

REFUGEE SECURITY AND THE ORGANIZATIONAL LOGIC OF LEGAL MANDATES

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INTRODUCTION

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Over the last half century, millions of people have used the international refugee protection system to seek refuge from persecution and conflict, making it one of international law's most recognizable features. Despite the value of that system as an expressive achievement, its underlying reality can be a brutal one. The system routinely places massive numbers of refugees in camps in the developing world, where they face chronic threats to their physical security from crime and disorder, coercion, and military attacks.¹ Yet key actors responsible for refugee protection, including host states, advanced industrialized countries, and the United Nations High Commissioner for Refugees (UNHCR), generally have failed to prioritize refugee security.² This article asks: (1) Why? (2) What have been the consequences? (3) And what do these answers reveal about how organizations carry out legal mandates in complicated political environments?

Conventional wisdom holds that security only recently became a major problem in the refugee protection system, that UNHCR's role in enhancing refugees' physical security is limited by the agency's legal mandate and practical constraints, and that problems of violence and physical security are largely episodic concerns affecting small numbers in discrete refugee populations.³ Drawing on historical documents, interviews, data on budgets and performance measures, and legal doctrine, I show this conventional wisdom to be wrong.⁴ A variety of distinct threats to refugees' physical security have been a pervasive problem since the creation of the modern protection system in the 1950s and have grown worse as sprawling refugee camps near conflict zones have become a lynchpin of that system.⁵ The legal concept of refugee protection clearly encompasses refugees' physical security, and even provides a framework for disarming and separating combatants in the mass influx emergencies that have become commonplace in the developing world. Key players in the refugee protection system nonetheless have long

¹ See *infra* Part I.b.

² In this context, the term "refugee security" refers to: (1) the protection of the physical integrity of refugees from threats of violence against them emanating from other refugees or surrounding populations; (2) the mitigation of the extent to which combatants or criminals manipulate refugees by keeping them hostage or exploiting resources meant to support civilian refugees; and (3) reductions in the risk that the presence of refugees will exacerbate regional conflict or war. For a more detailed discussion of the scope of "refugee security," see *infra* note 50 and accompanying text.

³ See *infra* Part I.b.

⁴ My data included internal memos and cables, particularly from the 1970s and 1980s, to which I obtained access from UNHCR Archives. I also examined more recent (publicly-available) legal analyses and public pronouncements from UNHCR, the United Nations Secretariat, and nongovernmental organizations; as well as publicly-available budget documents and performance measurements from UNHCR. In addition, I drew on declassified U.S. government documents discussing refugees, available from the National Security Archive at George Washington University. I also examined selected documents from relief NGOs that collaborate with UNHCR, including fundraising appeals, press releases, and policy statements. Finally, the data also included extensive semi-structured interviews with current and former officials and employees at UNHCR (34) and several of its NGO partners (6). Interviewees fell into three groups. First, I interviewed (13) current and recent senior officials at UNHCR (selected because of their important managerial positions, suggesting extensive knowledge of organizational priorities and challenges). Second, I selected a random sample of ten lower-level employees from protection (6) and operations (4) in the New York and Geneva offices, all with recent field experience. Third, I obtained a snowball sample of (11) mid-level officials with positions likely to be relevant to violence and security, both at UNHCR and a number of NGOs. Additional methodological details on file with author.

⁵ See *infra* Part I.b., Part III.a.

neglected refugee security, creating immediate protection problems and subtler difficulties for the evaluation of the entire system.

Only some of this neglect can be explained by international geopolitics or by legal compromises reflected in refugee law. Instead, the problems associated with the modern system also reflect the intersecting effects of bureaucratic realities, political pressures, and legal interpretations shaping the discretionary choices of UNHCR and its nongovernmental organization partners – the refugee advocates at the center of the modern protection system.⁶ I develop the argument by tracing the remarkable history of UNHCR as it transformed itself, sometimes despite the concerted opposition of the nations that created it, from a refugee advocacy organization into a modern relief agency. The agency’s history reveals how bureaucratic actors were constrained when they responded to their environment, but they were not bereft of reasonable strategies to mitigate violence and manipulation by (among other things) accumulating expertise, supporting changes in the structure of oversight for refugee protection, and raising funds to support policing activities. Nor are UNHCR and its partners powerless now – particularly not with regard to problems involving the maintenance of law and order in the ersatz cities that refugee camps have become, or involving instances where refugees are coerced by combatants. While these problems have obvious relevance for refugees, they also tell a larger story about the challenges of implementing ambitious legal mandates under uncertainty, particularly when the organizations doing so operate in complex political environments.

The argument proceeds as follows. Part I introduces the problem of refugee security with a description of refugee camps, created in the wake of the Rwandan genocide, in the Great Lakes region of Africa during the mid-1990s. The description reveals how a combination of proximity to conflict zones, international aid, poor camp management, and militarized camp control structures can turn refugee protection into a contradiction in terms. The discussion then elucidates the scope and conceptual definition of refugee security problems throughout the globe, and considers why they matter beyond the specific context of refugee welfare.

Part II provides the context for the analysis by describing the familiar and less-familiar features of the overall global refugee protection system in which security problems persist. As will become clear, nothing about that scheme makes sense without recognizing the protection system to be a *compromise*, the purpose of which is to regulate relations between predominantly poor refugee host countries, advanced industrialized countries, UNHCR, and the refugees themselves. That arrangement (which I refer to as a “grand compromise”) places only limited burdens on developed countries, while it creates massive refugee camps at the frontiers of poorer ones. Because most refugees are housed in camps in developing countries where physical security threats are endemic and few actors in the system are inclined to take responsibility for refugees’ physical security, this arrangement also fails to mitigate, and sometimes exacerbates, threats to refugee security. Yet international law supposedly makes the physical integrity and security of refugees (“refugee security”) an important imperative for at least four sets of actors: (a)

⁶ See *infra* Parts II and III.

host country governments, (b) combatants, (c) the refugees themselves, and (d) UNHCR and its major partners.⁷

Regardless of such guarantees, Part III shows how security problems have long been recurring features of the global refugee problem. While the violence marring refugee protection has been exacerbated by a host of predictable factors, such as host states' inadequate provision of law enforcement services or outright complicity in camp militarization, close attention to security problems reveals that they can be disaggregated into three different types, some of which can be addressed more readily than others. Most difficult to resolve are the problems associated with states-in-exile that become heavily militarized with considerable support from rank and file refugees are the most difficult to resolve. Recurrent crime-control problems appear (with some exceptions) to be more amenable to practical solutions, and situations involving the coercion of refugees by combatants are somewhere in the middle. Despite these distinctions, security problems are conceptually related because they all implicate refugees' physical integrity, they occasionally overlap (as when generalized fear of disorder and crime strengthens a state-in-exile), and historically they have often been lumped together when refugee advocates occasionally discuss them.⁸ While the threats to refugees' security are rooted in the nature of refugees' underlying circumstances and the structure of the refugee protection system itself, refugee advocates seem to retain limited power to mitigate at least some kinds of security problems even under existing legal mandates.

Part IV then scrutinizes how such powers have been used by analyzing the evolution of the primary global refugee advocate, UNHCR. It documents how UNHCR and its partners generally have not prioritized the goal of mitigating any of the aforementioned security problems.⁹ While individual staff members have at times shown deep concern and sensitivity to security problems, indeed sometimes forcefully,¹⁰ the historical performance of the key organizational player itself is a different story. It reflects occasional, slow, protracted responses in articulating institutional priorities for protecting security. UNHCR and refugee advocates repeatedly emphasize the responsibilities of host states (but these states do not or cannot carry them out), poorly evaluate the refugee (as opposed to staff) security situation in camps, place limited emphasis on diplomatic and political advocacy of security goals, and provide even more limited attention to the security consequences of its own activities providing material assistance. The organization's many partners – often funded largely with UNHCR resources – similarly tend to avoid responsibility for security.¹¹

Instead, UNHCR's focus has been primarily on delivering material assistance and secondarily on extending nominal legal protection to refugees. By adopting an

⁷ See *infra* Part II.

⁸ See *infra* Part III.

⁹ See *infra* Part IV.

¹⁰ Some of the notable exceptions include: the focus of UNHCR and a few of its major relief provider NGO partners on calling attention to the problem of sexual and gender based violence since the late 1980s, occasional efforts to enhance camp security and negotiate workable agreements with local authorities led by enterprising field and protection staff within UNHCR and some NGOs, and occasional evaluations, studies, and public expressions of concern from humanitarian staff, particularly after being confronted with the crisis in Rwanda. See *infra* Part IV.c.

¹¹ See *infra* Parts IV.b. and IV.c.

interpretation of its legal mandate promoting a focus on material assistance to increasingly broad categories of displaced people, the agency fostered conditions giving it little incentive to assert ownership over thorny physical security problems. Although not all organizations crave the budgets and jurisdiction associated with missions like material assistance, UNHCR's early leadership and staff nonetheless made choices to promote organizational survival that put the agency on a path towards seeking more resources and jurisdiction over time.¹² As the organization navigated stormy political developments from the 1950s to the late 1990s, it settled into a predictable pattern. The agency weathered crises by pressing to expand the populations who could benefit from its material assistance, cultivating government support of humanitarian relief and cementing perceptions that refugee problems could be managed primarily through an activity – the provision of material assistance – that the agency increasingly mastered.

By contrast, the agency had no strong incentive to assume any responsibility for security problems. From the agency's perspective, many of the most visible such security problems implicated risky political complexities and appeared difficult to resolve. Even if the agency merely sought to galvanize global attention to security problems, there was likely to be some tension between such concern and the agency's implicit contention that virtually all refugee-like populations merited material assistance. These organizational developments appear to have been shaped by four critical factors that drive how some organizations implement their legal mandates: early external constraints imposed primarily by donor countries, early political choices by leaders and staff seeking to increase the global relevance of the refugee protection organization, locked-in organizational goals making it difficult for leaders and staff to change the agency's subsequent priorities, and the structure of refugee law itself.¹³

Part V explains how refugee advocates' relative neglect of physical security threats has materially diminished what the international refugee protection system can accomplish on behalf of a uniquely vulnerable population. Even in a world of self-interested nation-states with little reason to mitigate the underlying causes of refugee flows, practical strategies exist that would likely allow UNHCR and its partners to mitigate security problems. Certain predictable host state failures to provide effective security services, for instance, may be mitigated with supplemental funding, technical assistance, and personnel. In addition, refugee advocates' priorities have almost certainly diminished global attention to security problems that *can* be mitigated, and papered over the relationship between more intractable security problems and the refugee protection system's structure. Thus, while the overall system is an expressive achievement of sorts, its structure ironically runs the risk of exacerbating the violence and chaos confronting refugees.¹⁴ In closing, this Part considers how the institutional redefinition of UNHCR's mandate and the effect of such shifts on security problems may be an example of a more general phenomenon afflicting organizations with ambitious legal mandates facing complicated political constraints.

¹² *See id.*

¹³ *See id.*

¹⁴ *See infra* Part V.

But the present story is not only about institutional redefinition or the convoluted fate of legal doctrine. It is also an intensely human drama of uprooted people facing threats to their own survival, and the vigorous, at times heroic, efforts of workers trying to help them. The system's failures persist and sometimes thrive despite the fine intentions of these workers. It would dishonor the spirit of these workers' humanitarian labors to ignore the gap between aspirations and reality, as refugee protection's future depends on understanding that gap. When the law entrusts to organizations the responsibility of addressing complicated problems involving risk, uncertainty, danger, and human misery, they rarely have the resources to fully take on, let alone to resolve, these problems. What then? In the absence of a miracle, organizations and the people within them settle for doing something. Refugee protection provides a powerful insight into how that *something* gets chosen, what stories are told to justify it, and with what consequences. This is, in short, not just about heaping blame on the thousands of people who have sought to improve refugees' lives. It is about understanding how, despite the best intentions, the system in which they work has produced the disturbing results that it has. That story harbors precious lessons for anyone, including longtime refugee advocates, who hope that ambitious legal commitments can make the world a better place.

I. THE SCOPE OF THE PROBLEM: REFUGEE INSECURITY IN A CHANGING WORLD

Between April and July of 1994, about a million and a half refugees left their countries and flooded into the thick brush of eastern Congo, deep in Africa's Great Lakes region.¹⁵ Nearly all were ethnic Hutus from neighboring Rwanda and Burundi, two densely populated nations devastated by genocidal violence. Hutu militias had slaughtered 800,000 ethnic Tutsis and moderate or well-to-do Hutus in Rwanda, and several hundred thousand more in Burundi.¹⁶ In the aftermath, Tutsi rebels advanced on the Rwandan capital from makeshift bases in refugee camps, sending large chunks of the Hutu population into a hasty retreat. Most of these refugees headed west to the Congo on clogged dirt roads, and settled in refugee camps around the Congolese villages of Goma, Bukavu and Uvira.¹⁷

The fate of these refugees reveals how massive population movements in the developing world can fuel protracted violence around refugee camps, physical insecurity within them, and social instability in surrounding regions. This Part tells the story of the Great Lakes refugees as an introduction to these problems, and then defines the scope of the concept of "refugee security." While such security problems obviously matter to the refugees themselves, this Part also discusses how the factors exacerbating violence and physical insecurity for refugees also affect millions of people who are not refugees, and epitomize the complex transnational threats that increasingly frustrate national governments.

¹⁵ That nation was then known as Zaire, but in the wake of the overthrow of Mobutu Sese Seko, its new leadership changed the name back to the Democratic Republic of the Congo. For simplicity, I refer to it as "Congo" throughout.

¹⁶ See GÉRARD PRUNIER, *THE RWANDA CRISIS* (1996). For an insightful account of the dynamics of the genocide itself, see ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999).

¹⁷ See generally SARAH KENYON LISCHER, *DANGEROUS SANCTUARIES: REFUGEE CAMPS, CIVIL WAR, AND THE DILEMMAS OF HUMANITARIAN AID* (2005).

A. *The Great Lakes*

As the Rwandan refugees crossed the Congolese border in the Spring of 1994, they were met by hundreds of humanitarian relief workers. The workers spent their days shepherding arriving refugees into rapidly constructed camps just a few kilometers from the Rwandan border, on the banks of Lake Kivu. Nearly overnight, for example, Goma village was surrounded by nine camps. Together they housed 1.2 million people – the equivalent of San Diego, California’s population.¹⁸ Katale, the largest camp near Goma, soon acquired a population comparable to that of Pittsburgh, Pennsylvania. The Bukavu region was burdened with a “mere” 300,000 refugees, scattered across 27 camps, and Uvira housed another 180,000 in 12 encampments.¹⁹ Humanitarian workers rightly considered the construction of these instant cities and the staggering quantities of material assistance delivered to be striking achievements back in 1994.²⁰

But it was another fact about the camps that soon overwhelmed the workers and refugees. By 1996 these erstwhile humanitarian sanctuaries were under constant attack.²¹ The attackers pounced on the camps around the clock, as one of the Rwandan refugees in Eastern Congo describes in the following account of a day in October 1996:

It was during the day, around 3 P.M. We heard gunfire, two shots far from us, and we were afraid it was the start of an operation. We took the possessions we could carry and fled... [T]he soldiers encircled the group left in the forest with the children and took them away to massacre them, even the babies... Every time refugees erected camps, others would come and destroy them. There was a little camp near Kibumba where I found many dead. All the dead had been shot.²²

The shots were fired by the new Tutsi-led Rwandan army based just across the border from the camps, and by their Congolese rebel allies, the Banyamulenge. It was the arrival of the Tutsis that had triggered the mass exodus of Hutus from Rwanda and Burundi. Many of the departing Hutus no doubt harbored a profound fear of reprisals by the newly empowered Tutsis. But many other civilians were coerced into leaving by the retreating Hutu-led militias.²³

¹⁸ UNHCR, *Refugee Camp Security in the Great Lakes Region*, UNHCR Inspection and Evaluation Service Report No. EVAL/01/97 9 n.2 (April 1997)(“UNHCR, Camp Security Report”).

¹⁹ *Id.*

²⁰ UNHCR, *Lessons Learned from the Rwanda and Burundi Emergencies*, UNHCR Evaluation Report 3 (December 1, 1996)(“[I]t is clear that UNHCR’s emergency response capacity, spearheaded by EPRS, PTSS and STS and supported by stand-by agreements with fellow agencies, represents a major operational asset for UNHCR which should not only be maintained but further strengthened to permit the organization to retain its international lead in this respect.”).

²¹ *See id.*

²² *Zaire: “Attacked by All Sides” -- Civilians and the War in Eastern Zaire*, Human Rights Watch Africa, vol. 9, no. 1 9 (A) (1997).

²³ *See* UNHCR, *Camp Security Report*, *supra* note __, at 2 (“The [Hutu] MDNR propaganda machine survived the crisis and started up again, military operations were carried out in Rwandan territory, and the refugees were made to support this effort, by force if necessary.”); Johan Pottier, *Relief and Repatriation: Views by Rwandan Refugees; Lessons for Humanitarian Aid Workers*, 95 AFRICAN AFFAIRS 403, 410 (Jul. 1996)(“Emergency food aid is both a means of survival and a common political weapon. This was very visible in the early days of life in exile, when distributions were invariably hijacked by leaders and by the military (ex-FAR; *Forces Armées Rwandaises*).”).

Coerced or not, the refugees soon found themselves in camps that were almost entirely controlled by the formerly official Hutu government, and by their allies among the militias who had just perpetrated the fastest mass genocide in history. Hence the following observation from one employee who was in the Congo on behalf of the United Nations High Commissioner for Refugees (UNHCR), the agency charged with protecting refugees and the key funder of relief efforts:

I was there when Rwanda launched the attacks. It was definitely an emergency which I hope never to see again. We were working tirelessly. There was no end to the suffering. We didn't have a day, we didn't have a night. Sometimes I'd sneak out of the scene, to take a nap. I remember sneaking out then having to come right back, working with nothing but those occasional naps. *I was doing all but real protection*, I would say – because it was mostly for me to attend to the needs of this population but I could not stop the attacks. There were women who were dying here, and children, and women who were delivering. It was just too much. It was a disaster.²⁴

A disaster all the more exasperating for such officials, no doubt, because of the paradox it revealed in the work of UNHCR, an organization that fields hundreds of “protection officers” and sits at the center of a system designed to protect refugees.²⁵ Despite the overt importance of protecting refugees, the deteriorating security picture at the camps in eastern Congo showed its efforts to constitute “anything but real protection.”

None of this should have been a surprise to UNHCR. Nor should the violence sweeping through the camps have surprised anyone else playing their part in the refugee protection system. Residents of the Great Lakes region itself had witnessed much the same drama three decades earlier. At the time, Rwandan Tutsis in Burundi had used refugee camps there as bases to mount a brutal attack on Rwanda.²⁶ In effect, a simple fact true in the 1960s remained at play in mid-1990s: no matter how emphatically the law says that asylum should be “civilian and humanitarian” in character,²⁷ the practice of

²⁴ Interview with UNHCR Official, Geneva, Switzerland, July 21, 2004 (emphasis added).

²⁵ See, e.g., UNHCR Handbook on Emergencies 12 (2000) (“UNCHR’s fundamental responsibilities are to: (i) provide international protection to refugees...”); *id.* at 19 (“The authorities of the country of asylum must be made aware of the fact that they retain primary responsibility for security and must ensure the safety and well-being of refugees.”).

²⁶ See UNHCR, THE STATE OF THE WORLD’S REFUGEES 49 (2000):

Armed elements among the Rwandan refugees, who were for the most part in two camps close to the Rwandan border, carried out the raids into Rwanda itself. These armed groups, known as *inyenzi* (the “cockroaches”), had the effect of hardening anti-Tutsi sentiment within Rwandan and confirming the Hutu ethnic mythology.

²⁷ See UNHCR, *Conclusion on the Civilian and Humanitarian Character of Asylum*, Exec. Committee Concl. No. 94 1 (LIII)(2002). Despite previous reluctance to reach such conclusions, the Executive Committee’s legal interpretation of UNHCR’s mandate therein emphasized that:

...refugee camps and settlements should have an exclusively civilian and humanitarian character, that the grant of asylum is a peaceful and humanitarian act which should not be regarded as unfriendly by another State, as stated in the 1969 OAU Convention... and a number of Executive Committee conclusion, and that *all actors*, including refugees themselves, have the obligation to cooperate in ensuring the peaceful and humanitarian character of refugee camps and settlements [emphasis added].

channeling material resources into conflict zones without a workable security strategy invites combatants to take control of those resources and exploit refugees as they continue their struggle.²⁸ Ironically, UNHCR's initial response to this problem during the Great Lakes crisis was to belatedly subcontract with Congolese soldiers from the armies of dictator Mobutu Sese Seko to provide security in some of the camps – despite Mobutu's alliance with the Rwandan Hutus that were hardening their grip on the camps.²⁹

With a new base funded by international aid, the former leaders of Rwanda had organized a state-in-exile. From there they repeatedly attacked the new Rwandan government across the border – just as the Tutsi-led forces now in power in Rwanda had once used refugee camps in Uganda to strike against the Hutus.³⁰ The exiled Hutu leaders controlled the distribution of food and resources in the camps to reward their allies and punish their enemies.³¹ Bolstered by food aid, shelter, medical care, and the legal protection that supposedly attaches to a refugee camp, they continued using bank secrecy havens to funnel resources to international arms dealers.³²

By 1996 this toxic brew had a predictable effect on civilians living in the camps. The new Rwandan army and their Congolese rebel allies began decimating much of what was left of the Hutus' forces in the camps, along with the civilians therein, in punishing attacks like the one described above. Force beget force. The camps were emptied.

²⁸ See *infra* Part IV.a for a detailed explanation.

²⁹ See DAVID RIEFF, *A BED FOR THE NIGHT* 189 (2002).

³⁰ See Part IV.b. See also Rieff, *supra* note __, at 190 (2002):

And so, goaded almost beyond sanity, the Rwandans attacked the camps. UNHCR had predicted the refugees would not return peacefully. It was wrong. Most, in fact, walked back home, and far fewer died than NGOs such as Oxfam had predicted. But the [Rwandan Patriotic Front] hunted down anyone who fled their advance. The United States, which by then had moved from preventing action to halt the genocide to supporting the RPF, covered up the slaughter.

³¹ Sometimes humanitarian workers seemed to encourage this control by the Hutu leaders to make the camps easier for it to administer. See Pottier, *supra* note __, at 413 (describing camps in Goma, Zaire where food distribution occurred through the pre-existing “*prefecture*” government); UNHCR, *Camp Security Report*, *supra* note __, at 11 (“Contrary to what might have been expected, the exodus of Rwandan refugees was not anarchic. Organised groups traveled together or were later reformed. This was due partly to the hierarchical structure of Rwandan society and partly to the effectiveness of the leadership of the authorities and militias.”).

³² Documents found at the camps, for example, include a letter from the “Mil-Tec Corporation” to the Rwandan “Minister of Defense” (addressed, astonishingly, to a refugee camp in Bukavu, Zaire), noting that:

We were approached for very urgent supplies on the 10th of April 94, after the tragic death of His Excellency the President, we received this urgent request from Col. Kayumba, Major Tereraho and finally from the then [Hutu government] Minister of Defense Augustin Bizimana, as you will see our first shipment was delivered 8 days later at this time we insisted to the then Minister for the outstanding payment and we were assured these would be paid forthwith... it was suggested by some of your officials that the amount of U.S. \$ 579,645.00 was received by us, we enclose a confirmation from our Bank (ANNEX 7) we can assure you, that had we received this payment we would not be making any claims for it. [sic].

Letter from MTC Mil-Tec Corporation Limited to The Minister of Defense, Republic of Rwanda, Bukavu, Zaire (Dec. 7, 1994), quoted in Fiona Terry, *Condemned to Repeat? The Paradox of Humanitarian Action* 250 (2002)

Hundreds of thousands returned to Rwanda. Others fled deeper into the Congolese jungle or other nations, often with UNHCR convoys at their tail to continue delivering aid. Tens of thousands of refugees, conservative estimates suggest, were killed in the process.³³ Along Africa's magnificent Great Lakes there grew a disaster fed by a rapid mass influx, the aftermath of a brutal genocide, the disintegration of a major host state, and the apathy of the international community.³⁴ If anything can render the crisis less disturbing, it is perhaps the sense that security breakdowns marring an otherwise reliable global system of refugee protection and relief are a rarity.³⁵

B. The Scope and Significance of Refugee Security Problems

Except they are not. No doubt in some ways the scale of the Great Lakes carnage is in its own class. Yet despite the determined efforts of refugee advocates in transnational organizations, NGOs, and some governments, refugees have been chronically plagued by violence and threats to their physical security during the entire half-century history of the modern refugee protection system. In February 1958, just as UNHCR was tip-toeing into the business of funding refugee camps in the developing world, French forces responded to artillery from anti-colonial forces along the Tunisian-Algerian border by launching an air strike against a refugee community in Sakiet, Tunisia.³⁶ Seventy-five civilians were killed in a single attack. More followed. In the 1960s, Mozambican refugees in Tanzania lived in camps infiltrated by Frelimo, the Mozambican Liberation Front. In response, Portuguese forces invaded Tanzanian territory and made punishing attacks against the Mozambican refugees.³⁷ In the next decade Mozambique itself was the site of the slaughter of 3,600 refugees between mid 1976 and 1977, with thousands more wounded by Rhodesian forces.³⁸ South African forces attacked Kassinga camp in Huila Province, Angola, killing 600 refugees in a single attack and wounding 400 others.³⁹ In the 1980s Cambodian refugees in camps on the Thai-Cambodian border controlled by the Khmer Rouge were exploited by their erstwhile political masters, forced to support the combatants' drive for renewed power against the Vietnamese-backed Cambodian government, and subjected to reprisal attacks from that government.⁴⁰ Indeed, by the early 1980s, UNHCR was routinely receiving cables indicating deteriorating security situations at refugee camps. Attacks by the Afghan Air

³³ See Dennis McNamara, *The Protection of Refugees and the Responsibility of States: Engagement or Abdication?*, 11 HARV. HUM. RTS. J. 355, 356 (“[T]ens of thousands more were killed or disappeared deeper into Zaire in the ethnic violence that tore through the region”). Some commentators claim that UNHCR initially played down the casualties from attacks on the camps. See Rieff, *supra* note __, at 190 (“For its part, UNHCR refused to go public with the anecdotal evidence of mass killings tht is field workers had collected.”).

³⁴ See, e.g., Prunier, *supra* note __, at __. UNHCR, Camp Security Report, *supra* note __, at __.

³⁵ Cf. Stephen John Stedman, *Conclusions and Policy Recommendations*, in REFUGEE MANIPULATION: WAR, POLITICS, AND THE ABUSE OF HUMAN SUFFERING 167 (Stephen John Stedman and Fred Tanner, eds. 2003) (“The large majority of refugees and refugee groups are provided a modicum of security and experience little chronic violence in their exile.”).

³⁶ See HORNE, A SAVAGE WAR OF PEACE: ALGERIA 1954-1962, 249-50, 265-9 (1969).

³⁷ See SARAH KENYON LISCHER, DANGEROUS SANCTUARIES 116 (2005).

³⁸ See Elly-Elikunda Mtango, *Military and Armed Attacks on Refugee Camps*, in *Refugees and International Relations* 87 (Gil Loescher and Laila Monahan, eds. 1989).

³⁹ *Id.*

⁴⁰ See *infra* Part IV.b.

Force killed 43 refugees in a single week in August 1984.⁴¹ An internal UNHCR report (which appears to be the only such effort) concluded that millions of refugees a year were affected by violence during the late 1980s and 1990s, even though it used a methodology that is likely to substantially understate the impact of violence on refugees.⁴²

While such military attacks on refugees have often been devastating,⁴³ they are not the only security problems afflicting refugee communities.⁴⁴ Combatants who infiltrate the camps sometimes exploit the refugees directly even if these armed elements do not provoke reprisal attacks. They may use refugees as hostages to imbue armed struggles by genocidal killers with the legitimacy of the blameless refugee label, as undertaken by the ruthlessly efficient Khmer Rouge with respect to Cambodian refugees in Thailand in the 1980s. Many of these problems also arose in Southern Africa in the 1970s. Refugees have been repeatedly taxed or imprisoned by armed combatants bent on continuing with combat and criminal activities.⁴⁵ They are subject to forced recruitment, as were Algerian military-age men taking refuge in Moroccan and Tunisian camps in the late 1950s and early 1960s, during the anti-colonial war against the French.⁴⁶ Criminals and thugs directly exploit refugees at some camps, using them as staging areas for smuggling drugs

⁴¹ S. Wijertané, Acting Chief, South West Asia Section, UNHCR, Note for the File, *Telephone Conversation with Mr. M. Rafet Mahdi, Counsellor, Pakistani Permanent Mission, Geneva* (22 August 1984) (“Mr. Mahdi confirmed that according to information received from Islamabad, 47 Afghan refugees have been killed and 17 refugees wounded as a result of the recent air raids in Pakistani territory by the Afghan Air Force”). See also UNHCR, *State of the World’s Refugees*, *supra* note __, at __ (“Further attacks in 1986 and 1987 killed hundreds more [refugees]. Soviet and Afghan government forces also carried out attacks against Pakistani civilians, fanning tensions between local populations and refugees.”).

⁴² See Sarah Kenyon Lischer, *Refugee Involvement in Political Violence*, WORKING PAPER NO. 26, NEW ISSUES IN REFUGEE RESEARCH, UNHCR EVALUATION AND POLICY ANALYSIS UNIT (July 2000)(on file with author). The report relies on UNHCR’s own country reports (which do not routinely include reliably gathered data on security incidents in refugee camps, but reveal incident reports and impressions of staff) and press accounts, and it only analyzed the impact of “political violence,” thereby excluding the impact of internal disorder, crime, and attacks from bandits in the camps. For a discussion of how closely linked political violence is to crime and private gain in Africa, see WILLIAM RENO, *WARLORD POLITICS AND AFRICAN STATES* (1998). See also *infra* Part II.c.

⁴³ In contrast to the impact of military attacks on refugee camps, problems of access to food, water, and medical care have been increasingly resolved by a global assistance pipeline. On the other hand, infectious disease is still occasionally a major problem. See McNamara, *supra* note __, at __ (discussing Rwandan Hutu refugee deaths from infectious disease).

⁴⁴ See *supra* Part IV.b.iv.

⁴⁵ See *supra* Part IV.ii.

⁴⁶ A UNHCR official inspecting the camps in Morocco noted that ALN guerrillas were using many of the camps as a base of operations for attacks, and were forcibly recruiting young men into their ranks:

The mobilisation is openly in progress and appears to have been going on for some weeks. The press-gang method is used for reluctant persons. A small green truck known as the ‘salad basket’ circulates in the streets of Oujda City and young men are suddenly knocked on the head and popped into the bus. In some cases of reluctance extreme measures have been used and I have been informed of three persons found with their throats cut. The extent of the mobilisation in actual numbers is quite impossible for me to judge, but I am convinced that the new recruits must run into thousands.

Walton Memo to UNHCR Headquarters, Distribution of Rations to Refugees who May be Mobilized or Trained for Warlike Activities, 13/1/31 MR, F/HCR 11.1 (Feb. 1, 1961).

or diamonds.⁴⁷ And virtually every refugee camp is an “instant city,” forged in conditions that immediately give rise to severe law enforcement problems that only sometimes get successfully addressed by host countries or UNHCR. In Northern Kenya, for example, refugee camps have experienced rampant violence, crime, and sexual assaults, along with a breakdown of nonviolent dispute resolution mechanisms.⁴⁸ These conditions degrade life for refugees and have the potential to spread instability into the fragile hinterlands beyond the camps themselves.⁴⁹ Discussion of refugee security should thus be understood to encompass several interrelated concepts. They include: (1) the protection of the physical integrity of refugees from threats of violence against them emanating from other refugees or surrounding populations; (2) the mitigation of the extent to which combatants or criminals manipulate refugees by keeping them hostage or exploiting resources meant to support civilian refugees; and (3) reductions in the risk that the presence of refugees will exacerbate regional conflict or even war.⁵⁰

Together the problems associated with crime and instability in refugee camps, coercion by armed elements, and militarized states-in-exile provoking reprisal attacks on camps paint a disturbing picture. In it, refugee protection often degenerates into a contradiction in terms. Security problems arise time and again, in multiple forms, and involving multiple perpetrators. Despite the humanitarian mandate in the laws they are supposed to uphold and honor, UNHCR and international aid NGOs inject material assistance into camps dangerously close to a conflict zone, sometimes even helping to launder the resources that countries with strategic interests are funneling to combatants using refugee sanctuaries as bases of operation.⁵¹ Such material assistance tends to flow

⁴⁷ See Terry, *supra* note __, at 123 (“[P]art of the revenue [for the gangs] came from taxes levied on black marketers who came to the border to buy gold and gems from smugglers or to set up markets to sell goods to refugees.”).

