater at a time of such considerable American power and influence. Federal offi-

[hereinafter REFUGEES BY NUMBERS], available at <http://www.unhcr.org/basics/basics/4523b0bb2.pdf>.

⁶ See *id.*

⁷ See Cuéllar, *supra* note 2, at 627–28.

⁸ See *id.* at 709–11 (discussing the difficulty of entirely mitigating root causes).

⁹ See *id.* at 591–92 (discussing the mass influx of refugees to surrounding countries during and after the Rwandan genocide).

¹⁰ See REFUGEES BY NUMBERS, *supra* note 5.

¹¹ See U.N. High Comm’r for Refugees, Executive Comm. of the High Comm’r Programme, *Protracted Refugee Situations*, U.N. Doc. No. EC/54/SC/CRP.14 (June 30, 2004), available at <http://www.unhcr.org/excom/excom/40c982172.pdf>.

¹² See U.N. High Comm’r for Refugees, *Government of the United States of America—UNHCR Donor Profile and Donor History* (Dec. 31, 2006), available at <http://www.unhcr.org/partners/PARTNERS/3b9f6316a.html>.

¹³ See REFUGEES BY NUMBERS, *supra* note 5.

¹⁴ See generally TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* (2005) (discussing American efforts to support the reconstruction of Europe through the Marshall Plan); SADAOKO OGATA, *THE TURBULENT DECADE* (2006) (discussing American concern over conditions in the Balkans).

cials, for instance, have failed to fill tens of thousands of annual slots for refugees in the American refugee resettlement program since 1999.¹⁵ American policymakers have moved to address the needs of only a tiny fraction of the refugees from Iraq that American action has contributed to generating, only offering to resettle about 7000 a year.¹⁶ The asylum adjudication system allowing refugees to seek protection if they reach American shores has grown increasingly restrictive,¹⁷ and American policymakers have pointedly refused to rule out interdiction measures in the event of a future mass influx from Haiti or Cuba.¹⁸ Beyond their support of UNHCR, U.S. officials have made meager efforts to assuage the concerns of the vast majority of present and future refugees whose lives are bound up in squalid camps or put at risk in brutal humanitarian disasters such as the one in Darfur.¹⁹

Given such a world, this Essay considers how a politically realistic American refugee policy could better serve both humanitarian needs and American interests. A reconceived American refugee policy could tackle lingering problems in the nation's resettlement and asylum systems. But more crucially, it would focus less on debates about asylum or resettlement and more on pressuring countries and UN organizations to better address mass refugee movements and, more generally, the conditions affecting the vast majority of refugees. Because of America's unique actual and symbolic influence, American leadership can potentially reshape how international organizations address refugee problems and how other advanced industrialized countries do so. In the process, American choices can gradually alter how the game is played in a crucial domain where human needs and national interests converge.

As Americans take stock of those human needs and deliberate about their national interests, they encounter few images more haunting than those

¹⁵ See DAVID A. MARTIN, DEP'T OF STATE, THE UNITED STATES REFUGEE ADMISSIONS PROGRAM: REFORMS FOR A NEW ERA OF REFUGEE RESETTLEMENT iv (2004) [hereinafter REFUGEE ADMISSIONS PROGRAM], available at www.state.gov/documents/organization/36495.pdf (describing "a steep fall-off in refugee admissions for fiscal years 2002 and 2003," from an average of 76,000 in the previous five years to below 28,000 annually).

¹⁶ Arshad Mohammed, *U.S. to Take in More Iraqi Refugees After Criticism*, REUTERS ONLINE, Feb. 14, 2007, http://www.reuters.com/article/homepageCrisis/idUSN14418722.CH_2400 ("The United States said on Wednesday it aimed to interview about 7,000 Iraqi refugees for possible U.S. resettlement by the end of September as it sought to blunt criticism that it took in only 202 last year.").

¹⁷ See, e.g., Michele R. Pistone & John J. Hoeffner, *Rules are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 168–72 (2006); Laura I. Bauer, Note, *They Beg for Our Protection and We Refuse: U.S. Asylum Law's Failure to Protect Many of Today's Refugees*, 79 NOTRE DAME L. REV. 1081, 1088–94 (2004).

¹⁸ See generally Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT'L J. REFUGEE L. 677 (2006) (discussing the legal problems associated with potential American responses to mass influx emergencies directly impacting the United States).

¹⁹ See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 279 (2002).

of refugee families, burdened by fear, marching across arid plains in Africa or Asia, or adrift in the Caribbean. “How,” asked former United States Ambassador to the United Nations Richard Holbrooke, “can the world turn away from people made homeless by political evil?”²⁰ Indeed, refugee problems have historically been unavoidable for the United States, both because refugees desperately seek to reach its shores and because American interests and policies are capable of exerting some impact on global refugee flows. Yet, as will emerge, current policy places disproportionate emphasis on a relatively small number of forced migrants, neglects opportunities to address some of the most pressing problems associated with mass influx emergencies, and leaves the United States vulnerable to charges that it unduly disregards its responsibilities under international law.

As will also become clear, these limitations matter not only because of humanitarian concerns, but because many American interests are shaped by the success or failure of refugee policy. Refugee problems routinely implicate both humanitarian needs and strategic problems affecting global stability and security. American efforts to promote peace and security in Africa are damaged by the decisions of refugee communities in Chad to support Chadian rebels,²¹ just as efforts to promote peace in the Middle East are complicated by outflows of Iraqi refugees into Syria and Jordan, or by third-generation Palestinians born into refugee camps. In addition, compliance with international law is valuable, particularly in a world increasingly skeptical about U.S. motives. American policymakers should therefore consider the provisions of international refugee law and associated doctrines of human rights law in shaping the nation’s approach to the needs of refugees.

The alternative to the status quo involves neither rejection of humanitarian needs nor neglect of the political realities that can sabotage even the most idealistic policy. Instead, U.S. policymakers should best address refugee-related dilemmas by adapting a pragmatic approach that could be termed “strategic humanitarianism.” Four basic principles would define that approach. First, policymakers should approach refugee problems—and related domains involving human rights, humanitarian relief, and foreign policy—by taking a subtle and long-term view of American interests. Second, the United States government should seek to respect its international legal commitments, and, when these commitments are allegedly incompatible with American interests, the United States should articulate the interest in question and change its international legal commitment. Third, policymakers should begin from the premise that it may be necessary to advance American interests through robust use of political, economic, and military power when it is possible to do so at a reason-

²⁰ ARTHUR HELTON, *THE PRICE OF INDIFFERENCE* 1 (2002).

²¹ See Emily Wax, *A Loss of Hope Inside Darfur Refugee Camps: Over Two Years, a Genocide Comes Into View*, WASH. POST, Apr. 30, 2006, at A12.

able cost. Finally, policymakers should display sensitivity to political and organizational complexities.

This approach not only represents a laudable strategy to rekindle trust in American policymakers in a post-Iraq world, but also underscores the value of reshaping certain priorities in American refugee policy. Existing refugee law and humanitarian concerns render asylum and resettlement important parts of any principled refugee policy. However, there is a tenuous and imperfect connection between policies of asylum and resettlement and the needs of most refugees. Given this fact and the political constraints on dramatically expanding either program, American refugee policy should shift its focus toward addressing mass influx emergencies around the world. Doing so entails both growing American commitments to financially supporting the work of UNHCR and competent NGOs and refashioning the capacity of these organizations to diagnose and respond to different security problems.

Because of their unique ability to influence the global order, American officials can lower the risk that aid funneled through the refugee system will subsidize ongoing conflict. Lowering this risk, however, requires the development of protocols to monitor, restrict, and redirect aid. American policymakers should also strengthen refugee policy by encouraging more effective responses to mass influx emergencies and by using political, economic, and military resources, when reasonably possible, to address the humanitarian emergencies that generate such large refugee flows. Together, these approaches reflect the combination of pragmatism, respect for legal commitments, and enlightened conceptions of national interest defining strategic humanitarianism.

The preceding arguments unfold in three parts. Part I reviews current American policy and its costs, with a particular focus on the consequences of failing to meet the security-related needs of the vast global refugee population. Part II develops the concept of strategic humanitarianism, explaining how and why American policy should be guided by this perspective. Part III uses strategic humanitarianism to evaluate specific policy changes that can better address refugee-related legal and policy problems.

I. U.S. REFUGEE POLICY IN PERSPECTIVE

A. *The Structure of American Refugee Policy: Uncertain Asylum, Constrained Resettlement, and Partial Global Engagement*

1. *Asylum*

For almost as long as the United States has been a nation, people have been coming to its shores seeking asylum from persecution. Because current American immigration policy is fairly restrictive, however, people

seeking asylum today must jump through a series of increasingly narrow hoops.²² The refugees must convince an immigration inspector at an international airport, a seaport, or a land port of entry that they harbor a credible fear of persecution if they are forced to return to their country. If the agent does not bar their application for asylum via increasingly restrictive procedural rules, they must eventually navigate an intricate asylum adjudication system, which requires convincing immigration adjudicators that they are especially worthy of protection. The asylum applicant must show, for example, that his or her fear meets a standard of being “well-founded” that is itself based not only on international law, but also on interpretations of domestic law providing an additional (and often more demanding) content to the definition over time.²³ In 2005, only thirty-two percent of the asylum applicants whose cases were adjudicated convinced adjudicators that they met the relevant standards.²⁴

Tens of thousands of asylum seekers, with thousands of refugees among them, seek protection through this adjudication system each year.²⁵ Although they come from all over the world, these refugees have a common ability to reach American shores. Haitians and Cubans manage this through physical proximity, though in many cases they do so at considerable physical peril.²⁶ Others come from a motley assemblage of regions that have experienced internal or cross-border violence, including Africa, Central Asia, South America, and the Balkans. Adjudicators consider their applications as one part of a system through which the American people meet their responsibilities under international law. These responsibilities

²² See Pistone & Hoeffner, *supra* note 17 (discussing the increasingly narrow scope of asylum in the United States). See also Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101 (2006); Gerald L. Neuman, *On the Adequacy of Direct Review After the Real ID Act*, 51 N.Y.L. SCH. L. REV. 133 (2006).

