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## The United States' Response to Humanitarian Refugee Obligations: Inconsistent Application of Legal Standards and Its Consequences

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# The United States' Response to Humanitarian Refugee Obligations: Inconsistent Application of Legal Standards and Its Consequences

Andrea Freiburger\*

## INTRODUCTION

One of the defining events of the twentieth century, World War II, occurred simultaneously with the genocide of millions of men, women, and children in the Holocaust.<sup>1</sup> After such atrocities, the international community recognized an obligation to never again enable the persecution of innocent populations.<sup>2</sup> In 1948, the countries of the United Nations (“U.N.”) adopted the Universal Declaration of Human Rights (“Declaration”).<sup>3</sup> The Declaration

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1. The genocide commonly known as the Holocaust is defined by one source as “the systematic state-sponsored killing of six million Jewish men, women, and children and millions of others by Nazi Germany and its collaborators during World War II.” *Holocaust*, ENCYCLOPÆDIA BRITANNICA, 2009, <http://www.britannica.com/EBchecked/topic/269548/Holocaust> (last visited Aug. 1, 2010). When non-Jewish victims are included, estimates using the broadest definitions state that the death toll may have reached seventeen million. DONALD L. NIEWYK & FRANCIS R. NICOSIA, *THE COLUMBIA GUIDE TO THE HOLOCAUST* 45 (2000).

2. For information regarding the impact of World War II on refugee movements and the international recognition of a need for a concerted response, see GIL LOESCHER ET AL., *THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR): THE POLITICS AND PRACTICE OF REFUGEE PROTECTION INTO THE TWENTY-FIRST CENTURY* 9 (2008), and GIL LOESCHER, *BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS* 42–44 (1993) [hereinafter LOESCHER, *BEYOND CHARITY*].

3. Universal Declaration of Human Rights (“Declaration”), G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Declaration], available at <http://www.un.org/Overview/rights.html>. The first sentence of the Preamble is indicative of the document as a whole and recognizes “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” *Id.* The General Assembly adopted the Declaration on December 10, 1948, and asked member countries “to cause it to be disseminated, displayed, read and expounded

formally asserted the right to seek and receive asylum from persecution.<sup>4</sup> At the 1951 Convention Relating to the Status of Refugees (“1951 Convention”),<sup>5</sup> this right was developed into the principle of non-refoulement, whereby signatories agreed not to return anyone to a country in which there was a danger of persecution.<sup>6</sup>

As a practical matter, these rights are implemented through domestic asylum policies.<sup>7</sup> Immigration laws generally dictate that a refugee within a country’s borders has legal status and is permitted to stay.<sup>8</sup> In addition to its domestic asylum policy, the United States implements a voluntary overseas resettlement program, through which it brings refugees harbored in other countries to the United States.<sup>9</sup>

Although the principle of non-refoulement requires countries to give legal status to refugees within their borders, countries have discretion in determining who meets the definition of a refugee.<sup>10</sup> By altering how refugee status is determined, countries can, in effect, control and limit whom they admit and the humanitarian obligation they assume.<sup>11</sup> This control is of great interest to the United States, which has historically been opposed to accepting unquantifiable and

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principally in schools and other educational institutions, without distinction based on the political status of countries or territories.” Description and Text of the Universal Declaration of Human Rights, <http://un.org/en/documents/udhr/index.shtml> (last visited Aug. 1, 2010).

4. Declaration, *supra* note 3, art. 14.

5. See Convention Relating to the Status of Refugees art. 33, Jul. 28 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

6. See *id.*; *infra* notes 70–72 and accompanying text.

7. See STEPHEN H. LEGOMSKY & CHRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 894 (5th ed. 2009) (“[H]ow the United States internally allocates the responsibility for implementing those international legal obligations [assumed under the 1967 Protocol] is a matter of domestic United States law.”). The domestic United States law regarding asylum policy is codified at 8 U.S.C. § 1158 (2006).

8. See *infra* notes 70–72 and accompanying text.

9. See *infra* Part I.C.3.

10. See, e.g., 8 U.S.C. § 1101(a)(42) (2006) (defining “refugee”). Additionally, the Attorney General is responsible for creating the procedures for asylum application. 8 U.S.C. § 1158(d)(1) (2006).

11. The United States, for example, has cited control over the admittance of refugees as a primary reason for encouraging different standards depending on whether an applicant is in the United States or overseas: “This difference in emphasis is appropriate because the United States remains in full control of the volume of overseas admissions in any case.” See *infra* note 116 and accompanying text.

uncontrollable obligations.<sup>12</sup> The United States has aligned its adjudication process to channel refugees through the voluntary resettlement process, as opposed to the domestic asylum process.<sup>13</sup> In terms of obligations imposed by international humanitarian law, admittances through the overseas resettlement process are completely voluntary, as opposed to admittances of refugees located within a country's borders, which are required by the duty of non-refoulement.<sup>14</sup>

This Note seeks to draw attention to the intentional application of different standards for refugee determinations and proposes a fairer alternative to achieving the interests of the United States.<sup>15</sup> Part I provides general background on the refugee issue. Part I.A discusses the different aspects of international refugee law. Part I.A.1 describes the humanitarian concerns associated with refugees and their plight. Part I.A.2 details the formation of the United Nations High Commission for Refugees ("UNHCR") as an international response to these concerns. Part I.B discusses the practical solutions currently used to handle protracted refugee situations, including refugee camps, voluntary repatriation, integration, and resettlement, and further addresses the duty of non-refoulement and the disparity in obligations this creates for different countries. Part I.C examines the United States' relationship with refugee situations, and looks in particular at its asylum policy, its resettlement policy, and the degree to which it fulfills its humanitarian obligations. Part II analyses the United States' policies toward refugees, specifically comparing the legal standards used for adjudication in domestic applications for asylum with those used in overseas applications for resettlement. It concludes that the United States policy achieves predictability, but (1) runs contrary to the spirit of non-refoulement, (2) increases the burden of unpredictability for other countries, and (3) increases inconsistent

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12. See LOESCHER ET AL., *supra* note 2, at 10–16 (discussing the historical development of the international refugee regime after World War II). “Despite the scale of the global refugee crisis, however, the US was unwilling to pledge unlimited support to refugees and actively opposed the international community committing itself to unspecified and future responsibilities.” *Id.* at 12.

13. See *infra* Part I.C.3.

14. See 1951 Convention, *supra* note 5.

15. See *infra* Part I.C.

adjudication. Part III presents a proposal that would help to achieve predictability while eliminating some adverse effects of the current system.

## I. BACKGROUND

### A. *Development of Refugee Law*

#### 1. The Refugee Problem

One of the greatest indicators of human suffering is the physical displacement of individuals from their homes.<sup>16</sup> For many, fleeing the home means entering an existence as a refugee without basic food, clothing, and shelter.<sup>17</sup> Flight breaks up families and communities with the result that both material and psychological support systems disappear.<sup>18</sup> Approximately fifty percent of displaced populations are under the age of eighteen and therefore are especially susceptible to safety threats.<sup>19</sup> This vulnerability makes refugees the object of significant humanitarian concern.<sup>20</sup>

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16. LOESCHER ET AL., *supra* note 2, at xii (“Physical displacement is *prima facie* evidence of vulnerability because people who are deprived of their homes and communities and means of livelihood are unable to resort to traditional coping capacities.”).

17. Reports of emergency humanitarian assistance reflect the need of refugee populations. See *UN Rushing Relief Supplies for Somali Refugees in Ethiopia*, UN NEWS CENTRE, Feb. 6, 2009, available at <http://www.un.org/apps/news/story.asp?NewsID=29799&Cr=somali&Cr1=refuge>; *Central African Republic Refugees Pouring into Chad in Dire Need of Help—UN*, UN NEWS CENTRE, Feb. 6, 2009, <http://www.un.org/apps/news/story.asp?NewsID=29801&Cr=Chad&Cr1=Refuge>. Novels may paint a more comprehensive picture of the day-to-day struggles of refugees. See, e.g., DAVE EGGERS, *WHAT IS THE WHAT* (2006) (chronicling the experiences of Valentino Achak Deng, one of the “Lost Boys” of Sudan).

18. See Marina Ajdukovic & Dean Ajdukovic, *Impact of Displacement on the Psychological Well-Being of Refugee Children*, 10 INT’L REV. PSYCHIATRY 186 (1998) (discussing the adverse psychological effects of displacement on children).

19. OFFICE OF THE UNHCR, *The State of the World’s Refugees 20–22* (2006) (according to a 2003 survey of approximately 7.5 million persons of concern to UNHCR).

The large number of young people among displaced populations has important implications for protection. Displaced children and adolescents are particularly vulnerable to threats to their safety and wellbeing. These include separation from their families, sexual exploitation, HIV/AIDS infection, forced labour or slavery, abuse and violence, forcible recruitment into armed groups, trafficking, lack of access to education and basic assistance, detention and denial of access to asylum or family-reunification procedures. Unaccompanied children are at greatest risk, since they lack the protection, physical care, and emotional support provided by the family.