⁴⁸ See Interview with Senior UNHCR Official # 5, Geneva, July 21, 2004. See also Jeff Crisp, *A State of Insecurity: Violence in Kenyan Camps*, UNHCR NEW ISSUES IN REFUGEE RESEARCH: WORKING PAPER NO. 16 (December 1999).

⁴⁹ See Crisp, *State of Insecurity*, *supra* note __, at __. Quoting an internal UNHCR report from November 7, 1998, this report shows the extent to which generalized violence and insecurity can pose problems as dire as those involving “political violence” for refugees:

The security situation in and around Dadaab has been deteriorating... Despite additional live fencing being installed, banditry attacks within the camps (including looting, shooting etc.) have become almost daily occurrences. One or two bullets being fired is now considered a minor incident and some shootings even appear not to have been reported to the police. A senior UNHCR staff security officer described the Daaab situation as probably worse than that in Kosovo.

Id. at 3.

⁵⁰ While emphasizing these problems’ common features sheds light on their legal and practical importance in the refugee protection scheme, Part III, *infra*, explains how many such problems become easier to resolve if they are distinguished and analyzed separately.

⁵¹ See, e.g., Loescher, *supra* note __, at 217 (“The refugee camps provided a shield behind which Pakistan could channel military aid and training to the Mujahadin fighters. Even humanitarian aid had military purposes.”); Terry, *supra* note __, at __. Throughout the many episodes where refugee camps illegally serve as conduits of resources to combatants, the question of what humanitarian officials knew and intended in these instances raises issues not unlike those raised in domestic money laundering prosecutions, where financial intermediaries often insist they do not know about the illicit provenance or intended use of the transferred funds. Compare *United States v. Long*, 977 U.S. 1264 (8th Cir. 1992)(evidence sufficient to

to conflict zones despite the potentially troubling relationship between that assistance and the conflict or criminal activities it can potentially prolong, thereby damaging what lawyers have since come to refer to as the “civilian and humanitarian character of asylum.”⁵²

Moreover, the refugees’ plight affects more than just those who took flight. Breakdowns in the civilian and humanitarian character of the refugee camps can powerfully affect the spread of chaos, disease, and misery in some of the world’s most unstable and impoverished regions. Eastern Congo is a classic example. Combatants who exploited camps and their civilian populations came in droves masquerading as legitimate refugees. They found chaotic conditions and natural resources to exploit.⁵³ Many never left. The resulting violence, destruction of foodstocks, and chaos fomented what has been called the “first world war of Africa,”⁵⁴ which in turn has resulted in millions of deaths over the last few years.⁵⁵ Thus refugee security is properly understood to encompass both the welfare of the refugees directly, and the regional security implications of refugee flows – implications that, as the reader will see, can turn sharply negative when the “civilian and humanitarian character of refugee protection” turns into a farce.⁵⁶

Much of the responsibility for those negative consequences lies with national governments.⁵⁷ Many host countries in the developing world neglect and in some cases deliberately interfere with the provision of security services in camps. Their advanced industrialized counterparts have funded a system that relies heavily on refugee camps in conflict-torn regions, and in some cases have abetted the militarization of such camps.

While such governments cannot be expected to treat refugee security problems as a priority, however, one might expect something different from UNHCR. Given its status the key refugee advocate under international law, one might expect the organization would emphatically prioritize the search for solutions to the security problems confronting refugees. No reasonable person could expect even the dedicated and

support money laundering conviction of owner of car dealership for cars purchased by drug traffickers on “willful blindness” ‘theory, even when he had no direct knowledge of the proceeds used to buy the cars) with WILLIAM SHAWCROSS, *THE QUALITY OF MERCY: CAMBODIA, HOLOCAUST, AND MODERN CONSCIENCE* 229 (1984)(analyzing internal United Nations World Food Program documents indicating that officials knew they were feeding Khmer Rouge combatants and other guerrillas).

⁵² See UNHCR, ExCom Conclusion No. 94 (2002).

⁵³ See Prunier, *supra* note __, at __.

⁵⁴ See Interview with Senior UNHCR Official # 1 (March 7, 2004).

⁵⁵ See International Rescue Committee, Congo Report (2005)(estimating that 3.8 million people died in the “Second Congo War”).

⁵⁶ A small literature has developed seeking to explain this connection between the security of the refugees themselves and the larger regional and international security context. See Lischer, *Dangerous Sanctuaries*, *supra* note __, at __ for a particularly cogent analysis. What remains to be discussed in the literature is the legal and organizational response, both historically and in terms of present and future possibilities. Although my focus on both of these aspects of refugee security is primarily consequentialist, there is also an ethical dimension to the whole issue, as humanitarian action is supposed to be the opposite of war, and UNHCR in particular is under a legal obligation to be “strictly neutral and non-political.” See UNHCR Statute, *supra* note __, at __. Breakdowns in security that allow aid to fuel war therefore represent a contradiction at the core of the whole humanitarian enterprise. An illuminating if somewhat pessimistic discussion of the ethics of the problem are found in Terry, *supra* note __, at __.

⁵⁷ See generally *infra* Part I.c.

determined refugee advocates working in such an agency to stop wars or achieve peace through mere words. Instead, the agency might have anticipated recurring problems involving the delivery of law enforcement services, setting up a bureau to provide technical assistance on refugee security and recruiting specialists to monitor conditions. It could have gathered data on assaults and attacks as it does on refugee children's education, and mounted a concerted decades-long effort to press nations, whether Security Council members or fragile host nations, to invest in security. The agency could have built up its own capacity to mitigate and prevent violence by hiring large numbers of security experts to work in its relief operations and advocating drastic changes in the refugee protection system to reduce the reliance on dangerous refugee camps.

Yet refugee protection advocates' response to such intense and diverse security problems poses something of a puzzle. While physical security threats may be inherent in a system that relies so heavily on refugee camps near conflict zones, UNHCR and its partners still retain the power to mitigate some of the consequences of security problems and advocate forcefully against them. Nonetheless, during most of UNHCR's history, the refugee advocates working there and their partners in other organizations have repeatedly neglected, denied responsibility for, or downplayed their role in mitigating dangers faced by refugees – a stance that unquestionably impinges on the more prosaic “protection” mission that the institution claims for itself when interpreting its legal mandate. “Why,” ask some UNHCR officials even years after the problems with refugee militarization in Congo arose, “should UNHCR be worried about weapons?”⁵⁸ Similarly, refugee advocates frequently question whether security problems are worth their attention when host states (such as Tanzania) and powerful countries (such as the United States) are the ones with the responsibility and power to solve them.⁵⁹

Reality is more complicated. As will become clear, UNHCR and its partners have not been powerless to blunt impact of security threats. That refugee protection can fail – as can domestic crime control, public housing schemes, transnational money laundering regulations, or environmental enforcement – will surprise virtually no one. Nor should it surprise some observers to see how key actors in the system sometimes harbor callously little concern for the plight of refugee families. On the other hand, the claim that their *advocates* systematically and repeatedly neglect a core concern of the refugees, and that such neglect materially worsens refugees' lives, may strike at least some observers as a deeper failure. Why is there no high-level bureaucratic unit devoted to protecting refugee security within an international organization that was explicitly created to advocate for and protect refugees, has grown to have at least a limited measure of autonomy, and boasts a yearly budget of over \$1 billion? Why has it historically made constant fundraising appeals to obtain food and shelter for refugees but not explicitly to find solutions to the violence affecting their camps? Surely organizations with exceedingly difficult legal mandates sometimes respond to their context in complex and problematic

⁵⁸ UNHCR protection officer, Geneva, July 1998 (quoted in Lischer, *Dangerous Sanctuaries*, *supra* note ___, at 4). Another said that just shortly after nonetheless listing a number of things UNHCR could have done better and was only slowly implementing nearly a decade after the Great Lakes crisis. “At the end of the day,” he said incongruously, “UNHCR cannot really do much about security.” See Interview with UNHCR Protection Officer # 4, Geneva (July 23, 2004).

⁵⁹ See *infra* Part IV for a discussion of examples.

ways, but this observation simply restates the question given that those responses are often divergent and unpredictable.⁶⁰ The puzzle is all the more interesting because it is not resolved by some of the most commonly-offered explanations advanced either by UNHCR officials or by scholars. The problem is not a recent one.⁶¹ Similarly unavailing are assertions that UNHCR lacks the legal mandate to seek solutions to security problems,⁶² or that nothing can be done about security problems without, for example, massive interventions from the United Nations Security Council or deployments of peacekeepers.⁶³

Nor does the small existing literature on refugee security problems or the history of UNHCR resolve the issue. Most legal scholarship on refugee issues trains attention on the complicated doctrinal questions bearing on individualized asylum adjudications in industrialized countries.⁶⁴ Historical work on UNHCR itself illuminates some aspects of the organization's evolution (such as how *much* it grew) but not others (such as *why* it grew), and fails to draw on an extensive body of research on the behavior of public and international bureaucracies.⁶⁵ Neither does it manage to explain how the refugee

⁶⁰ See *infra* Part IV for a more detailed discussion.

⁶¹ See McNamara, *supra* note __, at 356 (“*Increasingly*, refugee and relief agencies operate in the midst of conflict, rather than before or immediately after them.”); UNHCR, *Safety and Security Issues*, Exec. Committee for the High Commissioner’s Programme, Standing Committee, 24th meeting, Doc. No. EC/52/SC/CRP.11 1 (May 30, 2002) (“Managing the security of UNHCR’s staff, as well as that of refugees, returnees, internally displaced persons and others of concern to the Office, *has become a major challenge in today’s operating environment.*”) (emphasis added); Letter from Ambassador Felix Schnyder to Mr. Poul Hartling, The United Nations High Commissioner for Refugees 4 (Sept. 29, 1982) (UNHCR Archives) (copy on file with author) (“Military attacks on refugee camps are *a relatively new phenomenon...*”).

⁶² See SADAOKO OGATA, *THE TURBULENT DECADE: CONFRONTING THE REFUGEE CRISES OF THE 1990S* 198 (2005) (“In principle, the implementation of security measures rests with the host government.”). See also *infra* notes __ (describing interviews with UNHCR protection staff disclaiming responsibility for refugee security). As Part II explains, these turn out to be inaccurate and misleading positions, which are in some tension even with recent legal interpretations from UNHCR itself.

⁶³ See McNamara, *supra* note __, at 355 (“Unless governments are willing to provide muscle to support refugee protection, refugees will not be protected.”); Stephen John Stedman, *Conclusions and Policy Recommendations*, in *REFUGEE MANIPULATION: WAR, POLITICS, AND THE ABUSE OF HUMAN SUFFERING* 190 (Stephen John Stedman and Fred Tanner, eds. 2003) (“As long as the problem [of refugee safety] is not deemed a security threat, the choices for humanitarian agencies will be limited to providing assistance that prolongs war or walking away from the needs of those hundreds of thousands caught in the middle who deserve help.”) In fact, security problems vary in their details, context, and severity, and a host of feasible tactics show potential for improving the situation over time – including, for example, tactics that UNHCR and other actors in the system have offered support for during the last ten years but which were equally appropriate at a policy level many decades earlier. For a discussion of some of these tactics and strategies, see *infra* Part IV.

⁶⁴ See, e.g., Karen Musalo, *Claims for Protection Based on Religion or Belief*, 16 INT’L J. REFUGEE L. 165 (2004); Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in An Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433 (1992); James C. Hathaway, *The Causal Connection (“Nexus”) to a Convention Ground*, 15 INT’L J. REFUGEE L. 461 (2002). But see James C. Hathaway, *The Right of States to Repatriate Former Refugees*, 20 OHIO ST. J. ON DISP. RESOL. 175 (2004); JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005).

⁶⁵ By far the most thorough existing work on UNHCR’s history is GIL LOESCHER, *THE UNHCR IN WORLD POLITICS* (2002). Although Loescher illuminates many aspects of UNHCR’s work and evolution, his account does not precisely address why UNHCR transformed itself from a legal and diplomatic advocate for refugees into a conduit for material assistance, nor does it analyze specifically how the agency’s refugee security policies evolved.

protection system specifically has responded to refugee security problems.⁶⁶ A small literature (primarily in political science) has begun to document and analyze the security problems afflicting refugees.⁶⁷ Although all of this work is engaging, and some of it is particularly insightful, its focus has not been primarily on the organizational history of the response to these problems, or the legal and policy questions raised by the refugee protection system's response to the problem (or lack thereof).

As will become clear, filling these gaps requires more than just attention to security problems. That is, we must comprehend not only what the core institutional advocate of refugee protection *fails* to do, but what it *does* do, *why* it does this, and *how* its chosen organizational missions may be in tension with other goals enshrined in law. This requires a detailed investigation of *why* UNHCR evolved into its current form as it implemented refugee protection laws, and *how* those laws and policies themselves evolved along with UNHCR. Although UNHCR does not describe or represent that entire system, its central importance to that domain as an interpreter of law, a conduit for assistance, and an advocate for refugees is widely acknowledged and hard to question.⁶⁸ Close scrutiny of UNHCR and its partners is therefore likely to reward anyone trying to understand the performance of the entire refugee protection system.

Scrutiny of that system has obvious relevance for the fate of millions of refugees. But in a world where 1.1 billion people live on less than a dollar a day and nearly two billion lack basic health care,⁶⁹ why focus on the plight of several million refugees? Unlike people starving in the third world or displaced by a tsunami, refugees by definition can rarely be helped within their own country. The very nation where the refugees normally reside is either complicit in or otherwise in no position to stop the violence and persecution assailing them. The refugees' flight across borders lays bare the inherent tensions between universalist human rights aspirations and the territorial logic of global politics. Their story provides an interesting moral and historical lens through

⁶⁶ Some of that work, for example, makes much of tensions between UNHCR's traditional "protection" function and its evolving role in providing material assistance. *See id.*, __, *passim*. But it is not immediately obvious what exactly "protection" encompasses. This makes it hard to draw implications for security from the mere existence of a tension between protection and assistance. Nor is it obvious without some further discussion why the agency's assistance operations could not also integrate protection or security concerns more fully than at present.

⁶⁷ *See generally* STEPHEN STEDMAN AND FRED TANNER (eds.), *REFUGEE MANIPULATION AND THE ABUSE OF HUMAN SUFFERING* (2002); Terry, *supra* note __, Lischer, *Dangerous Sanctuaries*, and Stéphane Jacquemet, *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or a Non-International Armed Conflict Become an Asylum Seeker?*, UNHCR DEP'T OF INT'L PROT.- LEGAL AND PROTECTION POLICY RES. SERIES PPLA/2004/01 (June 2004). For a more pessimistic lament written in something of a journalistic spirit, see Rieff, *supra* note __, at ____. These works provide insightful analyses of different facets of the refugee security problem, and Lischer's – in addition to describing the problem – analyzes some of the factors shaping whether refugee movements contribute to civil conflict. For the most part, though, these analyses do not attend to the organizational aspect of refugee security problems.

⁶⁸ As I discuss below, the organization's leadership has had a crucial role in shaping the modern system, including its laws and commonly-accepted assumptions about the goals of refugee protection and assistance. Its role as a funder of NGOs shapes their priorities. And the history of the entire organization also reveals the political pressures impacting the entire refugee protection system.

⁶⁹ *See* World Bank, *Dramatic Decline in Global Poverty, But Progress Uneven* (April 23, 2004), avail at <http://web.worldbank.org>, last accessed May 13, 2005.

which to understand the consequences of manmade tragedies that have epitomized the last century and continue to mar the present one.⁷⁰

Indeed, the disproportionate attention refugees already draw is reason enough to study the success and failure of the intricate administrative system designed to protect them. Because both the practical and humanitarian implications of that refugee drama have not been entirely lost on policymakers, the refugee protection system makes for a compelling study of how legal mandates are carried out by organizations when a complicated, transnational problem *does* garner attention. While various aspects of the system might work better if they received still greater resources or were blessed by more favorable domestic policies, efforts to resolve refugee problems nonetheless benefit from many institutional advantages flowing from global attention.⁷¹ This makes it appropriate to ask what can go wrong (or right) when a problem manages to garner the sustained attention that refugee problems have achieved. That degree of attention has had an indelible effect on the distinctive strengths and weaknesses of the modern refugee protection system, to which we now turn.

II. THE CONTEXT: ASYLUM SEEKERS AND “INSTANT CITIES” IN MODERN REFUGEE PROTECTION

It is a testament to the expressive power of international law that the word “refugee” evokes such powerful imagery and sympathy from audiences across the world.⁷² Beneath the deceptive simplicity and blamelessness suggested by the label, however, lie daunting complexities. The word can just as easily describe an Eastern European scientist, a Caribbean athlete, a Vietnamese fisherman, a poor central African farmer, or a Sub-Saharan child soldier. Use of the refugee label invokes an elaborate legal regime defined by a host of familiar features, like asylum proceedings in advanced industrialized countries.

Yet the international refugee protection system is also epitomized by a host of less familiar features, described in this Part, which together set the stage for chronic problems afflicting refugee security and promoting civil instability in areas surrounding refugee settlements. Accordingly, the analysis that follows explains the compromises built into the architecture of the refugee protection system and the tensions that arise as a result. It begins by providing a snapshot of the global refugee problem. That problem encompasses not only thousands of annual asylum-seekers arriving in developed

⁷⁰ See ARISTIDE ZOLBERG, ASTRI SUHRKE, AND SERGIO AGUAYO, *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* (1989) for an interesting discussion of these themes.

⁷¹ These include an international organization with a current budget hovering around \$1 billion, a network of NGOs raising and spending hundreds of millions of additional dollars on the plight of refugees, substantial media coverage in developed nations, a binding international treaty that most nations of the world have signed and to which they constantly reaffirm a commitment, a network of global declarations and regional agreements, and fairly massive amounts of scholarly attention through specialized journals, research centers, conferences, and scholarly projects. It is, in short, a system that the advocates of many pressing global challenges that receive meager attention might envy.

⁷² See, e.g., Hathaway, *The Rights of Refugees* 75 (“The origins of refugee rights are closely intertwined with the emergence of the general system of international human rights law”); FRANCES NICHOLSON AND PATRICK TWOMEY, *REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES* (1999).

countries but also hundreds of thousands or millions annually seeking refuge in the poorer half of the globe. As a result, refugee protection is increasingly built around “instant cities” holding people for long periods of time in developing countries, supported by large amounts of international material assistance. The architecture of that system ends up increasing the importance of discretionary choices made by UNHCR, refugee advocates, donor countries, and host states. By understanding the architecture of the refugee protection system, we can better appreciate how these discretionary choices affect vulnerable populations, and how those choices measure up against the goals allegedly at the heart of that system.

A. The Familiar and Less-Familiar Features of the Global Refugee Problem

Today each of the aforementioned people and millions like them can apply for asylum in most advanced industrialized countries. Because of successive waves of applications from such people, nations such as Canada, the United States, and France have each come to house hundreds of thousands of refugees on their territory. The European Union countries alone received 300,000 new asylum applications in a single year (2003), and hundreds of thousands more applied in advanced industrialized countries elsewhere in the world.⁷³ In principle, nations receiving these applications decide them in accordance with international law treaties, including particularly the Refugee Convention and its 1967 Protocol,⁷⁴ as well as interlocking domestic laws. Arriving asylum seekers benefit from elaborate individualized adjudication procedures generally geared to draw distinctions on the basis of the provisions of the Refugee Convention, which makes protections conditional on a showing that a person has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁷⁵ The bulk of legal scholarship on refugees trains attention on the subtle doctrinal questions arising at the intersection of the elaborate Convention categories and the domestic laws giving it effect.⁷⁶

Despite scholars’ tendency to focus primarily on refugee determinations as they play out in industrialized nations’ domestic courts, millions of refugees never make it out of the developing world and primarily end up in refugee camps.⁷⁷ As a result, other actors in the system exist to fill in gaps left by the advanced industrialized countries. Chief

⁷³ See UNHCR, REFUGEE STATISTICS YEARBOOK (2004), Table C4 et al., Appendix I. Because recognition of refugee status in advanced industrialized countries is often linked to permanent immigration benefits, people granted refugee status in such countries are assumed to stop being refugees after five to ten years.

⁷⁴ United Nations Convention Relating to the Status of Refugees, July 28 1951, 189 UNTS 137 (1951)(“Refugee Convention”); 1967 Protocol relating to the Status of Refugees, 606 UNTS 267, entered into force October 4, 1967 (“1967 Protocol”).

⁷⁵ See *id.*, *supra* note __, at __. Parsing the “well-founded” and “on account of” language is the subject of a considerable proportion of existing refugee law scholarship. For particularly thoughtful treatments, see GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 43-80 (2nd ed. 1996), and JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 65 185 (1991).

⁷⁶ Those questions are all the more important because they arise constantly in national legal systems capable of giving some effect to judicial pronouncements, and because achieving refugee status under the terms of that Convention tends to result in access to desirable opportunities for long-term asylum in advanced industrialized countries. Developed nations are therefore extremely sensitive to changes in domestic or international laws that might force them to accept larger numbers of refugees.

⁷⁷ See *infra* note __ (discussing protracted refugee situations).

among these is UNHCR, a complex agency entrusted with the legal mandate of advocating on behalf of the protection of refugees, searching for solutions to their problems, and (more recently) raising large amounts of money to play the crucial role in assisting refugees in developing countries.⁷⁸ The agency also works with NGOs partially funded through UNHCR itself. Together the agency and its NGO partners endeavor to respond to the needs of refugees and asylum seekers in the marginalized corners of the world's southern half, where individualized adjudication opportunities and the promise of long-term asylum are not forthcoming. UNHCR must therefore distinguish among asylum seekers on the basis of whether they are encompassed by the refugee concept *without* the benefit of such individual adjudication procedures.⁷⁹ It must also find means of encouraging developing nations to accept refugees when they may be inclined not to do so, while simultaneously pressing more prosperous nations with individualized adjudication systems to apply their laws consistently with their international commitments.⁸⁰

This balancing act calls for UNHCR to decide whether (for example) 10,000 Congolese peasants arriving in Tanzania on a particular day are refugees within the meaning of the law it interprets. Group determinations allow UNHCR to solve the problem of serving as the international arbiter of the refugee definition even if thousands of people simultaneously stream into a country unbidden. But group determinations themselves bring their own difficulties, because they are necessarily somewhat *ad hoc* applications of a legal definition meant to apply to individuals. Similar difficulties arise from UNHCR decisions about who might benefit from the assistance of the refugee protection system without meeting formal legal requirements for being a refugee. The modern refugee concept, grounded most firmly in the Refugee Convention, was initially designed to apply to individuals and their families. The drafters were predominantly from two places: war-torn regions of industrialized Europe, and the United States.⁸¹ The beneficiaries were initially overwhelmingly European individuals and families.⁸² The drafters did not take it upon themselves to figure out what to do about tidal-wave sized movements of humanity fleeing wars in the developing world, because they did not think that would be their problem.

The experiences of UNHCR and host countries in applying refugee law to these massive groups of incoming asylum seekers reveals some of the complexities inherent in that law. Under the familiar Convention definition, it takes more than fear of violence to

⁷⁸ See UNHCR Statute, *supra* note __, at __. See *infra* Part IV for a discussion of UNHCR's evolution.

⁷⁹ See generally UNHCR, THE STATE OF THE WORLD'S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION (2000) (chronicling UNHCR's evolving legal and logistical challenges).

⁸⁰ See Goodwin-Gill, *supra* note __ at 33-34, 327-28 (describing the difficulty of ensuring that advanced industrialized countries live up to their commitments under refugee law, and some of UNHCR's efforts to achieve it).

⁸¹ See *id.* (discussing the drafters of the Refugee Convention).

⁸² These refugees may have seemed more desirable to a host of countries than racially different, predominantly unskilled Asian and African migrants. Cf. James A. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L. J. 129, 171 (1990) ("Reconsideration") ("The ease with which the refugee definition can accommodate both the encouragement and deterrence of refugee claims via the subjectivity of its central criterion creates a significant opportunity for states to interpose other priorities besides the needs of refugees...[and] may flow from a host of extraneous political factors.").

trigger international protection.⁸³ The key is the link between a refugee's (well-founded) fear and some aspect of her civil or political status, such as that persecution is on account of religion or race.⁸⁴ The assumption behind the use of the elaborate Convention categories makes sense in light of the historical context and the interests of Western nations expecting to absorb refugees at the time. It seemed to be that people displaced by Nazi persecution or fleeing socialist countries could be protected without opening a spigot that would let massive numbers of people legally emigrate by qualifying as refugees. As most observers of the refugee protection system have realized, things did not stay this way for long. De-colonization and the wars that followed inaugurated massive crises in the developing world.⁸⁵ UNHCR's response was to do its best to broaden the legal definition of a refugee to encompass these millions of people. When such broadening placed more strain on the definition than it would bear, the agency pushed the bounds of its legal mandate to assist populations resembling refugees.⁸⁶ In this fashion, the agency and its partners have come to the aid of the hundreds of thousands of displaced families in Darfur, who are in situations sufficiently similar to those of bona fide refugees that they merit assistance under the High Commissioner's "good offices."⁸⁷ Many countries wanted it to do precisely that, because they wanted its assistance in dealing with a mass influx of foreigners. UNHCR's move to broaden the refugee definition was also aided by the fact that – despite the aforementioned strictures of the Convention definition of a refugee – there was support for a broader definition of a refugee in the agency's own statute and in some regional agreements.⁸⁸ Although some

⁸³ See Refugee Conv. *supra* note __, at __.

⁸⁴ These definitions first developed in response to western nations' political goals (and, to some extent, their substantive values). See Hathaway, *Reconsideration*, *supra* note __, at __, for a particularly cogent account.

⁸⁵ See Loescher, *supra* note __, at __.

⁸⁶ See *infra* Part IV.b.

⁸⁷ See generally Louise W. Holborn, *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951-1972, Vol. 1* (1975) 434-40 (discussing the legal evolution of the "good offices" concept used in the UNHCR statute from one referring to the role of an impartial intermediary assisting in the solution of a dispute between two states to one encompassing the distribution of material assistance to individuals otherwise outside the scope of UNHCR's responsibilities); Sadruddin Aga Khan, *Statement by the United Nations High Commissioner for Refugees to the Economic and Social Council*, July 26, 1976 (avail. at <http://www.unhcr.ch>, last accessed August 1, 2005) ("In agreement with governments, my Office continues to have recourse to this [good offices] concept whenever a narrow legalistic approach would appear to be incompatible with the humanitarian objectives of UNHCR...").

⁸⁸ Although term *refugee* is indeed a legal term of art, is not defined *exclusively* by the 1951 Refugee Convention and its 1967 Protocol. Someone to be a refugee even if they don't merit the protections of the Convention and Protocol. At least three other bodies of law are relevant: (1) regional treaties or declarations explicitly expanding the scope of the refugee term, specifically the 1969 Organization for African Unity (OAU) Convention, and the more recent Cartagena Declaration of the Organization of American States; (2) the UNHCR Statute and the many General Assembly resolutions discussing its terms, and (3) the emergence – according to some scholars like Guy Goodwin-Gill – of a customary law norm against *refoulement* (expulsion) of certain asylum seekers and "refugees." UNHCR has often interpreted the Convention more broadly than virtually any country would in individualized determinations. Zolberg et al. sought to summarize several decades' worth of definitional developments in such interpretation by observing that the refugee term should encompass people who flee across an international border and is in need of *protection*. See Zolberg et. al., *supra* note __, at __. This fudges the question of whether it's enough for them to fear the adverse impact of conflict on their lives, or whether they need to fear some kind of persecution (even if they cannot show it to be *on account* of a protected characteristic, as the Convention and Protocol would require).

nuance is required to make sense of UNHCR's group determinations amid the chaos, a reasonable synthesis would suggest that over time the agency's used the "refugee" label to cover people escaping violence or the threat of it – including, but not limited to, those who face the specific persecution that would trigger protections at the national level on the basis of the Convention. Such determinations have swelled. By using that power and also stretching the definition categories, UNHCR was able to extend its "protection" to millions of people who would have had a hard time qualifying for refugee status in the elaborate, Convention-focused individualized adjudication proceedings in advanced industrialized countries. The question of *why* UNHCR sought to interpret its mandate in this fashion and what consequences followed is addressed in Part IV.

But the most immediate consequence of the broadened refugee definitions used by UNHCR and chaotic political circumstances in the developing world was a staggering increase in the aggregate number of refugees. Asian and African nations in the population-rich but economically poor global South have seen the sharpest. According to UNHCR estimates, the number of officially-recognized refugees essentially stayed relatively stable and even declined gradually until the mid-1960s, at which point UNHCR began making group-based determinations of refugee status in earnest. From then on the number of refugees fluctuates but generally increases, driven especially by mass influx emergencies in Africa. In the late 1970s, the world witnessed an order of magnitude increase in refugees, as the number of officially-recognized refugees in Africa continued to mushroom and the Afghanistan and Indochina crises begin displacing people in Asia. Between 1975 and 1985, the number of refugees (according to UNHCR) goes from just under 3 million to nearly 12 million. In eight more years the refugee population jumps again, reaching 18 million by 1993 – before falling to just under 12 million by 1999. Even in the latter half of the 1990s, as the refugee population was falling, the total number of people "of concern" to UNHCR in Africa and Asia – and therefore eligible for assistance – generally continued to rise.⁸⁹ While these totals obviously reflect UNHCR's expansion in the scope of the refugee definition, they unquestionably also reflect political developments in the political world that tended to push up the number of refugees under almost any reasonable definition.

Much of the preceding account should sound at least vaguely familiar to scholars and policymakers following developments in transnational law and policy. Other features of the refugee problem may be somewhat less familiar. For instance, the modern refugee protection enterprise largely revolves around the creation, maintenance, and justification of "instant cities" in the fringe corners of the developing world. More conventionally these sites are known as temporary refugee camps. That appellation simply fails to do justice to the size and permanence of many such camps. Even outside the context of a staggeringly rapid refugee movement like the one in the Great Lakes region in the 1990s, camps end up with the population of cities large and small. For instance, 41,800 refugees live in a camp in Ghana's Buduburam region (where 43% of residents are under the age of 18), 86,000 in Kakuma camp in Kenya (50% under 18), and nearly three quarters of a million in several camps in Pakistan's frontier province

⁸⁹ See UNHCR REFUGEE STATISTICS YEARBOOK 2003 (2004).

region bordering Afghanistan (58% under 18).⁹⁰ Camps there originally set up to house people uprooted by the Soviet invasion of the 1970s have endured despite the fact that the invasion, and even the Soviet Union itself, have gone the way of the floppy disk.⁹¹ Some Palestinian refugee camps are welcoming a third (or even fourth) generation of inhabitants descended from the original camp arrivals.⁹² In fact, UNHCR itself admits that about 6.2 million refugees worldwide, not including the millions of Palestinian refugees in the Middle East under the separate mandate of the United Nations Relief and Works Agency for Palestine (UNRWA), find themselves in “protracted” refugee situations in Africa and the Middle East. This amounts, under most estimates, to more than 50% of the world’s refugees.⁹³ Many more refugees (or refugee-like) populations not defined as being in protracted situations arguably *are* in such situations – partly given that UNHCR’s measure of what is *not* a protracted refugee situation depends on its views about the success of repatriation, which are sometimes unduly optimistic.⁹⁴

In contrast, African and Asian refugees flowing into the immigrant neighborhoods of prosperous industrialized countries constitute only a tiny slice of the global refugee population. By far the largest number of refugees are so recognized as part of a *prima facie* (or generalized group determination) in some destitute Asian or African nation. Those nations tend to observe a non-expulsion norm with the arriving uprooted people. They are allowed to stay in camps, but they are almost never given access to full asylum. While some advocacy-oriented NGOs occasionally protest at the “warehousing” of refugees in camps,⁹⁵ the camps are nonetheless the quintessential feature of the modern refugee protection system. In 1999, for example, nearly 1.7 million refugees arrived as part of a mass influx into developing countries while just about 138,000 asylum seekers were allowed to stay in all advanced industrialized countries.⁹⁶ Only a small proportion of asylum seekers are allowed to stay in the advanced industrialized countries where they seek protection, and the proportion has been falling somewhat in recent years.