²³ Applicants may also qualify for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (1984). But the threshold showing sufficient grounds for fear of torture is even more demanding than showing persecution. See, e.g., *Auguste v. Ridge*, 395 F.3d 123, 153 (3d Cir. 2005) (“[The alien] must establish that it is more likely than not that he will be subjected to torture if removed.”). In addition, while most asylum applicants must demonstrate a well-founded fear of *future* persecution, federal regulations allow for a discretionary grant of humanitarian asylum in cases of unusually severe past persecution, regardless of whether the applicant holds a well-founded fear of future persecution. See generally Rebecca H. Gutner, *A Neglected Alternative: Toward a Workable Standard for Implementing Humanitarian Asylum*, 39 COLUM. J.L. & SOC. PROBS. 413 (2006).

²⁴ DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2004 YEARBOOK OF IMMIGRATION STATISTICS 51 (2006) [hereinafter YEARBOOK], available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2004/Yearbook2004.pdf>.

²⁵ In 2005, for example, 53,813 persons arrived in the United States as refugees, of which 25,257 were granted asylum when they applied affirmatively or defensively. See KELLY JEFFERYS, DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT ON REFUGEES AND ASYLEES 1 (2006).

²⁶ See, e.g., Scott Fontaine, *A Long Way From Cuba*, TACOMA NEWS TRIBUNE, Feb. 13, 2007, at C01.

include both a prohibition on the refoulement (or expulsion) of genuine refugees along with a duty to help resolve the overall refugee problem.²⁷

In judging the extent to which the present asylum system meets those responsibilities, two additional aspects of the system are worth emphasizing. First, asylum adjudication in the United States is growing increasingly restrictive. A succession of changes between the late 1980s and the present have made it ever more difficult for asylum seekers (and the many refugees among them) to avoid being summarily excluded before applying for asylum at all,²⁸ to avoid having their case procedurally blocked because of legal changes made to antiterrorism laws passed since the mid-1990s,²⁹ and, given doctrinal changes reflecting court decisions and regulatory amendments, to prevail on the merits of an asylum claim.³⁰ In part as a result, the approval rate for asylum applications fell from an average of forty-five percent in the last four years of the 1970s to twenty-eight percent in the last four years of the 1990s.³¹

Access to asylum is even more restricted by the fact that applying for it depends on making it to U.S. territory in the first place, which proves exceedingly difficult for the vast majority of the world's refugees. Moreover, given American policies that diverge in troubling ways from humanitarian imperatives grounded in international law, refugees must confront more than simply natural or practical obstacles to reach American shores. On occasion, they must even confront U.S. Coast Guard and naval forces, as Haitians did in the late 1980s and early 1990s, when they were subject to American interdiction and repatriation without having their asylum claims adjudicated.³²

A second recurring feature of asylum adjudication is the relatively high degree of scholarly, public, and policymaking attention it receives compared to other features of refugee policy. A substantial portion of the refugees permitted to stay in the United States involve asylum adjudications. The vast majority of legal scholarship on refugee issues focuses predominantly on asylum issues. Asylum engenders greater Congressional

²⁷ See United Nations Convention Relating to the Status of Refugees, *supra* note 2; Protocol Relating to the Status of Refugees, *supra* note 2. Together, these treaties are commonly referred to as the "Convention and Protocol." The non-refoulement obligation is included in Article 33 of the Convention. The duty to cooperate with the United Nations in addressing refugee problems is included in Article II of the Protocol, and is further articulated in resolutions of the United Nations General Assembly and the Executive Committee of UNHCR.

²⁸ See Pistone & Hoeffner, *supra* note 17. For an alternative perspective, see generally David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673 (2000).

²⁹ See Neuman, *supra* note 22.

³⁰ See *id.* As noted below, changes in legal doctrine governing availability of asylum in the United States are not necessarily consistent with permissible (and, in some cases, obligatory) interpretations of international law.

³¹ YEARBOOK, *supra* note 24, at 51.

³² See Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1, 3 (1994).

controversy, reform, and discussion about refugees than any other topic involving refugees.³³ And, with some notable exceptions,³⁴ refugee advocates and advocacy organizations tend to concentrate much of their attention on helping people get asylum, reflecting to some extent the fact that legal advocacy can help individual refugees whose needs are especially salient, given their presence on American soil.

2. Resettlement

A second key component of U.S. refugee policy is a refugee resettlement program that allows a select group of refugees—generally those of special humanitarian or political concern to the government—to resettle in the United States. In 2005, about 53,800 refugees were admitted to the United States through this program, with the majority originating from Somalia, Laos, and Cuba.³⁵ United States government officials have used the resettlement program in past years to address the needs of Southeast Asian, Central American, and Balkan refugees.

Although the resettlement program has been the vehicle through which hundreds of thousands of refugees have come to the United States, the program faces a number of challenges. With some exceptions, the number of refugees resettled through the program has been shrinking over the past decade and a half.³⁶ These drops are the result of a range of factors, including security-related concerns following the September 11 attacks and the gradual evisceration of predictable flows of resettlement migration—such as migration from the former Soviet Union—that received consistent priority as a policy matter in prior decades. The drop is all the more conspicuous because in every year since 1999, U.S. policymakers have failed to fill the refugee admission slots set aside by presidential determination.³⁷ The shortcomings of the program in recent years illustrate the extent to which opportunities for humanitarian migration to the United States depend on bureaucratic priorities and effective cooperation among

³³ This is partly a qualitative judgment, but it reflects the relative paucity of hearings focused primarily on the resettlement program compared to the degree of discussion and reform primarily targeting the asylum adjudication system.

³⁴ See, e.g., *Current Issues in U.S. Refugee Protection and Resettlement Before the Subcomm. on Africa, Global Human Rights and Int'l Relations of the H. Comm. on Int'l Relations*, 109th Cong. 95–101 (2006) (testimony of Kenneth H. Bacon, President, Refugees Int'l).

³⁵ JEFFERYS, *supra* note 25, at 1.

³⁶ *Id.* at 1 fig.1 (showing the drop in refugee arrivals to the United States).

³⁷ REFUGEE ADMISSIONS PROGRAM, *supra* note 15. The presidential determination system meshes refugee-related admissions in the United States with the broader system of immigration targets under the Immigration and Nationality Act. Presumably, policymakers can react to massive changes in the overall refugee population by working to change the presidential determination amount. Moreover, given that the asylum adjudication process entails a measure of unpredictability, the refugee resettlement program can, in principle, compensate with a larger proportion of resettlement admissions when asylum-related admissions turn out to be unusually low.

a range of institutions (including UNHCR) that can result in a manageable strategy to fill the empty slots.³⁸

Second, even assuming that the resettlement program's slots remained at present levels or somewhat higher and were routinely filled, the United States cannot realistically accept a substantial percentage of the world's refugees. Resettlement remains limited even if the focus is on current refugees to whom the United States plausibly owes the most humanitarian concern, such as those leaving Iraq at a rate of about 50,000 a month. The United States is currently offering to take in about 7000 Iraqi refugees a year, yet UNHCR estimates that 3.8 million refugees have left Iraq since the fall of Saddam Hussein four years ago.³⁹ Of course, it is not the responsibility of the United States to take in every refugee in the world—not even every Iraqi refugee. Other countries have resettlement programs as well, but constraints rooted in the domestic politics of advanced industrialized countries limit the extent to which the refugee problem can be resolved through resettlement to those states.⁴⁰

3. *Partial Global Engagement*

A third component of U.S. refugee policy involves the nation's engagement with refugee-related humanitarian problems around the world. Such engagement is particularly relevant when it involves international organizations with major refugee-related responsibilities, such as UNHCR, or efforts to resolve humanitarian crises that generate underlying refugee populations, such as the one currently devastating Darfur. Here again, the record of the United States is a mixed one, reflecting a significant (though ultimately constrained) degree of concern among domestic constituencies, coupled with a measure of neglect and risk aversion.

These contradictory tendencies are plain in the approach U.S. policymakers have taken to UNHCR, the organization working to protect refugees under the auspices of the United Nations. In absolute terms the U.S. government provides more annual resources to UNHCR than any other country (about \$329 million in 2006).⁴¹ Yet, in terms of per capita contributions, the United States ranks ninth, behind major contributors such as Norway and the Netherlands.⁴² The United States has often failed to support UNHCR requests for Security Council action to mitigate physical secu-

³⁸ For an insightful analysis, see REFUGEE ADMISSIONS PROGRAM, *supra* note 15.

³⁹ Charles Recknagel, *U.S. Plans to Take Iraqi Refugees*, SPERO NEWS, Feb. 16, 2007, <http://www.speroforum.com/site/article.asp?id=8022>.

⁴⁰ In 2005, the United States resettled about twice as many refugees as the resettlement programs of other nations combined. See REFUGEES BY NUMBERS, *supra* note 5.

⁴¹ U.N. High Comm'r for Refugees, *Contributions to UNHCR Programmes for Budget Year 2006* (2007), available at http://www.unhcr.fi/se/how_i_can_help/pdf/donations_31_October_06.pdf.