In most cases, the displaced have fled interstate or internal conflict, widespread human rights abuses, or both.<sup>21</sup> The causes of movement are primarily “war, ethnic strife, and sharp socioeconomic inequalities.”<sup>22</sup> According to recent estimates, there are almost sixteen million refugees<sup>23</sup> and twenty-six million internally displaced persons (“IDPs”) worldwide.<sup>24</sup>

## 2. International Response: Formation of the UNHCR

As World War II ended, thirty-five to forty million displaced people flowed toward the center of Europe,<sup>25</sup> an unprecedented population shift of enormous magnitude.<sup>26</sup> The strain of such numbers on the already war-torn continent forced international recognition of the need to deal with refugee concerns.<sup>27</sup>

On December 14, 1950, the United Nations General Assembly adopted the Statute of the Office of the High Commissioner for Refugees (“the Statute of the UNHCR”).<sup>28</sup> The Statute of the

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*Id.* at 20 (citing UNHCR, Global Consultations on Int’l Prot., *Refugee Children*, 1, U.N. Doc. EC/GC/02/9 (Apr. 25, 2002)).

20. The destitution of refugees affects not only the displaced population, but also the regions into which they disperse. *See* discussion and sources cited *infra* notes 74–76. Most refugees move from one Lesser Developed Country (“LDC”) to another, and their presence often puts a significant strain on neighboring countries’ struggling economies and weak political infrastructures. *See* LOESCHER, BEYOND CHARITY, *supra* note 2, at 8. Such strain can cause a conflict to spread and perpetuate further humanitarian and refugee crises. *See infra* notes 44–45.

21. OFFICE OF THE UNHCR, *supra* note 19, at 16. *See generally id.* at 10–18.

22. LOESCHER, BEYOND CHARITY, *supra* note 2, at 12.

23. Press Release, UNHCR, UNHCR Annual Report Shows 42 Million People Uprooted Worldwide (June 16, 2009), <http://www.unhcr.org/4a2fd52412d.html>. Both in the vernacular and according to the 1951 Convention on Refugees, refugees are defined as those who have fled across the border of their country of origin. 1951 Convention, *supra* note 5, art. 1; *see* LOESCHER ET AL., *supra* note 2, at xii. The text of the Convention is available on the United Nations High Commission for Human Rights Website at <http://www.unhcr.org/3b66c2aa10.html>.

24. *UNHCR Annual Report*, *supra* note 23. In contrast to refugees, who by definition have crossed an international border, internally displaced persons have been forced from their homes, but remain within the borders of their own country. *See* OFFICE OF THE UNHCR, *supra* note 19, at 153. “Often persecuted or under attack by their own governments, they are frequently in a more desperate situation than refugees.” *Id.*

25. LOESCHER, BEYOND CHARITY, *supra* note 20, at 46.

26. *Id.*

27. *Id.*

28. LOESCHER ET AL., *supra* note 2, at 13.

UNCHR provided authority for the adoption of the 1951 Convention on the Status of Refugees, at which U.N. member states created the office of the UNHCR.<sup>29</sup> The UNHCR is the principal U.N. program for dealing with refugees today.<sup>30</sup> The Statute of the UNHCR establishes the twofold objective of the UNHCR as: (1) protecting refugees and (2) finding permanent solutions for their plight.<sup>31</sup> The initial mandate lasted three years and was repeatedly renewed, usually for five years at a time.<sup>32</sup> In December 2003, the temporal limitation was finally eliminated and the Office was confirmed as a department of the U.N.<sup>33</sup> The UNHCR has grown from thirty-four employees in the 1950s to its current level of 6,500 employees in 116 countries.<sup>34</sup> Its annual budget for the past several years has exceeded \$1 billion U.S. dollars.<sup>35</sup> The UNHCR is the only global organization whose mandate is to protect refugees and “find solutions to their plight.”<sup>36</sup> Other departments of the U.N. have avoided involvement in refugee affairs, largely because they see them as issues handled by the UNHCR.<sup>37</sup>

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29. *Id.* at 1–2. Meetings held between 1948 and 1950 led to the establishment of the UNHCR. *Id.* at 12.

30. *See id.* at 1.

31. *Id.* at 13.

32. *Id.* at 75.

33. *Id.*

34. *Id.* at 79.

35. *Id.* As established by the Statute, the U.N. funds only the administrative costs of running the UNHCR; “all other expenditures relating to the activities of the High Commissioner shall be financed by voluntary contributions.” *Id.* at 14. The voluntary contributions of donor countries therefore make up the majority of the UNHCR’s budget, and donor countries’ approval of UNHCR activities is therefore extremely important. The ability to withhold contributions gives main donors significant influence over the organization’s work. *Id.* at 14, 73. The United States is the largest contributor to the UNHCR, donating 30.5 percent of the organization’s total budget in fiscal year 2006. *Id.* at 93 fig.4.2.

36. *Id.* at 73.

37. *See id.* at 76.

Notwithstanding [the] increased involvement of the Secretary-General and the Security Council, there is a widespread perception within the UN system that refugees are UNHCR’s “problem.” This perception, likely a result of the territoriality and competition between UN agencies that dominated the 1990s, has frustrated efforts to articulate a more comprehensive and holistic engagement in issues relating to refugees.

*Id.*

### B. Practical Solutions

#### 1. Short-term Solutions: Refugee Camps

As a short-term solution in cases of large refugee populations, the UNHCR or a host country may set up a refugee camp.<sup>38</sup> Although not intended as long-term solutions, there are many instances of refugee populations living in camps for decades.<sup>39</sup> The UNHCR has recognized “that indefinite encampment is unacceptable” and can lead to violations of internationally recognized human rights.<sup>40</sup> Camps run the risk of creating dependent populations, the likelihood of which increases the longer refugees remain.<sup>41</sup> Camps also pose safety and security problems.<sup>42</sup> The incidence of physical and sexual violence within camps is a concern, especially because the majority of refugees are women and children.<sup>43</sup> In the case of protracted refugee situations, tension may develop between refugees and their host country.<sup>44</sup> This can result in local violence, but may also

38. See OFFICE OF THE UNHCR, *supra* note 19, at 22. “According to UNHCR’s 2003 demographic data, of the 13.1 million displaced persons of concern to the organization, some 36 per cent were located in camps or centres. . . .” *Id.* “In Africa, almost half the people of concern to UNHCR are in camps, as compared to less than a quarter in Asia.” *Id.* “Many host governments now require the vast majority of refugees to live in designated camps, and place restrictions on those seeking to leave the camps for employment or education.” *Id.* at 114–15.

39. *Id.* at 22; see generally *id.* at 106–27 (describing trends, causes, and implications of various protracted refugee situations). “[D]ozens of protracted refugee situations remain unresolved in highly volatile and conflict-prone regions.” *Id.* at 118; see also *id.* at 116–17 (box 5.2 describes the protracted Bhutanese refugee situation in Nepal). “Approximately 103,000 Bhutanese Lhotshampas have been confined to several refugee camps in south-eastern Nepal since 1990. This protracted refugee situation is a source of regional tension between Nepal, Bhutan and India. If left unresolved, it may set a dangerous precedent in a region rife with ethnic and communal tension.” *Id.*

40. *Id.* at 130. “The prolonged encampment of refugee populations has led to the violation of a number of rights contained in the 1951 UN Refugee Convention, including freedom of movement and the right to seek wage-earning employment.” *Id.* at 115. “Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile.” *Id.* at 106 (citing UNHCR, Executive Comm. of the High Comm’r’s Programme, Standing Comm., *Protracted Refugee Situations*, 1, UN Doc. EC/54/SC/CRP.14 (June 10, 2004)).

41. *Id.* (“UNHCR defines a protracted refugee situation as ‘one in which refugees find themselves in a long-lasting and intractable state of limbo . . . . A refugee in this situation is often unable to break free from enforced reliance on external assistance.’”).

42. See *id.* at 114–18.

43. *Id.* at 115.

44. See, e.g., *id.* at 116 (box 5.2 describes tensions created by the encampment of over one



engender ill will on a national level and cause significant future conflict.<sup>45</sup>

## 2. Long-term (Durable) Solutions

There are three long-term or durable solutions for refugee populations: voluntary repatriation, integration, and resettlement.<sup>46</sup>

### a. Voluntary Repatriation

When possible, voluntary repatriation, or returning to the home country, is considered the preferred durable solution.<sup>47</sup> Repatriation can have beneficial aspects for all parties involved: for refugees, a desirable alternative to living in a prolonged refugee situation; for host countries, a way to lighten the burden of the refugee population; and for home countries, an opportunity to rebuild after a period of conflict or human rights abuse.<sup>48</sup> The right to return to one's home country has been recognized as a universal human right,<sup>49</sup> which

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hundred thousand Bhutanese refugees in south-eastern Nepal). "This protracted refugee situation is a source of regional tension between Nepal, Bhutan and India. If left unresolved, it may set a dangerous precedent in a region rife with ethnic strife and communal tension." *Id.* at 116.

45. *Id.* at 116–18. In addition to the example of the Bhutanese in Nepal, "[t]he presence of Burmese refugees on the Thai border has been a frequent source of tension between the governments in Bangkok and Rangoon." *Id.* at 117. Furthermore, "[a]ccording to UNHCR, 'the failure to address the problems of the Rwandan refugees in the 1960s contributed substantially to the cataclysmic violence of the 1990s.'" *Id.* at 118 (citing UNCHR, *THE STATE OF THE WORLD'S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION* 49 (2000)). "Tutsis who fled Rwanda between 1959 and 1962 and their descendents filled the ranks of the Rwandan Patriotic Front which invaded Rwanda from Uganda in October 1990. Many of these refugees had been living in the region for more than three decades." *Id.*

46. *Id.* at 6. Specifically pursuing these three options as durable solutions is considered part of the UNHCR's core mandate responsibilities. LOESCHER ET AL., *supra* note 2, at 13.