On the surface, host countries’ focus on camps nonetheless comports remarkably with the underlying structure of international law. Not even the Refugee Convention *requires* states parties to offer durable asylum to refugees.⁹⁷ Instead it commits signatories not to *expel* refugees and to provide them with certain limited social

⁹⁰ See *id.*, Table 11.

⁹¹ See *id.* In August 2005, UNHCR also provided the author with updated country-by country refugee trend data (on file with author).

⁹² See BENJAMIN N. SCHIFF, *REFUGEES UNTO THE THIRD GENERATION: UN AID TO PALESTINIANS* (1995)(discussing the extent to which camps for Palestinians in the Middle East have become permanent encampments).

⁹³ For UNHCR’s own discussion of the problem, see Executive Committee of the High Commissioner’s Programme, *Protracted Refugee Situations*, Doc. EC/54/SC/CRP.14 (Standing Committee, 30th Meeting)(June 10, 2004)(avail. on <http://www.unhcr.ch>, last accessed October 26, 2005)(“Protracted Refugee Situations”).

⁹⁴ See *supra* note __, at __ (discussing the situation of Mozambican refugees and the difficulty in achieving successful repatriation).

⁹⁵ This has not gone entirely unnoticed by a small set of NGOs. See G. Jeffrey MacDonald, “Warehoused Refugees Are Caught Between Conflict and Closed Doors,” *Christian Science Monitor*, July 24, 2004.

⁹⁶ See UNHCR, *Refugee Statistics Yearbook 2003* (2004). In other years the gap is somewhat less striking, but refugees coming in through *prima facie* movements are always a substantially greater number.

⁹⁷ See Refugee Conv., *supra* note __, at __ (provisions establishing asylum as discretionary).

guarantees and economic opportunities. States that are not parties to the Convention also routinely observe a norm of non-expulsion, often without having signed a formal agreement committing them to do this or to offer the guarantees the Convention requires, such as limited access to a state's labor market. Once these norms are considered alongside the prevalence of mass influx situations and the fragile political circumstances in many developing countries, there is little wonder how camps evolved into a touchstone of refugee protection. Even leaving aside the considerable possibility for tensions between refugees and local populations, massive numbers of migrants fleeing conflict can present host countries with complicated social, economic, and political problems.⁹⁸

B. The Commitment to Refugees' Physical Integrity and to the "Civilian and Humanitarian Character" of Asylum Under International Law

The problems associated with massive numbers of arriving asylum-seekers in the developing world often implicate a facet of refugee law generally garnering less attention than the legal complexities governing asylum in wealthy countries or even material assistance to camps in poorer ones. From the very beginning, the people and governments who worked together on creating the current system viewed it as a civilian, humanitarian endeavor, ostensibly designed to promote the physical security of protected refugees.⁹⁹ Time and again, humanitarian workers since then have maintained this characteristic should be more than an empty slogan.¹⁰⁰ Whether it applies to refugees given temporary asylum or granted access to longer-term resettlement, ensuring that the institution of asylum is civilian and humanitarian means it is not supposed to be a vehicle for combatants to prolong their armed struggle. Refugees are not supposed to flee violence simply to end up being coerced, assaulted, and manipulated.¹⁰¹ Nor are international criminals or people threatening to host states supposed to use the refugee protection system as a way to escape. To deal with these imperatives, the Refugee Convention itself lets countries exclude people who are international criminals, threaten the security of the host country, or have engaged in acts contrary to the purposes of the United Nations.¹⁰²

⁹⁸ Sometimes those concern lead an erstwhile host country to forcibly repatriate the refugees or some group of them, as did India with East Pakistanis in 1971 and Thailand with some Cambodians during the 1980s.

⁹⁹ Indeed, before World War II governments, scholars, and lawyers debated the limits of *nations'* rights to offer asylum, and a crucial assumption undergirding the recognition of such a right was that asylum could only be offered on civilian and humanitarian terms that would not interfere with the security of the asylees' nation of origin (or any other nation). See generally Alice Edwards, *Human Rights, Refugees, and the Right 'To Enjoy' Asylum*, 17 INT'L J. REFUGEE L. 293, 300 ((discussing the history of the right of nations to offer asylum).

¹⁰⁰ See Margaret E. McGuinness, *Legal and Normative Dimensions of the Manipulation of Refugees*, in REFUGEE MANIPULATION: WAR, POLITICS, AND THE ABUSE OF HUMAN SUFFERING 135-166 (Stephen John Stedman and Fred Tanner, eds. 2003), Rosa da Costa, *Maintaining the Civilian and Humanitarian Character of Asylum*, UNHCR DEP'T OF INT'L PROT.- LEGAL AND PROTECTION POLICY RES. SERIES PPLA/2004/02 (June 2004); Stéphane, Jacquemet, *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or a Non-International Armed Conflict Become an Asylum Seeker?*, UNHCR DEP'T OF INT'L PROT.- LEGAL AND PROTECTION POLICY RES. SERIES PPLA/2004/01 (June 2004).

¹⁰¹ See Jacquemet, *supra* note __, at __.

¹⁰² See Refugee Conv. *supra* note __, at __ (provisions governing exclusion and security guarantees).

A more powerful normative basis for preserving asylum's civilian and humanitarian character is found in the principles contained in three interlocking bodies of law, covering war and neutrality, humanitarian protections for civilians in conflict, and human rights protections for all people regardless of whether they are refugees. The law of war and neutrality emphasizes nations' duty to refrain from attacking other nations except in narrow circumstances that tend to involve self-defense.¹⁰³ This duty increasingly appears to place limits, under both interpretations of treaty law and customary law, on the provision of indirect support of attacks by allowing the perpetrators to use the nation's territory as a base.¹⁰⁴ Humanitarian law protects refugees and other civilians from attack in international conflicts.¹⁰⁵ Things are a little more complicated when the conflict is "internal," rather than international. By tradition, humanitarian law makes considerable distinctions between conflicts that are international, where the full panoply of Geneva Convention protections apply and those that are "internal," where only limited protections apply.¹⁰⁶ Although internal conflicts kill more people and destroy more lives,¹⁰⁷ the protections available to civilians under the formal treaty regime covering international conflicts are far more extensive than those in the embryonic treaty regime that applies to internal ones. In part because of this, refugee advocates have made a heroic effort to ground the humanitarian law of internal armed conflicts in customary law, and specifically in:

...a conclusion that a humanitarian norm initially designed for international armed conflicts should also apply in the case of a non-international armed conflict when such a norm has clearly a protective nature and is not regarded by States as an intolerable infringement upon their sovereignty.¹⁰⁸

Although this statement is somewhat opaque, it comes close to describing the realities of the existing legal framework. If customary law is accepted as valid, the case for it as a source of humanitarian norms applying to internal conflicts is reasonably strong.¹⁰⁹ Customary norms protecting civilians in or near conflict zones then overlap with guarantees lodged in human rights law, which is supposed to guarantee individuals'

¹⁰³ UN Chart., Art. 2, para. 4.

¹⁰⁴ See *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 14 at 89-91 (June 27, 1986)(hereinafter *Nicaragua case*).

¹⁰⁵ Humanitarian law doesn't quite cover the question of what sort of legal status civilians fleeing an international conflict should have in the country to where they flee (that, presumably, is what refugee law is for). But a plausible reading of the Conventions and complementary bodies of humanitarian law would emphasize the imperative of protecting civilians from conflict when it spills over to the country hosting them. See PIETRO VERRI, *DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* (ICRC 1992).

¹⁰⁶ See Sonja Boelaert-Suominen, *The Yugoslav Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts*, 13 *Lieden Journal of International Law*, 619 at 621 (2000).

¹⁰⁷ See James D. Fearon and David Laitin, *Ethnicity, Insurgency, and Civil War*, 97 *AM. POL. SCI. REV.* 75 (2003).

¹⁰⁸ See Jaquemet, *supra* note __, at __ (citing Judgment, Trial Chamber, *Kupreskic et al.*, IT-95-16 Judgment (14 January 2000), para. 518).

¹⁰⁹ See Judgment, Trial Chamber, *Prosecutor v. Milan Martić*, IT-95 14/2-PT, Review of the Indictment Pursuant to rule 61, ICTY Trial Chamber (March 8, 1996), para. 11. (noting that there is "a corpus of customary international law applicable to all armed conflicts irrespective of their characterization as international or non international armed conflicts... [including] general... principles designed to protect the civilian population as well as rules governing means and methods of warfare."). See also PIETRO VERRI, *DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* (ICRC 1992).

basic dignity, and their opportunity to be free from unwarranted coercion.¹¹⁰ While their language is sometimes vague, human rights treaties have also served as the foundation for a conception of international security that could be termed “human security,” exemplified by the aforementioned Security Council resolutions recognizing that systematic threats to civilians undermine international peace and security.¹¹¹

Together these separate layers of legal doctrine – applying to civilians generally, and particularly in conflict areas – complement the basic precepts of refugee law.¹¹² Despite these prohibitions, refugee advocates and national governments may sometimes believe in the legitimacy of armed struggles such as those waged by the African National Congress against South Africa’s Apartheid regime. Nonetheless, the militarization of camps undermines the range of protections guaranteed by refugee, humanitarian, and human rights law – and risks undermining the humanitarian character of asylum that has been so critical to building international support for refugee protection.¹¹³

It should come as no surprise that the guarantees associated with asylum’s peaceful, civilian, and humanitarian character unfortunately exist in some tension with the reality of ostensible refugee protection because of crucial features of the protection system’s institutional structure, including the size and ubiquity of refugee camps as the means of housing displaced refugees, the value of material assistance to combatants, and the incentives of key players such as host countries and UNHCR. For the moment, we might leave aside those incentives to make a simple observation: at least in principle, virtually all the major players in refugee protection should recognize the relevance of the preceding legal doctrines. While the law does not precisely allocate responsibilities for the protection of refugees’ physical security, some measure of responsibility appears to

¹¹⁰ See Universal Declaration of Human Rights, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, 999 UNTS 171, Dec. 19, 1966. See also UNHCR, Executive Committee of the High Commissioner’s Programme, Sub-Committee of the Whole on International Protection, *Informal Meeting on Military Attacks on Refugee Camps and Settlements in Southern Africa and Elsewhere*, Doc. No. EC/SCP/27 (held on Thursday, April 28, 1983)(on file with author). The document chronicled the discussions of the sub-committee to follow up on a report by former High Commissioner Felix Schnyder on the problem of military attacks on refugee camps. The Chairman of the Executive Committee, H.E. Ibrahim Kharma of Lebanon, described the High Commissioner’s mandate thus:

The international protection mandate of the High Commissioner meant that he should ensure that refugees of his concern were protected and their fundamental rights as human beings safeguarded. The first and most fundamental right was the right to life, and by virtue of his mandate the High Commissioner had the moral obligation to safeguard the right to life as well as other basic rights of every refugee. *The fact that the international community had not provided him with concrete physical means to ensure the physical protection of refugees did not preclude the High Commissioner from using all the means at his disposal to fulfill this moral responsibility.* [Emphasis added].

Id. at 2.

¹¹¹ See S.C. Res. 1509, at ¶¶ 3(a)-(g), U.N. Doc. S/RES/1590 (2003).

¹¹² See Hathaway, *The Rights of Refugees Under International Law*, *supra* note __, at 449 (“Whatever the historical reason, we are today required to ground a right to physical security for refugees not in the Refugee Convention itself, but instead in what has been described as a ‘criss-cross of rules which have some bearing on the subject’”).

¹¹³ See *infra* Part III for additional discussion.

rest with at least four sets of actors: host country governments, combatants and their supporters, the refugees themselves, and UNHCR. Many host states have explicitly assumed responsibilities for international protection of refugees (either under the Convention and Protocol or under more expansive instruments such as the OAU Convention). Most have formally agreed to be bound by human rights treaties such as the Universal Declaration of the Rights of Man. Those imperatives exist alongside far-reaching legal prohibitions on aggression lodged most notably in key provisions of the UN Charter, and are further supplemented by interpretations of that prohibition as also precluding subtler forms of aggressive activity through assistance to non-state actors.¹¹⁴ The customary law of neutrality (reflecting acceptance of commitments initially enshrined in the Fifth Hague Convention of 1907) further precludes participation in the conflicts of other nations. Together these doctrines suggest that host states have a responsibility to undertake a host of measures, such as endeavoring to separate armed elements from arriving asylum-seekers and providing a modicum of security in camps, to maintain the civilian and humanitarian character of asylum. The doctrines also imply that combatants and the refugees themselves have a responsibility to cooperate with these measures. Whether host states, combatants, and even refugees live up to these duties is another matter.

UNHCR must also contend with its share of responsibility for advancing the physical security of the vulnerable populations that it is mandated to protect. It should not be surprising that the UNHCR Statute, together with the myriad General Assembly resolutions that further fill in the scope of UNHCR's mandate, clearly call for the agency to be concerned with the well-being of refugees and others in similar circumstances – concerns which would themselves be fairly empty ones if they did not encompass to some extent refugees' own worries about their physical safety.¹¹⁵ UNHCR thus ought to care about refugee security because of a combination of its own Statute, General Assembly, and straightforward interpretations of the concept of refugee protection. In effect, it ought to recognize that “safeguarding the personal security of refugees is implicit in the High Commissioner's mandate of ‘providing international protection’”¹¹⁶ So should host states who claim (or seek) to take the law seriously. True, physical security's not explicitly discussed in the Refugee Convention or regional instruments like the OAU Convention. But concerns about physical security are implicit in these treaties.¹¹⁷ What's more, once the rest of the applicable international laws – particularly humanitarian and human rights laws – are considered, it becomes ineluctable that host countries have no business participating in the refugee protection system if they don't consider and try to mitigate the physical security problems affecting displaced people on their territory.

¹¹⁴ See Nicaragua case, *supra* note__.

¹¹⁵ See Thematic Compilation, *supra* note__.

¹¹⁶ See Personal Security note, *supra* note__, at para. 23. Rare as this language is in a UNHCR document, the note makes a compelling case for it.

¹¹⁷ Article II of the OAU Convention, for example, notes that “the grant of asylum to refugees is a peaceful and humanitarian act,” and member states should not subject a person to measures “...which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.”

If UNHCR's mandate concerns protection (as it obviously does), then virtually any reasonable interpretation of it, at some level, requires it to care about security, even if its leaders believe host states have the primary responsibility for it. Indeed, UNHCR itself occasionally emphasizes how much physical security is part of the "protection" function at the core of its mandate, even as it sometimes disavows responsibility for promoting such security. Its Global Report in 2000 describes physical safety and security" as one of the mandates that UNHCR activities have "expanded" to include.¹¹⁸ And an International Protection statement from 1993 explains at length how refugees' "personal security" is central to what the organization tries to do.¹¹⁹ Even NGOs providing relief claim to be doing so in a humanitarian spirit that draws support from (and is consistent with) international law.¹²⁰

Nonetheless, the refugee agency often dances around the core issue, qualifying (particularly before the mid-1990s) the extent of its legal obligation in this area, as it did in this 1989 report:

Although neither UNHCR's Statute nor the Convention relating to the Status of Refugees refer explicitly to the physical safety of refugees, it is well-appreciated that the safety and well-being of refugees constitute primary concerns for States and UNHCR. References to physical safety and security in 26 Conclusions adopted by the Executive Committee over the last 13 years are ample testimony of this concern. These conclusions cover all aspects of refugee protection and include departure, treatment in asylum-countries and durable solutions, notably voluntary repatriation.¹²¹

Not only does UNHCR emphasize Executive Committee resolutions rather than financial or operational priorities in order to demonstrate its concern with physical safety, but it clearly resists a coordinating role in this area. Instead it tends to emphasize the extent of state responsibilities.¹²² Thus, its own manual for handling emergencies emphasizes that "host governments are responsible for the security and safety of, assistance to, and law and order among refugees on their territory."¹²³

The penchant of UNHCR staff for constantly qualifying their agency's own responsibilities under law protecting physical security is perhaps understandable, but ought to be viewed with some skepticism. It is obviously true that neither the symbiotic instruments of the Convention and Protocol or the UNHCR Statute mention "physical security". But it's also true those instruments rarely mention many of the other activities UNHCR and its partners have aggressively pursued in the name of protecting refugees and similarly-situated people. The Convention and Protocol don't mention specific forms of material assistance – such as health care.¹²⁴ The UNHCR Statute doesn't give the

¹¹⁸ See UNHCR, *THE STATE OF THE WORLD'S REFUGEES*, 2000.

¹¹⁹ See UNHCR, *Note on International Protection (Submitted by the High Commissioner)*, A/AC (1993)(UNHCR Archives)(copy on file with author).

¹²⁰ See Interview with NGO Official # __ (CARE Official, Stanford, 2004).

¹²¹ See UNHCR, *Note on International Protection (Submitted by the High Commissioner)*, A/AC.96/728 (August 2, 1989).

¹²² See

¹²³ UNHCR Emergency Manual 4 (2000).

¹²⁴ See 1951 Convention.

agency blanket authority to funnel aid to internally displaced people. Instead what's happened is that a combination of agency-driven policy innovations and political demands from powerful countries, host countries, and international organizations have created conditions for UNHCR and its partners to assume important new responsibilities over the years – most notably for material assistance.¹²⁵ The assumption of these responsibilities shows a consistent record of the organization mining the relevant bodies of law (particularly the “good offices” reference in the UNHCR Statute and General Assembly resolutions) for legal and moral authority to forge ahead. That same authority unquestionably applies in the context of physical security and mitigation of manipulation. That is to say, even if there were no *independent* legal basis outside of refugee law for thinking that protection *must* encompass physical security, refugee law clearly allows the concept to encompass physical security.¹²⁶

Nonetheless, that external basis *does* exist. Besides occasional references to “civilian, humanitarian, and non-political” values in refugee law, the rest of the applicable bodies of law protecting civilians in conflict call for protecting the physical security of refugees loud and clear. Any country or organization that takes these bodies of law seriously will see that refugee law and asylum law make no sense without having protection encompass physical security, and – as a consequence – the mitigation of manipulation and insecurity.¹²⁷ Whether these guarantees become a reality depends on the role different crucial actors play in the refugee security system and the structural features of that system, to which we turn next.

C. Institutional Architecture: The Grand Compromise of Refugee Protection

The tangle of treaties, customary international law, domestic laws, administrative practices, and organizational units epitomizing that system are best understood not as the manifestation of a principled commitment to shield vulnerable population, but as the product of a grand compromise to let national governments simultaneously express humanitarian aspirations and limit the burdens from doing so. The compromise is

¹²⁵ See Cuéllar, *supra* note __, at __.

¹²⁶ The flexibility in the concept of protection is clearly apparent, for example, in the different statements and resolutions from the UN General Assembly and the UNHCR ExCom involving the scope of “protection.” See, e.g., Thematic Compilation.

¹²⁷ Refugee law purists may insist nonetheless that “protection” is a term of art. Epistemic communities make this claim all the time, and of course there's a grain of truth to it. “Protection” means one thing to extorting *mafiosi* and another to UNHCR protection officers in a chaotic refugee camp. But the crux of my claim here is *not* that protection *doesn't* have a special meaning in the refugee context. It's that protection in the refugee context is best understood as being informed by *two* things that are both important: (a) a straightforward understanding of what refugees (and similar populations) actually *need* in order to enjoy any of the more prosaic components of protection; and (b) bodies of legal doctrine that apply to refugees, asylum seekers, and similar civilian populations and explicitly aim to protect them from physical harm and exploitative manipulation. Thus protection may have a specialized meaning in the refugee context, but trying to disentangle that meaning from the value of physical security requires (I would say) a more heroic effort and is unlikely to succeed – unless one takes an unduly segregated and narrow-minded view of the refugee protection mandate. And given the massive expansion of material assistance and aid to non-refugees through the refugee protection system, that sort of narrow view simply fails to square with nearly any aspect of the current system. Which is why the General Assembly (and, more occasionally, the Executive Committee of UNHCR) have promulgated dozens of resolutions and statements emphasizing the importance of physical security. See, e.g., *infra* note 136 (discussing UNHCR's “Thematic Compilation” of resolutions involving physical security, and sources therein).

epitomized by relatively small asylum burdens on developed nations (relative either to the total number of refugees and internally displaced persons, or to global legal and illegal migration flows involving non-refugees), a proliferation of refugee camps around the world, material assistance, and persistent security problems. That system is unquestionably a *compromise* because it's not perfect from anyone's point of view, perhaps least of all the refugees. It is a *grand compromise* in the sense that the system has nonetheless achieved considerable legal and political feats. These include the firm rooting of the refugee concept in the vast majority of the world's legal systems and in the moral and visual imagination of the public in many industrialized nations, the development of a non-expulsion (referred to as *non-refoulement* in the parlance of the Convention) norm that is surprisingly widespread, and the pronounced attention that scholars and policymakers afford to refugee issues. How refugee security fits into the larger set of bargains defining refugee protection emerges more clearly if we scrutinize the grand compromise that refugee advocates, advanced industrialized nations, and host nations have built.

i. Limited Burdens for Advanced Industrialized Countries.

Controversy envelops the refugee protection system, but pragmatism defines it. In reality, the system imposes quite limited formal legal obligations on advanced industrialized countries. Refugee protection controversies make more sense in light of internal contradictions and political divisions in wealthy countries, where people are sometimes genuinely divided about the relative merits of permissive asylum policies. The fact is that wealthy countries retain formal legal control over asylum and resettlement. Over time, the U.S., Canada, and Europe have all adjusted their refugee status determination procedures, generally making it harder through legislation to obtain benefits and easier to disqualify people who apply for asylum.¹²⁸ National governments retain the flexibility to adjust the amount of refugees accepted to suit domestic political and economic pressures. Their judges can reconsider doctrinal interpretations of refugee law and the procedural system regulating asylum applications.¹²⁹ Legislatures can alter the process of asylum adjudication or the benefits afforded refugees.¹³⁰ Jurists and politicians tend toward extreme caution when the migration spigot is in their hands. They tend to fear that permissive decisions about the scope of refugee status determinations will bring untold numbers of new permanent migrants. Migration trends rooted in refugee law are kept in check because of that fear. Where occasional courts, legislative majorities, and executive authorities make substantive standards governing matters such

¹²⁸ In the United States, for example, statutory changes established a summary exclusion program in 1996 commonly known as "expedited removal," wherein potential asylum-seekers can be summarily removed if they do not explicitly request asylum when they enter the country or show they have a "credible fear." 8 U.S.C. § 1225(b)(1)(A)(i) (2000). And rigid time limits require asylum seekers to file applications within a year of having arrived in the United States. See Immigration and Naturalization Act § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2000). For a discussion of these and many other techniques through which developed countries limit asylum applications, see STEPHEN LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND PROCEDURE* 1095-1135 (2005).

¹²⁹ See, e.g., Karen Musalo, *Ruminations On In Re Kasinga: The Decision's Legacy*, 7 S. CAL. REV. L. & WOMEN'S STUD. 357 (1998).

¹³⁰ See generally John Fredriksson, *Bridging the Gap Between Rights and Responsibilities: Policy Changes Affecting Refugees and Immigrants in the United States Since 1996*, 14 GEO. IMMIGR. L.J. 757 (2000).

as the definition of a “particular social group” more permissive, other actors stand ready to keep the burdens limited by changing another part of the substantive standard (such as what it means to be persecuted) or imposing procedural requirements (such as setting time limits to govern when asylum seekers can file applications).¹³¹ No doubt part of the pressure to do this comes from the connection between refugee status and permanent immigration benefits in advanced industrialized countries.¹³² Thus, Haitian boat people started getting turned away by the U.S. without even a screening in the late 1980s and early 1990s.¹³³ This almost certainly went too far under even highly permissive readings of American international law commitments, as Guy Goodwin-Gill has pointed out in a penetrating critique.

The larger point is that the grand compromise protects advanced industrialized countries from burdens because it ensures that the refugee protection system lacks an enforcement mechanism akin to that of the World Trade Organization. Even if such enforcement were forthcoming, the existing structure of refugee laws plainly lets advanced industrialized countries limit what they do on behalf of refugees (as long as they observe the non-expulsion norm). And with few exceptions, richer nations can avoid confronting the problems associated with mass influxes.¹³⁴ Instead these nations benefit from the geographic, logistical, financial, and legal barriers making it difficult for large numbers of refugees to apply for asylum on the territory of such nations.

ii. Networks of Refugee Camps in the Developing World

Developing nations are in a different position. In the arid plains and thick jungles of the global South, the demands wrought by mass influxes intersect with the structure of refugee law. Host states are rarely willing to simply integrate the arriving foreigners into their population, and refugee law (to the extent it is relevant at all) merely requires them not to expel the arriving refugees.¹³⁵ As a result, countries and refugee advocates respond by creating instant cities in the form of refugee camps. As a result the camp, though

¹³¹ For a cogent discussion of restrictive trends in asylum law, see Legomsky, *Immigration and Refugee Law*, *supra* note __. For a discussion of the conditions likely to change this trend, see James C. Hathaway and Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. L.J. 115 (1997).

¹³² Strange as this connection seems, it’s probably more than just the result of advocacy from immigrant rights’ groups. Most advanced industrial countries probably lack the infrastructure of internal control and surveillance necessary to track migrants who are (unlike people with truly temporary visas) admitted for several years at a time. Nor do admittees have much incentive to go home given economic opportunities in developed nations. Without any change in that, temporary protection in developed countries would be difficult to implement).

¹³³ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993). See Goodwin-Gill, *supra* note __, at __, for an articulate argument about the extent to which this policy conflicted with the Refugee Convention and international law.

¹³⁴ The United States is an obvious exception, given its proximity to countries such as Cuba and Haiti. Moreover, mass influxes can eventually lead to increased migration burdens on developed countries. For example, the Great Lakes crisis eventually led to increased applications from that region in European countries. The refugee crisis in Indochina initially impacted Thailand, Indonesia, and other nearby countries – but these nations eventually exerted successful pressure on the U.S., France, and other developed nations to take on more refugees. These nations are unlikely to be entirely disinterested in mass influx situations – their governments may instead seek to promote the management of such crises to shape their impact and avoid longer-term indirect migration burdens.

¹³⁵ See *supra* Part II.a.

much decried early in the history of UNHCR, has become the lynchpin of the refugee protection system. Official UNHCR estimates show at least several million refugees in camps in recent years, and varying but nearly always massive numbers of “prima facie” refugees (subject to group determinations and routinely arriving into camps) every year. But these figures tend to understate the numbers of refugees in camps, as many host countries use UNHCR help to maintain camps but do not adequately report information on them (something that seems to be borne out by looking at the numbers of prima facie refugee arrivals and considering the slower rate of resettlement, asylum grants, or repatriation that would reduce the total population in camps), and millions more on the verge of becoming refugees but for not having crossed a border (known as “internally displaced persons” or IDPs).

Arriving refugees encounter fluid refugee camps – hastily created ersatz urban agglomerations that become complex social, political, and economic entities. As Figure 2 shows, a massive number of people each year are subject to generalized, *prima facie* determinations and end up in the camps – and the figures below substantially understate the number of people in camps because they do not include the millions of Palestinian refugees living in camps under the mandate of UNRWA or the IDPs living in camps. The camps’ tendency to persist is exacerbated by at least three predictable factors that have little or nothing to do with continued well-founded fear of persecution. Source countries often loathe the prospect of repatriating refugees, especially when vanquished rivals to the source country’s government lurk among them. Refugees long for the opportunities to permanently resettle in wealthy countries which sometimes become available to camp residents, particularly when the host country obtains resettlement agreements at the outset of a mass influx, as did Thailand when it confronted masses of arriving Vietnamese and eventually, Cambodian, refugees.¹³⁶ Finally, camps sometimes provide opportunities for desirable economic activity not available in the host country – or, more often still, for material assistance that would not be available if they returned.

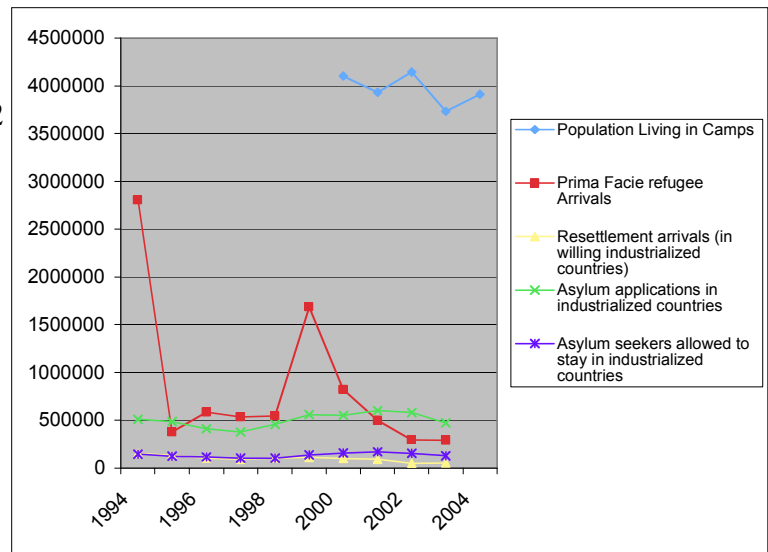
FIGURE 2
Prima Facie Refugee Arrivals and the Total Refugee Population

¹³⁶ Refugees are almost certain to dramatically exaggerate that probability. Cf. Alison Round, *Introduction to Clinical Reasoning*, 7 J. EVAL. CLINICAL PRACTICE 109, 110 (2001).

iii. Flows of Material Assistance

The source of that assistance shows how much the advocacy-centered work of the early UNHCR changed over time. Every year UNHCR and relief-oriented NGOs effectuate a massive transfer of resources from advanced industrial countries to refugees in developing countries. This makes it somewhat more tolerable for host countries to recognize arriving migrants as refugees and to allow camps on their territory.¹³⁷ Material deprivation still occurs in humanitarian emergencies. But industrialized countries, through UNHCR, have nonetheless developed a mechanism of staggering capacity to channel food, shelter, medical care, and other components of material assistance to refugees, simultaneously, to camps in the Chad-Darfour border region, in Pakistan, in Guinea, Ethiopia, and dozens of other countries. The emergency relief focus has permeated every aspect of the organization's priorities and rhetoric since at least the Pakistan emergency of 1971, when UNHCR assumed a global relief coordinating role in that emergency.

This placed the agency in the position to simultaneously undertake at least four interrelated functions that tied its work to the perceptions of wealthy industrialized countries: raising its own funds from voluntary government contributions, making appeals on behalf of the UN for funds that could be channeled to other UN agencies like the World Food Program and relief-oriented NGOs, overseeing the work of those entities, and executing its own operations in host countries across the world. Aided by a vigorous fundraising operation and the image of the refugee as a blameless innocent, UNHCR and NGOs have together raised many billions of dollars to meet refugees' material needs. In this process they enlist movie stars like UNHCR's "Goodwill Ambassador" Angelina Jolie.¹³⁸ Humanitarian organizations like UNHCR, the WFP, and UNICEF use the legal machinery of the United Nations to make urgent appeals through the General Assembly. Increasingly, the public agencies are imitating the private humanitarian NGOs they help fund, by reaching out directly to the population of advanced industrialized countries. This almost certainly built political support for government donations and also garnering increased support for humanitarian activities directly from individuals. Thus, UNHCR helps ensure a steady supply of images visually dramatizing the material deprivation of displaced people, and it even makes web-based "video games" available for people in advanced industrialized countries to better understand the plight of refugees.¹³⁹



¹³⁷ But not tolerable enough in many instances where the size of the incoming flow or the nature of the political context makes receiving country governments perceive the refugees as a particularly acute political threat – as did India in the case of arriving East Pakistani refugees in 1970 and 1971. See Loescher, *supra* note __, at 160 (discussing India's expulsion of the East Pakistanis by invading what became Bangladesh).

¹³⁸ See, e.g., UNHCR News Release, *Goodwill Ambassador Angelina Jolie*, March 9, 2004.