⁴² U.N. High Comm'r for Refugees, *2005 Governmental Contributions to UNHCR per Capita* (2006), available at <http://www.unhcr.org/partners/PARTNERS/451be6b20.pdf>.

rity threats confronting refugees.⁴³ Although U.S. officials earmark the majority of the UNHCR budget by region and country, they do not earmark any portion of it specifically to address one of the most chronic deficiencies in UNHCR's programs: the protection of refugees from physical violence and insecurity.⁴⁴

Even beyond the realm of UNHCR, U.S. policymakers have shown considerably less interest than some of our allies (particularly the Scandinavian countries) in physical security problems and the mass influx emergencies that exacerbate these problems. United States policymakers have also avoided taking a leadership role in encouraging international organizations, NGOs, or other countries to cooperate in developing protocols to address the difficult problem of limiting, restricting, or redirecting aid when refugee camps become military bases used to continue a military conflict or to coerce refugees to stay against their will.⁴⁵ In some cases during the 1980s where it suited perceived American strategic interests, American policymakers turned a blind eye to militarization of refugee sanctuaries in Pakistan and Central America,⁴⁶ and, more recently, U.S. government officials have blocked or neglected to support United Nations Security Council action that would have meaningfully addressed refugee militarization.⁴⁷

A mixed record of American engagement is also evident in American responses to humanitarian emergencies. American policymakers have occasionally recognized the value of using the full range of military, diplomatic, and economic tools at their disposal to target the source of refugee crises. In the spring of 1991, for example, U.S. troops undertook Operation Provide Comfort to assist the Kurdish population in northern Iraq. Turkey refused to offer protection to the thousands of Kurdish refugees fleeing the repressive Iraqi government. The United States was instrumental in securing passage of Resolution 688, which established that refugee flows were enough to constitute a "threat to the peace" justifying substantial Security Council action under Chapter VII of the United Nations Charter.⁴⁸

⁴³ See OGATA, *supra* note 14, at 223 (describing a U.S. "nonresponse" to Rwandan government warnings that attacks of refugee camps were imminent); see also *id.* at 325 (indicating how the position of the United States "undermined the possibility of forging a solution").

⁴⁴ See U.N. High Comm'r for Refugees, *Government of the United States of America—UNHCR Donor Profile and Donor History* (2006) available at <http://www.unhcr.org/partners/PARTNERS/3b9f6316a.html> (discussing earmarks); Cuéllar, *supra* note 2, at 682–88 (regarding UNHCR shortcomings and needs with respect to the physical security of refugees).

⁴⁵ See Cuéllar, *supra* note 2, at 638–40; see also FIONA TERRY, *CONDEMNED TO REPEAT: THE PARADOX OF HUMANITARIAN ACTION* 114–55 (2002).

⁴⁶ See TERRY, *supra* note 45, at 78–79.

⁴⁷ See Samantha Power, *Bystanders to Genocide*, ATLANTIC MONTHLY, Sept. 2001, at 84, 103 ("On May 17, by which time most of the Tutsi victims of the genocide were already dead, the United States finally acceded to a version of [UN Commander Roméo Dallaire's plan [to mitigate the violence, but then] Pentagon stalling resumed.>").

⁴⁸ See David A. Martin, *Interdiction, Intervention and the New Frontiers of Refugee*

More recently, however, humanitarian disasters generating refugees have received relatively low priority in the hierarchy of American foreign policy goals. Examples include the American responses to the genocide in Rwanda in the 1990s and to the current situation in Darfur. The conflict in Darfur has generated about two and a half million forced migrants and killed nearly half a million people.⁴⁹ About a million people have been displaced within Sudan itself.⁵⁰ Hundreds of thousands more have crossed into neighboring Chad—thereby becoming bona-fide refugees—and have faced violence and insecurity there as the fighting has spread.⁵¹ Hence, while Darfur is a humanitarian atrocity for a host of reasons, the related problems of forced migration, and the spreading human misery and instability engendered in the region, constitute yet another important factor militating in favor of American engagement.⁵²

Admittedly, the origin of the conflict in Darfur is complicated. No doubt the problem will be difficult to control,⁵³ thereby complicating American and United Nations' initiatives to resolve the conflict. While the deteriorating situation in Sudan may be impossible to resolve entirely, American officials remain in a position to vigorously press for a robust United Nations force with a Chapter VII enforcement mandate and over 20,000 troops, which experts believe will be the minimum necessary to enforce a peace agreement.⁵⁴ NATO would then be in a position to offer logistical support. In the larger scheme, American decisions concerning the resources they will use to pressure the Sudanese government are as much an element of refugee policy as the existing resettlement program. Indeed, resolving the conflict in Darfur, which has already killed nearly half a million people, has the potential to affect far more actual and potential refugees than the resettlement program.⁵⁵

Law and Policy, 33 VA. J. INT'L L. 473, 478–79 (1993).

⁴⁹ Susan E. Rice, Anthony Lake & Donald M. Payne, Editorial, *We Saved Europeans. Why Not Africans?*, WASH. POST, Oct. 2, 2006, at A19.

⁵⁰ See REFUGEES BY NUMBERS, *supra* note 5.

⁵¹ See Lydia Polgreen, *Refugee Crisis Grows as Darfur War Crosses the Border*, N.Y. TIMES, Feb. 28, 2006, at A6; Rice et al., *supra* note 49.

⁵² Whether the conflict qualifies technically as a genocide is a function of the internecine quirks of international criminal law, but as David Luban has pointed out, the technical classification should not concern us. See generally David Luban, *Calling Genocide by Its Rightful Name: Lemkin's World, Darfur, and the UN Report*, 7 CHI. J. INT'L L. 303 (2006).

⁵³ See Samantha Power, *Dying in Darfur*, NEW YORKER, Aug. 30, 2004, at 58, available at http://www.newyorker.com/archive/2004/08/30/040830fa_fact1.

⁵⁴ See Rice et al., *supra* note 49.

⁵⁵ Of course, pressuring Sudan to act is not simple. British Prime Minister Tony Blair's proposal to entice the Sudanese government with debt relief, trade concessions, and aid would be more compelling if combined with direct engagement by high-level American officials, such as the Secretary of State, and backed by the United Nations-sanctioned threat or use of force. Indeed, given the Bush Administration's often-professed commitment to resolving the situation in Darfur, the relative absence of direct engagement by the Secretary of State thus far has been somewhat puzzling.

In the absence of a settlement, three developments are likely: untold numbers of refugees will die or face permanent injury; flows of refugees will continue spilling to Chad and neighboring countries; and refugee camps will increasingly become both targets of and centers for military activity.⁵⁶ The world witnessed precisely such a scenario in the Great Lakes region following the Rwandan genocide.⁵⁷ These realities emphasize a larger point: American political efforts abroad are deeply connected to its refugee policy. In effect, refugee policy depends not only on American asylum and refugee resettlement or pressuring host countries to treat refugees humanely. It also depends on the strategic and occasionally costly use of American political influence to pressure source countries.

B. Dynamics Driving American Refugee Policy

The preceding elements of American policy did not develop in a vacuum. They represent a response to the political environment at the intersection of migration rules, humanitarian endeavors, and foreign policy. Due to predictable domestic concerns about migration, political pressures work against refugee admissions.⁵⁸ Those pressures are likely exacerbated by the extent to which recent refugee flows to the United States—and to Europe—are made up of people from Asia and Africa, whose cultural, religious, linguistic, and racial differences spark unease among majority populations. Coupled with American legislators' willingness to use refugee-related legal changes to signal concern about the risk of terrorism, it is not surprising that recent trends have narrowed the ability of refugees to resettle in the United States, either through asylum adjudication or through the resettlement program.

As asylum and resettlement opportunities in the United States have shrunk, the key players in American refugee policy have sometimes appeared to be caught in a spiraling "restrictive asylum" dynamic capable of delivering an increasingly shrill debate about refugees and asylum. When asylum seekers and their advocates confront increasingly narrow opportunities to argue for humanitarian relief, it should come as no surprise that they will seek to push the limits of existing rules in an effort to evade increasingly harsh restrictions.⁵⁹ These efforts can make it easier for advocates of further restrictions to prevail,⁶⁰ which in turn may lead refugee

⁵⁶ For a discussion of why such trends are likely in this situation, see Cuéllar, *supra* note 2, at 638–41.

⁵⁷ *See id.* at 592–96.

⁵⁸ For an insightful account of the social factors and historical forces shaping anxiety about migration in the United States, see generally ARISTIDE ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006).

⁵⁹ *See, e.g.*, David A. Martin, *The Need for Balance*, 98 AM. SOC'Y INT'L L. PROC. 252, 253–54 (2004) ("Alleged abuses of the asylum system became a significant public issue, and a backlash began.").

⁶⁰ *See, e.g.*, Fed'n for American Immigration Reform, *A Look at Refugee and Asylum*

advocates to concentrate their attention on the increasingly restricted asylum process. Meanwhile, lawyers and their clients are left to further strain in search of ways to mitigate new strictures imposed by statutory and regulatory changes. Such a dynamic tended to harden the position of refugee advocates, making them more fearful of losing the refugee protections already in place (flawed though they might be), and less willing to consider pragmatic approaches to resolving refugee policy problems, including, for example, burden-sharing arrangements. These arrangements can help alleviate the pressures on American political actors in the event of a mass influx emergency and may contribute to reducing the proportion of refugees warehoused in camps in the developing world.⁶¹

The extent of such refugee warehousing, leaving the bulk of refugees in massive camps in the developing world, is itself the product of a larger political dynamic rooted in the compromises that have built the modern refugee protection system.⁶² For the most part, by keeping refugees in camps near national borders, host countries are able to avoid assuming the political and economic risks associated with integrating new refugee populations directly into their societies. UNHCR and its donor NGOs help funnel financial resources to host countries, which mitigate the cost of running and housing the camps. By helping to fund the system, governments of advanced industrialized countries assuage domestic political pressures for humanitarian action, thereby avoiding risky political, economic, or military ventures on behalf of marginalized populations. Unfortunately, this compromise fails to address the often squalid conditions in camps, the long-term problems of protracted refugee situations such as those afflicting Palestinian and clusters of African refugees, and the threats of coercion and violence that are endemic to many refugee camps around the world.⁶³

Given this assortment of practical and political obstacles, some observers might conclude from this dynamic that American interests simply fail to support a more generous refugee policy.⁶⁴ But such a view ignores

Numbers (Aug. 2003), http://www.fairus.org/site/PageServer?pagename=research_research41d1 (criticizing the size of the refugee and asylee population in the United States); Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA Patriot Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 517 (2002) (describing how immigration reforms of 1995 and 1996 were driven by “both real and perceived abuses.”).