47. OFFICE OF THE UNHCR, *supra* note 19, at 30 ("[R]epatriation is now often regarded as the most desirable durable solution—provided that return is genuinely voluntary and sustainable.").

48. The connection between repatriation and rebuilding after conflict is demonstrated by the 4R concept of repatriation, reintegration, rehabilitation, and reconstruction. *See id.* at 133. The 4R concept is accepted as a successful method to achieve sustainable repatriation in a state of origin. *Id.* "It simply combines the notion of voluntary repatriation with the idea of post-conflict reconstruction." *Id.*

49. Guy Goodwin-Gill, *Voluntary Repatriation: Legal and Policy Issues*, in *REFUGEES AND INTERNATIONAL RELATIONS* 255, 258 & n.9, 259 n.10 (Gil Loescher & Laila Monahan

supports the notion that the international community should make efforts to facilitate voluntary repatriation. The United Nations General Assembly took this view and adopted the UNHCR Statute requiring governments to help promote voluntary repatriation.<sup>50</sup>

Although preferred under ideal circumstances, voluntary repatriation is often not a feasible solution.<sup>51</sup> Evaluating safety conditions in the country of origin is far from an exact science, and determining when conditions are safe for refugees to return is often an issue of significant debate.<sup>52</sup> Furthermore, repatriation must be voluntary,<sup>53</sup> and even when international organizations and involved countries agree conditions are safe, refugees themselves may doubt these evaluations and resist repatriation.<sup>54</sup> Desire to find a solution combined with the legally mandated requirement to facilitate repatriation can at times turn what is supposed to be encouragement into coercion.<sup>55</sup> Retrospective review of circumstances surrounding the repatriation of millions in the 1990s has highlighted the need to ensure that repatriation is in fact feasible and voluntary.<sup>56</sup>

#### b. Integration

In the event that repatriation is not an option, a second possible durable solution is integration into the local host community.<sup>57</sup> While

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eds., 1989) (citing, *inter alia*, articles nine and thirteen of the Universal Declaration of Human Rights).

50. *See id.* at 258.

51. OFFICE OF THE UNHCR, *supra* note 19, at 130.

52. For instance, “arguably premature repatriations to the former Yugoslav republics and Afghanistan in the early 2000s . . . renewed debate on sustainable reintegration and its relationship to post-conflict reconstruction.” *Id.*

53. *See id.* at 129–30. “However, returns under pressure from host governments—particularly the 1996 return of Rwandan refugees hosted by Zaire (now the Democratic Republic of Congo, or DRC) and Tanzania—have raised fresh questions about the degree of voluntariness and the role of compulsion . . .” *Id.* at 130.

54. *See* Goodwin-Gill, *supra* note 49, at 275–77 (discussing the example of Chadian refugees in west Sudan in 1986 who resisted efforts by the UNHCR and other organizations to initiate large-scale repatriation).

55. *See id.* at 277–80 (chronicling repatriation from Djibouti to Ethiopia in 1986–87 and demonstrating the difficulties in encouraging repatriation without coercing).

56. OFFICE OF THE UNHCR, *supra* note 19, at 130.

57. *See id.* at 134–37, especially Box 6.1, for a discussion of efforts to promote integration into host communities.

integration into a community is the goal of any long-term solution, initial countries of refuge may be reluctant to accept refugees permanently.<sup>58</sup> Integration can cause significant strain to already struggling economies, a problem that often fuels cultural clashes and local resentment.<sup>59</sup>

### c. Resettlement

The third durable solution is resettlement to a third country.<sup>60</sup> “Resettlement may be defined as the transfer of refugees from a state in which they have initially sought protection to a third state that has agreed to admit them with permanent-residence status.”<sup>61</sup> For example, a Rwandan refugee who fled to a camp in Kenya might be transported to a third country, such as Canada, for resettlement. The main countries that resettle refugees are the United States, Australia, Canada, Sweden, Norway, and New Zealand.<sup>62</sup> Resettlement has been recognized as a way for developed countries further removed from refugee crises to share the burden.<sup>63</sup> The commitment to achieving a more “equitable sharing of responsibility” is important for encouraging all countries to honor the terms of the 1951

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58. *Id.* at 134. “Receiving countries usually have strong concerns about the economic, political, environmental and security implications of moving beyond encampment.” *Id.* at 135. “[I]n the aftermath of economic adjustment and democratization most [southern states] have been less willing to support local integration. This is in contrast to the situation in the 1960s and 1970s when, in Africa, for instance, rural refugees were allowed a high level of *de facto* local integration.” *Id.* at 130.

59. *Id.* at 114.

A marked decrease in financial contributions to [help long-standing refugee populations] has security implications, as refugees and local populations begin to compete for scarce resources. The lack of donor support has also reinforced the perception of refugees as a burden on host states, which now argue that the displaced put additional pressure on the environment, services, infrastructure and the local economy.

*Id.*; see, e.g., CNN.com, Police patrol South Africa riot zone, May 21, 2008, <http://www.cnn.com/2008/WORLD/africa/05/20/southafrica.violence/> (providing a recent example of the potentially violent effects of xenophobia on refugee populations).

60. See OFFICE OF THE UNHCR, *supra* note 19, at 142–46.

61. *Id.* at 142.

62. In 2006, the United States resettled 41,300 refugees, Australia 13,400, Canada 10,700, Sweden 2,400, Norway 1,000, and New Zealand 700. UNHCR, Report of the United Nations High Comm’r for Refugees, ¶ 11, U.N. Doc. A/62/12 (Oct. 11, 2007).

63. OFFICE OF THE UNHCR, *supra* note 19, at 143.

Convention and the Protocol Relating to The Status of Refugees (“1967 Protocol”).<sup>64</sup>

Although resettlement is a durable solution, less than one percent of the total refugee population is resettled each year.<sup>65</sup> Because of the high monetary and social costs of refugee resettlement and integration, resettling countries limit the number of refugees admitted through resettlement each year.<sup>66</sup> Unlike the duty of non-refoulement, countries have no affirmative obligation to resettle refugees.<sup>67</sup> Because of resettlement’s limited scope, it is viewed as a complement to the other durable solutions.<sup>68</sup> Resettlement must be considered in the context of the entire protracted refugee situation, since, for example, “it may represent a disincentive to repatriation by encouraging some refugees to remain in the host state hoping to be resettled.”<sup>69</sup>

### 3. Non-refoulement and the Disparity in Resulting Responsibility

The 1951 Convention defined a refugee as one who is outside his or her country of origin “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”<sup>70</sup> The 1951 Convention

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64. *Id.*

65. 84,651 refugees were resettled in 2004 out of the over nine million worldwide. *Id.* at 146 fig.6.4; UNHCR, 2004 UNHCR Statistical Yearbook, <http://www.unhcr.org/44e5cd172.html>.

66. See, for example, the United States Presidential Determination of the ceiling for refugee admissions, described *infra* notes 145–52 and accompanying text.

67. UNHCR, Information on Refugee Resettlement, [http://www.unhcr.org/ua/main.php?article\\_id=160&view=full](http://www.unhcr.org/ua/main.php?article_id=160&view=full) (last visited Aug. 1, 2010). In fact, a minority of the world’s countries have resettlement programs. Only sixteen countries resettled refugees in 2004, and only four of these countries resettled more than one thousand people. OFFICE OF THE UNHCR, *supra* note 19, at 146 fig.6.4.

68. *Id.* at 143 (“[R]esettlement can be used alongside other durable solutions as part of a comprehensive strategy to overcome protracted refugee situations.”).

69. *Id.*

70. 1951 Convention, *supra* note 5, art. 1. The United States did not participate in the 1951 Convention. See United Nations, Participants to the Convention Relating to the Status of Refugees, <http://treaties.4n.org/Pages/ViewDetailsII.aspx?&src=UNTS&no=V~2&chapter=5&Temp=mtmsg2&lang=en> (last visited Aug. 1, 2010) [hereinafter Participants to the 1951 Convention]. The 1951 Convention applied only to events occurring before January 1, 1951. *Id.* In 1967, a new Protocol Relating to the Status of Refugees extended the reach of the 1951 Convention by removing temporal and geographic restrictions. See Protocol Relating to

also established rights for refugees, including the right of non-refoulement, which ensures that “[n]o contracting State shall expel or return . . . a refugee . . . where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>71</sup> All signatories to the 1967 Protocol agreed to recognize this right of non-refoulement.<sup>72</sup>

The practical implications of this agreement are significantly different for each country.<sup>73</sup> Because non-refoulement applies only to those refugees already within another country’s borders, the burden of refugee crises falls most directly on countries accessible to fleeing refugees: those surrounding the refugee-producing countries.<sup>74</sup> The

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the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. The United States did sign the 1967 Protocol. UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol [hereinafter States Parties to the 1951 Convention and 1967 Protocol], <http://www.unhcr.org/BasicFacts/Docs/States%20parties%20to%20the%20Convention&Protocol.pdf>.