¹³⁹ UNHCR News Release, *UNHCR Introduces Web-Based Video Game in Sweden*, June 15, 2005.

iv. Risks of Neglected Security Problems

Recall that the law defines a set of security guarantees for refugees as such, for civilians in or near conflict zones, and for people in general through human rights law.¹⁴⁰ What it fails to do is precisely allocate the extent of responsibility for those guarantees. Who then “owns” refugee security problems in the fluid environment that is so likely to produce such problems? Refugees have a responsibility to cooperate in maintaining the civilian and humanitarian character of asylum and order in their encampments, but may collectively support militarization or face individual incentives to engage in criminal activities that foster instability. While host countries may often have an interest in policing refugee camps and reducing militarization, cash-starved governments in the developing may be unable to provide security services. Host country governments may also be unwilling to provide security services if, for example, the leaders of the host state support political groups seeking to coerce refugees.¹⁴¹ Even wealthy industrialized nations may be directly implicated. Sometimes their policies deliberately undermine the civilian and humanitarian character of asylum by fomenting refugee militarization, as did the U.S. with Afghan refugees in Pakistan and Nicaraguans in Honduras.¹⁴²

Thus, despite the fact that security problems merit attention from host countries, donor countries, and the refugees themselves, UNHCR generally fails to call attention to and address festering security problems. But in the present refugee protection scheme, this may be too much to ask. UNHCR focuses its appeals for funds and its description of its day-to-day work on the provision of material assistance and making legal determinations about who merits “protection,”¹⁴³ not on raising resources for niches not filled by relief-oriented NGOs, involving police, camp security, dispute resolution and adjudication. As a relief-oriented agency, UNHCR is subject to a measure of pressure from donors that may not harbor an interest in resolving security problems. Staff trying to call attention to the security problems in camps that may seem flush with material resources in comparison to surrounding areas may face obstacles arising from the agency’s heavy institutional investment in providing and coordinating material assistance

¹⁴⁰ See *infra* notes __ (discussing refugee, humanitarian, and human rights law).

¹⁴¹ See *infra* notes __ (discussing how host state actions may exacerbate coercion and state-in-exile problems).

¹⁴² See Mari-Luci Jaramillo, *National Guard Refugees in Honduras*, U.S. Embassy, Honduras, Cable/Secret (July 30, 1979)(Digital National Security Archive, Nicaragua Collection)(copy on file with author)(discussing how former members of the Nicaraguan National Guard sought support from the U.S. Embassy in Honduras as they recruited counterrevolutionaries from among Nicaraguan refugees in Honduras).

¹⁴³ See Interview with UNHCR Senior Official # 3 (Geneva, 2005)(“It’s UNHCR’s problem when there’s low-level violence; when you get politicized violence, it’s harder. During the Great Lakes when things got worse UNHCR went to a mercenary company – they would do it for \$10 million. But we hadn’t raised funds for this.”). An examination of UNHCR’s annual Global Appeal publication, the core fundraising document used to galvanize support from government, organizational, and individual, is also instructive. It is hard to draw inferences from the overall strategic goals because of their vagueness (i.e., “Support governments in the creation and maintenance of an international protection regime”). But examining the details of the expected accomplishments (and particularly the “indicators of achievement” that UNHCR offers the donors) reveals only a scant number of lines devoted to anything remotely related to refugee security. For instance, the 2005 Global Appeal has one “indicator of achievement” associated with security buried on page 9, which states the indicator as “Continued work to implement ExCom Conclusion No. 94 on the Civilian and Humanitarian Character of Asylum.” UNHCR, GLOBAL APPEAL 2005 9 (2004).

to refugee-like populations. On the surface, it certainly appears as though this is the case. Security problems in their various forms are a predictable and pervasive result of the creation of refugee camps and the provision of assistance to their population. They have afflicted millions of refugees in four continents since the 1950s, when UNHCR and the modern refugee protection system was created. And UNHCR lacks a dedicated bureaucratic unit to deal with refugee security.¹⁴⁴ As Figure 3 indicates, major public proclamations on the issue from the General Assembly didn't start until the 1980s and 1990s. Those involving material assistance and general "protection" were common long before that.¹⁴⁵

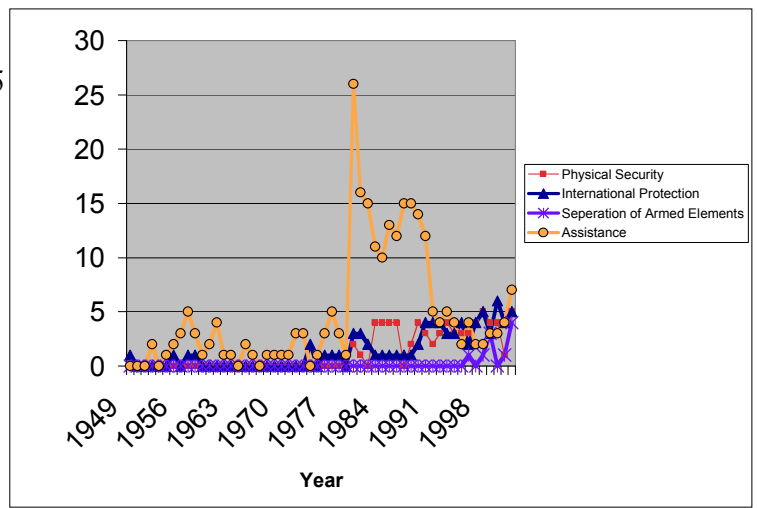
FIGURE 3
Number of Times General Assembly Resolutions Mention Selected Refugee-Related Concerns

¹⁴⁴ As Part IV documents, the historical record is instead replete with half-completed efforts and examples of neglect in efforts to create a bureaucratic unit focused on refugee security matters. One official observed that:

There was an explicit effort to task a unit for responsibility with [security]. Probably where it didn't work out is they didn't get the buy-in from the protection people. That new unit was going to be part of operations, and I know there has always been a big dispute between protection and operations about refugee security. Quite a few years ago, mid-1990s, we were asked to set up a working group on refugee security. For 3-4 months that we were working on that, the protection unit didn't show up or sent a different person to each meeting.

Interview with Senior UNHCR Official # 3 (Geneva, 2005). Others emphasized the extent to which the organization devoted attention to physical security concerns following the problems with Rwandan refugees. One official demonstrated in the process the organization's tendency confound discussions of routine provision of law enforcement services with discussions of camp militarization: "I would say that this issue [of security] got on the screen as a result of Rwanda. The Interhamwe were in the camps, and aid was being diverted. Refugees were being coerced – forced to stay in the camps....Which gets you to some fascinating legal questions that we've only recently begun to actually consider." Interview with UNHCR Protection Official # 2 (Geneva, 2004). Both senior officials and rank-and-file staff were miffed as to why UNHCR had taken so long to begin developing separation guidelines and similar initiatives. *See* Interview with UNHCR Protection Official # 1 (Geneva, 2004). Which did not surprise an NGO official that frequently observes conditions at refugee camps, who observed that "UNHCR sometimes seems to forget that it has both a protection and an assistance mandate. They act like it's all just assistance." Interview with NGO Official # 3 (Stanford, 2004).

¹⁴⁵ Resolutions were coded using UNHCR-compiled lists of General Assembly resolutions, available at www.unhcr.ch. *See* UNHCR, Thematic Compilations: Assistance, Physical Security of Refugees; International Protection; and Camps (all on file with author). The pattern in the figure almost certainly reflects some combination of strategic action by powerful countries and UNHCR lobbying that can (in both cases) command the support of a majority of UN member states -- tends to show much greater concern with assistance than any aspect of physical security; *also* shows that beginning in the 1980s, General Assembly activity nonetheless strengthened the legal (if not the political) basis for UNHCR and other actors in the refugee protection system to devote resources and attention to mitigating security problems.



It would be hard to make the case that staff-level interest in security has kept the issue alive within the refugee agency, its NGO partners, and the United Nations. Even its efforts in writing guidelines for separating combatants from refugees or hiring humanitarian security offers didn't begin in earnest until the organization had been operating for four decades. This is not to say that refugee advocates and aid workers within UNHCR and its major NGOs have reason to uniformly disregard security.¹⁴⁶ Yet the staff are likely to operate in an environment posing substantial risks that refugee security problems will be neglected. The current system emphasizes the need to keep the refugee burden on wealthy countries low, and also relies heavily on the presence of camps and material assistance in developing countries – where combatants and criminals have plenty of opportunities to manipulate refugee communities. Not all host countries are likely to have the incentive or capacity to mitigate the security problems, and advanced industrialized countries are likely to find it far easier to ignore security problems because they so rarely have to deal with encampments on their own soil (or, as with some host countries, they may even have a strategic interest in abetting militarization). Meanwhile, UNHCR has carved an attractive niche for itself providing material assistance that is not obviously compatible with efforts to mitigate security problems or to restrict assistance to militarized refugee camps illegally using those resources to continue engaging in an armed conflict. As a result, refugees and their advocates face an environment where refugee security problems are common but efforts to mitigate such problems may be quite rare.

Ultimately, the full picture of how UNHCR and its NGO partners respond to security may be considerably more intricate than it appears on the surface – as there may be subtler actions they have taken to cope with the reality of security problems, and it's not obvious that there was or is much that could be done about the violence affecting refugees or the regions where camps exist. To get a better sense of what lurks beneath the surface, though, we must first understand the complexities associated with distinct security problems affecting refugees and the measures that could be taken to mitigate them.

III. THE DEPTH OF THE PROBLEM: THE ROOTS OF REFUGEE INSECURITY

Thus far we have established that the grand compromise of refugee protection creates an institutional architecture along the following lines. Millions of refugees and similar populations receive a place in a refugee camp in the developing world. They

¹⁴⁶ See *infra* Part IV.

obtain shelter, food, water, some access to medical care, and often the provision of education and other social services. Hundreds of millions of dollars a year are spent on providing these. In material terms,¹⁴⁷ the resulting life is often better than what the refugees might have back in their own countries. On the other hand, the combination of available material resources, the lack of opportunities for the most desirable “durable” solutions, and genuine fear that the refugees have about returning to their countries of origin renders the refugee camps long-term features of the global landscape. There, the refugees sometimes confront lethal diseases,¹⁴⁸ simmering tensions with surrounding populations viewing them with distrust or envying their higher living standards,¹⁴⁹ proximity to armed conflict, and generalized disorder in chaotic refugee camps.¹⁵⁰

This Part shows how the structure of the current refugee protection system makes various kinds of security problems not only likely but a reality, given the incentives of combatants and the refugees themselves, along with the frequent pattern of interests exhibited by host country governments. Despite the absence of direct quantitative measures, a combination of indirect measures (such as those drawn from UNHCR’s own news reports) and insights about the structure of the existing protection system lead to the conclusion that security problems are relatively endemic, and have been since the early days of the refugee protection system. The discussion then addresses how the various kinds of security problems – ranging from generalized disorder to coercive exploitation and to the existence of aggressive states-in-exile ensconced in refugee camps – are similar and different, how they affect civil conflict in surrounding regions, and what factors exacerbate the particularly nettlesome security problems involving coercion and states in exile. Finally, the analysis in this Part suggests that it is not impossible, at least in principle, to see how security problems may be mitigated despite being deeply rooted in the existing refugee protection system. This will lead us to then recast the focus of the analysis, Part IV, on what UNHCR has actually managed to accomplish with regard to physical security problems, and on what forces have shaped its reaction to such a critical dimension of refugee protection over the course of its history.

A. The Long-Term Presence of Security Problems

During a single week in May 2005, for instance, UNHCR’s own news reports indicate that violence broke out at a camp in Chad after the arrest of refugees selling plastic sheeting at a local market,¹⁵¹ the Burundian military reportedly broke into refugee

¹⁴⁷ Loescher describes the following incident:

[W]hen one UNHCR official visited a Laotian refugee camp, he noted that the camp canteen was serving Peking Duck for lunch! Some of the medical facilities at Indo-Chinese refugee camps were so sophisticated that the doctors could perform open heart surgery.

Loescher, *supra* note __, at 240 n.2 (quoting Interview with Zia Rizvi, UNHCR, New York, 1983).

¹⁴⁸ See R. Degni-Segui, Report on the Situation of Human Rights in Rwanda, at 4, U.N. Doc. E/CN.4/1995/12 (Aug. 12, 1994)(describing the spread of cholera in refugee camps).

¹⁴⁹ See Crisp, *State of Insecurity*, *supra* note __, at __ (alluding to instances where refugees often live at least as well, or better, than people in the surrounding community).

¹⁵⁰ See *supra* Part II.d.iv.

¹⁵¹ *UNHCR Seeks to Ease Tension in Chad’s Camps*, UNHCR NEWS (May 11, 2005) (avail. at <http://www.unhcr.ch>)(on file with author).

shelters to beat refugees and threaten them if they did not leave the country,¹⁵² and displaced people at camps in Colombia faced murders, sexual abuse, and forced recruitment into armed groups.¹⁵³ Such problems recur with disturbing regularity across geographic settings and time periods: rapes, assaults, economic exploitation, and law enforcement problems afflicting the camps and their thousands of inhabitants; coercive manipulation including the forcible recruitment of military age men (and sometimes children); and the operation of a war economy by states-in-exile bent on achieving military victory and often boasting considerable support from refugees themselves.¹⁵⁴ More examples arise with each passing month.

Despite the absence of detailed historical figures, available sources suggest that, since the 1950s, refugee encampments have routinely faced problems of internal order, coercion, and external attack.¹⁵⁵ What these problems have in common is that (a) they eventually come to threaten the refugees' physical integrity, (b) they generally foster broader instability in the entire region where the refugee camps are located, and (c) they have not been solved.

Remarkably, even in recent years UNHCR and NGOs have not developed precise estimates of violence in various refugee camps across time and space. According to the one United Nations report directly addressing the subject in the aggregate, by Sarah Kenyon Lischer, millions of refugees a year during the late 1980s and 1990s were affected by violence while they were stuck in camps.¹⁵⁶ Despite its restrictive focus on "political violence," the study revealed that the proportion of refugees affected by such violence was as high as 60% in some years between 1987 and 1998, and affecting an average of about five million refugees a year.¹⁵⁷ This amounts to roughly to the number of refugees living in camps, which in turn tend to be located in the developing African and Asian nations that most exhibit the "political violence" that the report studies.¹⁵⁸

¹⁵² *Intimidation Reported as Rwandans Return from Burundi*, UNHCR NEWS (May 13, 2005) (avail. at <http://www.unhcr.ch>)(on file with author).

¹⁵³ *Colombia's Displaced Youth Face Violence, Forced Recruitment in Cities, Warns UNHCR*, UNHCR NEWS (May 17, 2005) (avail. at <http://www.unhcr.ch>)(on file with author).

¹⁵⁴ See *supra* Part II.b.

¹⁵⁵ See *id.* See also Hathaway, *Rights of Refugees*, *supra* note __, at __.

¹⁵⁶ See Lischer, *Political Violence*, *supra* note __.

¹⁵⁷ See *id.* at 7-8. The proportion of refugees involved in or affected by violence, according to her methodology, fluctuated between 60% in 1987 and about 33% in 1998 – despite the fact that the dataset entirely excludes acts “of violence such as an assault or a murder that [are] described as originating from personal motivations or criminal activity.” *Id.* at 3 n.8. Although Lischer describes the observed pattern as a decline, she acknowledges that the number of states impacted by refugees grew during the relevant time period. Much of the decline, moreover, in the purported number of refugees affected by violence (as derived by the news report-driven methodology of the study) is attributable to fluctuations in reported violence involving Afghan and Palestinian refugees. See *id.* at 9-10.

¹⁵⁸ While Lischer notes that “100 receiving states reported no violence at all during the 12 year period” she studied, *id.* at 18, this is somewhat misleading as most such states only accept a small number of refugees a year. For example, in 1999, Somalia reported a total of 130 refugees, Mauritania reported 220, Niger 350, Sri Lanka 20, Qatar 10, and so on. UNHCR, *REFUGEES AND OTHERS OF CONCERN TO UNHCR: 1999 STATISTICAL OVERVIEW* 7-8, Table I.2 (2000). If we examine only states hosting more than 100,000 refugees in a given year (where most refugees find themselves), between 75% and 33% of those states were classified as violent under Lischer’s methodology (which, as explained above, only includes states where refugees are associated with sustained “political violence”). See Lischer, *Political Violence*, *supra* note __, at 10 (Chart 3).

Indeed, virtually all the refugee situations that UNHCR describes as “protracted” are among those that Lischer identifies as exhibiting the most intense political violence.¹⁵⁹ The average proportion of the refugee population receiving assistance from UNHCR, moreover, is strikingly higher where refugees are associated with the most intense political violence.¹⁶⁰

A similarly striking picture emerges from examining UNHCR news reports available in UNHCR’s database (encompassing approximately the last nine years), which supplement the conclusions of the aforementioned report. Enough attacks occur each year to prompt UNHCR to mention security problems in a growing number of news reports.¹⁶¹ The attacks generally occur in crowded refugee camps. Despite UNHCR’s disproportionate attention to problems involving staff security, sexual or gender based violence, and attacks that displace people in the first place, refugee security problems in the camps are more widespread and less localized. The story is all the more striking because it is perforce biased *against* revealing the full picture of threats to refugees’ physical security. UNHCR news reports are likely to drastically understate the scope of security problems because the organization does not keep detailed records of security incidents across the world, and (as the reader will see) official attention to the security issue is not likely to be bureaucratically rewarded. Despite this, there were comparable numbers of news reports regarding problems involving refugee security (815, of which 673 focused on security problems affecting refugees *after* they had initially fled their country or region of origin) to those involving matters to which UNHCR devotes considerably more organizational attention, such as health or medical care (763); or schools, teachers, and education (678). These figures, along with Lischer’s aforementioned study, make it hard to accept the notion that security problems involve isolated crises.

B. The Political Economy of Refugee Security Problems Under the Grand Compromise

The staggering degree of insecurity afflicting refugee communities is partly rooted in the value of material assistance and the prospects for exploiting refugee

¹⁵⁹ Compare Lischer, *Political Violence*, at 20 with UNHCR, *Protracted Refugee Situations*, *supra* note ___, at 10. Ironically, the UNHCR document describes these protracted situations as those where refugees’ “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 1, ¶ 3.

¹⁶⁰ In 1993 (one of the only years for which data on the proportion of refugees assisted by UNHCR and Lischer’s coding on intense political violence were simultaneously available) for example, UNHCR assisted an average of about 40% of refugees in nations hosting refugees that did not experience intense political violence. The corresponding proportion for host nations experiencing intense political violence was 80%. Assistance rates calculated from data in UNHCR, *POPULATIONS OF CONCERN TO UNHCR: A STATISTICAL OVERVIEW*, Table 3 (1994). An exploratory binary logistic regression analysis, moreover, suggests that reports of political violence are associated with a country’s average refugee population (1987-1998) and the proportion of refugees assisted by UNHCR (binary logistic regression; Cox & Snell r-squared = .158, Nagelkerke r-squared = .215). Analyses substituting intense political violence (according to Lischer’s coding scheme) as the dependent variable returned similar results, as did analyses restricted to countries with more than 50,000 or 100,000 refugees on average during the years 1987-1998.

¹⁶¹ The reported results are based on a population of all documents in UNHCR’s News Database between 1995 and 2005 containing references to “attacks” (singular or plural), “criminal” activity or “crime,” “violence,” and “camp security.” Documents referring to the same incident, or not referring to any aspect of refugees’ physical security, were excluded. None of the 815 reports mentioned the search terms primarily to emphasize UNHCR’s success in combating the problem.

populations. Suppose there are people who want to carry on a conflict amidst uprooted communities and one places them close to sites providing shelter, food, and medical care. Suppose further that those sites also house people who can be used as resources for exploitation, for imbuing the conflict with the legitimacy that comes from claiming to represent people, for recruiting combatants (or as hostages). Suppose finally that there is minimal security provided by host states or anyone else, there is little or *no penalty* for taking over those sites, or even for individual residents to engage in violent behavior as they compete for resources or seek to exploit other refugees. Predictably enough, physical insecurity tends to emerge as a pervasive challenge. Combatants intermingle with the refugee population. Guerrillas repeatedly did so with American support in camps along the Afghanistan-Pakistan border during the 1980s after the Soviet invasion.¹⁶² In the tropical jungles of Central America, the U.S. government sought to staunch precisely what it was encouraging on the other side of the world, as left-leaning Salvadoran guerrillas planned attacks that would “originate from refugee camps and safe havens,”¹⁶³ and where, “while in the camps... guerrillas do not register with the UNHCR but do benefit from the food, clothing, shelter, medicines, and protection which the camps offer.”¹⁶⁴ Or they take over: as in Mozambique-Tanzania, Cambodia-Thailand, Rwanda-Congo, and Liberia-Sierra Leone. Or individuals in the camps and surrounding areas assault refugees, plunder the resources in camps or even kidnap people in them to engage in human trafficking, as in Northern Kenya.¹⁶⁵

As these examples demonstrate, the presence of material resources and uprooted populations in the developing world gives rise to three distinct types of security problems: generalized instability and crime control, coercion, and states-in-exile. Consider each in turn.

i. Problem # 1: Generalized Instability and Crime Control

The most common security problem is implicit in the creation of the ersatz urban agglomerations that lie at the core of the modern refugee protection system. Even the most peaceful and prosperous cities need police. Though refugee camps tend to be cities in all respects except their name, they are unlikely to be peaceful or economically prosperous, their initial population faces chaotic conditions, the extent of law enforcement services to be provided is uncertain or meager, and the location is routinely close to areas of violent conflict. This creates predictable challenges even when host

¹⁶² See, e.g., U.S. Dep’t of State, Bureau of Intelligence and Research, *Pakistan Faces a Dangerous and Puzzling World*, Report/Secret 1 (May 20, 1980)(Digital National Security Archive, Afghanistan Collection)(copy on file with author)(“[T]he Pakistanis seek to... satisfy their own domestic pressures by providing assistance to the Afghan rebels” in refugee camps); Deane R. Hinton, *Discussion Between Congressman Charlie Wilson and Pakistani Officials on the State of Afghan Refugees*, Cable/Secret: U.S. Embassy, Pakistan (January 12, 1983)(Digital National Security Archive, Afghanistan Collection)(copy on file with author)(discussing the proximity of weapons storage sites for Afghan guerrillas near refugee camps).

¹⁶³ Office of the Defense Attaché, *Plan “Saigon” – The FMLN: Strategic Plan*, U.S. Embassy, Honduras, Cable/Secret 02912 2 (March 5, 1987)(Digital National Security Archive, El Salvador 1980-94 Collection)(copy on file with author).

¹⁶⁴ John H. Penfold, *FMLN uses of Colomocagua/Mesa Grande Salvadoran Refugee Camps in Honduras*, U.S. Embassy, Honduras, Cable/Secret 16533 2 (Oct. 1, 1987)(Digital National Security Archive, El Salvador 1980-94 Collection)(copy on file with author).

¹⁶⁵ See generally Crisp, *State of Insecurity*, *supra* note ___, at ___.

states ostensibly manage to provide security services at UNHCR-sponsored camps, and even then, ethnic rivalries, property crime, sexual assault, and conflict economies can cause spiraling breakdowns in security conditions at the camps.

Northern Kenya is one example of where such a spiral occurred.¹⁶⁶ The early 1990's marked the beginning of a mass influx of refugees into the country. By the end of 1992, there were at least 420,000 refugees in Kenya, 30 times more than the country hosted two years before.¹⁶⁷ Many of the Somali and Sudanese refugees pouring into the country were placed in camps in the North. Sudanese refugees made up the majority of the approximate 75,000 refugees that inhabited Kakuma in 1999, while Somalis accounted for about 105,000 of the 110,000 refugees in Dadaab. Ethiopians made up most of the remainder in both camps. Both camps have been plagued by rape and assault on a "daily and nightly" basis that humanitarian workers anecdotally consider to be worse than in similarly-sized camps in Africa or Asia.¹⁶⁸ In response, UNHCR belatedly sought to supplement the wages of local police officers and train them on refugee law. Humanitarian staff achieved little progress by 1999, when the refugee agency attempted one of its rare analyses of security problems in specific camps.¹⁶⁹ Conflict and disorder continues to disrupt the camps and to spill into Kenyan areas around both camps, allowing rebel groups to easily continue using the camps as a base.¹⁷⁰

ii. Problem # 2: Coercion

Still more troubling security problems involve situations where refugees are subject to the organized use of force, involving coercion by combatants in their midst, or external attacks on camps that the refugees were unable to escape because they were being coerced to remain. Rwandan refugees in the Great Lakes region faced such coercion. Both problems also afflicted Cambodians in Thailand during the 1980s.¹⁷¹

From a refugee perspective, Indochina was a perpetual disaster between the mid-1970s and the early 1990s. Successive waves of armed conflict engulfed the region virtually without end beginning with the Vietnamese war of independence against the French in the early 1950s, and continuing through a second Indochina war pitting Americans against North Vietnamese troops and guerrillas as well as civil conflicts and war between Vietnam and China.¹⁷² By the late 1970s, thousands of refugees sought to enter Thailand from Vietnam and Cambodia. When Vietnam invaded Cambodia to vanquish its brutal Khmer Rouge adversaries, the steady flow of Cambodians trudging through the mountainous jungle into Thailand became a flood. UNHCR initially resisted involvement with many of the refugees, which eventually led the United States and its allies to sponsor a separate United Nations Border Relief Operation (UNBRO) to supply

¹⁶⁶ See *id.*, at ___ (discussing efforts to improve conditions to reduce sexual and gender-based violence in the refugee camps, especially in Northern Kenya).

¹⁶⁷ See *id.*, at ___.

¹⁶⁸ See *id.*, at ___.

¹⁶⁹ See *id.*, at ___.

¹⁷⁰ See U.S. Committee for Refugees and Immigrants, *Kenya: Country Report*, WORLD REFUGEE SURVEY (2003)(avail. at www.refugees.org, last accessed October 10, 2005).

¹⁷¹ See *infra* notes ___ (discussing Thailand).

¹⁷² See generally Terry, *supra* note ___, at ___ (discussing the deterioration of refugee conditions in Thailand).

and administer camps immediately on the Thai-Cambodian border.¹⁷³ Eventually U.S. pressure and the size of the influx resulted in UNHCR's provision of assistance services. UNHCR ran a holding center further back from the border where some Cambodian refugees awaited resettlement. Before long the Khmer Rouge, backed by multilateral, American, and (covertly supplied) Thai aid, controlled many of the camps and the refugees within them. Some refugees managed to escape. Many more were held against their will.

The Thai government, meanwhile, seemed bent on either letting the border camps remain in the grip of Khmer Rouge fighters or forcing civilian refugees back to Cambodia. In a single incident on night during the soggy month of June in 1979, the Thai military forcibly moved 40,000 encamped Cambodians across the border to Cambodia. Thousands died from exploding mines and military gunfire as they sought to return, and more still died of malaria and starvation.¹⁷⁴ In autumn 1979, warnings of impending starvation in Cambodia, and the promise of international aid money coaxed the Thais into allowing the refugees to be held at closed camps run by UNHCR. The Thais fought efforts to resettle refugees in the U.S. and other Western countries, fearing such a program would attract still more refugees that the Western nations would ultimately fail to resettle.¹⁷⁵

C. Problem # 3: Militarized States-in-Exile

Perhaps the thorniest security problem involves populations of refugees determined to support combatants ensconced in the camps with them. Unlike situations involving coercion, states-in-exile often command substantial, and even enthusiastic, support from rank and file refugees.

Untold thousands of Mozambican refugees did precisely this in Tanzanian camps during the middle of the 20th century, as did South African refugees throughout southern Africa. During the late 1950s and 1960s the Portugese sought to harden their grip on power in the southern African nation through violent attacks on opposition groups and legal restrictions on dissent. Anti-resistance groups then reaped additional support, bolstered by perverse reaction to the restrictive measures among the Mozambican population, and revolts in the Portugese colony of Angola. In the fall of 1964, the Mozambique Liberation Front, FRELIMO,¹⁷⁶ launched a military offensive against the Portuguese in Mozambique. Having begun with a paltry 250 trained and equipped men in 1964, the movement grew to 8,000 by 1967.¹⁷⁷ Portugal took notice of the actions of the Tanzanian government and the FRELIMO troops and began periodic attack raids on

¹⁷³ See Loescher, *supra* note __, at __ (discussing Indochina).

¹⁷⁴ See *id.*, at 211, 213 (“As it turned out, refugees did not return home for nearly twelve years but remained pawns of Khmer military groups who used and abused the refugees at will.”).

¹⁷⁵ See Terry, *supra* note __, at __ (discussing the Thai government's reluctance to allow the refugees to come). Troubling as the Thai government's actions were from a humanitarian perspective, the question of whether Thai behavior was legal is more complex. Thailand did not sign the Refugee Convention and Protocol. The legality of its actions therefore depend on contested inferences about the extent to which non-refoulement had attained the status of a norm of customary international law at the time. For a discussion of the customary law question, see generally Goodwin-Gill, *supra* note __, at __.

¹⁷⁶ See MARK F. CHINGONO, *VIOLENCE AND DEVELOPMENT: THE POLITICAL ECONOMY OF WAR IN MOZAMBIQUE, 1975-1992* (1996).

¹⁷⁷ See EDUARDO MONDLANE, *THE STRUGGLE FOR MOZAMBIQUE* (1960).

Tanzanian camps. They also lined the border between Tanzania and Mozambique with mines.¹⁷⁸ At UNHCR, High Commissioner Schnyder “felt that it was not the job of the High Commissioner to resolve the bigger political problems... stress[ing] that the High Commissioner’s role was to ease tensions between states by assisting refugees and [helping] governments resolve refugee problems.”¹⁷⁹ As aid continued to flow, the estimated number of Mozambican refugees in Tanzania soon grew to tens of thousands.¹⁸⁰ The new refugee flows yielded fresh recruits and resources for FRELIMO, but also brutal reprisal attacks on the refugee camps by the Portuguese army.¹⁸¹ The army’s broader response consisted of forcibly relocating over a million people within Mozambique into “fortified villages.” By the time this “protected village” policy ended in 1972, about 1.25 million had been relocated. The local backlash against this forced displacement fed FRELIMO’s growth. Its guerrillas continued advancing on the Portuguese, assisted from its refugee-camp bases by rank-and-file refugees. The deterioration of the Portuguese military’s position eventually helped fuel a coup in Lisbon. Its new military government agreed to liberate Mozambique within one year.¹⁸²

A similar situation developed involving South Africans. Combatants and their refugee supporters sought to dislodge the Apartheid regime. UNHCR staff continued supplying the camps despite their obvious militarization.¹⁸³ The South African government responded by aggressively targeting the camps.¹⁸⁴ The violence afflicting Mozambicans, South Africans, and similar refugee populations thus involves not generalized disorder or pervasive coercion of by irregular bands of combatants. Instead, the violence enveloping the camps tends to involve the armed activities of a virtual state-in-exile, often operating with substantial support from the population of refugees, where the imperative of distributing aid to needy refugees necessarily conflicts with laws requiring that asylum remain “civilian and humanitarian.”¹⁸⁵

C. Mitigating Refugee Security Problems

The preceding description makes it clear why a refugee protection system relying on camps in chaotic regions in the world is likely to confront distinct kinds of security problems. At the same time, the various types of threats to refugees’ physical security also reflect important commonalities. Chaotic disorder in the camps, like coercion and military states-in-exile, directly involves risks to refugees’ physical integrity that offend guarantees enshrined in international. All security problems have the potential for spillover effects exacerbating the risks of civil conflict in regions where refugees are

¹⁷⁸ See Loescher, *supra* note __, at __.

¹⁷⁹ See *id.*, at 117.

¹⁸⁰ Zambia also hosted between 2,000 and 5,000 registered refugee. See Loescher, *supra* note __, at __. See also UNHCR, *State of the World’s Refugees*, *supra* note __, at __.

¹⁸¹ See UNHCR, *State of the World’s Refugees*, *supra* note __, at __ (discussing Portuguese attacks against Mozambican refugees).

¹⁸² See MARIO JOAQUIM AZEVEDO, TRAGEDY AND TRIUMPH: MOZAMBIQUE REFUGES IN AFRICA, 1977-2001 (2002).

¹⁸³ See Interview with Senior UNHCR Official # 3 (Geneva, 2005).

¹⁸⁴ See UNHCR, *State of the World’s Refugees*, *supra* note __, at __ (discussing infiltrated camps of South African refugees); Ely-Elikunda, *supra* note __, at 92-93.

¹⁸⁵ See *supra* Part I.b.

housed.¹⁸⁶ And, as will become clear, each of the security problems have been neglected to some extent by UNHCR and its partners.

But it is another potential similarity among these problems could prove most disturbing to refugee advocates, and that is that little or nothing can be done about them.¹⁸⁷ The sense of futility might loom even larger given the fact that the problems are partly rooted in the structure of the refugee protection system itself. Nonetheless, not all security problems lack plausible solutions.