⁶¹ Compare Deborah Anker, Joan Fitzpatrick & Andrew Shacknove, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295 (1998) (raising a host of normative objections to burden-sharing, including commodification) with Peter H. Schuck, *A Response to the Critics*, 12 HARV. HUM. RTS. J. 385 (1999) (defending refugee burden-sharing arrangements and decrying the tendency to merely wait for changes in “political will” to resolve refugee policy problems).

⁶² For a full description, see Cuéllar, *supra* note 2, at 612.

⁶³ See United Nations, *Protracted Refugee Situations: Millions Caught in Limbo, With No Solutions in Sight*, in TEN STORIES THE WORLD SHOULD HEAR MORE ABOUT (2006), http://www.un.org/events/tenstories_2006/story.asp?storyID=2600#.

⁶⁴ Cf. Goldsmith & Krasner, *supra* note 1. Some observers might dismiss the needs of many refugees fleeing from violence on the grounds that many of them would not meet the

three important points. First, although domestic political environments in advanced industrialized countries generate pressures against migration, they also generate considerable interest in humanitarian policy and compliance with international law.⁶⁵ Second, the concept of national interest is not self-explanatory: the interests of the American people, rather than being defined by a stable, predictable metric of material well-being, are subject to considerable political debate and competition.⁶⁶ As illustrated by the discussion below, even by defining the national interest in a fairly conventional manner—including considerations such as American geostrategic influence abroad—it may prove feasible to reshape American refugee policy to better serve those interests.

C. *The Consequences of Current American Policy*

American refugee policy is characterized primarily by an elaborate but increasingly restrictive asylum adjudication system, a resettlement policy that routinely fails to fill even the relatively meager number of annual slots available, and a mixed level of engagement with global humanitarian concerns that fuel refugee problems. Although American policy is unquestionably more generous than it could be, the incomplete nature of the policy has consequences. First, the policy leaves most refugees relatively marginalized from the policy's core features. Despite the intense controversy engendered by asylum and (to a somewhat lesser extent) resettlement, only a small percentage of refugees will ever qualify for asylum or resettlement in the United States or even in the European Union. To address the needs of the millions of refugee families who will never live in Basel or Boston, American policymakers must revisit complicated questions involving the financing and priorities of UNHCR and its NGO partners.⁶⁷ They must dwell on the feasibility of impacting the behavior of

strict and narrow definition of refugee status applied by asylum adjudicators in advanced industrialized countries. Cf. David A. Martin, *Large-Scale Migrations of Asylum Seekers*, 76 AM. J. INT'L L. 598 (1982). Nonetheless, broader definitions of refugee status are possible, in many cases, either under the Refugee Convention itself or under regional instruments. See Cuéllar, *supra* note 2, at 611 n.85. Moreover, the rights of refugees attach even before they have been adjudicated as such, which creates a basis for countries or international organizations to design policies providing protection to groups that are especially likely to contain large proportions of refugees. Finally, refugee-like populations are subject to a variety of other protections grounded in humanitarian law and human rights law that militate in favor of their protection. See *infra* Part II.B.

⁶⁵ See Michael Tomz, *The Influence of International Agreements on Foreign Policy Preferences* (Stanford Univ. Political Sci. Dep't Working Paper, Sept. 2005) (on file with author).

⁶⁶ Cf. Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597, 1598 (2003) (“[A] nation state is not an ‘it’ but a ‘they.’”).

⁶⁷ Cf. Stephen John Stedman, *Conclusions and Policy Recommendations*, in REFUGEE MANIPULATION: WAR, POLITICS, AND THE ABUSE OF HUMAN SUFFERING 167 (Stephen John Stedman & Fred Tanner eds., 2003).

nations who generate or host refugees. And they must consider the possibility of using political, economic, and military power to shape the conditions in which humanitarian emergencies arise in the first place.

Second, the current policy runs the risk of failing to act on opportunities to mitigate refugee needs that can exacerbate threats to peace and security. When refugee camps fall into the iron grip of guerrilla fighters who use them as bases for continuing conflict and exploit relief resources that should be going to civilians, combatants gain valuable new resources to spread their war.⁶⁸ Opposing belligerents then respond by invading the territory of host countries with refugee camps,⁶⁹ and, in some cases, by supporting efforts to topple host country governments. For instance, the militarized refugee camps in the aftermath of the Rwandan genocide spurred the new Rwandan government's participation in a widening war blighting the Democratic Republic of Congo.⁷⁰ A similar dynamic is now affecting Chad, as Sudanese rebels increasingly target the Chadian president.⁷¹ Unmet refugee needs can also fuel support for terrorist activity⁷² and create internal displacement that can provoke a host country to engage in military action against the source nation in an effort to stop refugee movements and militarization.⁷³ These problems persist in the larger structure of the refugee protection system, and are unlikely to be solved without American leadership.

Finally, the current policy fits poorly with international legal norms, which the United States may wish to be particularly conscious of at a time when international skepticism of American motives is so pronounced.⁷⁴ The American commitment to following its existing legal responsibilities seems uncertain because of increasingly restrictive interpretations of asy-

⁶⁸ See generally SARAH KENYON LISCHER, *DAANGEROUS SANCTUARIES: REFUGEE CAMPS, CIVIL WAR, AND THE DILEMMAS OF HUMANITARIAN AID* (2005) (discussing how combatants can turn both refugee populations and the material assistance provided to them into resources for prolonging conflict).

⁶⁹ See Cuéllar, *supra* note 2, at 596. See also Polgreen, *supra* note 51.

⁷⁰ See Cuéllar, *supra* note 2, at 595–97.

⁷¹ See Fox, *supra* note 3.

⁷² See, e.g., Tracy Wilkinson, *Israeli Forces Storm Into 2 Palestinian Refugee Camps*, L.A. TIMES, Mar. 1, 2002, at A1 (describing Palestinian refugee camps as “hotbeds of terrorism”).

⁷³ See generally GIL LOESCHER, *THE UNHCR AND WORLD POLITICS: A PERILOUS PATH* (2001).

⁷⁴ See PEW GLOBAL ATTITUDES PROJECT, *SUMMARY OF FINDINGS* (2006), available at <http://pewglobal.org/reports/display.php?PageID=824> (indicating eroding global perceptions of American legitimacy).

Cf. JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* 9 (2002):

Soft power rests on the ability to set the political agenda in a way that shapes the preferences of others If I can get you to want to do what I want, then I do not have to force you to do what you do not want to do. If the United States represents values that others want to follow, it will cost us less to lead.

lum law,⁷⁵ combined with an expedited removal process that likely excludes some individuals who cannot navigate the complex process of applying for asylum at the border.⁷⁶ American policymakers have previously used interdiction to stop refugees and others from seeking protection in the United States,⁷⁷ and they have yet to rule out doing so again in the future.⁷⁸ In addition, despite occasional American efforts to condemn instances where militarization, coercion, and violence problems overrun refugee sanctuaries, the absence of American leadership in this sphere has probably contributed to the persistence of the problem. Even if one refused to accept that some affirmative “responsibility to protect” exists under international law, the United States’ unique position and resources—not to mention some past transgressions involving *support* for military action based in refugee camps—make it particularly appropriate for American policymakers to play a preeminent role in fashioning a response to violence and militarization.

II. STRATEGIC HUMANITARIANISM AS AN ORGANIZING PRINCIPLE

The reconstruction of Western Europe following World War II signaled American resolve to defend Europe, while it also delivered substantial benefits to millions of people whose lives had been upended by the war.⁷⁹ Similar convergence between strategic interests and concern for marginalized populations is evident in the development of the Peace Corps during the Kennedy Administration, the more recent creation of the Millennium Challenge Corporation, and the origins of the legal commitment to refugee protection itself.⁸⁰

These episodes showcase an important theme in modern American history: concern for the beneficial impact of American policies on the lives of vulnerable populations, perhaps warranted both because of ethical concerns about the responsibilities of powerful nations and the potential to advance national interests by fostering impressions of American concern about marginalized populations among domestic and international audiences.⁸¹ Refugee policy fits well within the pattern of occasional American preoccupation with the risks of neglecting marginalized populations. On the one hand, no humanitarian policy can be expected to last long

⁷⁵ See Pistone & Hoeffner, *supra* note 17; Bauer, *supra* note 17.

⁷⁶ See Pistone & Hoeffner, *supra* note 17.

⁷⁷ See Koh, *supra* note 32.

⁷⁸ See Legomsky, *supra* note 18.

⁷⁹ See generally JUDT, *supra* note 14 (chronicling the impact of Marshall Plan assistance on the lives of Western Europeans).

⁸⁰ See, e.g., MICHAEL J. HOGAN, *THE MARSHALL PLAN: AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947-1952* (1987).