71. 1951 Convention, *supra* note 5, art. 33. “[T]he framers of the Convention stipulated that refugees should have access to national courts, the right to employment and education, and a host of other social, economic and civil rights on a par with nationals of the host country.” LOESCHER ET AL., *supra* note 2, at 15.

72. According to Olivia Bueno, compliance with the principle of non-refoulement has been less than perfect. OLIVIA BUENO, INT’L REFUGEE RIGHTS INITIATIVE, PERSPECTIVES ON REFOULEMENT IN AFRICA 4–7 (2006), <http://www.refugeerights.org/Publications/2006/RefoulementinAfrica.pdf>. In 2006, five African countries (often forced to shoulder the brunt of refugee burdens) received grades of D or F by the United States Committee for Refugees and Immigrants. *Id.* at 4. D grades, representing instances of “significant” refoulement, were received by the Central African Republic and Egypt. *Id.* F grades, given to countries with over one hundred cases of refoulement each year, were given to Burundi, Tanzania, and the Republic of South Africa. *Id.*

73. The concepts of “burden-sharing” and “responsibility-sharing” recognize the disproportionate effects of refugee movements and focus on alleviating the strain that falls mostly on regions neighboring refugees’ countries of origin. See OFFICE OF THE UNHCR, *supra* note 19, at 184.

74. *Id.* “[I]n contrast to the widely accepted and customary legal norm of *non-refoulement*, the global refugee regime lacks an established legal framework to make states share the responsibility for long-term solutions.” *Id.* at 146. The disparity becomes even more apparent when those who have fled their home countries, but do not officially fit within the refugee definition are taken into consideration. See Alexander Betts & Esra Kaytaz, *National and International Responses to the Zimbabwean Exodus: Implications for the Refugee Protection Regime* (UNHCR Policy Dev. and Evaluation Serv., Research Paper No. 175, 2009), available at <http://www.globaleconomicgovernance.org/wp-content/uploads/Betts-and-Kaytaz-National-and-international-responses-to-the-Zimbabwean-exodus.pdf>. The exodus of approximately two million nationals of Zimbabwe between 2005 and 2009 demonstrates the potential scale of non-refugee migrant impact. *Id.* at 2. Although these Zimbabweans did not leave voluntarily, they are not refugees under the definition provided by the 1951 Convention. *Id.* at 1.

vast majority of refugees are from lesser developed countries (“LDCs”), and neighboring countries tend to be similarly poor.<sup>75</sup> “In Malawi, for example, where the GNP per capita is only \$170, one in every ten persons is a refugee from Mozambique. This is the equivalent of the United States, a far richer country, suddenly admitting over 25 million Central Americans. . . .”<sup>76</sup> According to the UNHCR, developing countries host seventy-one percent of the world’s refugees, asylum seekers, and others of UNHCR concern.<sup>77</sup>

### *C. The United States’ Response to Refugees*

#### 1. Asylum

When a refugee is already within the borders of the United States, he is said to be an asylum seeker.<sup>78</sup> Domestic immigration laws handle the policy and procedure of granting asylum.<sup>79</sup> In 1952, Congress passed the basic legislation in force today, the Immigration and Nationality Act (“INA”).<sup>80</sup> The INA initially had no provisions that specifically addressed refugees; instead it utilized ad hoc measures and the attorney general’s parole power.<sup>81</sup> In 1965,

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75. LOESCHER, *BEYOND CHARITY*, *supra* note 2, at 8.

76. *Id.*

77. See OFFICE OF THE UNHCR, *supra* note 19, at 114 (citing U.S. COMM. FOR REFUGEES AND IMMIGRANTS, *WORLD REFUGEE SURVEY 2005* 13 tbl.12 (2005), available at [http://www.refugees.org/uploadedFiles/Investigate/Publications\\_&\\_Archives/2005/ratios\\_of\\_refugees\\_to\\_host\\_country\\_populations.pdf](http://www.refugees.org/uploadedFiles/Investigate/Publications_&_Archives/2005/ratios_of_refugees_to_host_country_populations.pdf)).

78. RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 8 (2005), <http://www.fas.org/sgp/crs/misc/RL32621.pdf>.

79. The United States granted 25,270 requests for asylum in 2007. KELLY J. JEFFERYS & DANIEL C. MARTIN, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., *ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2007* 5 tbl.6 (2008), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_rfa\\_fr\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2007.pdf).

80. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952); see also LEGOMSKY & RODRIGUEZ, *supra* note 7, at 16–17.

81. See, e.g., Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504 (1960); Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400, 403; Displaced Persons Act of 1948, Pub. L. No. 80-774, § 4, 62 Stat. 1009. The Attorney General’s parole power is authorized at INA § 212(d)(5)(A), which states that, “[t]he Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States . . . .” 8 U.S.C. § 1182(d)(5)(A) (2006). Because this parole power is designed to be only temporary, however, Congress had to pass additional legislation

Congress amended the INA to officially recognize resettled refugees as a group of “conditional entrants,” but limited the applicability of the new category to those fleeing political adversaries, such as the Soviet bloc or the Middle East.<sup>82</sup> In 1968, the United States signed the 1967 Protocol, which incorporated the 1951 Convention.<sup>83</sup> By doing so, the United States accepted the principle of non-refoulement.<sup>84</sup>

The Refugee Act of 1980 (“the 1980 Act”)<sup>85</sup> formally recognizes the obligation of non-refoulement created by the 1967 Protocol.<sup>86</sup> Under the 1980 Act, and in accordance with the principle of non-refoulement, anyone within the physical borders of the United States is eligible to apply for asylum.<sup>87</sup> To qualify for asylum, an applicant must meet the United States’ definition of a refugee, which is based on the definition created in the 1951 Convention.<sup>88</sup> A refugee must be

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before those brought in through the parole power could become legal permanent residents. *See id.* (“[B]ut such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled”). Congress has passed several laws designed to allow certain paroled groups to attain legal permanent resident status. *See* Law Offices of Clark T. Trainor, PA, History of the United States Asylum Officer Corps, <http://www.ailc.com/services/asylum/history.htm> (last visited Aug. 1, 2010) [hereinafter Asylum Officer Corps].

82. Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965). The language of the 1965 version states as follows:

Conditional entries shall next be made available . . . to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion . . . .

*Id.* § 203(a)(7), 79 Stat. at 913.

83. *See supra* note 70.

84. *See supra* text accompanying note 71.

85. Refugee Act of 1980, 8 U.S.C. §§ 1521–1522 (2006).

86. LEGOMSKY & RODRIGUEZ, *supra* note 7, at 893. “[T]he Refugee Act of 1980 brought the United States statutory law into conformity with the Convention. *Id.*”

87. “Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum . . . .” 8 U.S.C. § 1158(a)(1) (2006) (specifying that statutory limitations or exceptions do not apply).

88. History of the Asylum Officer Corps, *supra* note 81. The 1967 Protocol incorporates the 1951 Convention, which provides: “No Contracting State shall expel or return (“refouler”) a

“unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, [his or her] country [of origin] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>89</sup>

For those on United States soil who meet this definition, there are two distinct adjudication systems in place through which one may seek permission to remain in the country.<sup>90</sup> A person may affirmatively apply for asylum by filing an application with the United States Citizenship and Immigration Services (“USCIS”).<sup>91</sup> He or she is then scheduled for an interview with an asylum officer.<sup>92</sup> The asylum officer may grant asylum if the applicant satisfies the criteria established in the refugee definition.<sup>93</sup> If the asylum officer does not grant the application, he or she does not conclusively deny asylum, but rather will refer the applicant to a formal hearing.<sup>94</sup> At this time the applicant will generally be slotted for deportation, but may make a defensive application for asylum in front of an immigration judge.<sup>95</sup> The defensive application is the statutory

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refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” 1951 Convention, *supra* note 5, art. 33.1; *see also* 1967 Protocol, *supra* note 70 (incorporating and expanding upon the 1951 Convention).

89. 8 U.S.C. § 1101(a)(42) (2006). The definition allows the President to specify a person still in the country of their nationality who meets the definition of a refugee and will therefore be eligible for rights associated with the designation. *Id.* The definition also excludes anyone from the refugee definition who, “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion,” as well as other explicit exceptions. *Id.*

90. LEGOMSKY & RODRIGUEZ, *supra* note 7, at 1030–32.

91. *Id.* at 1030. The Affirmative Asylum Procedures Manual, published by the United States Citizenship and Immigration Services, outlines the steps for affirmatively applying for asylum. U.S. CITIZENSHIP AND IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL (2007), available at <http://www.uscis.gov/files/nativedocuments/AffirmAsyManFNL.pdf>.

92. LEGOMSKY & RODRIGUEZ, *supra* note 7, at 1030.

93. *Id.* at 1030–31. The United States admitted 12,463 affirmative applicants in 2007. JEFFERYS & MARTIN, *supra* note 79, at 5 tbl.7; *cf.* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 43 tbl.16 (2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois\\_yb\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf) (reporting 12,317 affirmative asylum applications granted in 2007, 146 fewer applications than stated in the previous source).