The most predictable and recurring problem involves keeping order in the camps, which turns out to resemble the problem of controlling criminal activity in some domestic public housing projects.¹⁸⁸ At its core, this problem involves enforcing rules of criminal justice in what becomes an instant city. It is exacerbated by some of the conditions of refugee camps, which seem all but carefully crafted to catalyze crime. These conditions include a displaced population, a hastily developed physical environment, its characteristic as a site for distribution of valuable resources, and the blending of populations that have some pre-existing or recently-developed propensity for conflict (ethnic or otherwise) with each other. If left unchecked, the generalized instability can also contribute to regional instability and to the spread of conflict, because combatants not infrequently mix their activities with criminal pursuits and coercion to enhance their resources.¹⁸⁹

On occasion, UNHCR has made efforts to fund security-related activities by the host country,¹⁹⁰ but for the most part it continues to insist that this is part of the host state's responsibilities.¹⁹¹ The principled case for neglect here is almost impossible to make. The humanitarian character of asylum seems close to meaningless as a legal principle if generalized lawlessness overwhelms refugee security. Not only is this problem entirely possible to anticipate, but UNHCR's resources presumably allow it to do something about it – to raise funds for it, finance it, engage in research and evaluation, and hire technical experts knowledgeable about this all to a degree far greater than what it's done. Host state responsibility does not extinguish UNHCR's role. Thus, UNHCR

¹⁸⁶ See Lischer, *Dangerous Sanctuaries*, *supra* note __ (discussing how coercion and states-in-exile can exacerbate the risk of wider conflict). See also interview with UNHCR Senior Official # 3, *supra* note __ (discussing how generalized disorder and instability can create problems for surrounding communities close to refugee encampments).

¹⁸⁷ See, e.g., Ogata, *supra* note __, at 353 (noting that UNHCR “deploy[s] our own staff, unarmed humanitarian workers, to dangerous and isolated duty stations [and]... in most parts of the world where UNHCR and its humanitarian partners are called upon to operate, mechanisms to address security problems are slow-moving, unwieldy, and not adapted to the new type of conflicts”); Interview with NGO Official # 3, *supra* note __; Interview with UNHCR Protection Official # 4, *supra* note __.

¹⁸⁸ Cf. Dennis W. Roncek, Ralph Bell, and Jeffrey M.A. Francik, *Housing Projects and Crime: Testing a Proximity Hypothesis*, 29 SOC. PROBLEMS 151, 163 (1981)(Finding that “the size of the housing projects has a small but positive and statistically significant effect on the distribution of crime across all the residential blocks in Cleveland...” and that “[c]oncentrating public housing results in more crime on the blocks where the projects are located”).

¹⁸⁹ See Lischer, *supra* note __, at __.

¹⁹⁰ See *infra* notes (describing instances where UNHCR has made limited efforts to help fund security operations, as in Eastern Congo in the mid-1990s or in early 2002 in Northern Kenya).

¹⁹¹ See Ogata, *supra* note __, at __ (suggesting that most security problems can be fixed if host countries face up to their responsibilities).

staff could build on current dispute resolution training efforts in camps to focus on funding, evaluation, logistical support, and providing incentives for host country.

Such steps need not imply a wholesale divestment of operational responsibilities for material assistance. Although there is a palpable conceptual tension between advancing such a security agenda and delivering material assistance, the agency's capacity to mitigate violence and exploitation may ironically depend on understanding the intricate interrelationship between material assistance and the political economy of security problems in the camps. Refugee advocates sometimes insist on emphasizing that providing material assistance amounts to providing security. This conception ironically rings simultaneously hollow and true. While it may be unconvincing to argue that the agency's contribution to security is legally sufficient simply because it provides relief, material assistance is nonetheless often tightly interwoven with security problems. I have already discussed how assistance can attract and exacerbate security problems by making refugee camps valuable to combatants. The flip side is that changes in the flow of material resources to camps with a settled population may spark crime and conflict for which the agency ought to prepare a response. An example:

One time we had a 40% drop in our food supply because the WFP had a problem with the food pipeline. Like that, a drop of 40%. And then we found prostitution went up. Women were prostituting themselves because they wanted food. Domestic violence went up because the men weren't bringing home the food. Women got involved in convincing us to change the structure of food distribution within the camps so we could get the food directly to them. It never occurred to us that the men wouldn't bring the food home. Then the young men started getting violent, joining militias. The rumor started going around that if you slept with a virgin you became invincible. Who would have thought that the rape of an eight year old girl would have been connected to a 40% drop in the food supply?¹⁹²

It is tempting to view this spike in lawless chaos at a camp as support for the contention that assuring the flow of material assistance resolves security problems. But the example suggests a more intricate relationship between economic and physical security. Material assistance can subsidize conflict and violence just as it can assuage chaos borne from deprivation. Changes in material assistance flows may tend to have predictable security implications connected to the political economy of resource distribution in the camps, which in turn suggests that UNHCR can learn to anticipate how best to allocate scarce resources to support law enforcement efforts aimed at controlling instability linked to changes in the delivery of material assistance.¹⁹³

Coercion and state-in-exile problems raise more profound complexities, because of the magnitude of military or civilian policing capacity necessary to implement lasting solutions and the possibility (in the case of states-in-exile) that the refugees themselves may support goals plainly at odds with refugee law. To understand why refugee advocates can mitigate these particularly severe security problems, we must investigate

¹⁹² Interview with UNHCR Official # 4 (New York, 2004).

¹⁹³ See *infra* Part IV for a discussion of the extent to which UNHCR currently fails to do this.

what conditions enable these problems to arise and grow in severity. In dozens of refugee emergencies over the last five decades, a pattern of coercion and militarization emerges to undermine refugee security. Dozens more give rise to incidents of sufficient intensity that they are chronicled in UNHCR news reports.¹⁹⁴ These situations contrast with a host of others where refugee camps (indeed, sometimes from the same countries of origin, or in the same host country, as those previously described) prove altogether more peaceful – at least according to the small scholarly literature on the subject and some of the officials I interviewed. These include Rwandans in Tanzania in the 1990s, Liberians and Sierra Leonians in Guinea in the late 1990s and today, Afghans in Iran in the 1980s, and camps in Kenya today outside its northern provinces. As one UNHCR official noted:

Over the years sometimes we've had workable collaborations with states to help them undertake their responsibility for law and order, and we also assist them in separation and internment. Good examples include Sierra Leone, Zambia... Sometimes the presence of UNHCR has been critical, because there's a lot of learning that goes into this process of resolving disputes peacefully in the camps. We seem to have learned some valuable things particularly with sexual and gender-based violence. We support a lot of groups to offer education, but we also try to foster dialogue... In the larger camps we've helped committees come up with a set of camp rules, and regulations, including a code of conduct for security volunteers.¹⁹⁵

So what helps explain situations where violence and threats to refugees' personal integrity engulf a camp?

A major problem in answering the question directly is the paucity of reliable time-series data on violent incidents in the camps, and the lack of quantitative data on laws and policies governing them.¹⁹⁶ Available data nonetheless yield a complex, though necessarily tentative, picture.¹⁹⁷ Many of the most severe security problems – involving coercion and states-in-exile – seem to be exacerbated by the availability of resources to fuel conflict, the camps' proximity to pre-existing zones of conflict, the extent of political organization among arriving refugee communities, support for civil conflict among refugees, the role of host states in solving or exacerbating security problems, and the strategies used by UNHCR and its partners to mitigate the risk of violence. Consider each of these in turn.

An initial factor is the availability of economic resources that combatants and criminals can exploit in refugee communities. From the plains of Africa to the thick Andean forests, economic resources prove central to armed conflict. Fighters know

¹⁹⁴ See *supra* Part II.d.iv.

¹⁹⁵ Interview with UNHCR Operations Official # 2, *supra* note __.

¹⁹⁶ The Lischer UNHCR study and the preceding analysis of UNHCR news reports contained in this article appear to constitute the most extensive quantitative efforts thus far.

¹⁹⁷ To obtain that picture, I drew on interviews discussing instances where security was perceived as being a particularly severe or mild problem by staff, the small existing literature on refugee security problems, and an analysis of five cases that humanitarian staff at UNHCR and NGOs repeatedly identified as representing major breakdowns in the civilian and humanitarian character of asylum. These involved Afghans in Pakistan in the 1980s, the Great Lakes crisis in the 1990s, Cambodians in Thailand in the 1980s, South Africans throughout southern Africa in the 1970s and 1980s, and Nicaraguans in Honduras in the 1980s.

conflict to be costly and risky. Foot soldiers must be fed, their families sheltered, and their wounds dressed. Individual combatants may harbor complex, overlapping ideological motivations underlying decisions to fight. But groups desire to prevail in the recurring competition for economic resources can be a powerful inducement to fight, and their initial access to economic resources can be a crucial determinant of their viability.¹⁹⁸ It is repeatedly the case that an intimate link develops between aid, physical security problems, and manipulation. Other things being equal, less aid seems to make particular populations or geographic sites less attractive to combatants, and greater aid makes control of these populations (and their resources) more valuable. The pattern of combatants diverting aid and establishing military operations in refugee camps has therefore arisen frequently, in location such as Thailand (with Cambodian refugees), in Honduras (with Salvadoran and Nicaraguan refugees), in Southern Africa (with South African refugees, as well as Zimbabweans and Mozambicans), and a host of other settings. Resources may also be available where combatants come to control natural resources (like diamond or gold deposits) or assert control over what would otherwise be licit, as well as illicit, trade.¹⁹⁹ The synergy between these financial resources, as well as the organizational, material, and legitimacy advantages of camps, can exacerbate security and manipulation problems.²⁰⁰

So can proximity to pre-existing conflict zones. Even UNHCR admits that relative proximity to conflict zones makes things worse. Its guideline of building camps at least 50 kilometers from national borders is sometimes simply honored in the breach.²⁰¹ And indeed, sometimes 50 kilometers or more of distance from the border are not enough to prevent the deterioration of security in a camp. But the presence of pre-existing conflict makes it easier for various parties in the conflict to manipulate the refugees, to use them as a convenient proxy target, or to exploit their resources to feed a pre-existing war economy.²⁰²

The refugee community's extent of political organization is a filter for the impact of geography and the quest for resources. A full state-in-exile, such as the Rwandan Hutu Regime in Eastern Congo or Palestinians in Lebanon, exacerbates risk of violence, both in the form of greater risks of violent aggression against refugee populations, and (more significantly) greater likelihood of militarized activity based in refugee camps drawing violent reprisals. Ironically, sometimes UNHCR has encouraged the political control of a state-in-exile, as have advocates working at UNRWA with Palestinian refugees. Humanitarian relief workers may see this strategy as a means of minimizing

¹⁹⁸ See Paul Collier and Anke Hoeffler, *Greed and Grievance in Civil War*, WORLD BANK RES. PAPER. (avail. at <http://www.worldbank.org/research/conflict/papers/greedandgrievance.htm>)(last accessed Oct. 31, 2005).

¹⁹⁹ Cf. Reno, *supra* note __, at __ (discussing the link between private gain and conflict in African states).

²⁰⁰ See Terry, *supra* note __, at __, and Lischer, *supra* note __, at __.

²⁰¹ See Interview with UNHCR Official # 3.

²⁰² In Honduras during the 1980s, for example, the left-leaning FMLN refugees had relatively low degrees of political organization and no support from the Honduran government, but the camps' proximity to conflict zones heightened the extent to which guerrillas easily recruited from the camps and used them to their advantage. See, e.g., John D. Negrofonte, *Salvadoran Refugees: Guerrillas Mine Trails Used by Refugees*, U.S. Embassy, Honduras, Cable/Unclassified (June 7, 1984)(Digital National Security Archive, El Salvador 1977-1984 Collection)(copy on file with author).

the risk of generalized lawlessness.²⁰³ But it is a costly bargain.²⁰⁴ Violence associated with an ongoing war breaches the legal character of asylum. It may be especially protracted and lethal. UNHCR has nonetheless often encouraged reliance on the existing structure of social control from the regions that the refugees fled – even if it involves leaders committed to continuing an armed struggle – because it simplifies camp administration and because disrupting it would consume resources. The extent to which this makes sense, though, depends in part on what one considers the goal of the refugee protection system. Serious concern about security appears to make reliance on pre-existing political structures problematic, particularly in situations where there is no obvious evidence that refugees themselves support that structure.

But sometimes they do. Keeping refugees safe surely becomes more difficult when the refugees themselves actively support the continuation of conflict. UNHCR and many other NGOs simultaneously emphasize their commitment to the civilian and humanitarian character of asylum while insisting on the crucial importance of refugee self-determination.²⁰⁵ It's a mirage to think that one routinely goes with the other. Refugees can intensely support armed conflict, as did Tutsis in Uganda in 1990, or Mozambicans in Tanzania in the 1960s.²⁰⁶ Even if support is initially weak, the presence of combatants in camps tends to draw reprisal attacks. In the right circumstances, as with Algerian refugees in Morocco and Tunisia in the late 1950s, such attacks help build support for combatants in the camps. Coercion may continue too, as it did in Algeria, which shows how compulsion can blend with and become easier when there is some support among civilian refugees. How the refugee protection system should respond is a difficult question. The answer depends in part on the value one assigns to compliance with the law and the ideals espoused therein. Nonetheless, while sometimes refugees are brutally coerced, security breakdowns can also be aided and abetted by rank and file refugees.²⁰⁷

As with the generalized crime-control problems, host state behavior can exacerbate the risk of coercion or militarization.²⁰⁸ Thailand actively encouraged Khmer Rouge control of border refugee camps.²⁰⁹ So did Tanzanian authorities sympathetic to the Mozambican independence movement.²¹⁰ When states are mired in chaos and have

²⁰³ See Lischer, *supra* note __, at __ (discussing states-in-exile).

²⁰⁴ Any consequentialist defense of the use of states-in-exile to control generalized lawlessness in refugee camps must contend with the fact that institutional pressures likely to distort UNHCR's own analysis of the merits of such a bargain. See *infra* Part IV.c.

²⁰⁵ Compare, e.g., Ruma Mandal, *Political Rights of Refugees*, DEP'T OF INT'L PROT., LEGAL & PROT. POLCY RES. SERIES, Doc. No. PPLA/2003/04 (Nov. 2003)(emphasizing the value of refugee self-determination), and UNHCR, COMMODITY DISTRIBUTION: A PRACTICAL GUIDE FOR FIELD STAFF 41 (1997)(“UNHCR and implementing partner staff will have a role to play to ensure that refugee representatives are truly representative”) with UNHCR, *ExCom Conclusion 94*, *supra* note __ (emphasizing the central importance of the civilian and humanitarian character of asylum).

²⁰⁶ See Loescher, *supra* note __, at __ (discussing states-in-exile involving refugee support).

²⁰⁷ See *infra* Part III (discussing refugees' support for combatants).

²⁰⁸ See Lischer, *supra* note __, at __ (discussing the impact of refugee organization and host state support on militarization).

²⁰⁹ See Terry, *supra* note __, at __ (discussing Thailand's active support of the Khmer Rouge, either from Fiona Terry).

²¹⁰ See *infra* notes __ (discussing Tanzanian support for Mozambicans).

more restricted capabilities to provide security in the camps, as in Eastern Congo and the Horn of Africa, the predictable consequence is that it lowers the cost for armed elements and criminals to take greater control in the camps. Not all instances of militarization or manipulation occur with host state support. Indeed, the fact that some host states attack the refugees themselves serves as an indication of that. But any comprehensive effort to address security problems must contend with the importance of changing the incentives of many host states. The same can be said for security capacity-building in chaotic host states like the Congo, or to acquiesce for their provision by the international community. In the absence of such services, the situation in the camps can quickly deteriorate. All of which provides some support for UNHCR's recurring emphasis on the behavior of host states.²¹¹

But only some support. In fact, the preceding analysis also supports the view that UNHCR and its partners can impact even the more nettlesome coercion and state-in-exile refugee security problems at the margin. As some observers (including UNHCR officials) have only recently and occasionally recognized, the agency has the power to reduce or eliminate material assistance in settings where aid merely supports combatants who are coercing refugees.²¹²

Admittedly, circumstances are rarely so clear-cut. Some situations where refugees initially appear to face violent coercion instead involve state-in-exile situations commanding substantial refugee support. But even these problems may not be impossible to mitigate. In an ideal world, military detachments and civilian police units would disarm arriving refugees and prevent those arriving from being coerced. As officials of UNHCR itself have occasionally recognized, the absence of such resources does not eliminate the possibility of mitigating coercion problems. Despite the frequent absence of support from peacekeepers or international civil policing contingents, UNHCR has shown itself not to be entirely powerless to confront security problems – particularly those involving sexual and gender-based violence and (occasionally) the provision of law enforcement services. On occasion UNHCR has helped pay for policing, it has (belatedly) provided technical assistance to promote peaceful dispute resolution within the camps, and it has helped countries run screening programs to separate combatants from refugees.²¹³ Among the crucial goals that UNHCR can

²¹¹ The problem is not with the agency's calls for host states to assume responsibility. It is instead with the assumption that such calls, by themselves, are likely to make a dramatic difference over time; and the focus on host states as part of a pattern where the organization generally minimizes the scope of its own responsibility to mitigate security problems within its competence, or to attract attention to them from the larger set of players shaping the refugee protection system.

²¹² See Stedman, *supra* note __ (discussing UNHCR's power to reduce funding to militarized refugee encampments). *But see* Ogata, *infra* note __ at __ (insisting, though ultimately unpersuasively, that UNHCR's mandate does not allow it to restrict aid in such a manner).

²¹³ Other episodes also show how observers in the field believe that some UNHCR-assisted (or UNHCR-led) security initiatives have a beneficial effect. Some examples: changing the location of single women in refugee camps throughout the world to prevent sexual assaults (Interview with UNHCR Operations Official # 3 (Bushra Halepota, New York, 2004); funding police in Northern Kenya, see Crisp, *State of Insecurity*, *supra* note __, at __; technical assistance to the Central African Republic in separating combatants from refugees, see HUMAN RIGHTS FIRST, *REFUGEES, REBELS AND THE QUEST FOR JUSTICE* (2002); and initiatives in Western Africa to increase monitoring at key refugee camps in Guinea and Sierra Leone, see Interview with UNHCR Operations Official # 2, *supra* note __.

materially assist in achieving – and indeed, that are mandated by the legal imperative of keeping asylum “civilian and humanitarian” – the most obvious are disarmament and separation, for which existing law provides a framework. In the past UNHCR has occasionally offered technical assistance and money for separation (as in the African region of Zongo), but the range of situations that call for such assistance appears to be greater than the historical record of assistance provided.²¹⁴ Camp locations and organization (as noted earlier) can probably reduce their attractiveness to combatants.²¹⁵ Using expertise and information, UNHCR could create and invest in a high-quality monitoring system to track progress, to take advantage of natural experiments, and to plan some partially-controlled experiments. It could also avoid the housing of refugees with substantial ethnic conflicts in or near the same camp (as did not happen in Kenya). Training sessions for refugee women, men, and NGO camp workers appeared to have had some positive effect, though no systematic empirical analysis seems to have been attempted.²¹⁶ Several UNHCR employees gave detailed examples of how changes in camp organization had enhanced security prospects by placing single women and young girls in places where they were less likely to be threatened.²¹⁷

At the same time, principled action in this domain depends on recognizing there is no technocratic fix for some of the most severe coercion and state-in-exile problems, particularly the latter situations that command substantial support from refugees. Unless rare scenarios arise can be entirely separated and interned, as with Rwandans in Tanzania, neither UNHCR nor relief NGOs can use a scalpel to separate legally acceptable recipients from bad ones. Even if they could, the refugees themselves would constantly try to undermine that separation as supporters of the armed struggle among the civilian population did their best to funnel resources to their armed brethren. If the combatants are intensely supported by the refugee population among which they are based, then it’s exceedingly difficult if not impossible to draw distinctions among recipients of aid. It’s as if the camp refugees had (democratically) elected to support the war effort. On the one hand, there may be a principled justification for simply ignoring the security problems and implementing a principle privileging the short-term prevention (or postponement) of starvation or within-country slaughter of potential refugees. From this perspective, simply cutting off aid has immediate consequences that are so dire from a humanitarian perspective that the option should essentially be removed from the table. This was former High Commissioner Ogata’s perspective during the Great Lakes debacle:

²¹⁴ Although Tanzanian camps housing Rwandan Hutus are a reasonably cogent example of mitigation techniques helping to reduce insecurity, they were certainly assisted in part by the direct support of a functioning government. Such government support was less forthcoming in Guinea and a few other countries, where mitigation techniques also appear (by some accounts) to have had an effect. See Lisa Yu, *Separating Ex-Combatants and Refugees in Zongo, DRC: Peacekeepers and UNHCR’s “Ladder of Options”*, UNHCR: NEW ISSUES IN REFUGEE RESEARCH, WORKING PAPER NO. 60 (August 2002).

²¹⁵ Though Lischer disputes the extent to which camp size matters in militarization, a number of UNHCR officials I interviewed suggested that larger camps are more prone to control by armed elements. Interview with UNHCR Operations Official # 2, *supra* note ___. Vastly larger camps (i.e., those of more than 50,000 inhabitants) almost certainly pose more complex law enforcement problems as well.

²¹⁶ See Interview with NGO Official # 2, *supra* note ___, at ___.

²¹⁷ See Interview with UNHCR Operations Official # 3 (New York, 2004).

On September 29 Médecins sans Frontières representatives called on me to express their concern about the undesirable situation of the camps controlled by the former Rwandese regime and to inform me that they were thinking of withdrawing. I shared their analysis, but my mandate would not allow us to leave the refugees. The group stated it had to take a definite stand that its ‘presence would continue to be used by the leaders to legitimize their past and future power.’²¹⁸

Staff and the organizations they work for might also bolster this sort of norm through reference to the justness of the cause involved.²¹⁹

This account no doubt reflects the extraordinary pressures that High Commissioner Ogata faced at the time. But it also elides disquieting problems implicit in modern refugee protection. While it would be nearly impossible for principled refugee advocates to argue for the continued provision of aid to combatants who are blatantly coercing refugees, many may find it tempting to look the other way when a state-in-exile garners refugee support. Nonetheless, if refugee advocates continue providing aid to a militarized state-in-exile as a means of making it viable for refugees to leave their host countries, at a minimum, they should recognize that such a move exists in stark tension with what the law requires, that it is likely to undermine support for asylum in the long run, and that it almost inevitably places refugees in danger of reprisal attacks. Given these risks and the forces likely to distort UNHCR’s capacity to make reasoned judgments in this area, it is hard to see the merit in a blanket policy of providing aid to states-in-exile merely because they are supported by refugees.

In short, the challenges associated with mitigating physical security problems for refugees are difficult and persistent because of a powerful political and economic logic feeding such problems. The problems themselves are different in crucial ways even though they also implicate related concerns, and there are at least some plausible avenues for refugee advocates – particularly UNHCR – to mitigate them. Indeed, this last point helped motivate both the organization’s leadership and staff to compile lists of various measures that could be implemented to mitigate such problems in the past (particularly after crises). Which raises the question of whether such mitigation has actually occurred, and (if so) how this potential mission has interacted with the other major roles of

²¹⁸ See Ogata, *supra* note __, at 203. The High Commissioner’s view about the legal constraints governing UNHCR during this operation is questionable. Neither the UNHCR Statute nor any other legal instrument prevents UNHCR from assessing the extent to which potential recipients of assistance and nominal protection are in fact appropriate recipients. In part for this reason, UNHCR has withdrawn assistance or avoided providing it in the first place in a number of instances (though certainly only a small fraction of the total) where camps are essentially bases of military activity. Moreover, the legal basis for providing refugee protection of any kind – including assistance – becomes increasingly questionable the higher the probability that the assistance essentially involves the support of active combatants and the continuation of conflict. Former combatants may naturally become eligible for refugee status under certain circumstances, but they must renounce armed struggle to do so. There may be some room for principled debate about this requirement, but as I noted earlier, its existence is hard to dispute. This suggests that the former High Commissioner was either engaging in a somewhat facile oversimplification of the legal and ethical issues, or (more likely) she was giving voice to a competing normative imperative akin to what I have defined as the principle of “preventing the immediate slaughter.”

²¹⁹ See Interview with NGO Official # 2, *supra* note __ (insisting that judgment calls are difficult and there’s something to be said for not disengaging from a refugee emergency that is militarized).

UNHCR and its partners – the provision of assistance to refugees and refugee-like populations, and the extension of formal legal protection through certifications of refugee status. We turn to these matters next.

IV. THE EVOLUTION OF UNHCR AND ITS IMPACT ON THE GRAND COMPROMISE

Our journey through the refugee protection system has demonstrated how much protection depends not only on the behavior of host country governments and their advanced industrialized counterparts, but also on how UNHCR and its partners manage refugee camps. This reality raises the critical question of what priorities most define the work of UNHCR and its partners, and how they came about. This Part sheds light on these questions. It does so by tracing the history of the modern UNHCR and surveying its relatively meager institute-wide efforts to address the various manifestations of threats to refugees' physical security in the evolving refugee protection system.

The historical narrative reveals a resilient agency with a capacity for significant, semi-autonomous, policy innovation. That capacity has emerged despite the constraints placed on it by the national governments who continue providing most of its funds and the host country governments that house the refugees under its care. The organization also exhibits a tendency to respond to political and budgetary crises by expanding the scope of the agency's responsibilities (thereby helping to grow the public and governmental constituencies supporting its work) and developing particular expertise in massive relief operations (thereby reducing the risk of embarrassing failures in the arena with which it became increasingly identified). On the other hand, the relative marginalization of the agency's mandate for providing "legal protection" to refugees (which it has primarily pursued by providing determinations of refugee status) showcases the tensions that exist between the agency's newly-central assistance mission – which is generally advanced by more widespread distributions of aid to populations that appear blameless and worth of aid – and competing tasks that depend on drawing distinctions between worth and less-worthy recipients of international attention. As will become plain, this tension has also worked against the agency's limited activities focused on promoting refugees' physical security in the encampments where most of them live.

The analysis begins from the premise that UNHCR shares two essential characteristics with a host of other domestic and international bureaucracies such as the National Highway Traffic Safety Administration (NHTSA), the Office of Foreign Assets Control, and the World Health Organization. Each is burdened with an ambitious legal mandate. And each possesses scarce resources to carry out that mandate. As a result, doing more of one thing almost inevitably means doing less of another. At NHTSA, more product recalls meant fewer resources devoted to prospective regulation.²²⁰ Before September 11, 2001 the FBI's focus on elaborate transnational drug enforcement consumed resources that might have otherwise been devoted to counter-terrorism.²²¹ When organizations such as UNHCR prioritize certain activities, they make it easier to pursue goals complementing those priorities and harder to pursue goals conflicting with

²²⁰ See generally JERRY MASHAW AND DAVID HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

²²¹ See generally REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2003).

them. Given the tensions between organizations' existing interpretations of their legal and policy mandates and potential ones, it is impossible to give a coherent account of UNHCR's responses to security-related problems without understanding how it has interpreted its legal mandate over time, how it has come play the role that it does – and to do the work that it does – within the refugee protection system. In short, to understand the legal and organizational realities affecting refugees' physical security, we must understand how the major refugee advocate came to prioritize its current functions.

A. Tracing the Evolution of UNHCR

The evolution of UNHCR during the last half-century is epitomized by entrepreneurial expansions in its responsibilities and resource accumulation following deliberate choices by its leaders to deal with organizational crises in this manner. Organizational expansion at the agency played out in symbiotic evolution with the refugee protection system as a whole alongside UNHCR, where the agency and the sprawling global system of NGOs, national priorities, treaties, and domestic laws reciprocally affected the availability of material assistance to displaced populations. The agency's earliest days, however, provided scarcely a hint of the global scope that lay in its future, of the massive legal and bureaucratic machinery of refugee protection implicit in the grand compromise described earlier.

When the Office opened its doors in 1950, it boasted only a few dozen employees, limited funds, restrictions on raising voluntary contributions from governments or individuals, an unclear mandate, and no proven track record of effectively solving any sort of problem for any important constituency. The soon-to-be finished Refugee Convention had the makings not of a foundational pillar of the postwar international legal order but of an expedient legal instrument to solve a narrow problem – involving European refugees who had been displaced during and immediately after World War II. It certainly showed no signs of furnishing the new refugee agency with a legal basis to protect refugees across the globe – and in any case the agency lacked the resources to do much of anything even in Europe at the time. What the Office did have – at least on paper – was an ambitious freestanding statutory mandate to:

...assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.²²²

Initially, the expansive protection mandate only applied to a narrow class of forced migrants. Only those displaced within Europe on account of race, religion, political opinion, or nationality before 1950 qualified for protection.²²³ The system then was largely preoccupied with resettling displaced Europeans, in many cases to Latin American countries eager to supplement their populations with European migrants. Until

²²² Statute of the Office of the United Nations High Commissioner for Refugees, G.A. res. 428 (V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950), Ch. 1, para. 1.

²²³ This implied, of course, that there was widespread priority given to dealing with refugees from Europe.

shortly after World War II, colonialism and the difficulty of travel had contributed to a self-regulating system preventing massive movements of people across international borders in the developing world. That would change during the latter half of the 20th century. At the time, however, the embryonic UNHCR was more concerned with activities such as helping Chile resettle 406 European refugees from Germany between 1952 and 1954,²²⁴ or helping Venezuela care for some of the 21,000 refugees from Europe it received by 1954.²²⁵

But even the Europe-focused work was difficult given the early organization's precarious position. Specifically, Gerrit Jan van Heuven Goerhart – a former Dutch refugee serving as the first High Commissioner – confronted three challenges in his new position, each complicated by the developing Cold War divisions of the former wartime allies. First, he sought to promote solutions for European refugees. Second, he tried to ensure the Office's permanence and capacity by building a staff that would help address technical problems relating to refugee determinations and to assist him in the process of making diplomatic entreaties aimed at advancing his vision of the Office as “primarily as the representative of the refugees and, as such, responsible for defending their interests.”²²⁶ He also lobbied for and succeeded in extending the life of the Office after its initial three-year mandate expired. Finally, the new High Commissioner confronted the doctrinal, practical, and political difficulties inherent in taking a refugee status framework that was based on individual-level determinations and applying it to groups.²²⁷

When subsequent leaders sought to address these challenges, they tried to raise the organization's profile still further. The key was to expand the scope of services the agency could provide donor nations. Swiss Diplomat Auguste Lindt took over in 1956 and promptly encountered an opportunity a sterling opportunity to raise the agency's profile. West Berlin experienced the arrival of a growing number of refugees from the East. UNHCR responded swiftly with an unprecedented operation to deliver supplies and assist West Berlin in coping with the influx of refugees, even though it was not clear that they were technically within the organization's then-narrow mandate.²²⁸ The Berlin crisis, as it came to be known, showed at least three things. First, crises involving the arrival of large numbers of asylum seekers were likely to arise even in places like Europe; not surprisingly, they were also likely to include at least some people quite clearly beyond the scope of the office's mandate.²²⁹ Second, despite the legal complications associated

²²⁴ See Holborn, *supra* note __, at 658.

²²⁵ *Id.* at 641.

²²⁶ Holborn, *supra* note __, at 105.

²²⁷ See Holborn, *supra* note __, at __ (discussing van Heuven Goedhart's early days as High Commissioner).

²²⁸ See Loescher, *supra* note __, at __ (discussing the Berlin Crisis and UNHCR's response).