⁸¹ The theme is captured nicely in John F. Kennedy’s inaugural address, where the new President called for a “new world of law, where the strong are just and the weak secure and the peace preserved.” President John F. Kennedy, Inaugural Address (Jan. 20, 1961).

without acknowledging some of the aforementioned political constraints facing American policymakers. At the same time, though it is tempting to think of humanitarian policy as primarily a means of engaging in acts of charity for globally marginalized constituencies, history has shown that American concern for the less fortunate around the planet can play an important role in advancing the nation's strategic interests.

What follows is a brief attempt to articulate a set of principles—which together might be described as “strategic humanitarianism”—that reflect concern for the condition of marginalized populations while being simultaneously sensitive to the political constraints American policymakers face and the complex costs and benefits associated with humanitarian actions from the perspective of American interests.

A. Subtle and Long-Term View of American Interests

The first element of strategic humanitarianism involves policymaking that takes a long-term view of U.S. interests. Limiting the loss of American lives and resources may appear not only as a politically viable approach, but as the most principled one. However, policymakers have a responsibility to weigh such a course against the costs of leaving growing regional, security, and public health problems unaddressed. Whether one favors more narrowly defined indicators of material prosperity or a more expansive and idealistic vision of American goals,⁸² national goals often take more than a generation to achieve. The time horizon then becomes critical as a means of assessing what costs are worth bearing. A longer time horizon is likely to better allow policymakers to consider the overall change in international public perception about the United States instead of just short-term advantage. American policymakers followed this principle when making the unprecedented financial and political commitment to the reconstruction of Europe through the Marshall Plan.⁸³

B. Respect for International Legal Commitments

The second component involves honoring the international laws that American policymakers have so often played a prominent role in creating. Direct commitments to refugee protection under the Convention and Protocol are among those promises the American state has committed to upholding.⁸⁴ Although honoring such commitments can seem costly to the

⁸² For an example of the former, see Goldsmith & Krasner, *supra* note 1. For an example of the latter, see President George W. Bush, Second Inaugural Address (Jan. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html> (“America’s vital interests and our deepest beliefs are now one. From the day of our Founding, we have proclaimed that every man and woman on this earth has rights, and dignity, and matchless value . . .”).

⁸³ See JUDT, *supra* note 14 (discussing the Marshall Plan).

⁸⁴ See James C. Hathaway & Anne K. Cusick, *Refugee Rights are Not Negotiable*, 14

American public, America also derives benefits from compliance. First, policymakers may find that legal compliance and humanitarian commitments serve a signaling function.⁸⁵ In a world where international audiences and national governments are unusually skeptical of American motives following the war in Iraq,⁸⁶ costly decisions to comply with legal commitments or undertake humanitarian missions have the potential to forge a more lasting, favorable impression than any managerial change in public diplomacy.⁸⁷ Second, the deterioration of refugee-related emergencies has the potential to exacerbate regional instability, raise risks to long-term American policies in the developing world, and increase demand for more costly American engagement (as with refugee emergencies in Africa and Asia).⁸⁸ Finally, some Americans place a value on international legal compliance, either for instrumental reasons (e.g., they believe it advances national goals) or because of inherent normative concerns.⁸⁹ Thus, from the perspective of policymakers, complying with international law can prove politically important by pleasing such constituencies.

Because a strategic humanitarian perspective assigns such importance to international legal commitments, it is critical to review how these have a bearing on American refugee policy. A brief survey of international refugee law makes plain its relevance both to the paradigmatic asylum situation that draws the most attention in the United States, and also to the mass influx situations that have become more common over time. In 1951 and 1967, diplomats and lawyers laid the cornerstones of the modern refugee protection system in the shadow cast by the atrocities of the Second World War.⁹⁰ In the aftermath of a war in which tens of million

GEO. IMMIGR. L.J. 481, 535–39 (discussing limitations in the existing degree of American compliance with refugee-related international legal obligations, and tracing some of the deficiencies to early and erroneous Supreme Court interpretations of the Refugee Convention and Protocol).

⁸⁵ See generally Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625 (2001); Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000) (developing a theoretical and empirical argument illustrating how signaling dynamics can make it rational for nations that otherwise have incentives against observing international law to nonetheless pursue compliance with international law).

⁸⁶ See PEW GLOBAL ATTITUDES PROJECT, *supra* note 74.

⁸⁷ The precise theoretical mechanisms through which such favorable impressions affect American interests may vary. But they are likely to include the effect of perceptions among the mass public regarding the desirability of U.S.-backed policies, as well as the impact of signaling given asymmetric information problems among policy elites regarding whether the United States is the type of nation that would pursue cooperative equilibria.

⁸⁸ See generally LISCHER, *supra* note 68; Cuéllar, *supra* note 2, at 636–41.

⁸⁹ See Tomz, *supra* note 65 (providing empirical evidence from survey experiments where respondents' foreign policy views were affected by whether a particular policy complied with international law).

⁹⁰ See James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L. J. 129, 171 (1990) [hereinafter *Reconsideration*].

were displaced by persecution and the war itself,⁹¹ the newly minted United Nations General Assembly created UNHCR to help manage refugee resettlement. A year later, the 1951 Refugee Convention introduced some of the terms—such as “persecution”—that have become familiar over the years.⁹² Any analysis of refugee law begins with the 1951 Convention and the “well founded fear of persecution” framework it defines, as well as the 1967 Protocol extending that framework to cover refugees regardless of time and geographic limitation. The terms of the Convention and Protocol established the crucial obligation of states parties not to refouler—or return—refugees to conditions where they may face persecution, while leaving open questions about the actual provision of permanent asylum.⁹³ Since many advanced industrialized nations have coupled refugee status determinations with the provision of permanent immigration benefits, the interpretation of refugee status under international and domestic doctrine is highly consequential.⁹⁴ In advanced industrialized countries, much of this interpretive process continues to play out in asylum adjudications. Despite their imperfections, such adjudications seem almost tailor-made to untangle the intricacies associated with deciding who has a valid refugee status claim.

The Convention and related provisions of refugee law have not always proven easy to interpret, or responsive to the plight of forced migrants. On the one hand, the Convention established obligations even in the absence of an asylum adjudication process.⁹⁵ Moreover, despite the specific language in the Convention implying that individual determinations would be the norm, states or international organizations do indeed have means of providing protection even in the absence of individualized determination. Alone and through UNHCR, states have developed prophylactic measures providing at least some protection for groups of forced migrants highly likely to fit even narrow versions of the refugee definition.⁹⁶

On the other hand, many of the terms of the Convention are ambiguous, especially because both the process of writing that law a half-century ago and of applying it today constitute major compromises for states parties.⁹⁷ The Western states that were the primary force behind the Refugee

⁹¹ See JUDT, *supra* note 14.

⁹² See United Nations Convention Relating to the Status of Refugees, *supra* note 2; Protocol Relating to the Status of Refugees, *supra* note 2.

⁹³ See *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 159 (1993).

⁹⁴ For a discussion of this reality and the potentially positive impacts on refugee law that might follow from disconnecting refugee determinations from long-term immigration benefits, see Manuel Angel Castillo & James C. Hathaway, *Temporary Protection*, in *RECONCEIVING INTERNATIONAL REFUGEE LAW* 1, 1–22 (1997).

⁹⁵ See Cuéllar, *supra* note 2, at 622–26 (discussing what the Convention accomplished and failed to accomplish).

⁹⁶ See *id.* at 625–26.

⁹⁷ Thus, in the United States, passage of the 1980 Refugee Act heralded the relatively faithful implementation of the Convention and Protocol, particularly with respect to the refugee definition. Nonetheless, in recent years, procedural changes have increasingly eroded

Convention wanted to open their doors to choice refugees whose persecution raised the deepest concerns to their ideologies (such as relatively high-status Jewish refugees from former Nazi Germany and Eastern Europe in the aftermath of the Second World War, or anti-communist dissidents later on).⁹⁸ However, these states did not want to take on massive numbers of migrants through asylum. While the states hold out an idealistic-sounding humanitarian promise (embodied in the non-refoulement obligation and the protection offered to people who qualify on account of specific kinds of persecution), they can undermine the scope of that commitment through a panoply of strategies,⁹⁹ including interdicting people before they manage to apply for asylum at all,¹⁰⁰ writing domestic laws applying the technical refugee definition narrowly (for example, encouraging highly circumscribed interpretations of the concept of “persecution” or the so-called “nexus” or “on account of” factors),¹⁰¹ and doing comparatively little to help permanently resettle refugees not at their borders.¹⁰²

Despite their limitations, however, the Convention and Protocol have become the lynchpin of a global framework for thinking about the legal status of people who flee conflict and cross borders in the process.¹⁰³ Although advanced industrialized countries with elaborate individualized adjudication procedures have repeatedly ended up treating the Convention and Protocol as excuses for turning people away, a good-faith reading of the doctrine makes this basic refugee law at least partly relevant to the mass influx situations as well. One can expect, for instance, that a combination of screening with the assistance of UNHCR and temporary group-based determinations can proceed with some reference to the categories in the Convention. Though it is not the same thing to have a well-founded fear of persecution on account of nationality or membership in a particular social group as it is to simply flee some man-made conflict,¹⁰⁴ a

the fidelity of the United States asylum adjudication process to the demands of the Refugee Convention. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as and amended at 8 U.S.C. §§ 1157–1159 (2000)). See also Hathaway & Cusick, *supra* note 84, at 488–90.

⁹⁸ See Hathaway, *supra* note 90, at 145–51.

⁹⁹ See *id.* at 165–73. See also GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 324–71 (2d ed. 1996).

¹⁰⁰ See *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 159 (1993).