94. LEGOMSKY & RODRIGUEZ, *supra* note 7, at 1031.

95. WASEM, *supra* note 78, at 9.



recognition of the duty of non-refoulement, referred to in United States domestic law as “withholding of removal.”<sup>96</sup> The network of immigration judges and the Board of Immigration Appeals (“BIA”) are part of the Executive Office for Immigration Review (“EOIR”) within the United States Department of Justice (“DOJ”).<sup>97</sup> Although procedurally different, both the affirmative and defensive routes utilize the same legal standard and refugee definition.<sup>98</sup> In both cases, the applicant has the burden of proving that he or she meets the definition of a refugee.<sup>99</sup>

One issue with asylum adjudication is the inconsistency of adjudication results.<sup>100</sup> High levels of inconsistency have been noted between immigration courts in different cities, as well as between individual immigration judges within the same court.<sup>101</sup> This inconsistency can be at least partially attributed to the inherent subjectivity of refugee status determinations.<sup>102</sup> The statute requires a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political

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96. 8 U.S.C. § 1231(b)(3) (2006); *see also* LEGOMSKY & RODRIGUEZ, *supra* note 7, at 892. Withholding of removal provides that, “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion,” subject to specific exceptions. 8 U.S.C. § 1231(b)(3)(A). Withholding of removal was previously referred to as “withholding of deportation” until the terminology changed in 1997. History of the Asylum Officer Corps, *supra* note 81.

97. WASEM, *supra* note 78, at 9. The EOIR and BIA operate under the authority of the Attorney General, completely separate from USCIS. *Id.*

98. *Id.* at 8.

99. *Id.*

100. *See, e.g.*, Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); *see also* Stephen H. Legomsky, *Learning To Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413 (2007) (explaining the asylum adjudication process, the importance of consistency, and the inherent difficulty in achieving consistency). *Cf.* TRAC Immigration, Latest Data from Immigration Courts Show Decline in Asylum Disparity (2009), <http://trac.syr.edu/immigration/reports/209> (noting that levels of disparity among decisions by immigration judges declined during 2006–07). TRAC compiles statistics on federal enforcement, staffing, and spending, including asylum grant rates for immigration judges. *See generally* TRAC Immigration, <http://trac.syr.edu/> (last visited Aug. 1, 2010).

101. *See* sources cited *supra* note 100.

102. *See* Arthur Glass, *Subjectivity and Refugee Fact-Finding*, in FORCED MIGRATION, HUMAN RIGHTS AND SECURITY 213, 214 (Jane McAdam ed., 2008) (noting the aspects of fact-finding in refugee adjudications that make determinations especially subjective).

opinion,”<sup>103</sup> but leaves interpretation of this requirement up to the individual decision maker.<sup>104</sup> There is often very little evidence to support applicants’ testimony, and so the determination may depend simply on whether the judge finds the applicant believable.<sup>105</sup> In addition, a judge’s degree of cultural sensitivity may play a significant role in his or her degree of understanding, which could ultimately affect the determination.<sup>106</sup>

Statistics on individual judges’ denial ratings reveal that within the same court, rates can vary drastically.<sup>107</sup> In New York between 2001 and 2006, asylum denial rates for individual judges ranged from 9.5 percent to 91.6 percent, meaning that one judge denied one out of every ten applicants, while another denied nine out of every ten applicants.<sup>108</sup> Such statistics suggest the outcome of an application may well depend on the court and the immigration judge assigned to the case.<sup>109</sup>

Consistency is recognized as important in adjudication for several reasons.<sup>110</sup> Intuitively, it indicates a sense of equal treatment for similarly situated individuals and therefore provides fairness.<sup>111</sup> As a more practical matter, inconsistency inhibits stability and certainty in the legal system.<sup>112</sup> This makes results unpredictable for parties and presents society with conflicting norms regarding acceptable

103. 8 U.S.C. § 1101(a)(42) (2006).

104. Glass, *supra* note 102, at 213–14.

105. *Id.* at 214.

106. *See id.*

107. Data on asylum application denial ratings for many individual immigration judges are available from the TRAC Immigration Project Website. TRAC Immigration, <http://trac.syr.edu/immigration/index.html> (last visited Aug. 1, 2010).

108. TRAC Immigration, Judge-by-Judge Asylum Decisions by Immigration Court: Fiscal Years 2001–2006, [http://trac.syr.edu/immigration/reports/183/include/1\\_judgelist.html](http://trac.syr.edu/immigration/reports/183/include/1_judgelist.html).

109. Ranji-Nogales, Schoenholtz & Schrag, *supra* note 100, at 378.

Whether an asylum applicant is able to live safely in the United States or is deported to a country in which he claims to fear persecution is very seriously influenced by a spin of the wheel of chance; that is, by a clerk’s random assignment of an applicant’s case to one asylum officer rather than another, or one immigration judge rather than another.

*Id.*

110. Legomsky, *supra* note 100, at 425–28.

111. *Id.* at 425.

112. *Id.* at 426.

conduct.<sup>113</sup> Some inconsistency is unavoidable given the nature of these particular adjudications.<sup>114</sup> Recommendations for improving consistency generally advocate for modest changes, such as increased training and more rigorous requirements for immigration judges, as opposed to a more detailed legal standard or overhaul of the current system.<sup>115</sup>

## 2. Attempts to Minimize Obligations

Despite the strong humanitarian reasons for honoring the 1951 Convention, signatories often attempt to limit the obligations they encounter through the duty of non-refoulement.<sup>116</sup> Refugees impose a heavy economic burden on host countries.<sup>117</sup> Although the UNHCR may provide assistance, the country of refuge will often face much of the cost of extremely needy refugee populations on its own.<sup>118</sup> This is especially an issue of concern in developing countries where resources are already scarce.<sup>119</sup> Even in the United States, a relatively rich country, the perception of social assistance given to resettled

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113. *Id.*

114. *Id.* at 473. “In asylum cases, the unavoidable abstractness, complexity, and dynamism of the relevant legal language make it inevitable that the human adjudicators will bring their diverse emotions and personal values to bear on their decisions.” *Id.*

115. *See, e.g.*, Ramji-Nogales, Schoenholtz & Schrag, *supra* note 100, at 379–89.

116. *See infra* notes 128–32 and accompanying text (discussing a tactic used to minimize or circumvent non-refoulement obligations); *see also* Michele Berg, *Banished on the Bases: Refugees and Asylum seekers Denied Rights in Europe*, in *WORLD REFUGEE SURVEY 2004* 106 (2004) (criticizing Great Britain’s refusal to allow asylum seekers in its Sovereign Base Areas (SBAs), British-sovereign territory, on the East and West coasts of Cyprus to apply for asylum status).

117. The experience of Tanzania demonstrates the challenges faced by countries hosting large refugee populations. *See* OFFICE OF THE UNHCR, *supra* note 19, at 102–03 box 4.3. “At the end of 2004, Tanzania was host to more than 400,000 refugees spread over 11 refugee camps in western Tanzania and an estimated 200,000 in refugee settlements in [other areas].” *Id.* at 102 box 4.3. “The [Tanzanian] government frequently says there has been no tangible benefit from hosting them, only a drain of its limited resources.” *Id.* at 103 box 4.3.

118. *See id.* at 100. UNHCR funds are limited to begin with and the funds often constrained by donor restrictions: “the high degree of earmarking of funds by donors precludes the allocation of resources in proportion to need.” *Id.* Requests to the UNHCR for funds are made through a Consolidated Appeals Process (“CAP”). *Id.* However, “[c]onsolidated appeals are consistently under-funded, even though donors declare their commitment to the process. In 2004, only 60 per cent of humanitarian assistance requested by the CAP was actually received.” *Id.*

119. *Id.* at 70.

refugees has a history of dampening public support for the refugee cause.<sup>120</sup> Host communities that initially welcome refugees may develop xenophobic ill will if economic tensions arise because refugees worsen existing problems.<sup>121</sup>

Nations' practical reasons for not welcoming refugees receive theoretical support from the concept of national sovereignty.<sup>122</sup> Although the 1951 Convention states that refugees have the right not to be returned to a country of persecution, the 1951 Convention does not impose an affirmative duty on countries to admit refugees.<sup>123</sup> The right to exclude non-citizens is one of the most fundamental in a nation's concept of sovereignty.<sup>124</sup> This creates a significant tension between the humanitarian obligation of non-refoulement and the sovereign right to exclude.<sup>125</sup> By signing the 1951 Convention and 1967 Protocol, states seemingly agree to waive at least a portion of their right to exclude.<sup>126</sup> However, sovereignty is still a powerful force in foreign policy, and it has been used to justify a narrow interpretation of the agreed-upon obligations to refugees.<sup>127</sup>

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120. See Robert L. Bach, *Third Country Resettlement*, in REFUGEES AND INTERNATIONAL RELATIONS, *supra* note 49, at 313, 325–26.

121. See OFFICE OF THE UNHCR, *supra* note 19, at 81 box 3.4.

122. See Joy M. Purcell, *A Right to Leave, but Nowhere to Go: Reconciling an Emigrant's Right to Leave with the Sovereign's Right to Exclude*, 39 U. MIAMI INTER-AM. L. REV. 177, 192–94 (2007).

123. See *id.* at 205 (noting that no country acknowledges a right to immigrate); see also LOESCHER ET AL., *supra* note 2, at 15 (“The 1951 Convention also defined a list of rights for refugees. . . . However, states decided not to grant refugees a right of asylum, notwithstanding the provisions of the 1948 Universal Declaration of Human Rights.”).

124. See Purcell, *supra* note 122, at 192 (explaining how, once the Supreme Court established the right to exclude in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), such a right was all but universally recognized).