²²⁹ At the time, UNHCR was working under significant legal strictures that no longer apply to the modern entity. The terms of its statute denied it the power to raise funds on its own, and the United Nations itself only provided it with a small cache of resources. This left the organization in a position to emphasize diplomatic, advocacy-based protection, and filling gaps – such as those involving the provision of water or physical protection at camps -- not addressed by NGOs instead of focusing on generalized material assistance. In response, Lindt's speeches emphasized the need to focus on the humanitarian needs of refugees covered by UNHCR's limited mandate as well as others (whom the High Commissioner also sometimes referred to as refugees). Though these were “legally very clearly separated... they are closely inter-related as far as their need is concerned.” Auguste Lindt, *High Commissioner's Statement to the*

with assisting people in such situations at the time (i.e., where UNHCR's own competence was not entirely clear given the constraints of its statute), key staff and organizational leaders saw value in placing the organization at the forefront of the response to such a crisis. As the Berlin crisis played out, for example, one of the High Commissioner's top advisers explicitly noted in a memo that the organization could gain relevance in global politics by demonstrating its capacity to rapidly coordinate the provision of massive assistance resources.²³⁰ This prospect appealed to the High Commissioner, whose vision for UNHCR was to grow its importance as a political entity.²³¹ Third, it appeared as though disaster relief operations could in fact bring the organization considerable acclaim.²³² When another mass influx situation presented itself in Europe as a result of tumult in Hungary, UNHCR moved with similarly aggressive resolve to provide assistance in addition to playing the role of diplomatic advocate for refugees and architect of longer-term solutions.²³³

Lindt viewed the Berlin and Hungary operations as successful; so did the United States and its allies among Western European governments.²³⁴ Despite this, it was no easy task for UNHCR to build the capacity to routinely handle mass emergencies at a time when most of its work still focused on advocating for smaller, discrete groups of refugees and promoting resettlement of European refugees. Thus, up until the mid-1960s, the agency had only achieved limited success in developing the capacity to respond rapidly in major crises with relief operations. Here the problem was in part the

Economic and Social Council (July 1960)(on file with author). "Here," he continued "a close division appears sometimes invidious, and very often unjust." At every turn, the High Commissioner and his aides emphasized the interrelated needs of mandate and non-mandate refugees to strengthen their case for removing some of the legal strictures that (in their view) hobbled UNHCR's response.

²³⁰ See Loescher, *supra* note __, at __ (discussing a staff memo addressed to the High Commissioner, making an impassioned case for why UNHCR should get involved in the Berlin crisis).

²³¹ Precisely why Lindt and some of his successors sought to promote such high-profile attention in the short run is not entirely clear given what is currently known about the history of refugee protection. The answer is likely to depend at least to some extent on personality characteristics, alternative career prospects, and the individual's core beliefs about the proper role for a venture like UNHCR. The High Commissioners were not all the same in their political outlooks or career prospects. Some High Commissioners came into the job with significant prospects for future political careers. Indeed, Thorval Stoltenberg left the High Commissioner's office to become Danish Foreign Minister, and Aga Khan publicly harbored ambitions of becoming United Nations Secretary General. Others had less certain prospects, and probably considered UNHCR to be the apex of their own careers and political relevance. Moreover, Lindt and Schnyder, the two Swiss diplomats who occupied the High Commissioner's office in succession at crucial early junctures in the organization's history, came from a nation that was not a party to the United Nations. Their nation's best prospect for directly influencing world events was through its participation in international organizations such as UNHCR, something that may have swayed them to think in exceedingly ambitious terms about the scope of the organization's mandate and powers. It's also possible Lindt and his allies thought that increasing the organization's visibility was the best way of avoiding the fate of the abolished International Refugee Organization.

²³² See Holborn, *supra* note __, at __ (discussing the acclaim won by UNHCR as a result of the Berlin operation and similar ones).

²³³ See *id.*, at __ (discussing the Hungarian emergency). UNHCR's leadership received acclaim not only for the swiftness of its response to this crisis but for the deft manner in which it handled the complex politics of dealing with Western bloc countries in promoting asylum and resettlement opportunities for many Hungarians, as well as the Eastern Bloc countries who sought repatriation (and who appreciated UNHCR's successful effort to persuade thousands of refugees to accept repatriation).

²³⁴ See generally UNHCR, *State of the World's Refugees*, *supra* note __, at __ (discussing the widespread perceived success of the Berlin and Hungary operations).

individual-focused structure of the refugee definition, which made it hard for UNHCR to insist on a certain standard of treatment from countries when it was not even clear that the arriving people were within its mandate to protect.²³⁵ Gradually, UNHCR gained some flexibility to use its “good offices” to assist and protect refugees.²³⁶ It also obtained the power to raise voluntary contributions from countries and individuals rather than simply relying on a small yearly allocation of resources from the United Nations, something that would later prove to be crucial to the development of the entire refugee protection system.²³⁷

Less clear was *what* exactly that protection would get for anyone, especially in mass influx situations in the developing world, where individual adjudication was basically impossible and where UNHCR had little ability to demand that nations do something about the arriving asylum-seekers.²³⁸ When a major refugee emergency ensued in Morocco and Tunisia as Algerian refugees fled the brutal fighting between pro-independence militias and French forces, Lindt and his senior staff were torn. On the one hand, independent UNHCR support of the bereaved asylum seekers risked alienating the French government, one of the Office’s crucial Western European constituents. Even the agency’s advocacy on behalf of these displaced persons was complicated by the absence of a legal framework establishing the host countries’ responsibilities to the arriving asylum seekers outside the narrow European context. On the other hand, the nascent staff and leadership interest in promoting the office’s capacity to handle assistance operations combined with a genuine humanitarian concern for the arriving asylum seekers. In the end the Office quietly helped fund some assistance efforts from its meager budget and, after complex negotiations, with France’s tacit approval. But neither existing refugee law nor UNHCR’s organizational priorities were yet firmly trained on the possibility of a large number of simultaneous mass influx emergencies in developing countries.

Key to resolving questions about the organization’s role in the developing world was Lindt’s politically astute successor, Swiss diplomat Felix Schnyder. Instead of turning away from the developing world in light of the difficulties UNHCR had faced with the Algerian refugees, Schnyder embraced it. In contrast to its previously tentative moves in this area, UNHCR now focused considerable resources on consolidating its authority to use its “good offices” to help refugees and others previously not within its mandate. In part at the insistence of UNHCR, between 1957 and 1959, the General Assembly passed a number of resolutions further emphasizing the parameters of the “good offices” framework.²³⁹ These allowed UNHCR to become involved in providing

²³⁵ This was less of a problem in cases, as with the Berlin and Hungarian crises of the 1950s, the host countries were broadly sympathetic to the arriving refugees.

²³⁶ See generally Goodwin-Gill, *supra* note __, at __ (providing a cogent account of the evolution of the good offices power).

²³⁷ See Holborn, *supra* note __ at __ (discussing how UNHCR developed the authority to raise its own funds instead of just relying on the UN’s allocation).

²³⁸ The 1951 Convention focused on the European aspect of the asylum problem, and even among the countries who had exercised the optional provision not to constrain the scope of covered refugees geographically (i.e., to those involving Europe), the chronological restrictions on coverage focused that instrument mostly on the aftermath of World War II. More comprehensive approaches to refugees in other parts of the world would have to await the 1967 Protocol to the Refugee Convention and regional arrangements. In both cases UNHCR officials played important roles in security legal changes.

²³⁹ See Holborn, *supra* note __, at 434-39.

material assistance to Chinese refugees in Hong Kong as well as Algerians in Tunisia and Morocco. Shortly thereafter, Schnyder's aides vigorously sought and received formal approval to use the funds over which the High Commissioner had greatest flexibility -- the emergency fund -- for non-mandate refugees in Togo, Cambodia, and Congo (Kinshasa).²⁴⁰ Although the organization's lawyers initially distinguished between the agency's powers to protect those refugees coming directly within its mandate and those merely receiving assistance through "good offices,"²⁴¹ Schnyder and his aides eventually extended the scope of "good offices" to encompass protection by emphasizing the extent to which refugees initially assisted under the "good offices" framework might later be found to be refugees under the traditional parameters of the UNHCR Statute.²⁴² In Africa and elsewhere in the developing world, where refugees increasingly appeared, the agency's lawyers and staff increasingly posited a connection between material assistance and international protection, which had heretofore been primarily associated with individual determinations but increasingly seemed to call for formal, though of necessity *prima facie*, group eligibility determinations.

Back in Geneva, the bureaucratic machinery of UNHCR increasingly accepted the need for making group-wide refugee status determinations. Schnyder responded by deftly pressing his staff to identify the precedents supporting this practice, thereby bolstering the High Commissioner's efforts to make *prima facie* determinations appear as a long-established core means of dealing with refugees. Thus, in a 1965 speech before the Hague Academy of International Law, Schnyder noted that:

Following the exodus of some 200,000 Hungarian refugees from their country, the High Commissioner's Office resorted to the concept of *prima facie* eligibility in order to avert the paralysis which would have resulted from a strict interpretation of the mandate. The concept of *prima facie* eligibility was applied collectively to this group of refugees as a whole and no longer, as is customary, to isolated individuals... There is nothing to prevent the High Commissioner's Office from following the same course again, whenever the conditions of eligibility appeared to be *a priori* fulfilled.²⁴³

Through such statements and internal policies conveying an equivalent message within the organization, Schnyder did his best to cement perceptions that *prima facie* determinations were routine functions of the Office rather than exceptional reactions to an unusual circumstance.

With frenetic bursts of fundraising, diplomacy, and rhetorical skill, Schnyder gradually formalized UNHCR's role in helping displaced people in the developing world. His approach reflected three basic premises that had an abiding impact on the agency. First, prioritize emergency material assistance over the more amorphous and complicated mission of "protection," which at the time was taken to mean primarily aggressive

²⁴⁰ *Id.* at 440.

²⁴¹ *See id.*

²⁴² *See id.*, at 443.

²⁴³ Felix Schnyder, Speech to the Hague Academy of International Law, The Good Offices and the Functions of the UNHCR in the Social Field, Doc. HCR/RS/32:19 (1965).

diplomatic advocacy on behalf of refugees.²⁴⁴ The Office was specifically charged with advocating on behalf of refugees. Yet, at a time when crises producing asylum seekers were beginning to emerge in large numbers in the developing world, Schnyder had his doubts about whether it was possible for a High Commissioner to be appropriately neutral if he assumed the equivalent of a lawyerly role advocating for the resolution of refugee problems with governments around the world.²⁴⁵ The High Commissioner and his staff seemed to recognize that politically and economically powerful donor countries sought a predictable coordination mechanism for funneling material assistance to regions hit with refugee emergencies.²⁴⁶ UNHCR's focus on material assistance was also likely to be attractive to host countries, who wanted to concentrate refugees at their borders and the resources to manage them there.²⁴⁷ The second premise was to prioritize the raising of major sums of money (in comparison to UNHCR's budget in the 1950s, rather than calling on NGOs to raise funds themselves). The third premise was the importance of downplaying expectations and ambitions about what UNHCR could accomplish with respect to everything else *besides* relief, including (for example) reductions of root cause problems and mitigation of violence.²⁴⁸ Predictably, the strategy had immediate payoffs for UNHCR's capacity to funnel material assistance in a growing number of mass influx situations in Africa. What it did not address were instances where physical security problems afflicted refugee populations, even during the 1960s.²⁴⁹

At first, Schnyder's lawyerly arguments sought to enshrine a conception of international protection that could subsume within it the role of providing material assistance. "The work of the High Commissioner is an organic whole," he insisted while speaking to a committee of the United Nations General Assembly, "in which legal protection and material assistance complement one another, although in a given situation one of these functions may become more important than the other."²⁵⁰ Over time, delivering assistance to large numbers of people appeared to dilute the quasi-adjudicatory, technical aspect of the organization's mission that had once crucially

²⁴⁴ See generally Holborn, *supra* note __, at __ (discussing what "protection" by UNHCR was taken to mean in the early 1960s).

²⁴⁵ See Holborn, *supra* note __, at __ (describing how Schnyder was reluctant to get too involved in the rough-and-tumble politics of resolving root refugee problems; Loescher, *supra* note __, at 117 ("Schnyder felt that it was not the job of the High Commissioner to resolve the bigger political problems..."). Note that this reluctance, combined with a simultaneous and somewhat incongruous desire to make the office relevant to resolving global problems powerfully fed the urge to focus on material assistance].

²⁴⁶ See Loescher, *supra* note __, at 126. Even in the 1960s, such emergencies were increasingly visible to the populations of wealthier countries. Although it was not as obvious at the time, the existence of a legitimate, official bureaucratic source of emergency assistance also eventually made it easier for Western nations – particularly the United States – to effectively launder resources primarily intended to fund guerrilla activities in the developing world.

²⁴⁷ Many of those countries ended up on UNHCR's Executive Committee (ExCom) alongside major donors. Although this formal privilege does not imply equality of power in shaping the refugee system, the power to sit on the ExCom may have given the representatives from these countries an indication that they'd have more control than if independent NGOs raised and spent the funds.

²⁴⁸ See Loescher, *supra* note __, at 117.

²⁴⁹ See Zolberg et al., *supra* note __, at __ (discussing some examples of refugee problems and crises during the early 1960s). See also UNHCR, *State of the World's Refugees*, *supra* note __, at __.

²⁵⁰ Felix Schnyder, High Commissioner's Statement to the Third (Social, Humanitarian and Cultural) Committee of the General Assembly (November 21, 1963)(avail. at <http://www.unhcr.ch>, last accessed Sept. 7, 2005)(on file with author).

depended on separating individuals on the basis of whether they were encompassed by the organization's mandate. The more the agency sought to dispense assistance to expanding populations of displaced persons, the less the agency concerned itself with narrow eligibility determinations.

Together with his advisers, Schnyder thus aggressively reoriented the organization towards generalized relief work, and away from diplomatic advocacy, filling gaps in the work of NGOs and other organizations, and issuing carefully crafted legal determinations about refugee status. These changes immediately enhanced UNHCR's relevance to the humanitarian emergencies breaking out in the developing world at a time when more such emergencies loomed just over the horizon. With East and West vying for influence in the developing world and Western donor governments viewing aid as a means of managing instability in the developing world, UNHCR found receptive ears when it made pleas for more funds.²⁵¹ Today Schnyder's agenda seems less dramatic because it is familiar. That agenda was considerably less familiar at the time it was implemented, in the early 1960s. Despite some high-profile relief operations in Europe like the Berlin crisis and the response to the massive arrivals of Hungarian refugees, the agency still conceived of its role primarily in terms of making fine-grained legal determinations of individual and group legal status, searching for diplomatic solutions to the plight of those people that the organization judged to be within its sphere of competence, filling gaps, and watching over relief efforts undertaken by NGOs.²⁵²

This growing attention to disaster relief did not happen in a vacuum. Van Heuven Goedhart and Lindt had already demonstrated that coordinating disaster assistance could raise the organization's profile. In response to lobbying from the organization, governments of advanced industrialized countries increasingly appreciated the value of providing material assistance visibly demonstrating their concern while contributing to the management of refugee problems away from their borders. The Cold War also limited some paths to political and practical relevance just like it opened such paths for certain other organizations at the time. While Schnyder buoyed UNHCR's disaster relief capacity in Geneva, the International Atomic Energy Agency, headquartered a few hundred miles away in Vienna, faced a very different Cold War environment. Both superpowers encouraged its development as a repository of valuable expertise. Both generally valued the prospect of neutral source of reliable technical information about whether other countries were developing dual use nuclear technologies,²⁵³ and developing countries benefited from some of its training and technical capacity building activities. Because of this, the IAEA more easily developed networks of esteem and support among scientists and some government officials even though its work concerned an extremely complex and inherently controversial security issue.²⁵⁴ In contrast, Schnyder's UNHCR did not have the clout or authority to make countries accept its determinations regarding

²⁵¹ See Loescher, *supra* note __, at 123.

²⁵² Even Schnyder's statement from the 1963 press conference is revealing in that he speaks in terms of UNHCR's contribution being "not the amount needed for this job... but the minimum means of action required to ensure the overall pattern of co-operation." See Schnyder, *Press Conference Briefing*, *supra* note __, at __.

²⁵³ See generally DAVID FISCHER, HISTORY OF THE INTERNATIONAL ATOMIC ENERGY AGENCY (1997).

²⁵⁴ Cf. Carpenter, *supra* note __, at __ (discussing the impact of "coalitions of esteem" on the developing autonomy of bureaucratic organizations).

who deserved asylum. The Cold War limited the scope of its capacity to resolve refugee problems through diplomacy or advocacy, and also dampened the possibility that United Nations-led action could address the security problems arising in or around refugee camps. Nor did UNHCR have the specialized technical knowledge that developing or more advanced countries would tend to find inherently valuable. In this environment, it was little wonder that the organization's leadership – committed as it was not only to the organization's survival, but to the enhancement of its relevance to international politics,²⁵⁵ accelerated implementation of a strategy giving UNHCR access to money for emergency relief with which to buy a seat at the international table. Yet, by placing the organization in a position to raise and spend considerable sums, UNHCR's leadership also increased the agency's dependence on its sources of funding.²⁵⁶

From their newly-purchased seat at the table of global politics, UNHCR's leaders during the mid-1960s could now discern certain patterns. Refugee protection activities were playing out in an uncertain international environment involving Cold War rivalries, growing instability in the developing world often tied to de-colonization, and changing priorities for High Commissioners and major donor countries making it possible for an entrepreneurial organization like UNHCR to finance material assistance operations. The UNHCR's legal position was enhanced by several important legal changes that happened during this period and immediately following it. UNHCR gained the ability to raise voluntary contributions directly from national governments.²⁵⁷ The agency's leadership consolidated its authority to provide assistance to two groups of people – “refugees” who did not explicitly qualify as such under the Convention or the UNHCR statute, and “people of concern” in refugee-like situations who might qualify for help under UNHCR's “good offices,” including people who had simply fled disasters across borders or occasionally internally displaced persons.²⁵⁸ In the succeeding years, the world

²⁵⁵ See Auguste Lindt, High Commissioner's Statement to Economic and Social Council (ECOSOC)([1]11)(July 1960)(avail. at <http://www.unhcr.ch>, last accessed August 7, 2005)(on file with author)(insisting that UNHCR's mandate should be broadened to allow it to assist larger groups of people because “[a]ll refugee problems have in common that they have a social and economic aspect, but only some of them also have a legal aspect.”). See also UNHCR, Joint Press Conference Given by the United Nations High Commissioner for Refugees, Mr. Felix Schnyder, and the Deputy High Commissioner, Prince Sadruddin Aa Khan, Statement of Mr. Schnyder (October 9, 1963)(avail. at <http://www.unhcr.ch>, last accessed October 9, 2005)(on file with author)(High Commissioner discusses goals of establishing a role covering “new needs of refugees in Europe and overseas”).

²⁵⁶ The contention that the agency would try to avoid reductions in its funding levels rests on the plausible notion that there is an asymmetry in the implications of a precipitous drop in funding when the organization has already built up a structure and set of priorities dependent on funding, compared to what transpires when an organization is deciding on its priorities. Prospect theory would predict as much. See Amos Tversky and Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251 (1986). The same might be true as a result of organizational leaders' desire to protect a particular reputation in which they have heavily invested.

²⁵⁷ See Holborn, *supra* note __, at __ (discussing how UNHCR gained authority to raise its own money).

²⁵⁸ The agency's response to the Berlin crisis was less an exception than a precursor of the many future operations where people who did not qualify under even the most expansive definition of “refugee” gleaned from the Statute and Convention nonetheless received assistance, as in Bosnia in the early 1990s and in Darfur today. UNHCR's involvement in Darfur, Sudan continues despite the fact that the overwhelming majority of people affected in the conflict are internally displaced rather than refugees under the agency's mandate. See *In Sudan, UN Refugee Chief Calls on World Leaders to Help Rebuild Shattered Lives*, UN.ORG, avail. at 2005 WLNR 13939049 (Sept. 4, 2005).

witnessed significant legal expansions of the scope of the refugee definition largely driven by the efforts of UNHCR officials themselves, working with networks of supportive NGO officials and representatives of national governments seeking to head off more radical changes in refugee protection. The agency's efforts to collaborate with refugee advocates in expanding the scope of refugee protection culminated most notably in two treaties. The 1967 Protocol to the Refugee Convention expanding the geographic and temporal scope of the refugee definition, garnering the support of much of the world's nations, and leading to the development of elaborate individualized adjudication systems in much of the advanced industrialized world.²⁵⁹ The 1969 Organization for African Unity Convention on Refugees explicitly accepted a broader definition of refugee to encompass people fleeing man-made disasters, and increasingly comports with how UNHCR itself was making group-based determinations.²⁶⁰ With its fundraising independence and the legal basis to expand its network of assistance and legal protection, UNHCR's leadership could raise money to provide assistance and expand its global reach. And it seemed like just in time: while UNHCR's earliest task of resettling Europeans was largely winding down, wars and conflict were displacing millions of people in the developing world whose fate could not be simply left to the emerging individualized adjudication systems in the developing world.

As the third-world refugee flows accelerated, the next High Commissioner, Prince Sadruddin Aga Khan, aggressively continued the pattern Schnyder established as the third-world refugee flows accelerated. The continuity was no surprise to the staff. Aga Khan, a dashing figure from the wealthy family that led a sect of Shia Imami Ismaili Muslims, served as Deputy High Commissioner during the term of the expansionist Swiss diplomat. His wealth and extensive global network emboldened Aga Khan to disagree occasionally with American positions, even as his ambition of one day serving as Secretary General of the United Nations worked in precisely the opposite direction.²⁶¹ Although he initially showed some caution in making refugee legal status determinations, thereby keeping UNHCR out of relief efforts for internally displaced persons in some violent African conflicts, he harbored an expansionist view of UNHCR and was ultimately even more willing than Schnyder to engage in entrepreneurial expansions in the scope of the organization's mandate. Indeed, during his term, UNHCR's work on behalf of massive agglomerations of displaced peoples in Africa and Asia accelerated. So did its potential to appeal to developed western nations as a mechanism for containing and managing those populations of displaced peoples near their source countries. As transportation and economic links between third and first world proliferated, some chunk of those displaced populations might be expected to find its way to the frontiers of developed countries that valued their legal commitment to refugee protection (in part because of pressure from domestic constituencies).²⁶² UNHCR's involvement in

²⁵⁹ See 1967 Protocol, *supra* note __, at __.

²⁶⁰ See Organization of African Unity: 1969 Convention on the Specific Aspects of Refugee Problems in Africa, 1000 UNTS 46, entered into force June 20, 1974 (hereinafter OAU Convention).

²⁶¹ See A. LEROY BENNETT, HISTORICAL DICTIONARY OF THE UNITED NATIONS (1995)(discussing Aga Khan's two unsuccessful campaigns to become Secretary General).

²⁶² See generally LEON GORDENKER, REFUGEES IN INTERNATIONAL POLITICS (1987) (discussing the plausible conclusion that advanced industrialized countries might have recognized the dangers of simply allowing uncontrolled mass migrations from one part of the developing world to another).

managing the displacement also provided some potential opportunities to mitigate the risks of regional instability and conflict that might otherwise accompany a more chaotic flow of refugees.²⁶³

But the chaos persisted during the late 1960s and 1970s, as UNHCR increasingly plunged into the relief role.²⁶⁴ Torrential flows of refugees, defined as such in UNHCR-driven *prima facie* determinations, moved across borders in Asia and Africa. In Sudan, Aga Khan personally intervened to seek the return of refugees to their homes. Though some of his efforts eventually paid off,²⁶⁵ UNHCR's more immediate focus was on keeping the flow of relief supplies going to the refugees and keeping its place as coordinator of emergency United Nations relief. In the new camps sprouting up between southern Africa and the Indian subcontinent, refugees not only experienced intermittent attacks from bandits and criminals, but also sustained punishing blows from guerrillas, host governments, and countries of origin. Humanitarian staff professed faith in the simple legal assumption that the hosts were responsible for meeting the asserted needs of refugees.²⁶⁶ The hosts rarely acted accordingly. In response, UNHCR's leadership cemented the agency's lynchpin role providing assistance to internationally-displaced people.²⁶⁷ At the same time, these violent conflicts sometimes occurred in regions where UNHCR's funder nations, such as the United States and France, had more than a passing interest in the nature of the conflict, which created a sometimes irresistible temptation to manage their refugee influxes in a way that would redound to the benefit of the combatants favored by the host countries.²⁶⁸

UNHCR needed financial resources to seize those opportunities. As Figure 4 indicates, it found them. The combination of turmoil in the developing world, the relative absence of other establish conduits for developed nations to visibly mitigate the condition of displaced people, and emphatic UNHCR appeals for funds resulted in spectacular resource increases for the agency during the ten years between 1971 and 1981 in constant (1983) dollars, transforming it from a coordinator of assistance into a major operator. Resources in real terms tripled between 1979 and 1981, rising from \$200

²⁶³ To give one cogent possibility, if no mechanism existed to mitigate the impact of hordes of arriving people on an economically marginalized developing country near the source of the refugee populations, it would not be long before the recipient country considered (formally or informally) abrogating any legal commitments to refugee protection.

²⁶⁴ See Leon Gordenker, *Organizational Expansion and Limits in International Services for Refugees*, 15 INT'L MIGRATION REV. 74, 78 (1981) ("Organizational Expansion") ("[T]he explosive expansion of UNHCR programs has come in programs of assistance rather than in dealing with the individual status of refugees").

²⁶⁵ See Louise W. Holborn, *The Repatriation and Resettlement of the Southern Sudanese*, 2 ISSUE: A JOURNAL OF OPINION 23 (1972) (discussing Aga Khan's efforts to secure repatriation of refugees in Sudan).

²⁶⁶ There is an eerie parallel between High Commissioners' early exhortation that host nations and the "appropriate Specialized Agencies" take responsibility for refugees economic needs and the now ubiquitous calls for host nations and the Security Council to take responsibility for refugee security. Compare Holborn, *supra* note __, at 137 (High Commissioner urges governments to work with Specialized Agencies to "work out in close collaboration with his office all suitable plans" for refugees' economic needs) with UNHCR, ExCom Conclusion No. 94, *supra* note __ (wherein the UNHCR Executive Committee "acknowledges that host States have the primary responsibility to ensure the civilian and humanitarian character of asylum.").

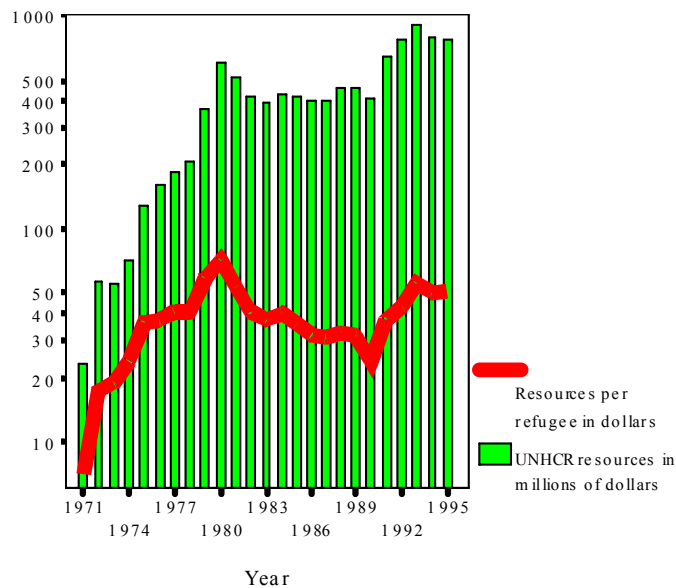
²⁶⁷ See Gordenker, *Organizational Expansion*, *supra* note __, at __.

²⁶⁸ See *infra* Part III.

million to \$600 million. Even before then, The agency's resources grew dramatically, from less than \$25 million in 1971 to over \$150 million by 1977, when Sadruddin Aga Khan left the High Commissioner's Office. Although this somewhat understates the full range of resources UNHCR commanded since the early 1970s because of its role coordinating other relief efforts, it nonetheless gives a picture of the funds over which the agency had the most control.

On the other hand, UNHCR's constant dollar resources fell by a third, from \$600 million to about \$400 million, between 1981 and 1983. Although UNHCR could influence the use of other relief resources (as it did in places like Indochina and Africa), the resources per refugee that UNHCR directly controlled fell between 1980 and 1983 from about \$72 per refugee per year to about \$37 per refugee per year in 1983. Once the agency had begun engineering its daily routines, its performance measures, its promotion paths, and its hiring practices to reflect the priority placed on raising and spending relief dollars, it would have likely been quite hard for it to turn away from this approach and return to a lawyerly focus on advocacy of refugee protection. Though advocacy certainly continued through the 1970s and 1980s, the agency faced both new and recurring constraints in the process.²⁶⁹

FIGURE 4
UNHCR Core Budget in Millions of Constant (1983) Dollars
and Resources Per Refugee (Log Scale)



The agency's success in using the legal flexibility it had acquired to raise and spend money ironically brought problems along with promise. The next High

²⁶⁹ Advocating for the protection or absorption of large numbers of asylum seekers from the developing world was a lot harder than enticing countries to protect discrete numbers of European families. The agency was likely to have little incentive to berate the willingness of its major donors to admit refugees, or to call attention to any security and protection problems that might remain entirely unaddressed by its relief efforts. In contrast, raising and spending relief dollars brought results that were superficially easier to measure.

Commissioner, Paul Hartling, and his advisors even managed to dramatically expand the organization's financial resources, to the point that its funds now actually outstripped its ability to spend the resources. Growing in staff and budgets, the agency assumed more direct operational functions, expanded the services refugees were provided at camps, and encouraged staff to spend more of the \$70 to \$80 million in funds left from the previous year.²⁷⁰ The heady days proved ephemeral. By the end of Hartling's term, donors were far less interested in supporting the buildup of funds in UNHCR. Yet the number and complexity of refugee emergencies and people considered within its mandate had grown markedly.²⁷¹ As he consolidated the assistance-focused work of UNHCR, Aga Khan achieved dramatic increases in funding for the agency throughout the 1970s despite his occasional policy disagreements with the organization's major donor, the United States. Figure 5 shows the pattern in terms of percent changes in agency resources, adjusted for inflation. Although agency budgets remained at roughly the same order of magnitude in the 1980s and 1990s, the agency encountered occasional declines in resources most directly under its control. Throughout this period, the organization also continued coordinating resources provided as either in-kind contributions or direct relief by other entities, including United Nations entities such as the World Food Program, advanced industrialized countries, NGOs, and occasionally the host countries themselves. While the new reality of the organization at the hub of the international refugee protection system reflected considerable economic resources to engage in operational activities, it also made the agency's position more fragile because of the difficulty of coping with downward swings in those resources – which tends to be difficult for most organizations with large budgets.²⁷² Despite donors' insistence on asserting greater control over UNHCR following the staggering resource increases under Hartling, the agency showed a remarkable track record in raising financial resources and funneling them into conflict-stricken regions in the developing world.²⁷³

That remarkable track record did not, however, engender universal enthusiasm among the staff for expanding every aspect of the organization's work. Even before UNHCR began weathering the full extent of the sharp declines in resources-per-refugee during the mid-1980s, the headquarters staff was intent on avoiding some of the thorniest

²⁷⁰ See Loescher, *supra* note ___, at 202.

²⁷¹ For example:

By the mid-1990s, there was not only a crisis in refugee protection but also a crisis in assistance funding. International assistance overall dropped 21% from 1992 to 1997. Donor governments also grew increasingly tired of funding refugee emergencies and protracted stays in host countries. From 1995 on, the failure of donor governments to provide adequate support for refugees became a chronic problem... In 1997-98, donors provided only \$320 million for the UNHCR's general program budget, a decline of \$31 million from 1996 and a shortfall of \$65 million compared to the Office's 1997 requirements. In following years, continuing funding shortfalls caused the Agency for the first time in many years to reduce its general programmes for refugees.

Id. at 322.

²⁷² Cf. Mark A. Mone, William McKinley, and Vincent L. Barker, *Organizational Decline and Innovation: A Contingency Framework*, 23 ACAD. OF MGT. REV. 115 (1998)(suggesting the presence of gain-loss asymmetries in organizations' ability to cope with limited resources and risks of decline).

²⁷³ This underscores how UNHCR's performance cannot be explained by simple theories of the lethargy of international organizations, or (in particularly) of the United Nations system.

refugee protection problems, such as what to do about refugees detained by host states allegedly for security reasons. The case of Somalia is illustrative. Between 1977 and 1987 Somalia had an average annual refugee population hovering near one million.²⁷⁴ The apogee of the nation's refugee crisis came around 1980, when the Somali state hosted approximately 2 million refugees at a time when the government faced external threats and with internal civil conflict. UNHCR's Mogadishu-based staff soon received reports that the Somali government was detaining scores of refugees and holding them as prisoners of war. When the Mogadishu office appealed to headquarters for guidance, the Director of International Protection replied in a cable that:

[I]t is not within the competence of UNHCR to concern itself with a “prisoners of war” situation unless it is clearly apparent that refugees are involved. Information as to the presence of refugees would emerge from the findings of the International Committee of Red Cross [sic] (ICRC) in the context of its monitoring function under the above-mentioned instruments [the Geneva Conventions and Protocol].²⁷⁵

The cable's argument rested on a spate of implicit (and therefore undefended) assumptions tantamount to a belief in an unarticulated “common law” of refugee protection generally excluding conflict-related matters from UNHCR's purview. Under this view, it was the ICRC that functioned as custodian of humanitarian law, and the Geneva Conventions where so much of that law was enshrined. Because “prisoner of war situations” were covered by the Geneva Conventions, such situations were primarily the ICRC's responsibility. The assertion in the headquarters memo was not moored to the UNHCR Statute or any other source of binding law governing the agency. Its analysis sidestepped the possibility that the ICRC would not prioritize refugee concerns or indeed, that the ICRC might not be operating at all in the country in question.²⁷⁶ Such measured reluctance to assume responsibility even for a relatively prosaic portion of the refugee protection mission stood in sharp contrast the entrepreneurial expansion of operational responsibilities that UNHCR demonstrated most sharply at times when its political and economic fortunes were uncertain.