¹⁰¹ See GOODWIN-GILL, *supra* note 99, at 71 (“Neither the 1951 Convention nor the *travaux préparatoires* say much about the source of the persecution feared by the refugee . . .”); JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 231–32 (1991).

¹⁰² But note the resettlement programs in the United States, as well as smaller programs in other countries. Together, these programs account for the resettlement of about 100,000 refugees a year. See David A. Martin, *A New Era for U.S. Refugee Resettlement*, 36 COLUM. HUM. RTS. L. REV. 299, 301 (2005).

¹⁰³ For the most comprehensive treatment (discussing both rights under the Refugee Convention and Protocol as well as under other bodies of international law), see generally JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES IN INTERNATIONAL LAW* (2006).

¹⁰⁴ For a more comprehensive discussion, see GOODWIN-GILL, *supra* note 99, at 204–10.

somewhat broad (and nonetheless quite plausible) interpretation of the terms of the Convention could easily lead to a considerable overlap with the more permissive conceptions of refugee that can be derived from the OAU Convention.¹⁰⁵ Working together, well-meaning host nations, UNHCR, and humanitarian organizations can fill any legal gaps in protection through reference to the UNHCR Statute (and its “good offices” provision), the General Assembly resolutions, regional conventions, and other bodies of relevant law, including, for example, the Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (Torture Convention).¹⁰⁶ Conversely, the Refugee Convention does not exempt countries from their obligations if they cannot easily undertake a comprehensive adjudication. International humanitarian and human rights law are also relevant in establishing the ostensibly civilian and humanitarian character of refugee protection, and the related principle that civilian forced migrants should not be subjected to violence or coercion.¹⁰⁷

The preceding bodies of law establish not only a series of responsibilities for countries when refugees arrive at their borders, but also a set of ideals underscoring the importance of seeking global solutions to temper the violence, instability, and coercion affecting mass refugee movements around the world.¹⁰⁸ The law’s failure to precisely allocate responsibility for these protections is no reason for American policymakers and humanitarian advocates to disregard the goals of protecting refugee civilians from conflict and ensuring that refugee protection does not become a resource for combatants to gain sanctuary and continue fighting.¹⁰⁹

¹⁰⁵ Stretching the terms of the Refugee Convention is not without its costs, however, as it may deplete the credibility of key actors, such as representatives of UNHCR’s Department of International Protection, to speak persuasively about the Refugee Convention to domestic courts. This may be one reason why the “good offices” concept in the UNHCR Statute has been so consistently and systematically expanded instead to encompass persons who seem to need “protection,” and whose individual status under the Convention is virtually impossible to adjudicate effectively in a mass influx situation. *See, e.g.,* GOODWIN-GILL, *supra* note 99, at 15. (“The field of UNHCR competence, and thus the field of its responsibilities, has broadened considerably since the Office was established”). In future years, American policymakers and transnational actors may increasingly conclude that forced migrants falling outside the scope of even the most expansive interpretations of the Convention, such as IDPs require separate legal arrangements. *See generally* Roberta Cohen, *Strengthening Protection of IDPs: The UN’s Role*, *GEO. J. INT’L AFF.*, Winter/Spring 2006, at 101.

¹⁰⁶ *See* LOUISE W. HOLBORN, *REFUGEES, A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951–1972*, at 151–292 (1975).

¹⁰⁷ *See* Cuéllar, *supra* note 2, at 616–18.

¹⁰⁸ *See id.* at 629–30 (discussing United Nations General Assembly resolutions urging countries to collaborate in the resolution of refugee problems); *see also* Protocol Relating to the Status of Refugees, *supra* note 2, Art. II (“The States Parties . . . undertake to cooperate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions”).

¹⁰⁹ *See* Cuéllar, *supra* note 2, at 640–41.

C. *Using Multiple Methods To Advance National Goals*

A third defining feature of strategic humanitarianism involves a willingness to advance American interests through robust use of political, economic, and military power when it is possible to do so at a reasonable cost. American political and material influence should be used when doing so can reasonably advance compelling humanitarian goals. This principle implies that there is value in not categorically ruling out military missions and the expenditure of political capital simply because America seeks a humanitarian goal.¹¹⁰ Despite their cost, such missions can play an important role—apart from their deontological value—by meeting explicit national needs via signaling, meeting domestic demand, and advancing U.S. short-term policy interests that may be aligned with humanitarian action, such as reducing the risk of refugee outflows from Haiti. Moreover, the application of American political and diplomatic pressure, even when costly, may be warranted because of the relationship between forced migration patterns fueling the growth of refugee populations and conflicts potentially sensitive to such pressure.¹¹¹

D. *Sensitivity to Political and Organizational Complexities*

Finally, humanitarian policy should be sensitive to practical and organizational realities, including the role of domestic and international organizations, the undeniable impact of national power and internal political interests, and the potential for unintended consequences, such as those unleashed by simply pumping assistance into conflict zones.¹¹² Sensitivity to practical consequences extends not only to the potentially perverse consequences of humanitarian action or the limitations of international bureaucracies, but also to the fact that American choices are made in a world of political and logistical constraints. Money is scarce and, while all human life is precious, U.S. politicians understandably place a high value on American lives. Additionally, spurring assistance from other advanced countries has proven difficult. The development of an internationally deployable civilian policing capacity, which so often seems critical to assuage humanitarian tragedies, has continually stalled due to organizational reluctance within and outside the United States, expertise problems, and path dependence.¹¹³ Additionally, the viability of some types of

¹¹⁰ Cf. Goldsmith & Krasner, *supra* note 1, at 58 (acknowledging that “[n]o one . . . would argue . . . that humanitarian concerns should carry no weight in decisions about intervention” despite expressing skepticism about the merits of humanitarian intervention).

¹¹¹ Developments in Northern Ireland and Central America are just two examples. The current situation in Darfur, which is discussed below is another.

¹¹² These types of unintended problems emerged at camps with Rwandan Hutu in the Democratic Republic of Congo. See Cuéllar, *supra* note 2, at 592–96.

¹¹³ See Panel on U.N. Peace Operations, *Report*, U.N. Doc. A/55/305-S/2000/809 (Aug. 21, 2000) available at http://www.un.org/peace/reports/peace_operations.

military intervention is hampered by the fact that essentially no international force exists capable of imposing peace in the midst of an ongoing conflict.¹¹⁴

Taken together, these factors argue against pursuing some policy options for resolving refugee problems, such as drastically expanding the refugee resettlement program or employing routine American military intervention to preclude forced migration patterns. The resulting challenge for concerned policymakers and pragmatic refugee advocates alike is to identify a realistic mix of subtle changes and bold action that can result in material improvements for displaced persons while advancing long-term American goals in an insecure world.

III. STRATEGIC HUMANITARIANISM AND U.S. REFUGEE POLICY

The preceding discussion of strategic humanitarianism is meant to serve as a point of departure for thinking about American foreign and migration policy. Three additional presumptions serve to further connect that discussion to refugee policy. First, the mix of pragmatism and idealism associated with strategic humanitarianism is preferable to the alternatives as a point of departure for evaluating the problems associated with refugee policy. Some policy observers undoubtedly prefer a narrower conception of American interests or favor a fairly strong presumption against costly uses of American influence in favor of humanitarian causes. Still, without a compelling and persuasive defense of this position, it seems problematic to reject long-term conceptions of American interests—and long-standing public expressions of American goals—that encompass humanitarian problems and compliance with international law.¹¹⁵ Second, any changes in migration opportunities to the United States and other advanced industrialized countries are likely to be incremental, and the level of financial resources that can be devoted to humanitarian causes is not likely to increase radically. Third, although refugees are not alone in needing material resources, they pose unique problems and opportunities for protection. Refugees pose distinctive problems because they are visible, discrete victims in the human drama, existing at the margin of the

¹¹⁴ For an excellent discussion of the potential applications and limitations of the existing multilateral peacekeeping framework and the preconditions for success, see VIRGINIA PAGE FORTNA, *PEACE-TIME: CEASE-FIRE AGREEMENTS AND THE DURABILITY OF PEACE* (2004).

¹¹⁵ See, e.g., Kennedy Inaugural Address, *supra* note 81; Bush Inaugural Address, *supra* note 82. This is not to suggest that consistency with political rhetoric should routinely become a lodestar of American policy. Rather, the point is that proponents of a view of American interests at odds with a major strand of avowed American policy goals have the burden of showing why that tradition is wrong, or why inconsistency with it ought not to be treated as a problem. For an intriguing argument that such rhetoric can be regarded as close to irrelevant, see generally Jack L. Goldsmith & Eric Posner, *Moral and Legal Rhetoric in International Relations*, 31 J. LEG. STUD. 115 (2002).

state-based system of global politics, wherein nationals are (ostensibly) offered protection by the nation of citizenship. In part because of these characteristics, refugee problems tend to receive relatively more attention than other problems involving the misfortune of the global population, and offer somewhat greater opportunities for mobilizing political support than would be available to address more inchoate humanitarian problems.¹¹⁶

A. Placing Asylum and Resettlement in the Broader Context of Refugee Policy

The refugees who reach American shores are not the only ones who matter. The gulf between the opportunities available to successful asylum seekers and less fortunate refugees makes it especially important for the United States to place its asylum and resettlement programs in the larger context of a comprehensive refugee policy. This approach implies the need for policymakers to speak realistically about what asylum and its resettlement cousin can accomplish when educating the public about refugee problems. Policymakers try to keep asylum consistent with international law. At the same time, both government officials and humanitarian advocates would be well-served by recognizing that scarce resources and attention can be devoted to refugees and that the American public may demand some trade-offs (in terms of public attention, opportunities for migration, and financial resources) between existing refugee programs and the degree of U.S. assistance to refugee communities in the developing world.¹¹⁷

To make asylum policy more fully consistent with American humanitarian obligations, U.S. policymakers should pursue strategies to mitigate existing asylum-related problems in a responsible manner without assuming that all incremental refugee-related resources should be poured into that system. With respect to expedited removal, the current system is so brutally efficient at excluding people at the border that it seems almost certain to deny some deserving individuals the chance to apply for asylum.¹¹⁸ The situation almost certainly calls for greater flexibility in how inspec-

¹¹⁶ See Cuéllar, *supra* note 2, at 607 n.69 (discussing how refugees receive disproportionate attention).