125. See *id.* at 196–98.

126. *Id.* at 198. “Acceptance of the duties under the United Nations Convention Relating to the Status of Refugees for example, demonstrates that consenting nations have essentially waived their right to exclude pursuant to international obligations.” *Id.* But note the slight distinction between a waiver of the “right to exclude” and the actual agreement not to “expel or return a refugee.” The first formulation suggests a waiver of the ability to prevent a refugee from entering, while the second applies when a refugee is already present within the country's borders.

127. For example, Australia's Prime Minister John Howard, using the concept of national sovereignty to justify turning away the *Tampa*, a ship carrying 400 refugees, said: “While this is a humanitarian, decent country . . . we are not a soft touch. We are not a nation whose sovereign rights . . . are going to be trampled on.” Peter Shadbolt, *Australians Ban Ship Laden with Afghan Refugees*, TELEGRAPH, Aug. 28, 2001, <http://www.telegraph.co.uk/news/worldnews/>

The United States and others have taken advantage of their relative geographic isolation in an attempt to limit their obligations under the duty of non-refoulement.<sup>128</sup> Both the United States and Australia have employed the practice of stopping boats of refugees in the water before they reach their shores.<sup>129</sup> In such cases, they have sought to prevent refugees from physically crossing their borders in order to avoid the application of the duty of non-refoulement, a tactic heavily criticized by the international community.<sup>130</sup> Many assert it constitutes a breach of the duty of non-refoulement under the 1951 Convention.<sup>131</sup>

### 3. Resettlement

Refugee resettlement in the United States began with the Displaced Persons Act of 1948.<sup>132</sup> The Act applied to those displaced by World War II and was used to resettle over 400,000 European refugees to the United States by 1951.<sup>133</sup> The United States was not a

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australiaandthepacific/australia/1338765/Australians-bar-ship-laden-with-Afghan-refugees.html. See also Susan Kneebone, *The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The 'Safe Third Country' Concept*, in FORCED MIGRATION, HUMAN RIGHTS AND SECURITY, *supra* note 102, at 129, 148 (criticizing the Australian government's invocation of the sovereignty concept in defending its actions in the *Tampa* incident).

128. "Rich countries have avoided responsibility through exclusionary or deterrent policies and their distance from regions of refugee origin." OFFICE OF THE UNHCR, *supra* note 2, at 146.

129. Angus Francis, *Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing*, 20 INT'L J. REFUGEE L. 273, 273 (2008) (citing Memoranda of Understanding that establish intake facilities on territory outside that of the potential host countries); see also Robert Suro, *Jamaica Will Help U.S. Process Haitians: Agreement Reached to Host Refugee Facility, Perhaps on Large Ships*, WASH. POST, June 1, 1994, at A1.

130. See, e.g., Danielle Every, *A Reasonable, Practical and Moderate Humanitarianism: The Co-Option of Humanitarianism in the Australian Asylum Seeker Debates*, 21 J. REFUGEE STUD. 210, 221–22 (2008); see also *European Press Review*, BBC NEWS, Aug. 30, 2001, <http://news.bbc.co.uk/2/hi/europe/1516108.stm> (providing an overview of the reaction to the *Tampa* incident from various newspapers across Europe).

131. According to Germany's Frankfurter Rundschau, "[Australia's response] 'marks a low point in international refugee policy and constitutes a breach of the 1951 convention on refugees.'" *European Press Review*, *supra* note 130.

132. Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009 (1948).

133. Daniel J. Steinbock, *The Qualities of Mercy: Maximizing the Impact of the U.S. Refugee Resettlement*, 36 U. MICH. J.L. REFORM 951, 956 n.18 (2003) (citing Michael J. Creppy, *Nazi War Criminals in Immigration Law*, 12 GEO. IMMIGR. L.J. 443, 445 (1998)).

signatory to the original 1951 Convention, but began financially supporting the UNHCR in the mid-1950s and eventually signed the 1967 Protocol, which incorporated the 1951 Convention.<sup>134</sup>

During the Cold War, the United States realized refugee resettlement could be used as a political weapon.<sup>135</sup> The United States welcomed refugees from Communist regimes as a propaganda tool to embarrass ideological adversaries.<sup>136</sup> People who came from communist countries were considered to be “voting with their feet by leaving.”<sup>137</sup> “Labeling the emigrants as refugees—people with a fear of persecution—further tar[red] the source country.”<sup>138</sup> Refugees came largely from Yugoslavia, Poland, Hungary, China, Cuba, and later Vietnam, Laos, and Cambodia.<sup>139</sup> Less than two thousand of the one and a half million refugees admitted between World War II and 1980 came from non-communist countries.<sup>140</sup> Until 1980, the authority for refugee admissions came from congressional legislation or the presidential parole power.<sup>141</sup> In both cases, permission for resettlement was allocated only to specific groups involved in particular crises.<sup>142</sup>

With the passage of the Refugee Act of 1980, the United States Congress created a permanent process that continues to govern American resettlement policy today.<sup>143</sup> The purpose of the Act was “to end an ad hoc approach to refugee admissions and resettlement that had characterized U.S. refugee policy since World War II.”<sup>144</sup> According to the Act, the President determines the number of

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134. LOESCHER, *BEYOND CHARITY*, *supra* note 2, at 66–67; *see* States Parties to the 1951 Convention and 1967 Protocol, *supra* note 70.

135. Meital Waibsnider, Note, *How National Self-Interest and Foreign Policy Continue to Influence the U.S. Refugee Admissions Program*, 75 *FORDHAM L. REV.* 391, 396–97 (2006).

136. *Id.*

137. Steinbock, *supra* note 133, at 981.

138. *Id.*

139. *Id.* at 956.

140. Waibsnider, *supra* note 135, at 396.

141. Steinbock, *supra* note 133, at 956.

142. *Id.*

143. *Id.* at 957.

144. ANDORRA BRUNO, CRS REPORT FOR CONGRESS: REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 1 (2006), available at <http://www.ilw.com/immigdaily/news/2006,0215-crs.pdf>.

refugees to be admitted each year after “appropriate consultation.”<sup>145</sup> The President apportions the number of slots among regions of the world as “is justified by humanitarian concerns or is otherwise in the national interest.”<sup>146</sup> Though the numbers are often considered targets, they are officially the ceilings for refugee admissions.<sup>147</sup> The President may, however, allow for additional refugees in the case of “an unforeseen refugee emergency.”<sup>148</sup> The number of resettled refugees has fluctuated from 207,000 in 1980 to 27,000 in 2002.<sup>149</sup>

The presidential determination of yearly refugee quotas has been criticized on several grounds.<sup>150</sup> Although the Refugee Act allows for admission of refugees based on *either* humanitarian concern *or* as otherwise in the national interest, the trend is for national interest, in particular foreign policy, to be the overwhelming motivation for presidential determinations.<sup>151</sup> This was especially the case during the Cold War, when foreign policy interests dictated resettlement policy.<sup>152</sup> Today, presidential determinations are influenced much more by domestic political pressure and public opinion. While this is a welcome change, it is still not ideal for those who feel humanitarian need should drive resettlement policy.<sup>153</sup>

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145. 8 U.S.C. § 1157(a)(3) (2006).

146. *Id.* § 1157(a)(2). The Presidential Determination for fiscal year 2009 allots for the resettlement of 80,000 refugees to be apportioned as follows: Africa-12,000, East Asia-19,000, Europe and Central Asia-2,500, Latin America/Caribbean-4,500, Near East/South Asia-37,000, Unallocated Reserve-5,000. Presidential Determination No. 2008-29, 73 Fed. Reg. 58,865 (Oct. 7, 2008).

147. There have been calls to treat the quotas as goals for admissions, rather than ceilings. See DAVID A. MARTIN, THE UNITED STATES REFUGEE ADMISSIONS PROGRAM: REFORMS FOR A NEW ERA OF REFUGEE RESETTLEMENT 30–38 (2005), available at <http://www.state.gov/documents/organization/36495.pdf>.

148. “If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest . . . the President may fix a number of refugees to be admitted to the United States . . . in response to the emergency refugee situation.” 8 U.S.C. § 1157(b) (2006).

149. Steinbock, *supra* note 133, at 957.

150. See Stephen H. Legomsky, *The Making of United States Refugee Policy: Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675 (1995); Waibsnider, *supra* note 135.

151. See LEGOMSKY & RODRIGUEZ, *supra* note 7, at 887.

152. See Legomsky, *supra* note 150, at 698.

153. *Id.* at 699. Professor Legomsky suggests a more humanitarian focus could be achieved by creating a Refugee Board to determine refugee quotas with the explicit purpose of easing suffering and promoting human rights. *Id.* at 708–13.