UNHCR's entrepreneurship reached its high point during Sadako Ogata's eventful tenure as High Commissioner. A Japanese university administrator and Berkeley-trained scholar of international relations, Ogata entered UNHCR determined to reinvigorate morale and restore the organization's capacity to achieve steady increases in resources. She sought to do this by demonstrating the agency's relevance to global political developments.²⁷⁷ Her approach is borne out not only by the perceptions of protection officers and operations staff during her tenure, but by Ogata's own recollection:

²⁷⁴ See UNHCR Statistical Office, *Annual Refugee Statistics 1960-2004*, *supra* note __.

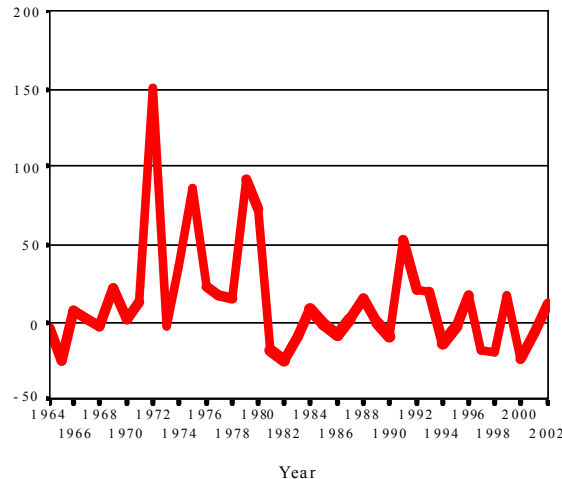
²⁷⁵ Memorandum from P.M. Moussalli, Director of Protection, to the Representative, UNHCR Branch Office, Somalia, *Detention of Refugees in Somalia*, Doc. No. HAS/1502 (17 Sept. 1982)(UNHCR Archives)(on file with author).

²⁷⁶ This turned out to be the situation in Somalia. Memorandum from Arthur A. DeFehr, Representative, UNHCR Branch Office Mogadishu to P.M. Moussalli, Director of Protection, UNHCR Headquarters Geneva, *Detention of Refugees*, Doc. No. SOM/HQ/615 (3 Oct. 1982)(UNHCR Archives)(on file with author).

²⁷⁷ See Ogata, *supra* note __, at __.

I realized that something crucial was going to happen to very key elements of the refugee equation – to borders, to wars, to the way people fled and the world responded. I had to think very quickly... UNHCR would end if it remained a slow, static conservative organization. If UNHCR was to stay relevant... then it had to be quick, smart, effective, and adaptable to a fast-changing environment.²⁷⁸

FIGURE 5
Percent Change in UNHCR Resources, Adjusted for Inflation



The new High Commissioner's sense of urgency reflected not only an increasingly demoralized staff and uncertainty about the organization's core competence, but also stagnant resources. As Figure 4 shows, the agency's resources on a dollars per refugee basis had fallen from nearly \$100 in 1980 to less than \$40 in 1989. The dramatic increases in resources in percentage terms between 1970 and 1980 shown in Figure 8 evaporated during the 1980s. In response, the new High Commissioner's brand of dynamism soon appeared to rekindle the organization's entrepreneurial approach to raising funds and expanding the scope of its work. During her tenure, for instance, UNHCR again began growing its budget in response to both Ogata's advocacy and high-profile crises like those in the Balkans. As a proportion of total United Nations core resources, UNHCR went from just over 6% in 1990 to nearly 14% by 1996.²⁷⁹

To attack the financial and morale problems, Ogata aggressively embraced seemingly novel missions, such as the provision of material assistance to individuals who had yet to flee their homes in the Balkans. She altered promotion paths, making it easier for staff with operational experience rather than familiarity with the intricacies of refugee law to rise through the ranks.²⁸⁰ Yet in some respects, Ogata simply optimized some of the agency's internal structures to carry out these practices. Thus UNHCR delivered

²⁷⁸ *Id.*, at 344-45.

²⁷⁹ Sources: Encyclopedia of the UN and International Agreements; United Nations Association (Germany)(UNHCR figures through 1995); UNHCR budget and expenditure estimates (1995 to 2004).

²⁸⁰ See Loescher, *supra* note __, at __.

assistance and conferred legitimacy to people stuck in Bosnia while a war raged, assisted many IDPs elsewhere, stepped up relief operations, and promoted younger officers with more discretion that built up the organization's capacity to rapidly deploy resources.²⁸¹ One UNHCR official who worked noted that she invested in "some people in the bureaucracy, and lived off them. We thought the decade of the '90s would be the decade of repatriation. But it became the decade of emergencies. She relied on people whose core experiences and conceptions of the organization were forged in the midst of high-profile emergencies."²⁸²

Despite the focus on humanitarian emergencies, problems of coercive manipulation and violence appear to have been initially neglected in the history of the organization, particularly before Rwanda.²⁸³ As a consequence, the organization was almost entirely unprepared when the Rwanda crisis did emerge and confronted the organization with the scale of carnage, the rapid flight of humanity, and the impact of all this on the physical security of people caught up in the conflict. Many of the consequences were disastrous.²⁸⁴ The Great Lakes crisis was widely perceived to be a debacle for UNHCR both within and outside the organization, resulting in considerable hand-wringing and soul-searching, about how best to implement the agency's legal mandate in a deeply flawed world constantly assailing the system's integrity.²⁸⁵

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The preceding narrative of UNHCR's evolution reveals how an organization came to implement, reassess, and ultimately redefine its own mandate by actively participating in creating a global legal regime. It shows how that implementation gradually came to embody the grand compromise discussed at the end of Part II, and characterized by accommodation of developed countries receiving refugees, refugee camps primarily in developing countries hosting mass, along with the growth of a massive relief-oriented

²⁸¹ See Rieff, *supra* note __, at 135. ("While little or no aid reached the eastern Bosnian enclaves of Srebrenica, Gorazde, and Zepa, and much that did reach people in the area known as the Boanska Krajina was stolen by the Serbs, an astonishing amount did reach those who needed it.")

²⁸² Interview with UNHCR Protection Official # 4 (New York, 2004); Interview with UNHCR Operations Official # 1 (Geneva, 2004) ("Ogata understood that emergencies were difficult but also a useful tool for building up institutions and defining them... [She fomented the advancement of] a generation of people who cut their teeth in the midst of an emergency requiring UNHCR to mobilize massive resources to deal with a situation that was not obviously within its mandate.").

²⁸³ For instance, a widely praised report within the organization following the Great Lakes debacle listed a number of recommendations that UNHCR should interpret as it discharged its legal responsibility of protecting refugees. Some of these recommendations are most striking because of what they imply about how the organization was implementing its legal mandate *before* December 1996 (the date of the report). For example, the recommendations included that UNHCR "...ensure that the protection aspect of UNHCR's emergency response capacity is greatly strengthened by ensuring high level decision-making on protection policy at the outset of emergencies..." and to "develop and adopt for the purpose of emergency preparedness and contingency planning, a range of policy options and measures which may be adopted swiftly to improve camp security in emergencies. UNHCR, *Lessons Learned from the Rwanda and Burundi Emergencies* 5 (December 1, 1996).

²⁸⁴ See UNHCR, *Camp Security Report*, *supra* note __.

²⁸⁵ See, e.g., Ogata, *supra* note __, at __ (discussing the Great Lakes crisis). See also Interview with UNHCR Protection Official # 2 (Geneva, 2004) ("This got on the screen because of Rwanda"); Interview with UNHCR Senior Official # 5 (New York, 2004) ("What happened in Africa around the Great Lakes was the First World War of Africa").

bureaucracy focused primarily on raising and distributing disaster relief assistance. The agency became such an important lynchpin of this system because of its financial resources and expanded mandate, both of which enhanced UNHCR's relevance in an uncertain environment where its future was once threatened. As the features of the grand compromise gradually emerged, the organization confronted periodic crises in the form of reductions in the flow of financial resources (which became increasingly essential as the agency prioritized relief work), tensions with crucial wealthy donor governments (particularly the United States), and political shocks such as the decolonization wars that swept Africa and eventually displaced millions of people. In virtually all these cases, the agency's leaders responded to crises by simultaneously expanding the agency's mandate and raising additional resources. This tactic sometimes led to growth in overall agency resources that did not entirely keep pace with the growing scope of beneficiaries.²⁸⁶ It allowed the agency to engage in politically sensitive missions such as administering dramatic relief convoys to Bosnian Muslim enclaves under siege but constantly moved further afield from its core mission of tending to the needs of people who met earlier, narrower refugee definitions.

In short, as UNHCR navigated the second half of the 20th century, the agency shed its primary identity as a legal and diplomatic advocate for refugee protection to forge a new role as a disaster relief entity. As it performed more operational functions associated with generalized relief programs, UNHCR came to perform less of other functions. It became less of a diplomatic and legal advocate, in contrast to entities such as the United Nations Environment Program eschewing most operational responsibilities to preserve their independence. It did not follow the path, more characteristic of the IAEA or the WHO, of limiting its core competency to filling genuine gaps in areas (such as evaluation, best practices in camp location and access to water, and security enhancements) likely to remain even in light of the work of NGOs, host countries, and other transnational bureaucratic organizations. And because of the centrality of its hefty operational responsibilities, the organization's dependence on streams of funding from developed nations almost certainly dampened its ability to forcefully criticize the refugee policies of those nations.²⁸⁷ Strategic efforts to fill gaps in refugee protection and assistance gave way to routinized responses to global emergencies.

Had the agency retained its original role or something close to it, it would be more understandable for its leaders and staff to treat security problems as breakdowns of legal protection primarily meriting forceful exhortations. Even in that counterfactual world, it would be baffling if the agency copiously reported on multiple facets of refugee protection without assessing refugees' physical security. Yet ironically, the instrumental success of UNHCR's institutional transformation – when viewed alongside legal texts establishing the nature of refugee protection and global human rights protecting – in

²⁸⁶ Hence the drop in resources per refugee documented in Figure 7; recall that the total number of refugees is not just a function of global political trends, but also of UNHCR legal interpretations that grew increasingly flexible between the 1960s and the 1990s.

²⁸⁷ Thus, while the ability of the agency's leaders to build up UNHCR's operational capacity is arguably an example of the agency's autonomy from the nations that designed it and (in the case of the United States) initially resisted the growth of its operational role, once the agency had built up its capacity to provide relief its dependence on funding almost certainly diminished that autonomy.

principle seems to bolster, not weaken, the case that the organization is invested with some responsibility for promoting the physical security of refugees. If the agency staff were deprived of the argument that its refugee protection mandate ought to be read so narrowly as to exclude any operational responsibility (an argument vitiated by its existing role in refugee assistance), their only remaining ground for excluding security responsibilities from its mandate depends on the view that it is futile for it to take ownership of such problems. Once again, the picture that emerges from studying UNHCR's own belated, incremental steps (discussed below) is more complicated.

B. Analyzing UNHCR's Responses to Security Problems

Chaotic circumstances enveloped much of the developing world during the time that UNHCR transformed itself refugee advocate with a modest budget and mandate for targeted interventions into a major relief provider. Decolonization, the spread of civil conflict, and the realities of uprooted disorder in refugee camps left refugees and similar populations of asylum-seekers to confront a proliferation of threats to their physical security. As a result, refugees confronted a proliferation of the now-familiar threats to their physical security. Having traced the evolution of UNHCR in detail, we can better evaluate its responses to the crime-control, coercion, and state-in-exile problems that have marred refugees' physical security since the 1950s.

i. Before the Great Lakes Crisis

The agency's newer disaster-relief mandate greatly complicated any move towards emphasizing safety and security. Managing security is virtually impossible without some framework for excluding people, but this would be expensive, and would reduce the number of people who receive assistance. Since the mere presence of assistance can exacerbate conflict and security problems, emphasizing security could conflict with guaranteeing assistance flows. For UNHCR's staff and leaders, focusing on security could also complicate the relationship with the U.S. and some of its allies.

These forces almost certainly set UNHCR on a path toward neglecting security problems before the Great Lakes crisis. Despite some heroic efforts from individual staff members and occasional ad hoc security assessments, many refugee emergencies in the 1960s, 1970s, and 1980s neglected the various types of security threats that could affect refugees' physical integrity. Refugee security emergencies such as post-colonial African wars in the 1960s produced no appreciable ExCom or General Assembly statements, which generally result largely from UNHCR's own lobbying. UNHCR itself participated in the forced repatriation of Burmese refugees from Bangladesh to Burma in the 1970s and 1980s.²⁸⁸ In a host of other crises many security-enhancing initiatives seem to reflect primarily individual staff initiatives, while the organization itself appears to have been de-emphasizing its protection work. Although the agency avoided directly funding some Khmer Rouge border camps in Thailand in the 1980s and withdrew assistance to some rebel groups in Zimbabwe, the agency otherwise overlooked militarization in a host of camps it sponsored.²⁸⁹ No bureaucratic structure focused exclusively on refugee (as

²⁸⁸ See Loescher, *supra* note __, at __ (discussing the forced repatriation of Burmese refugees).

²⁸⁹ See Terry, *supra* note __, at __ (discussing UNHCR's mixed role with respect to Cambodians in Thailand).

opposed to staff) security, either within the Department of International Protection, within Operations, or standing alone.²⁹⁰ In part as a consequence of the bureaucratic structure, historically UNHCR developed no guidelines for separation of combatants and civilian refugees despite the recurrence of the problem, nor any special unit to promote the acquisition of personnel or technical capabilities to facilitate this.²⁹¹

In the early 1980s, UNHCR finally commissioned a report from Felix Schnyder on one aspect of security problems – armed attacks on refugees. Schnyder’s brief was to:

[E]xamine the serious humanitarian problems resulting from military attacks on refugee camps and settlements which are the concern of UNHCR, and the need for special measures to protect and ensure the safety of such refugees.²⁹²

The High Commissioner requested the analysis in response to attacks on camps in Southern Africa. In it, Schnyder acknowledged the existence of a security problem in a growing number of camps.²⁹³ Beginning in the 1980s, General Assembly resolutions occasionally made reference to the civilian and humanitarian character of asylum, and to security issues. Nonetheless, despite such resolutions and the Schnyder report, there was a protracted debate about whether ExCom should condemn attacks on camps, and what form that statement should take. The United States in particular was leery of any pronouncement regarding attacks on refugee camps, as such a move was likely to invite scrutiny and condemnation of American initiatives supporting the militarization of refugee camps in Pakistan, Indochina, and Central America. Other ExCom nations, recognizing that such militarization was already common in settings such as Palestinian Camps in the Middle East, were reluctant to raise questions about their own right to respond to militarized camps. As a result, no explicit condemnation ensued from the ExCom.²⁹⁴

The pattern continued. In succeeding years, the agency’s leadership, its ExCom, and the General Assembly remained generally silent about the problem.²⁹⁵ To the extent that pronouncements were made about refugee security within the organization, much of the focus was on emphasizing the responsibility of host states, with limited or no attention to the ability of UNHCR to make a difference in this area.²⁹⁶ Operational staff

²⁹⁰ See Interview with Senior UNHCR Official # 3, *supra* note __.

²⁹¹ These things were *entirely* within its capacity without requiring attention from the Security Council or external nations willing to support peacekeeping, and could have helped generate information about how best to organize aid distribution, camp locations, relations with host governments, refugee education, and rudimentary security (in the absence of something better) in a manner that would promote security.

²⁹² Letter from Amb. Felix Schnyder to Mr. Poul Hartling, United Nations High Commissioner for Refugees 1 (Sept. 29, 1982)(UNHCR Archives)(copy on file with author).

²⁹³ See Felix Schnyder, *Military Attacks on Refugee Camps and Settlements in Southern Africa and Elsewhere*, Executive Committee of the High Commissioner’s Programme, Sub-Committee of the Whole on Int’l Prot., Doc. No. Ec/SCP/26 (March 15, 1983).

²⁹⁴ In the realm of material assistance, UNHCR rarely allowed such a stalemate to slow down policy innovation. See *infra* Part IV.a.

²⁹⁵ See *supra* Part II.d.iv.

²⁹⁶ There were a few exceptions, the most notable one being an internal note analyzing physical security produced by the Department of International Protection in 1993, emphasizing that UNHCR itself had the authority and responsibility to promote security. See UNHCR, *The Personal Security of Refugees*, International Protection (SCIP), Doc. No. EC/1993/SCP/CRP.3 ¶ 23 (May 5, 1993)(“Safeguarding the

began exhibiting concern with mitigating sexual and gender based violence problems sometime between 1985 and 1988. The attention responded to pressure from advocacy NGOs, and was bolstered by legal analyses from the protection staff linking such attention to human rights guarantees owed to refugees.²⁹⁷ The same degree of attention was not forthcoming for the problems posed by frequent, sometimes blatant violations of the “security and humanitarian character of asylum” rife in Pakistan and Thailand, with attacks and recruiting continuing in a number of cases in Africa. In fact, there do not appear to have been any high-level investigation of the problem of attacks on refugee camps. The Snyder report was one of only two notable exceptions. The other involved a protracted ExCom debate over something as limited as the adoption of a resolution condemning attacks – which was finally achieved in 1987.²⁹⁸ This distribution of attention indelibly shaped the agendas of dozens of NGOs that worked with UNHCR over the years providing assistance, allowing them to continue largely ignoring the ethical, legal, and practical dilemmas arising from the intimate association between aid and security problems.²⁹⁹

Thus, the historical record before the Great Lakes crisis shows not nuanced thinking about security dilemmas but something more akin to willful blindness. Return to the Snyder report of the early 1980s.³⁰⁰ The former High Commissioner report amounts to a pithy restatement of how UNHCR then viewed, and continues to view, its legal mandate. The lawyerly Snyder emphasized how UNHCR’s work had to be strictly humanitarian and non-political. “First and foremost,” Snyder noted, attacks were violations of the host state’s territorial sovereignty.³⁰¹ What he does not directly discuss is the intimate connection between those attacks and the use of internationally assisted refugee sanctuaries by combatants to carry on those attacks. The omission is surprising. At the same time Snyder was writing his report, UNHCR was hard at work stocking camps with combatants struggling against the South African government in Sub-Saharan Africa, and was letting the Pakistani government condition the distribution of internationally provided food on the basis of whether refugees joined parties supporting armed struggle against the government in Afghanistan.³⁰² Snyder did not grapple with the thorniest questions in his report, or even in his private correspondence with then-High Commissioner Hartling discussing his work. Neither did he consider the inexorable logic tending to make internationally-funded refugee camps attractive as combatant bases, and tending to make camps targets of attacks from the combatants enemies. Instead Snyder

personal security of refugees is implicit in the High Commissioner’s mandate of ‘providing international protection’”).

²⁹⁷ See Interview with UNHCR Operations Official # 3, *supra* note __. See also note __ (indicating that sexual and gender based violence issues were the only aspects of security included in UNHCR’s new camp indicator reporting system).

²⁹⁸ See Interview with Senior UNHCR Official # 4 (New York, 2004)(indicating no separate archival records existed for documents relating to violence and security problems).

²⁹⁹ See Interview with NGO Official # 2 (New York, 2005).

³⁰⁰ See Snyder, *supra* note __.

³⁰¹ See *id.* (discussing how attacks on refugee camps tend to constitute violations of host state’s territorial sovereignty). Notice how this position seems to sidestep the difficulties arising where elements of the host state are allied with the attackers and, indeed, conceivably welcome the intrusion from the attacking forces.

³⁰² See *supra* notes __ (discussing Pakistani support for recruitment of rebel combatants among Afghan refugees in the camps).

elided the fundamental dilemma at the heart of UNHCR's work in any relief operation where a state-in-exile carries on an armed struggle with support from refugees themselves. Refugee protection then becomes a subsidy to catalyze conflict. Perhaps Schnyder could not help but confront this dilemma as a former High Commissioner, too invested in the system he helped forge to fully appreciate its contradictions. Perhaps his analysis reflects his admittedly heavy reliance on information provided by UNHCR itself. Whatever the reasons, the Schnyder report was another missed opportunity for refugee advocates to confront intricate ethical, legal, and political questions about security implicit in their daily routines.

The pattern of relative neglect appears to have continued as High Commissioner Ogata sought to catalyze the organization's morale and extend its mandate more decisively in the Former Yugoslavia during the 1990s. Instead of endeavoring to help persecuted individuals leave the settings where they faced pronounced physical security threats, the agency provided the relief to help keep potential where they were, surrounded by such threats. While the energetic activities of UNHCR unquestionably confounded the lethargic image of the United Nations system, some observers have argued that these activities probably made it easier for the United States and its European allies to postpone action in Bosnia.³⁰³ The muscular relief operations carried on by UNHCR staff provided a visually compelling and highly salient response to domestic and international publics, and it helped undermine efforts to promote ethnic cleansing by uprooting Bosnian Muslims and driving them, *en masse*, into exile.³⁰⁴ The role UNHCR could play to dampen the urgency of intervention was not lost on the fragile Bosnian government, which sought to force UNHCR convoys heading into Sarajevo to use a narrower road into the besieged city – a road that could not “accommodate the tonnage [sic] required to feed Sarajevo.”³⁰⁵ Disagreements about the merits of UNHCR's involvement continue.³⁰⁶

Ironically, the organization administered and executed an operation designed precisely to keep potential refugees in the location where they would be most exposed to threats to their physical security. Pressure from funders almost certainly compounded the agency's enthusiastic response to what the High Commissioner and her top aides viewed as an enticing opportunity to emphasize UNHCR's relevance. The complexities of the Balkan nightmare perhaps make it easier for some erstwhile observers to justify UNHCR's bold interpretation of its mandate to reach from protecting those forced to flee to making it feasible for people not to flee. Still, an undeniable corollary of the agency's legal interpretation was that the UNHCR of convoys to Sarajevo plainly did not use its seat at the table to press for the safety of (current or potential) refugees. Its lot was cast with those governments who shared the potentially noble but discordant goal of ensuring

³⁰³ See Rieff, *supra* note __, at __ (discussing the problems associated with UNHCR's involvement in the Balkans).

³⁰⁴ See Hathaway, *Reconsideration*, *supra* note __, at __. See also Zolberg et al., *supra* note __, at __.

³⁰⁵ *A/S Shattuck Meeting with UNHCR*, U.S. Mission, Geneva, Cable/Confidential 2 (August 3, 1995)(U.S. State Dep't FOIA Electronic Reading Room, avail. at <http://www.state.gov>, last accessed October 9, 2005)(copy on file with author).

³⁰⁶ Compare Rieff, *supra* note __, at __ (criticizing UNHCR's Balkan involvement) and James A. Hathaway, *New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection*, 11 J. REFUGEE STUD. 350 (1998)(viewing UNHCR's “palliative” role in the Balkans as a “distortion”) with Ogata, *supra* note __, at __ (defending UNHCR's involvement).

that Bosnian Muslims not be cleansed from the valleys of central Bosnia. Even among the protection staff, there was a widespread embrace of the Balkan intervention with little dissent.³⁰⁷ There was therefore a marked contrast between UNHCR's organizational priorities on security issues affecting refugees and the way organizations tend to approach activities that their leaders and staff have managed genuinely to prioritize. But the Great Lakes crisis changed all that.

ii. Since the Great Lakes Crisis: Limited Capacity-Building Activities and Slow Implementation of Security-Related Priorities.

Or did it? The magnitude of the Great Lakes crisis made it nearly impossible for UNHCR or other organizations in the humanitarian world to ignore the security dimensions of refugee crises, and how these can be worsened with international assistance. But for reasons that help explain the previous record of neglect, actual change has been surprisingly slow in coming. The beginning of this phase of the refugee security timeline was marked by dramatic observations and declarations from the High Commissioner and key staff, recognizing that states occasionally fail to live up to their legal responsibilities but pinning most of the responsibility on the United Nations Security Council, DPKO, and neglect from the governments of powerful nations.³⁰⁸ At the staff and mid-level manager levels, there were occasionally swift responses involving changes in camp organization or funding for the provision of security services in Eastern Congo. The agency belatedly sought to pay Congolese army to guard refugee camps.³⁰⁹ UNHCR provided some funds to Tanzanians for police services.³¹⁰ A few successful initiatives resulted from a mix of staff initiative, fortuitous opportunity (such as the presence of peacekeepers near the community of Zongo), and the concern expressed by higher-level officials in the organization, certain humanitarian organizations, and by United Nations organs.³¹¹ Several internal and external evaluations, moreover, made recommendations for substantial changes within UNHCR (such as obtaining greater security expertise, making fundraising appeals focused on security).³¹²

After High Commissioner Ogata introduced a "Ladder of Options" to address future instances reflecting breakdowns in the civilian and humanitarian character of asylum,³¹³ a separate document sought to operationalize it with respect to UNHCR's own

³⁰⁷ See Interview with UNHCR Operations Official # 1 __ (Geneva, 2004).

³⁰⁸ See Ogata, *supra* note __, at __.

³⁰⁹ See UNHCR, *Lessons Learned*, *supra* note __, at __; Ogata, *supra* note __, at __ (describing problems she perceived with trying to pay for private security firms to provide security in the camps).

³¹⁰ See Ogata, *supra* note __, at __ (discussing limited support provided by UNHCR for Tanzanian security operations).

³¹¹ See Yu, *supra* note __, at __.

³¹² The proliferation of evaluation reports following the Great Lakes crisis showcase the gap between UNHCR's performance during and immediately before the refugee emergency associated with the Rwandan genocide, and the scope of policies UNHCR had the capacity to pursue to mitigate security problems (otherwise, there would have been few if any recommendations to make in the reports). See UNHCR, *Refugee Security*, *supra* note __; UNHCR, *Lessons Learned*, *supra* note __.

³¹³ See UNHCR, *The Security and Civilian and Humanitarian Character of Refugee Camps and Settlements*, Executive Committee of the High Commissioner's Programme, Standing Committee, 14th Meeting, Doc. No. EC/49/SC/INF.2 (January 14, 1999); Ogata, *supra* note __, at __ (discussing the "ladder of options").

functions.³¹⁴ Many of the recommendations made in reports following the Great Lakes crisis found their way into this operational document. Even taking into account the fact that the original Ladder of Options continued the emphasis of blaming host countries for refugee security problems, the resulting operational document evinced a surprising lack of organizational ambition to deal with the problem. It called for the hiring of two staff members to focus on refugee (as opposed to staff) security at a time when hundreds of camps holding millions of refugees continued to be at risk of security breakdowns and manipulation.³¹⁵ Its focus remained on encouraging host states to comply with their security responsibilities under the law by simply calling on them to do it.³¹⁶ Nor did the operational plans call for redirecting fundraising appeals to create resources for the few modest operational changes that the document did call for, like the deployment of “humanitarian security officers” (HSOs) in conflict regions to help assess the security situation.³¹⁷

Even these goals have been implemented at a glacial pace. As of the middle of 2004, the agency had only one staff member devoted exclusively to focusing on refugee security issues, and a smattering of others who focus on specific sub-sets on a part-time basis in addition to their core responsibility, such as monitoring refugee developments in a particular country.³¹⁸ UNHCR’s deployment of HSOs has stalled.³¹⁹ The agency’s budget documents, setting forth new priorities and performance measures, fluctuate in the attention devoted to refugee security issues, but mostly include vague standards making reference back to the priorities in the operational document described above. The writing of guidelines for separating combatants from civilian asylum seekers admittedly calls for consultation and deliberation by experts. But the process has stretched out over nearly a half-decade since the operational document was promulgated and more than a decade after the Great Lakes emergency began. It continues to this day.³²⁰ An analysis of evaluation reports over the last ten years shows how only six out of 77 address security problems affecting refugees in any substantial way. In contrast, nearly seven times that number of reports focus primarily on material assistance and how to enhance it. Of the tiny handful of reports focusing primarily on security, half or so deal with sexual and gender-based violence. An additional 19 reports mention security in passing, and most do so only to note problems and shortcomings in existing arrangements to provide

³¹⁴ See UNHCR, *The Security, Civilian, and Humanitarian Character of Refugee Camps and Settlements: Operationalizing the Ladder of Options*, Executive Committee of the High Commissioner’s Programme, Standing Committee, 185h Meeting, Doc. No. EC/50/SC/INF.4 (June 27, 2000).

³¹⁵ *Id.*, at ¶ 20 (“Two professional staff members in ERS [Emergency Response Service] will be dedicated to the security function”)(emphasis added).

³¹⁶ *Id.*, ¶ 5 (“It is a well established principle in international law that host States have primary responsibility for the physical protection of refugees...”). As I note in Part II.b., *supra*, the notion that states have “primary” responsibility is only consistent with existing doctrine inasmuch as it does not extinguish the responsibilities of other players – particularly UNHCR – for refugee security.

³¹⁷ *Id.*, at ¶ 13 (discussing “humanitarian security officers”).

³¹⁸ See Interview with UNHCR Operations Official # 2, *supra* note__.

³¹⁹ Four years after HSOs were initially proposed, UNHCR’s budget and performance measure document still listed initiating the deployment of HSOs as a new priority. See Interview with UNHCR Operations Official # 2, *supra* note__.

³²⁰ Neither the “Operationalizing” document discussed above nor the expert consultations appear to have produced any statements involving child soldiers.

refugee security.³²¹ These figures suggest that security was not among the top priorities of the agency's evaluation unit, at least was not during the ten years during and after the allegedly watershed Great Lakes crisis.

The need for improvement is not lost on everyone in the organization. Employees in protection, operations, and managerial positions who did not simply assert that security was beyond UNHCR's legal mandate believed there was considerable room for improvement on the organization's performance providing security, even after the Great Lakes debacle. As one UNHCR official noted:

The level of effectiveness in security reporting from camp to camp is questionable... What we have found from the camps is that sometimes they just report generalities – they might say that because there was relocation of refugees away from the border in Sierra Leone, that security problems have 'been addressed.' When we press by asking, 'can you describe situations involving serious crimes, like rape,' we get some pretty pathetic answers that raise concerns about the level of confidence in any reporting. The camp personnel might say 'Wasn't there one back in October?' When we ask, 'can you show us your records,' they might say 'we don't have any. I'm probably sharing with you frustrations for which UNHCR is partly to blame.'³²²

Nor does the agency describe the proportion of its budget devoted specifically to studying and improving refugee security rather than staff security.³²³ Even the most recent issue of the UNHCR's *Refugees* magazine, which focuses on security, ironically provides a picture of the organization's specific priorities in this area. While it touts the creation of an elaborate system for staff security and the overall scope of security problems affecting refugees, there is little information specifically describing statistics on refugee camp attacks, because these figures do not appear to exist.³²⁴

As before the sordid Rwandan drama, the organizational record of UNHCR is not one of complete neglect of security concerns. The organization took gradual and belated steps to promote law and order in the sprawling cities that refugee camps have become, such as paying for host country security services on occasion, or establishing rudimentary peace education programs in some camps (but not in others). Its operations and protection staff have continued taking steps to improve responses to sexual and gender-based violence through training, camp planning, and special assistance programs.³²⁵ But what is most remarkable is how little things changed. Reforms that were supposed to be

³²¹ See UNHCR Website – Evaluation (avail. at <http://www.unhcr.ch/evaluation>, last accessed October 1, 2005).

³²² Interview with UNHCR Operations Official # 2.

³²³ See UNHCR, *Refugee Security at a Glance*, REFUGEES MAGAZINE, (July 2005)(on file with author).