¹¹⁷ Recognizing the existence of this trade-off should not be a prelude to further restricting asylum and resettlement, but to recognizing the often-neglected needs of refugee populations unlikely to ever leave the developing world. Instead of expecting to meet their needs through unlikely expansions in refugee admissions to the United States, the United States should explore burden-sharing arrangements that make it more likely for refugees to have a chance to resettle *somewhere*, even if it is not in the United States. Cf. Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243, 270–76 (1997).

¹¹⁸ See Pistone & Hoeffner, *supra* note 17, at 168–69. Individuals who are given a chance to have a secondary “credible fear” interview are very likely to be allowed to apply for full asylum on the merits. Perhaps the inspection resources used for these “credible fear” interviews could be better employed elsewhere.

tors measure fear, how requests for asylum are interpreted, and how performance is audited.¹¹⁹ If and when applicants have the chance to apply for asylum, they should have access to immigration judges with a greater measure of independence. Current immigration judges are embedded in the same agency—the U.S. Department of Justice—that litigates against a finding of asylum for an applicant. Despite the potentially life-and-death nature of the immigration judges' determinations, they lack the degree of independence given to administrative law judges of agencies such as the Food and Drug Administration or the Federal Trade Commission.¹²⁰

Treating asylum and resettlement policy as an element of a broader, pragmatic, and international law-compliant refugee policy also entails redoubling efforts to fill annual slots available in the resettlement program. Key steps to filling those slots include enhancing resources to screen refugees and to prepare them for migration, furthering cooperation with UNHCR, and possibly defining two tiers of eligible refugees (“preferred” and “eligible”), such that “eligible” refugees could be used to fill slots when “preferred” refugees are not available. In the process of implementing such changes, policymakers would do well to treat the presidential determination process as a target rather than a ceiling for refugee admissions.¹²¹ Such an approach is consistent with the law, while better reflecting the occasionally unpredictable political forces that engender global refugee flows. In addition, given that the aforementioned changes in asylum policy have the potential to weaken the “restrictive asylum” dynamic that makes humanitarian advocates exceedingly risk averse,¹²² policymakers should further explore burden-sharing arrangements with third-party countries. Although it is important to ensure that such agreements comply with

¹¹⁹ See Karen Musalo, *Expedited Removal*, 28 HUM. RTS. Q. 12 (Winter 2001). Such flexibility need not diminish security-related screening procedures.

¹²⁰ See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372–74 (2006).

¹²¹ See REFUGEE ADMISSIONS PROGRAM, *supra* note 15, at vii.

¹²² For one example where U.S. government officials, legislators, and refugee advocates managed to weaken the dynamic of relative distrust and to cooperate, see Martin, *supra* note 59, at 253:

Thus began a cooperative process that led to important administrative reforms, adopted in late 1994 and implemented in 1995. The changes were both tough-minded and protective. Congress and the administration provided a major boost in resources so that the system could assure completion of first-instance decisions within 180 days of filing. A valid claim could usually be granted by an asylum officer, in a somewhat less formal part of the procedure, within sixty days—thus making good on the protection goals of refugee law.

Applicants who did not persuade the asylum officer would normally be placed promptly into deportation proceedings, which were to be concluded before the 180-day milestone. That more formal hearing before an immigration judge offered another opportunity to give evidence and prove the case for protection, but it also meant that a rejected claim would then result in a fully enforceable deportation order.

all international legal norms—particularly those involving non-refoulement¹²³—these agreements have the potential to expand the range of resettlement and asylum opportunities for migrants who desperately need them.¹²⁴ The United States led efforts to create such a burden-sharing arrangement for Indochinese refugees in the late 1970s and 1980s,¹²⁵ and the European Union has implemented its own version of burden-sharing in recent years.¹²⁶

B. Reshaping the Relationship Between the United States and the Leading Refugee Protection Organization

Just as the efficacy of refugee policy depends upon American interaction with other nation states, so too does it depend on American relations with international organizations, and particularly UNHCR. Working with its international organization partners and affected nation states, the United Nations agency is in a position to mitigate the difficulties arising from refugee crises when it proves impossible to implement peace agreements such as the one being sought in Sudan. Although UNHCR is the primary refugee advocate, it has a mixed track record in attending to refugees' concerns. On the one hand, it has developed into a massive and logistically elaborate relief organization, capable of coordinating the flow of material assistance in emergencies.¹²⁷ But it has also displayed a consistent pattern of under-emphasizing refugees' recurring security problems in camps.¹²⁸ Even years after the Great Lakes crisis, UNHCR lacked a dedicated bureaucratic unit focused on safety and security,¹²⁹ and its staff repeatedly downplayed the extent and intensity of the problem. Further, it

¹²³ See Stephen Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT'L J. REFUGEE L. 567, 584–85 (2003).

¹²⁴ Burden-sharing arrangements could provide financial and political incentives for greater cooperation with advanced industrialized countries, such as the United States, who accept high numbers of refugees.

¹²⁵ See generally Schuck, *supra* note 117 (describing the multi-country Indochinese refugee resettlement program as a precedent for burden-sharing arrangements).

¹²⁶ Of course, the potential value of burden-sharing does not imply that such arrangements effectively safeguard the interests of refugees. The European arrangement, in particular, is vulnerable to criticism on the ground that it insufficiently considers risks to refugees who are removed pursuant to a “safe third country” policy. For a critique of the European Union’s existing arrangements that nonetheless recognizes the value of burden-sharing, see Gretchen Borchelt, *The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards*, 33 COLUM. HUM. RTS. L. REV. 473 (2002).

¹²⁷ See OGATA, *supra* note 14, at 16 (discussing how UNHCR responded to a major refugee emergency by “mobilizing goods and personnel for the establishment of large-scale camps”); Cuéllar, *supra* note 2, at 665–76 (discussing the development of UNHCR’s material relief and logistical capabilities).

¹²⁸ See Cuéllar, *supra* note 2, at 677–82.

¹²⁹ See *id.* at 597–98 (discussing lack of bureaucratic structures focused on security problems).

had no mechanism in place to measure violent incidents, failed to sufficiently differentiate distinct types of security problems, attempted no dedicated fundraising to finance security initiatives, and experienced long delays in implementing even modest steps.¹³⁰

In response, American policymakers can galvanize coalitions of its nation-state allies and humanitarian organizations around the issues of emerging refugee crises by enhancing UNHCR's capacity to pursue reasonable priorities in response to refugee needs. The U.S. government can make incremental moves to enhance UNHCR funding overall, moving the United States farther up in rankings of support on the basis of per capita income, and thereby increasing its leverage in reshaping agency priorities while boosting support for UNHCR's programs at a time when severe refugee emergencies exist (including one in Iraq that has arisen in large part because of American policy choices). A move to change the balance of earmarks would also strengthen the organization. Instead of earmarking ninety-four percent of resources to specific countries, the focus should be on giving UNHCR greater flexibility to deploy resources by region at a time when the extent of refugee emergencies and the commitment of support from other sources are uncertain.

At the same time, UNHCR's historical record of relative neglect in addressing problems of militarization, coercion, violence, and physical insecurity underscores the value of placing earmarks on some resources to support these marginalized missions. Specific functions include training and paying for police services for camps; developing state-of-the-art monitoring programs to determine changes in the amount, severity, and scope of physical insecurity; funding dispute resolution training; hiring security experts; and financially supporting UNHCR's efforts to negotiate better arrangements with host countries with respect to both camp locations further away from conflict zones, and the reintegration of refugees.

In tandem, these techniques can help reshape UNHCR so that it more readily responds to refugees' unmet security needs, even if those needs are unlikely to ever be entirely assuaged. Within UNHCR, American officials could foment the creation of a dedicated bureaucratic unit to harness expertise on security, build internal and external support for security-related functions (e.g., in siting of refugee camps), and monitor effectiveness of interventions.¹³¹ Further, American officials could emphasize requirements for UNHCR and its partners to gathering data about security-related incidents. They could also support dedicated funds to address security-related needs such as defraying the cost of policing by host countries, training refugees in dispute resolution, and enhancing control mechanisms to reduce the ease with which refugees can be coerced through misappropriation of foodstocks and other resources by armed elements.

¹³⁰ See *id.* at 682–84 (discussing delays in implementation of security-related changes).

¹³¹ See *id.* at 709–17.

Changes in financing are only part of the solution. Each of the preceding steps could be further advanced through the application of diplomatic and political pressure, using the Executive Committee, Security Council, and General Assembly resolutions, as well as direct American diplomatic and political pressure. This pressure should favor the micro-level implementation of host country policies favorable to security, including the provision of adequate policing (or the anticipation of gaps when they are likely to occur), and appropriate sites for camps that minimize the threat of attacks.