The United States allows application for resettlement based on a priority system that structures the process.<sup>154</sup> Refugees may apply for resettlement based on their position in one of five priority categories, designated P-1 through P-5.<sup>155</sup> The P-1 category is comprised of referrals from the UNHCR and United States embassies, and focuses on “compelling cases.”<sup>156</sup> P-1 refugees were traditionally referred on an individual basis, but may now also be referred as groups.<sup>157</sup> Examples of P-1 refugees include victims of torture or violence, physically or mentally disabled persons, former political prisoners, women at risk, and persons in need of urgent medical care.<sup>158</sup> The P-2 category consists of specifically identified groups of special humanitarian concern to the United States.<sup>159</sup> Recent examples of these groups include the “Lost Boys” of Sudan, ethnic leaders and political activists from Burma, and mixed marriage families from Bosnia.<sup>160</sup> Categories P-3 through P-5 represent access for those with family relations in the United States.<sup>161</sup> Such access is only available to people of certain nationalities in certain relationships.<sup>162</sup>

P-1 referrals are assessed using an adjudication procedure. Refugee status determinations are made after the applicant interviews with either a staff member from the Refugee Division within the Department of Homeland Security (“DHS”), or as of 2006, with a member of the specialized Refugee Corps within the United States Citizenship and Immigration Services (“USCIS”).<sup>163</sup> As in the

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154. See MARTIN, *supra* note 147, at 62–99.

155. *Id.* at 62–63.

156. *Id.*

157. *Id.* at 64.

158. *Id.* at 63.

159. *Id.* at 64.

160. *Id.*

161. *Id.* at 66.

162. *Id.* “P-3 includes spouses, minor children, and parents . . . .” *Id.* “P-4 covers married sons and daughters, siblings, grandparents, and grandchildren. P-5 covers uncles, aunts, nieces, nephews, and first cousins.” *Id.* at 66 n.11.

163. Statement by Homeland Security Secretary Michael Chertoff in Commemoration of World Refugee Day, Dep’t of Homeland Sec. (June 20, 2006), [http://www.dhs.gov/xnews/releases/press\\_release\\_0931.shtm](http://www.dhs.gov/xnews/releases/press_release_0931.shtm); see also *USCIS Initiates New Refugee Officer Corps*, USCIS TODAY (U.S. Citizenship and Immigration Servs., Washington, D.C.), Nov. 2005, at 5, [http://www.uscis.gov/files/native/documents/USCISToday\\_Nov\\_05.pdf](http://www.uscis.gov/files/native/documents/USCISToday_Nov_05.pdf). “In FY05, USCIS officers conducted over 65,000 interviews in 51 countries for refugee applicants from over 60 nations.



domestic asylum application process, the relevant determination is whether the applicant meets the definition of a refugee, namely, whether he or she has “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .”<sup>164</sup> Additionally, the consistency of interviewer determinations is an issue in the resettlement context, with reports of different groups of interviewers returning varying approval ratings for similar groups of applicants.<sup>165</sup>

#### 4. Asylum and Resettlement Compared

In addition to the inherent inconsistencies in refugee determinations, interviewers are encouraged to apply the refugee definition differently depending on whether the applicant is in the United States or overseas. Overseas interviewers are encouraged to use a more flexible application of the standard in the resettlement context, as explained in a report commissioned for DHS:

It makes sense to use a generous interpretation of the standard in the overseas program, even though the government should continue to use a more strict approach in asylum adjudications involving persons who have already reached US soil. This difference in emphasis is appropriate because the United States remains in full control of the volume of overseas admissions in any case. *To be more precise, for asylum applications in the United States, the only real control on the volume of ultimate admissions as asylees is the refugee definition.*<sup>166</sup>

No empirical evidence exists as to the degree to which the differing standards affect an applicant’s chance of admittance as a refugee, as compared to that same applicant’s chance of admittance as an asylum seeker.<sup>167</sup> Anecdotal evidence does, however, confirm

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Almost 54,000 refugees were admitted to the U.S. for resettlement, almost 150 new immigrants each day.” *Id.*

164. *See supra* note 103 and accompanying text.

165. *See* MARTIN, *supra* note 147, at 104–06. The inconsistency within a group of interviewers may be somewhat alleviated by the recent decision to appoint a single group supervisor to review the determinations of interviewers in the group. *Id.* at 104.

166. *Id.* at 105 (emphasis added).

167. The lack of direct empirical evidence can be attributed to (1) the extreme unlikelihood

the intuitive conclusion that the differing standards mean some percentage of applicants denied asylum in the United States would be accepted if they were overseas.<sup>168</sup>

For those chosen for overseas resettlement, both international and American agencies provide assistance at each stage of resettlement.<sup>169</sup> The International Organization for Migration (“IOM”) arranges for transportation of the refugees,<sup>170</sup> USCIS adjudicates applications for refugee status,<sup>171</sup> and the Office of Refugee Resettlement (“ORR”) assists with integration into American communities.<sup>172</sup> In contrast, domestic asylum-seekers must get to the United States themselves and file their own applications; if their status is approved, they must figure out how to integrate into an American community.<sup>173</sup>

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that one individual would apply through both the domestic asylum channels and the overseas resettlement channel, and (2) the non-fungibility of applicants’ personal histories and situations. The general denial rates of adjudication in both instances can be compared, and reveal a much higher rate of denial in the domestic asylum situation. However, whether this comparison is indicative of the standard used is suspect because of the differences in applicant pools.

168. From 2004–09, Katie Herbert Meyer served as the Legal Director of Interfaith Legal Services for Immigrants, a non-profit organization representing low-income clients in the St. Louis, Missouri, metro area. According to Ms. Meyer, there is a general perception among practitioners in the local community that clients would have a better chance of attaining refugee status if their applications were evaluated through overseas adjudication. This contributes to the general frustration resulting from what appears to be impossibly high denial rates of some judges. Telephone Interview with Katie Herbert Meyer, Legal Dir. and Staff Attorney, Interfaith Legal Servs. for Immigrants (Feb. 11, 2009).

169. *See USCIS Initiates New Refugee Officer Corps*, *supra* note 163, at 5.

170. *Id.*

171. *Id.*

172. The Office of Refugee Resettlement is part of the United States Department of Health and Human Services. *See* Office of Refugee Resettlement (“ORR”), <http://www.acf.hhs.gov/programs/orr/index.html> (last visited Aug. 1, 2010). The mission statement of the ORR states that its purpose is to help integrate resettled refugees: “Founded on the belief that newly arriving populations have inherent capabilities when given opportunities, the Office of Refugee Resettlement (ORR) provides people in need with critical resources to assist them in becoming integrated members of American society.” ORR: Mission Statement, <http://www.acf.hhs.gov/programs/orr/about/mission.htm> (last visited Aug. 1, 2010).

173. “Asylees are individuals who, on their own, travel to the United States and apply for/receive a grant of asylum.” ORRL: Who We Serve, <http://www.acf.hhs.gov/programs/orr/about/whoweserve-2.htm> (last visited Aug. 1, 2010). For the steps an asylum-seeker must take to affirmatively apply for asylum, see the AFFIRMATIVE ASYLUM PROCEDURES MANUAL, *supra* note 91. Asylum-seekers do not receive any assistance while their applications are pending; they “are eligible for ORR-funded benefits and services beginning on the date of final grant of asylum.” ORR: Who we Serve, *supra*. *See generally* WELCOME TO THE UNITED STATES: A GUIDE FOR NEW IMMIGRANTS, <http://www.uscis.gov/files/nativedocuments/M-618.pdf> (exemplifying the materials expected to assist in integration).

## II. ANALYSIS

Overseas resettlement is one way the United States shares the burden of alleviating humanitarian crises associated with refugee displacement.<sup>174</sup> Because the United States is somewhat geographically isolated and bordered by two stable nations, it is largely sheltered from refugee movements.<sup>175</sup> At times, the United States has taken additional steps to discourage potential asylum-seekers, actions criticized as contrary to the spirit of the Refugee Convention.<sup>176</sup>

Although the United States may at times operate on the verge of violating non-refoulement, it also voluntarily resettles the largest number of refugees in the world.<sup>177</sup> However, this is not accidental. The United States prefers to shift as many refugee admissions as possible to the resettlement program because it has no affirmative duty to assist refugees located overseas.<sup>178</sup> By altering legal standards and channeling refugees through the resettlement program, the United States can control its obligation and involvement.<sup>179</sup> Like

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174. Another way the United States helps shoulder the burden is through its financial contributions to the UNHCR. *See* discussion *supra* note 35. Despite the resettlement of refugees and the monetary contributions, however, LDCs still shoulder a disproportionate amount of the refugee burden. *See supra* notes 74–77 and accompanying text.

175. *Cf. supra* notes 53–57 and accompanying text.

176. *See supra* notes 128–32 and accompanying text. Examples include the interception of boats before they reach United States shores and national security legislation creating additional barriers to entry. Although beyond the scope of this Note, the immigration restrictions implemented to address national security in the wake of September 11th have become an issue of significant debate. Rodger Haines QC, *National Security and Non-Refoulement in New Zealand: Commentary on Zaoui vs Attorney-General (No 2)*, in FORCED MIGRATION, HUMAN RIGHTS AND SECURITY, *supra* note 102, at 63 (2008); Penelope Mathew, *Resolution 1373—A Call to Pre-empt Asylum Seekers? (or ‘Osama, the Asylum Seeker’)*, in FORCED MIGRATION, HUMAN RIGHTS AND SECURITY, *supra* note 102, at 19.

177. The United States consistently resettles refugees in numbers far larger than any other country. *See* OFFICE OF THE UNHCR, *supra* note 19, at 141 fig.6.2. For example, in 2004 the United States resettled 52,868 refugees, and the next three largest resettlers of refugees were Australia with 15,967, Canada with 10,521, and Sweden with 1,801. *Id.* at 146 fig.6.4.