Finally, there is almost certainly something to be gained from the creation of a transnational operations and research entity to fill gaps left by UNHCR in the evaluation of the overall refugee protection system. Such an entity, perhaps along the lines of the late Arthur Helton's proposed humanitarian action and research agency, would aim to gradually buttress the capacity of UNHCR and provide alternatives where necessary.¹³²

C. Enhancing American and Global Responses to Mass Movements

1. Protocols and Policies To Address Refugee Militarization

It is particularly tragic when refugees who flee persecution and conflict are subjected to violence in the camps to which they flee. Such failures of refugee protection are especially difficult to resolve given the interest of some constituencies in exploiting refugees to achieve political or military victory, the chaos and banditry endemic near war zones and refugee camps, and the fact that displaced refugees sometimes support the continuation of military activity. Because such militarization threatens not only regional peace and stability but the humanitarian ideal of refugee protection, more comprehensive efforts to reduce the risk of militarization should be an important part of American refugee policy. Unfortunately, in the most stubborn situations, as during the aftermath of the Rwandan genocide, only direct military intervention or reductions in aid are likely to have an effect. The former option is often exorbitantly difficult, both practically and politically.

While the latter course is also difficult and may even threaten basic refugee needs for food and medical care, it is nonetheless important to identify this strategy as a lever that provides American and international institutions with a limited ability to impact deteriorating situations. To these ends, UNHCR sought to take some steps to create a "ladder of options" for addressing refugee security problems in the wake of the Great Lakes emer-

¹³² On the value of bureaucratic redundancy in spurring more vigorous activity, see Dara K. Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 711 n.135 (2006).

gency.¹³³ Although some discussion regarding this approach recognized that aid could exacerbate highly militarized or coercive refugee situations, the “Ladder” strategy kicked the hard questions to the Security Council, where they would land right in the lap of the United States and other permanent members. American officials, in turn, can play a critical role in developing the appropriate protocols, planning for contingencies in the event of aid reductions, and evaluating the situation in the event that these particularly difficult choices must be confronted by donor governments, UNHCR, and its NGO partners. In contrast, the status quo leaves aid cutoff decisions to UNHCR. This isolates the agency and undermines its efforts to advocate on behalf of the refugee community. Instead, UNCHR requires political cover from politically powerful countries that fund the organization in response to its appeals on behalf of refugees.

Any effort to address the matter must begin from the premise that aid can be and often is misused. In situations involving exiled political leaders and chaotic host-country conditions, misuse is more likely, and refugees may be coerced into cooperating with the exploitation of resources by combatants.¹³⁴ Addressing these circumstances requires an appreciation of the interrelationship between aid and political settlements to conflicts—such as that affecting Darfur. At a minimum, a responsible refugee policy requires sustained attention to the problem of militarization and coercion, along with a frank acknowledgement that restrictions in aid are likely to be necessary to limit the abuse of refugee status and the coercion of displaced persons. The United States can play a much more prominent effort in galvanizing the development of protocols to address these situations and promoting engagement from the Security Council and the UN Department of Peacekeeping Operations to facilitate responses to the misuse of refugee aid.

2. Changing the Incentives of Host and Source Countries To Mitigate Mass Influx Emergencies

As part of its comprehensive refugee policy, American policymakers can seek to provide incentives for host countries that support responsible camp locations or integrate refugees into society to get them out of camps altogether. Officials can combine refugee-related policy goals with broader aid programs, emphasizing the extent to which a host country’s decision to locate camps away from borders and conflict zones (and close to water and other crucial resources) will be rewarded by American assistance. Such a move is especially crucial given the impact of host countries’ policy decisions on the welfare of refugees, and particularly on security.

¹³³ See Cuellar, *supra* note 2, at 683–84 (discussing the ladder of options and its implementation). Implementation has been slow.

¹³⁴ See *id.* at 637–38.

But host country priorities merely represent one side of the equation. Any reasonable strategy to shape the incentives of host countries must also consider the actions of governments contributing to refugee flows through persecution, ethnic cleansing, or the political and financial support of militias advancing brutal agendas. Plainly, American policymakers are not in a position to stop all such conduct. Even when there is a potential opportunity to limit atrocities, decisionmakers should unquestionably consider the risks involved. But if it is unrealistic to expect that American policymakers will have the capacity and incentives to limit the extent of brutality wherever it occurs, it is equally naïve to expect serious progress in reshaping host country behavior without devoting attention to changing the political context creating refugee flows in the first place. The situation in Darfur is a case in point, with millions of displaced persons on both sides of the border and operations by the Sudanese-government backed Janjaweed militia threatening both refugees and the Chadian government. American policymakers can continue making measured progress through diplomatic pressure on the Sudanese government coupled with a demonstrated willingness to sanction or reward the government depending on its conduct.¹³⁵ Progress in this realm is likely to impact far more refugees than any changes in U.S. asylum adjudication or resettlement.

3. Responsible Policies To Handle Mass Influx Emergencies Affecting the United States

Finally, American policymakers must remain sensitive to the full range of challenges associated with mass influx emergencies involving Caribbean refugees fleeing to the United States.¹³⁶ In response, policymakers must design, test, and perfect a framework for managing a mass influx situation involving Haiti or Cuba in a manner that is both pragmatic and consistent with American responsibilities under international legal norms. In past decades, American officials have responded to mass influx emergencies with interdiction operations that failed to protect refugees' guarantees under international law and damaged the nation's reputation abroad.¹³⁷

¹³⁵ See generally Helene Cooper, *U.S. Sends (Another) Warning on Darfur*, N.Y. TIMES, Apr. 11, 2007, at A6 (describing additional steps, including enhanced economic sanctions and diplomatic pressure, that United States officials have belatedly taken to pressure the Sudanese government into backing a viable peace agreement).

¹³⁶ See, e.g., *U.S. Braced for Castro Nightmare*, DAILY TELEGRAPH, Dec. 27, 2006, at 27 ("Some estimates suggest as many as 500,000 Cubans could leave within a year of his death.").

¹³⁷ See, e.g., Legomsky, *supra* note 18, at 682:

Not a single one of the interdicted Haitians was deemed to have a credible fear of return, supposedly a lower threshold standard than the Refugee Convention's 'well-founded fear' standard. Upon interdiction, US officials provided no advice to the people taken aboard US Coast Guard cutters of their right to seek protection. Reportedly, there were not even Creole-speaking U.S. officials on board all the cut-

If policymakers condone extended detention of refugees in Guantanamo without meaningful asylum or protection opportunities, they will badly misjudge the extent to which the Naval base there has eroded American legitimacy.¹³⁸ A more responsible course would be to plan ahead for asylum adjudications on a massive scale and forge burden-sharing arrangements with appropriate third-party countries. Officials must also make reasonable provisions to assist state and local governments in fostering the integration of the many refugees who will end up in the United States.

IV. CONCLUSION

Americans today are living in a world of staggering humanitarian needs at home and abroad. The size of the American prison population, the spread of HIV/AIDS in Africa, the prevalent poverty on the United States-Mexico border, and the striking inequities betrayed by the response to the Katrina disaster all merit principled creativity and attention. Though not the only, or even the largest, humanitarian problem, the well-being of refugees and displaced persons makes a powerful demand on our psyche because their condition so undermines assumptions about what makes the world a stable and predictable place. They are canaries in the proverbial coal mine. By training attention on the treatment of refugees, we gain a lens to understand the competence of institutions, the logic and limits of human empathy, and the viability of assumptions about the primacy of the nation state as the constitutive element of global law and politics.

In practical terms, such attention also reveals that there is no viable means of entirely closing the global refugee spigot. My purpose here has been to show how, despite the real and important steps taken over the years to implement this humanitarian commitment, the complexities of the global refugee problem are often misconstrued and misunderstood. But more important than the specific changes discussed above is the approach they represent, which aims to be sensitive not only to unintended consequences and political constraints but also to the potential benefits—domestic as well as international—associated with responsible humanitarian action that advances principled objectives enshrined in international law, such as mitigating the problems faced by refugees. Properly appreciated as global problems involving millions of forced migrants stuck in camps in the developing world, refugee problems provide a context in which to demonstrate the possibilities of a “strategic humanitarian” approach to making incremental, though sustained and material, contributions in the humanitarian sphere.

ters involved in these interdiction

¹³⁸ Cf. Pablo Bachelet, *Guantanamo to be Readied for Expected Influx of Cuban Refugees*, KANSAS CITY STAR, Feb. 15, 2007, available at <http://www.kansascity.com/mld/kansascity/news/politics/16708593.htm>.

Conversely, ignoring this perspective poses some risks to policymakers. Refugees are a wildcard that not only arise from, but also can exacerbate, international security problems. Ignoring their plight is to ignore a critical variable that repeatedly affects American international security goals. Refugee policy is a prime example of the complex interrelationship between different legal-bureaucratic arrangements, dynamics involving domestic and international audiences, and the potential for subtle and complex unintended consequences. To address the full extent of problems and possibilities raised by refugees, American advocates and policymakers need to pay more attention to the millions of refugees and displaced persons beyond the reach of any asylum adjudication system and to proceed with a combination of humility and resolve when considering how best to mitigate their plight.

In the process, there is room for vigorous debate as American lawyers and policymakers trace a path for enhancing American refugee policy. One can argue about a range of problems without assuming that American interests are either entirely consistent, or in tension with, humanitarian goals: the precise scope of a host state's responsibility to disarm refugees as a means of preserving the non-military nature of refugee protection, the maximum costs the American polity should assume to encourage the preservation of asylum's humanitarian character by host states and to compel peace agreements in source countries, or the intricate limits of the refugee definition in the context of novel asylum claims from alleged members of "particular social groups." What makes less sense is to belittle the importance of international legal commitments to refugee protection or the value of humanitarian endeavors on the basis of crude assumptions about what is consistent with the national interest. Idealism without limits is all but impossible, as no American refugee policy can long survive if pivotal constituencies find it irretrievably at odds with American interests. But a policy of limits without idealism in a world capable of engendering such capacious misery and expectations of American leadership poses its own dangers.