178. The duty of non-refoulement applies only to those refugees who are already within a country’s borders. *See* Convention, *supra* note 5, art. 33 (“No contracting State shall *expel or return* . . . a refugee.”)(emphasis added)). “Resettlement and financial contributions to support local integration or repatriation have historically been discretionary acts by governments.” OFFICE OF THE UNHCR, *supra* note 19, at 146.

179. *See supra* Part I.C. “In the overseas program, the United States can apply a variety of other screening tools (such as the precise limitations on access categories) to assure that

other efforts to limit refugee obligations, altering standards, if not an outright violation of non-refoulement, certainly runs contrary to its spirit.<sup>180</sup>

Refugee flows and the events that cause them are never planned.<sup>181</sup> Unpredictability is therefore a characteristic inherent in refugee crises. By ensuring that its own obligation remains stable, the United States forces other countries to absorb the entire cost created by the uncertainty of refugee flux.<sup>182</sup> This means that, as compared to the physical burden of actual refugees, the burden of unpredictability is borne even more disproportionately by the world's LDCs.

The United States' policy of encouraging inconsistent application of the law sacrifices consistency in adjudication and equitable treatment of individuals for predictability.<sup>183</sup> The policy creates a system of immigration in which applicants who pay their own travel expenses to the United States and receive no resettlement services are at a disadvantage compared to individuals with similar legal qualifications who are interviewed overseas.<sup>184</sup> As previously noted,

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admissions do not exceed a pre-set level." MARTIN, *supra* note 147, at 105. The concept of resettlement has itself been criticized because it allows resettling countries (1) to externalize the selection process and avoid hosting and receiving applicants, and (2) to selectively choose those refugees who best suit its own needs. *See Resettlement vs Right of Asylum*, MIGREUROP (Apr. 2006), <http://www.migreurop.org/article916.html>. Such critics fear resettlement programs are a way for wealthier countries to avoid the duty to allow domestic asylum applications under non-refoulement. *See id.*; *see also* Marie-Paule Bourassa, *La réinstallation des réfugiés dans un pays tiers: une solution à double tranchant* [*The Resettlement of Refugees in Third Countries: A Double-Edged Sword*], Chaire de Recherche du Canada en Droit International Des Migrations (Oct. 8, 2007), <http://cdim.cerium.ca/La-reinstallation-des-refugies> (stating that control over migratory inflows is a main objective of resettlement).

180. *See supra* notes 129–31 (mentioning examples of international reactions to efforts to minimize refugee obligations).

181. *See supra* text accompanying notes 21–22.

182. Concerns about the impact of resettled refugees on the United States' social services program highlight the costs of absorbing such refugees into society. *See* Lavinia Limon, Director, Office of Refugee Resettlement, Testimony on Use of Welfare by Immigrants (Feb. 6, 1996), <http://www.hhs.gov/asl/testify/t960206a.html>. One can imagine that an unknown burden on the United States social services programs would make their operation much more difficult.

183. The current system promotes the United States' control over the inflow of refugees, but assesses individuals differently depending on their physical location. *See, e.g., supra* note 165 and accompanying text.

184. Refugees who receive the favorable resettlement standard also benefit from significant government services. The Office of Refugee Resettlement had a 2007 enacted budget of \$587,847,000 to appropriate for various forms of assistance for resettled refugees. *See* ORR Appropriations, <http://www.acf.hhs.gov/programs/orr/funding/appropriations.htm> (last visited

inconsistency in refugee and asylum adjudications raises concerns regarding fairness, predictability, and certainty.<sup>185</sup> A degree of inconsistency is inherent in refugee and asylum determinations, but the United States' policy exacerbates this problem by encouraging an inconsistent application of the refugee definition. This need not be the case, however, since systems could be implemented that reflect national interests without encouraging inconsistent legal standards.<sup>186</sup>

### III. PROPOSAL

Assuming that predictability retains its current importance in immigration policy,<sup>187</sup> the United States should still strive for the best policy that achieves that goal. The current resettlement program in the United States achieves predictability by adhering to the ceilings set each year by the President.<sup>188</sup> In contrast, the number of asylum seekers granted status through domestic adjudication can never be known for sure, since non-refoulement requires the United States to admit anyone within its borders who meets the refugee definition. Non-refoulement creates an obligation that puts the number of asylees outside of the United States' control.

Predictability for the total number of those who meet the refugee definition could be obtained by considering overseas resettlement and the domestic asylum process as two components of a single program. Consistency in the resettlement context is currently achieved by setting a ceiling for the number of those admitted. A ceiling could be

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Aug. 1, 2010). This is in contrast to asylum seekers, who are largely on their own for transportation and asylum application, and receive no services to help them enter a new community.

185. See *supra* text accompanying notes 110–14.

186. See *infra* Part III.

187. When considering the United States' immigration policy, the appropriate tradeoff between predictability and an equitable sharing of the refugee burden depends on an individual's evaluation of the weight that should be given to each of these concerns. The proper balancing of national priorities is an extremely worthy debate, but one that will depend significantly on personal opinion. This Note seeks to highlight the tension between priorities and promote consideration of the potential ethical issues presented by United States refugee and asylum law.

188. See 8 U.S.C. § 1157(a) (2000); *supra* notes 145–48 and accompanying text (describing the statutory authority for the Presidential determinations). The President has the authority to alter these determinations. See 8 U.S.C. § 1157(b); *supra* note 148.

set for the total number of people admitted under the refugee definition. This number would include both those granted asylum from within the United States and those brought to the United States through overseas resettlement. Because the number of refugees resettled is discretionary, the United States could alter this number and still be sure to honor its obligation under the principle of non-refoulement. The number of resettled refugees would be altered to account for any increases or decreases in the number of asylum-seekers granted refugee status.

The mechanics of implementing such a change would require only a few additional steps in setting the presidential determination of refugee quotas for a given year. This new presidential determination would be computed by adding together the desired number of resettled refugees (the current refugee quota) and the projected number of asylum-seekers for the given year. Depending on whether grants of asylum were higher or lower than the projected number, the following year's presidential determination would be raised or lowered by that amount.<sup>189</sup> In essence, the proposed presidential determination of refugee quotas would change the number of resettled refugees to account for the higher or lower levels of asylum seekers that are granted status.<sup>190</sup>

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189. Application to the following year's quota numbers is already done in other immigration contexts, such as employment visas. *See* 8 U.S.C. § 1153(b)(6)(B) (2006) ("The number of visas made available in any fiscal year under paragraphs (1), (2), and (3) shall each be reduced by 1/3 the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title.").

190. The proposed Presidential Determination would be the total number of both refugees and asylees in a given year. The difference between the projected number of asylees and the actual number of asylees would be taken into account in the next year's Determination. The following formula represents the mechanics of calculating the proposed Presidential Determination.

Where:

$R_x$  = the maximum number of refugees to be admitted in year  $x$ ;

$AP_x$  = the projected number of asylees in year  $x$ ;

$AA_x$  = the actual number of asylees in year  $x$ ; and,

$PD_x$  = the newly proposed Presidential Determination in year  $x$ ;

The following is the proposed equation:

$$PD_x = R_x + AP_x - (AA_{x-1} - AP_{x-1})$$

By linking asylee inflows to the discretionary resettlement quota, the United States could ensure predictability and therefore encourage a uniform application of the refugee definition. Because any unexpected increase in asylees would be accompanied by a corresponding decrease in resettled refugees, adjudicators would not have to favor applicants in one venue over another in order to achieve predictability. Although this would make the United States' insistence on control more obvious, it would be a more honest policy, and in actuality only externalize an objective the United States already pursues indirectly. Implementing this newly proposed method for calculating the Presidential determination of refugee quotas would not only ensure predictability, but would also ensure compliance with non-refoulement and avoid an unfair and inconsistent application of the law.

#### CONCLUSION

The United States values consistency and stability in its humanitarian obligation to assist refugees. Its current policy reflects this by attempting to channel refugees through the overseas resettlement process, where there is no affirmative obligation, as compared to through the domestic asylum process, where the duty of non-refoulement requires that the United States admit any refugees on its soil. Although a predictable and stable refugee burden is a legitimate state interest, the United States should evaluate the larger implications of any policy it uses to achieve this goal. The current method of encouraging an inconsistent application of the refugee

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This assumes that, for the first year of this equation's use, the previous year's projected and actual number of asylees were the same, resulting in:  $(AA_{x-1} - AP_{x-1}) = 0$ . After the first year, the actual values for each of the variables could be inputted as they are described.

As mentioned previously, American immigration law already uses the concept of altering quotas based on the previous year's numbers. *See supra* note 189. This is significant because it demonstrates that employing such a scheme would be administratively manageable. It may be desirable, however, to leave the numbers separated in order to emphasize that the United States continues to abide by the 1951 Convention and 1967 Protocol. Officially combining the numbers might suggest that the United States was pre-deciding the number of people that would receive asylum. Under the principle of non-refoulement, such a pre-determination would violate the 1951 Convention and 1967 Protocol. If the United States conceptually used the above formula, but only publicized  $PD_x = R_x - (AA_{x-1} - AP_{x-1})$  as the Presidential Determination, it would produce the same result and perhaps avoid confusion and unfounded criticism.

definition has a significant impact on the individuals involved, domestic immigration policy, and the international effort to ameliorate the refugee problem. If it is possible to achieve predictability without the negative consequences of an inconsistent legal standard, the United States should explore such alternatives.