³²⁴ See *id.*

³²⁵ See Interview with UNHCR Operations Official # 2 (Geneva 2004)(discussing the impact of NGOs on UNHCR's attention to sexual and gender-based violence). Another UNHCR official put it thus: "Pressure from outside groups increasingly leads to the creation of specialized units – we have one now to deal with gender, and another to deal with the environment, and so on. This complicates the agenda." Interview with Senior UNHCR Official # 3. This contrasts with the behavior of advocacy NGOs such as Human Rights Watch. See Interview with NGO Official # 3 (advocacy NGOs perform a valuable function by calling attention to deficiencies). MSF is an interesting but rare exception exhibiting considerable independence despite its operational role. See Rieff, *supra* note __, at __ (discussing MSF).

instituted, such as hiring people with security expertise, have stalled. Few evaluation reports discuss security issues. An executive committee conclusion on the civilian and humanitarian character of asylum wasn't finished until eight years after the Great Lakes debacle. As of 2004, there was still no bureaucratic unit devoted to refugee security or violence prevention, and only about 2 people in the entire organization (of 5,000 full-time employees) worked on that issue full time.³²⁶

History, in short, confirms how UNHCR has constructed an elaborate mandate that was supposed to advance the goal of providing “protection” to refugees enshrined in its Statute without prioritizing security. As of 2004, the organization keeps no systematic statistics of security problems. Only occasionally did it focus on gathering data when there's an ineluctable sense that there's a problem (as with the camps in Dadaab in Northern Kenya) – but this is rare and is likely to paint a misleading picture without the context of the full range of problems. Many personnel interviewed insist this is essentially not their responsibility. Its Emergencies Manual said little about how staff should manage the complex legal and practical problems associated with promoting security. UNHCR's priorities occasionally appeared to evince a willingness to de-emphasize the importance of asylum's “civilian and humanitarian character” and security for refugees in comparison to other considerations, as evidenced by continued funding for camps in Southern Africa in the late 1970s and early 1980s knowing they were essentially militarized, the Negroponte memo on Honduras situation in the 1980s, and the Balkans intervention to prop up safe areas in the 1990s.

Indeed, the security problems have stubbornly persisted for nearly five decades, in: (a) wars over colonialism in Africa and Asia; (b) cold war-related conflicts in Afghanistan, Indochina, and Central America; (c) ethnic and political economy conflicts in Africa. The reports on security issues then emerging from the Great Lakes debacle in the mid-to-late 1990s offer a striking chronicle of policy and legal initiatives that the organization had yet to take nearly four decades after refugee security problems had emerged. As late as the end of the 1990s, for instance, internal UNHCR reports were urgently recommending basic training programs on security for staff, inclusion of a section on security in the Emergencies Handbook, recruitment of security experts into UNHCR, and measures to improve penitentiary capacity in host countries.³²⁷ As late as 2000, another evaluation report (one of the few explicitly discussing security) called on the agency to “clarify” its responsibility for providing physical security.³²⁸ This pattern reflects an implicit notion (sometimes made explicit) that protection can be kept conceptually separate from refugees' physical security, when the legal texts in question support precisely the opposite conclusion.³²⁹

The pattern also reflects the evolution of UNHCR traced earlier. The implication of the analysis is not that UNHCR would have vanquished refugee security problems under different circumstances. Instead, more nuanced analysis points to the consequences of the road not taken by an organization that moved from lawyerly

³²⁶ See Interview with UNHCR Operations Official # 2, *supra* note __.

³²⁷ UNHCR, *Camp Security Report*, *supra* note __, at 4-6.

³²⁸ UNHCR, *Kosovo Report*, *supra* note __, at xv.

³²⁹ See *supra* Part II.b. (discussing the agency's legal mandate).

advocacy and strategic filling of gaps within a larger refugee protection system to massive relief operations. First, in turning its attention to massive relief operations, over time the organization had fewer resources to devote to filling strategic gaps that were left by host states as well as the coterie of NGOs and other transnational agencies concerned with refugees and humanitarian emergencies. As an advocate and overseer of the refugee protection system (rather than an operational player), UNHCR would have evolved into a more forceful advocate for refugee security and the technical solutions necessary to mitigate such problems. Ironically, once the agency embarked on an operational path, its security-related responsibilities should have been understood to increase as it acquired expertise and responsibility in domains (such as administering refugee camps) that could directly impact security. Although gaps in the provision of security services and expertise are perhaps not as easily solved as those involving (for example) the provision of water, the organization's reorientation away from strategically filling gaps almost certainly made it easier for it to avoid the problem altogether. Part IV discusses legal interpretations and programmatic steps that UNHCR could adopt to make a dent in the problem.

Second, the focus on disaster relief and material assistance not only diminished the organization's flexibility to fill gaps in security, but became part of a cycle of locked-in organizational goals that diminished the agency's capacity to acquire expertise and capabilities to make incremental contributions to security. As UNHCR was affected by such locked-in goals and became more dependent on funds to undertake material assistance operations, its capacity to serve as an organizational whistleblower was diminished, thus changing the problems that became the focus of legal and policy debates regarding refugees. Its capacity to call attention to the inextricable relationship between the system designed to provide refugee protection and the reality of refugee insecurity has therefore deprived the world of an emphatic advocate for reform of the very system that UNHCR ostensibly oversees.

C. Explaining UNHCR's Evolution and Priorities: The Organizational Logic of Legal Mandates

Why did UNHCR's own behavior evolve the way it did given the larger context of the grand compromise? This section explores several factors that appear to answer the question. Specifically, the factors exhibit the following characteristics. First, their influence is plausible given knowledge gleaned from previous empirical and theoretical work about law and organizations in other contexts. Second, assigning important to the factors below is consistent with the available evidence. Third, these influences are not mutually exclusive – and in some cases are self-reinforcing. The section concludes by analyzing several other plausible explanations that do not fit the available evidence.³³⁰

³³⁰ This analysis reflects, as it must, certain basic premises about organizations' behavior. It deploys what could be broadly termed a "bounded rationality" perspective in the tradition pioneered by Simon and by Cyert and March in the middle part of the last century. In a classic work challenging existing neoclassical conventions for explaining the behavior of firms, the latter described their approach as being grounded on "a perspective that sees firms as coalitions of multiple, conflicting, interests using standard rules and procedures to operate under conditions of bounded rationality." See Cyert and March, *supra* note __, at xii. Using this perspective as a point of departure, the discussion below also considers the implications of work in institutional sociology focusing on organizational routines and informal social networks. See, e.g.,

i. External Political Context and Funding Dependence

The path of refugee protection over the last half-century almost certainly would have been different if UNHCR had been blessed with a stable, independent source of funding to smooth out the jagged edges apparent in Figure 5, or if the powerful nations affecting its work had simply encouraged it to prioritize the strategic filling of gaps in protection –such as those involving refugee security in the developing world – over generalized material assistance. Instead the young international organization faced considerable external pressures as it sought to carry out its difficult legal mandate. Its early political context limited its options for developing autonomy and relevance through the accumulation of valuable scientific and technical expertise, an option that *was* available to at least some transnational agencies with similarly demanding legal mandates, like the IAEA and the WHO.³³¹ The agency’s context also indicated demand for a disaster and emergency relief agency.³³² Meanwhile, its dependence on key international actors like the United States and Western European nations for funding has exacerbated the difficulty the agency faces in criticizing these nations.³³³ And its more recent political context, where countries are cautious about providing resources and political commitments associated with the security of developing nations where they lack a powerful strategic interest, probably continues makes the organization reluctant to assume responsibility for issue areas that present considerable difficulties.³³⁴

Laws take shape through administrative decisions and legal interpretation rooted in agency practices. When choosing these practices, agencies seldom escape the influence of their external context.³³⁵ People within any organization are affected by the costs and benefits of their actions. They are likely to be concerned about how external pressures can affect the survival, success, and prestige of the organization where they work.³³⁶ This makes it hard to see how the behavior of agencies can be explained

DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA 409-410* (1996). As the reader will see, this research program does not contradict, and in fact complements, the larger body of work on bounded rationality, which in turn arguably helps provide a cogent explanation for some of the phenomena that institutional sociologists richly describe.

³³¹ See Fischer, *supra* note __, at __ (discussing expectations of the IAEA’s scientific and technical competence from national governments); LEO A. KAPIRO, *FORTY YEARS OF WHO IN EUROPE: THE DEVELOPMENT OF A COMMON HEALTH POLICY* (1991)(highlighting the World Health Organization’s development of scientific expertise and links to public health communities in nations throughout Europe).

³³² See *supra* notes __ (describing how the agency received support for its disaster relief mission, and why its plea for such resources found support among some advanced industrialized nations).

³³³ Cf. B. Dan Wood and Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991)(implying that bureaucracies subject to budgetary controls cannot easily criticize some of their funders). But note that the agency has nonetheless experienced periods of considerable conflict with its donors as well. See *infra* note __, at __.

³³⁴ See *infra* Part V.b.

³³⁵ See Mashaw and Harfst, *supra* note __, at __; Wilson, *supra* note __, at 113-37, 235-95; ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. LAW ECON. & ORG. 180 (1999); Michael N. Barrett and Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT’L ORG. 699 (1999).

³³⁶ There is obviously some variation in the extent to which individuals’ own concern about experiencing costs or achieving gains makes them concerned about the organization. But during much of its history, given the fairly long-term tenure of many employees and the potential long-term opportunities of High

without paying serious attention to both the strategic behavior of people with agendas inside and outside the organization, as well as the institutional rules of the game affecting how the agency does what it does. This is true regardless of whether the focus is on domestic agencies like the National Highway Traffic Safety Administration,³³⁷ the Nuclear Regulatory Commission,³³⁸ and the Bureau of Alcohol, Tobacco, Firearms, and Explosives; or whether it is on international organizations like the International Atomic Energy Agency,³³⁹ the United Nations Department of Peacekeeping Operations,³⁴⁰ or the Office of the Prosecutor of the International Criminal Court.³⁴¹ In all of these cases, people and organizations have fought with tremendous intensity over the structure of the agency, and they continue competing over how its work should be done after the structure is fixed. Consequently, observers bear a heavy burden if they try to explain the evolution of public organizations without considering the external political context, or the extent to which an agency's internal structure increases its dependence on external factors, as does (for example) UNHCR's dependence on member governments for funding.

UNHCR's history plainly bears out the impact of its external context. Throughout its early years, the agency was subject to pressure, perhaps especially under Messrs. Goedhart and Lindt, to do more of some things and less of others.³⁴² In its earliest days the Office not only lacked a budget but permanence, which heightened the need for the agency to be sensitive to its political context.³⁴³ Nations such as the United Kingdom and France eventually supported UNHCR's efforts to gain the authority to raise funds, for which it had to lobby intensely in the General Assembly, and then began funding its work because they saw it as valuable for a host of reasons. All of which added up to constraints shaping the organization's evolution. While it is true that every organization experiences some kind of constraint, whether from politics or economic scarcity, perhaps under different circumstances those constraints could have pointed in different directions.

ii. *Early Strategic Choices by Leaders and Staff*

Even in light of the external constraints just discussed, the earliest leaders of the organization acted as though they possessed some flexibility to chart the organization's course. They did. Some early High Commissioners differed among themselves in their priorities, in ways not obviously or pervasively linked to the immediate political context.

Commissioners and their senior staff, it's hard to tell a story where UNHCR's leadership and staff could insulate themselves from the fate of the organization where they worked.

³³⁷ See Mashaw and Harfst, *supra* note __, at __.

³³⁸ See, e.g., Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 452-53 (2005).

³³⁹ See Fischer, *supra* note __, at __.

³⁴⁰ See Paul F. Diehl, Daniel Druckman, and James Wall, *International Peacekeeping and Conflict Resolution: A Taxonomic Analysis with Implications*, 42 J. CONFLICT RES. 33 (1998).

³⁴¹ See Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597 (2003).

³⁴² See Hathaway, *Reconsideration*, *supra* note __, at __ (discussing pressures not to focus on asylum-seekers undesirable for Western nations, such as those displaced in the developing world).

³⁴³ See Mone et al., *supra* note __, at __ (describing leaders' efforts to avoid the dissolution of their organizations); JAMES Q. WILSON, *BUREAUCRACY* (1990) (discussing organizational leaders' incentives to avoid scenarios undermining organizations' valuable reputations).

The agency also showed some early independence from wealthy, politically powerful nations, as evidenced by its decisions to pursue activities like relief to Algerians that drew the ire of some major donors like France,³⁴⁴ and its active and successful advocacy for greater powers in the United Nations at a time when some key nations (including the United States) initially had concerns about this.³⁴⁵ By most accounts, even subsequent leaders continue to possess enough discretion to make their political choices matter separately from the constraints of the political context, as shown by disagreements between High Commissioners like Aga Khan and Hocké and the United States, and by some United States complaints about UNHCR's lack of sufficient concern about refugee safety.³⁴⁶ Because neither donor countries nor other outside interests were in a position to entirely squelch the organization's discretion to shape its quotidian agenda, strategic choices by leaders affected what the organization prioritized. Scarce resources and staff responses, in turn, had some effect on the viability of the leaders' strategic choices.

In retrospect, it appears that UNHCR's early leadership navigated the intricate political environment by making strategic choices calculated to enhance the organization's prospects for survival and its relevance to international politics. In the 1950s, one of High Commissioner Lindt's advisors explicitly urged his boss to support a UNHCR role in providing relief in Berlin in order to show the agency's relevance to the concern of Western nations, despite the fact that the arriving asylum seekers did not seem to fall under UNHCR's mandate.³⁴⁷ Although there was certainly some demand among those nations for UNHCR to play a relief-focused role, Schnyder's emphatic focus on such activities seems aggressively entrepreneurial in retrospect, even pushing the limits of that existing demand by emphasizing the agency's potential role in emergency relief and economic development.³⁴⁸ Schnyder also did his best in public speeches and statements to downplay the organization's role in the political settlement of refugee situations.³⁴⁹ Long after the agency's survival seemed assured, High Commissioners Aga Khan and Hartling still made haste to raise money and develop the system of making global appeals in response to mass crises.³⁵⁰ Later, High Commissioner Ogata remained eager to plunge into relief situations increasingly attenuated from the agency's core refugee protection mandate (for example, in Bosnia and Albania) in order to emphasize the agency's relevance and utility to major powers.³⁵¹

Superficially, it might seem as though a recognition of UNHCR's political constraints would be incompatible with the view that the agency acted autonomously.

³⁴⁴ See UNHCR, *State of the World's Refugees*, *supra* note __, at __ (discussing French objections to UNHCR's activities on behalf of Algerian refugees).

³⁴⁵ See Holborn, *supra* note 100-107 (discussing how the United States and some of its European allies initially objected to giving UNHCR the open-ended power to raise and spend resources without direct UN oversight).

³⁴⁶ See, e.g., Agency staff response also matters because it can presumably change the leaders' costs of imposing particular strategies (as shown by the High Commissioners' eagerness to find supportive staff within the organization and promote their careers, as Ogata did – according to my interviews).

³⁴⁷ See Loescher, *supra* note __, at __ (discussing the Berlin memo from UNHCR staff).

³⁴⁸ See *supra* notes __ (describing the context of High Commissioner Schnyder's effort to emphasize the role of economic development in refugee operations).

³⁴⁹ See *id.*

³⁵⁰ See *supra* notes __ (discussing Aga Khan's and Hartling's priorities).

³⁵¹ See *supra* notes __ (discussing Ogata's priorities).

This is not the case. If *autonomy* is understood to encompass the limited ability of the agency leadership to materially change the organization's political circumstances, then it appears the agency gradually achieved a measure of such ability. True, early in its history UNHCR's leaders faced not only shortfalls in funding but legal constraints on their ability to raise resources. United States opposition to providing the agency with an unconstrained ability to raise funds from national governments exacerbated the problem. But the agency made a deliberate, and ultimately successful, effort to simultaneously broaden the scope of potential beneficiaries, remove financial constraints, and hone a generalized relief function that changed its role in transnational law and politics. When the agency first sought this role it did not enjoy the support of most advanced industrialized nations. Eventually it secured the backing of the United States government and its European allies. In effect, UNHCR's early leaders faced a situation where neither Western European governments nor the United States generally supported its desire for additional funds and relevance, and turned it into a situation where these governments generally (and sometimes vigorously) supported giving the agency greater funds and political relevance *after* it made crucial changes in its legal structure and priorities.³⁵²

These changes do not bear the hallmarks of an agency that reflexively moved, marionet-like, in response to the desires of advanced industrialized countries. No doubt those governments constrained the choices of UNHCR's leaders. But the agency nonetheless achieved a limited autonomy amidst the real constraints that its donors and practical circumstances imposed. It vigorously insisted (sometimes over initial reluctance from national governments) in expanding the concept of "good offices" through legal interpretations and General Assembly resolutions. It catalyzed efforts to promulgate changes in treaty law (as with the 1967 Protocol and the OAU Convention) that expanded the scope of beneficiaries. It then positioned itself to serve as a provider of generalized relief to limit chaos in developing regions of the world and to serve as a conduit for funds that wealthy nations wanted (for humanitarian or strategic reasons) delivered to the chaotic global periphery. Although such autonomy may not rise to the level enjoyed by certain domestic and international agencies at other times, it was enough to allow UNHCR to transform the legal mechanisms through which refugees were protected and its specific role in that system. In effect, UNHCR's early leaders refused to simply accept the small role previously assigned to the agency and instead introduced a new relief-oriented dimension into the political debate about its role. When its resources dropped (or the rate of their growth did), the organization responded by further broadening the class of beneficiaries and aggressively moving still further along the disaster relief dimension.

The agency's success in convincing donors about the value of that new dimension its work helps explain the staggering increases in UNHCR's resources, documented earlier. While such increases did not eliminate the pressures the agency faced when it confronted troughs in the trend, the overall pattern made possible by its leaders' choices allowed the agency to transform itself from a policymaking and advocacy entity into a massive relief provider. UNHCR's success in securing such resources were especially

³⁵² For a more extensive analysis of the political economy of this transformation, see Mariano-Florentino Cuéllar, *The UNHCR and the Political Economy of Institutional Redefinition*, STANFORD PUBLIC LAW & LEGAL THEORY WORKING PAPER (January 2006).

stark in comparison to the growth in resources at other United Nations agencies with policymaking responsibilities, such as the United Nations Environment Programme (UNEP) and the United Nations Population Fund (UNFPA). Between 1975 and 1995, UNEP's expenditures in nominal dollars grew from \$20.7 million to \$154.4 million (approximately a 750% increase), and UNFPA's jumped from \$71.2 million to \$312.1 million (about a 440% increase). During the same period, UNHCR's core expenditures grew from \$69 million to nearly \$1.2 billion (a staggering 16,000 % increase).³⁵³ Even United Nations relief and development funds such as the United Nations Development Program (UNDP) and the World Food Programme (WFP) showed far less dramatic rates of growth in nominal expenditures during the same period. Expenditures at the WFP grew by 365%, at UNDP, an entity with global responsibility for development, by 265%.

In part, the funding increases for UNHCR achieved reflect the fact that by the mid-1960s, its staff did not reject, and indeed, embraced the leadership's efforts to become and remain the preeminent disaster relief coordinator. The agency's preeminence in the field was demonstrated not only in the employees' perceptions of their agency, but in massive regional relief operations such as those along the East Pakistan-India border under Aga Khan and in Bosnia under Ogata.³⁵⁴ The staff supported their leadership's successful efforts to undermine moves to create rival agencies occupying the disaster relief role during Aga Khan's time,³⁵⁵ and in subsequent efforts to reduce the influence of the modern-day United Nations Office for Coordination of Humanitarian Affairs, whose budget UNHCR still dwarfs.³⁵⁶

This picture of UNHCR's evolution contrasts with more deterministic accounts, viewing transnational organizations as mere appendages of wealthy or hegemonic nations.³⁵⁷ UNHCR indeed faced constraints when interpreting its legal mandate. If UNHCR had *no* flexibility, it is hard to see how it could have come to be at such loggerheads with some of its major donors at various points in its history (such as when Lindt contemplated and ultimately pursued the provision of assistance to Algerian refugees, initially over pronounced French opposition; when Aga Khan argued with the United States about UNHCR's role in conflicts where the U.S. had major strategic interests, and where the U.S. complained about the safety of some Central American refugees in Honduran camps). But its discretion proved enough to allow its leaders and staff a narrow but essential opportunity to shape the agency's destiny. This arrangement brought with it burdens along with benefits. UNHCR lost independence to be a forceful advocate for refugees, and complicated a crucial part of its core mandate – which was to

³⁵³ See Klaus Hübner, *Expenditures of Special Organs, 1971-1995*, Res. Council, United Nations Assoc., Germany (revised October 1997)(avail. at <http://www.globalpolicy.org/finance/tables/finorgan.htm>, last accessed October 21, 2005).

³⁵⁴ See UNHCR, *Lessons Learned*, *supra* note __, at ¶ 8 (focusing on the need for UNHCR to “retain its international lead” in emergency response capacity).

³⁵⁵ See Loescher, *supra* note __, at __ (discussing unsuccessful efforts to create an alternative relief organization, particularly in connection with Bangladesh operation).

³⁵⁶ See *supra* note __ and accompanying text for trends on the UNHCR budget. In 2005, OCHA's budget was just over \$110 million. See OCHA, *A Brief History of OCHA* (avail. at http://ochaonline.un.org/webpage.asp?Nav= about_en&Site= about, last accessed October 31, 2005).

³⁵⁷ See, e.g., John C. Yoo and Will Trachtman, *Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L L. 379, 383 (2005)(“ Like all international organizations, the United Nations seeks to facilitate the bargains made between states.”).

be a zealous and forceful advocate for the well-being of refugees.³⁵⁸ Of course, the agency's strategic choice to focus on material assistance might seem less troubling if it simply served as a temporary response to ephemeral political constraints, thereby allowing future agency leaders the chance to forcefully advocate for refugee security while continuing to provide material assistance through increasingly large contributions from (for example) domestic publics rather than governments. As the discussion below suggests, reality is more complicated.

iii. Locked-In Organizational Goals

Between the mid-1950s and the late 1960s, UNHCR's leaders put the agency on a path that would transform it into a major conduit for the delivery of material assistance, and would downplay protection and security concerns. It was a mix of priorities that became exceedingly difficult to change. Organizations are molded by "the inefficiencies of history, [and] the ways in which the match between and environment and the rules followed by organizations may be slow to evolve or indeterminate."³⁵⁹ Goals associated with the leadership's strategic choices can easily become entrenched and hard to change. This implies that "path-dependence" has some impact; but that impact is best understood in the context of specific factors (discussed below) that explain more precisely the extent of "dependence" and the theoretical mechanisms that bring it about.³⁶⁰

While ambiguous legal provisions about refugee protection may engender an illusion of limitless flexibility, locked-in goals reify agency mandates through dynamics that strengthen each other like economic complements. At the most basic level, protection officers, relief operations workers, and supervisors may all come to experience the sort of cognitive dissonance that goads people to reconcile their attitudes with their behavior. This may help explain the frequency with which officials interviewed gingerly denied the severity of security problems, either downplaying them or arguing that UNHCR could do little or nothing about them.³⁶¹ Even if individuals themselves could insulate themselves from this dynamic, the organization itself is likely to encourage resistance to evidence disconfirming its goals and strategies, given that such evidence might require it to endure subsequent pressures for change or a loss of autonomy.³⁶²

³⁵⁸ It would, however, be misleading to conclude that UNHCR loses autonomy when it expands the scope of its mandate. For such a view, see Loescher, *supra* note __, at __. Instead, UNHCR's transformed mandate appears to have brought with it space for the agency to exert control over some activities (such as the technical process through which humanitarian aid is distributed) while eventually restricting some of its independence to serve as a forceful advocate. The contention that UNHCR lost autonomy overall therefore implies a judgment about the relative merits of its competing mandates that should be made explicit and, as the section that follows indicates, is far from universally accepted within the organization.

³⁵⁹ Cyert and March, *supra* note __, at 215.

³⁶⁰ See generally S.J. Liebowitz and Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J. LAW ECON. & ORG. 205 (1995). Note that, by itself, invoking path-dependence does little to explain the status or evolution of an organization. The key is to discuss *what* path the organization and its legal interpretations followed, and precisely *why* they did so.

³⁶¹ See *supra* notes __ (where interviewees indicate UNHCR downplays its security responsibilities). The structure of cognitive dissonance theory is cogently explained in R.H. Fazio, M.P. Zanna, and J. Cooper, *Dissonance and Self-Perception: An Integrative View of Each Theory's Proper Domain and Application*, 13 J. EXPER. SOC. PSYCH. 464 (1977).

³⁶² This may help explain the lack of research, development, and evaluation activity focused on security issues.

Instead its performance measures increasingly exalted the distribution of assistance to as wide a group as possible, making it silly for the organization to restrict the number of beneficiaries.³⁶³ The pre-eminence of the Operations division, and the paucity of people with deep knowledge of security also make more sense when we consider the path-dependent nature hiring and promotion paths. People tend to hire those that share their priorities.³⁶⁴ To the extent that the organization and its leaders have priorities when it comes to the agency's internal organization, moreover, it should be noted that the distribution of internal political power is also likely to be path-dependent.³⁶⁵ Even if these dynamics were not impediments to reconciling assistance with a focus on physical security, some functions are like oil and water. When goals are “dis-complementary,” distinctive characteristics of the initial goal make it especially difficult to harmonize with some goals, such as security determinations that undermine the refugee's blameless image, and easier to harmonize with others, such as providing development assistance. This is how an organization that helps create refugee camps can end up with new camp indicators measuring everything except security.³⁶⁶

The micro-politics evident in rivalries between the operations staff and other organizational units are only part of the story. Internal routines may lead individuals and work groups within the agency to gradually, and perhaps unconsciously, downplay certain kinds of risks – such as those potentially marring the safety of refugees where UNHCR insists on repatriation.³⁶⁷ The reduced perception of risk almost certainly helps the organization cope with complexity and uncertainty that would otherwise threaten to overwhelm the organization's tenuous grasp on the intricate environment where its work is performed.³⁶⁸ Scholars observing the work of other organizations with complex mandates have described this sort of lock-in before, sometimes under the rubric of

³⁶³ Even recent performance measures continue to focus on the importance of delivering aid, though High Commissioner Lubbers did manage to re-focus the organization on trying to reduce the total number of refugees. Interview with High Commissioner Ruud Lubbers (Geneva, July 2004). See also UNHCR, ANNUAL PROGRAMME BUDGET 2004 43 (2003)(listing among its performance measures the “number of IDPs in situations similar to that of refugees protected and assisted by UNHCR...”); *id.* at 46 (“Number of training and awareness raising activities held, and persons trained.”); *id.* at 47 (“Increase in number of enrolments, especially of girls...”).

³⁶⁴ See, e.g., James N. Baron, Alison Davis-Blake, and William T. Bielby, *The Structure of Opportunity: How Promotion Ladders Vary Within and Among Organizations*, 31 ADMIN. SCI. QUART. 248 (1986)(discussing how promotion paths reflect and reinforce particular internal firm goals).

³⁶⁵ The success of the Department of Operations in weathering its longstanding rivalry with the Department of Protection is an example of the former department's pre-existing centrality to UNHCR's core assistance delivery mission.

³⁶⁶ UNHCR's new camp indicator reporting system is an attempt to gather data on 52 quantitative indicators of conditions in refugee camps. See UNHCR, *Camp Indicator Report* (avail. <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics>, last accessed Nov. 3, 2005). The 52 indicators cover matters such as the number of micro-nutrient deficiency outbreaks or the average number of kilocalories consumed daily by camp residents. Aside from several questions about the number of survivors of sexual and gender based violence, the indicators do not cover any aspect of crime, security, or violence in the camps.

³⁶⁷ Cf. Barnett and Finnemore, *supra* note __, at 722 (explaining a perceived “lowering of barriers to repatriation and an increase in involuntary repatriation” as a result of a dynamic wherein UNHCR officials engaged in a normalization of risk and deviance).

³⁶⁸ Cf. C.R. Snyder, *Social Motivation: The Search for Belonging and Order*, 7 PSYCH. INQUIRY 247 (1996)(discussing the need for “order” and “belonging” to social groups as a means of managing cognitively undesirable unpredictability).

“organizational culture.”³⁶⁹ Criminal investigation agencies in the Treasury Department simultaneously resisted focusing their energies on investigating financial activities related to terrorism and using more sophisticated analytical techniques in favor of focusing on methods that piggybacked off existing undercover drug investigations or involved looking for bulk aggregations of currency.³⁷⁰ The FBI appears to have repeatedly failed to adapt its priorities, sources, and methods to investigate the threats of asymmetrical terrorist attacks despite what appear to have been strong political demands and policy arguments favoring such adaptation.³⁷¹ In short, observers of public organizations report something akin to locked-in organizational goals frequently enough that it would seem important to investigate its potential role here, particularly given the exacerbating factors discussed below.

Together these factors almost certainly help explain why some High Commissioners have sought to rein in the organization’s focus on providing material assistance, and to enhance its focus on protection (and even, occasionally, on physical security) without much success.³⁷² In effect, the fundamental goals of the organization (or ideal point in the parlance of game theory) appear to have shifted over time to reflect greater interest in emergency relief and less in filling gaps in protection, security, and advocacy. Even individual staff members who otherwise show considerable regard for the welfare of refugees and are sometimes willing to make sacrifices for them nonetheless express relatively little concern about the security issue, and sometimes even insist that the organization itself can do virtually nothing on the issue. For instance, one protection officer interviewed who decried the security problems at several campsites in Africa where UNHCR provided relief. On the one hand, the official noted that to address security, “you [presumably meaning UNHCR] have to think of relocating the camp further inside the country of asylum. In the case where the camp is militarized, you have to identify who the militarized elements are, separate them, and encamp them.”³⁷³ It did not, however, follow for this official that UNHCR had a security responsibility:

It’s not really in our mandate to deal with security matters. It’s in the first place the responsibility of the host state, to maintain the ‘civilian character of asylum.’

³⁶⁹ The problem with this particular term, in my view, is that it does not lend itself to asking explicit questions about *how* the culture in question develops and why it is maintained. Though the difference may seem subtle, framing the issue as one involving “locked-in” organizational goals seems naturally to provoke the question not only of what those goals are, but precisely how and why they remain locked-in. For two analytically-rigorous and insightful efforts to disentangle the “organizational culture” concept, see David Kreps, *Corporate Culture and Economic Theory*, in RATIONAL PERSPECTIVES ON POLITICAL SCIENCE, (James A. Alt and Kenneth Shepsle, eds. 1986); GARY MILLER, *MANAGERIAL DILEMMAS: THE POLITICAL ECONOMY OF HIERARCHY* (1992).

³⁷⁰ See Cuéllar, *Tenuous Relationship*, *supra* note __, at __.

³⁷¹ See Commission Report, *supra* note __, at __. Even critics of the report recognize the extent to which the FBI failed to adapt. See, e.g., Richard A. Posner, *The 9/11 Report: A Dissent*, N.Y. TIMES MAGAZINE, August 29, 2004.

³⁷² Compare Interview with High Commissioner Ruud Lubbers, *supra* note __ and accompanying text (emphasizing the importance of long-range planning to focus on refugee protection and physical security) with Barb Wigley, *The State of UNHCR’s Organizational Culture*, Report: UNHCR Eval. & Pol. Analysis Unit, Doc. No. EPAU/2005/08 22 (May 2005)(quoting a senior official as emphasizing that “I like the way the organization operates in emergencies. It’s incredible, does its work incredibly well. At times we joke that it doesn’t work properly when not in an emergency”).

³⁷³ Interview with UNHCR Protection Official # 3 (New York, 2004).

And then you have in the UN this sort of military branch which is DPKO, which normally deals with anything that is a threat to international peace. And normally they would have some room for maneuvering. So we really say it point blank – it’s not in our mandate, but we really have a vested interest in securing the civilian and humanitarian character of asylum, and to reduce the threats caused by problems... that’s why we consider the issue and try to advocate.³⁷⁴

Even such advocacy often appears circumscribed. Assuming the organization has continuing political incentives to avoid responsibility for security because it’s costly and likely to make it look bad, that does not fully explain its unwillingness to more fully incorporate security into its procedures for planning refugee camps (by promulgating formal procedures, hiring more experts, or creating a dedicated bureaucratic unit) or in its priorities for research and development – even when its major donor (the United States) would occasionally want it to do so.³⁷⁵ Indeed, such neglect even runs the risk of making the organization appear ineffective. Yet, as we have seen, public pronouncements about security – even when they focused on the security responsibilities of others – have been remarkably slow in coming from UNHCR, despite the extent to which it’s been facing the problem since its inception.³⁷⁶

³⁷⁴ *Id.* The difference in perception between this official’s view and that of an advocacy NGO official decrying UNHCR’s lack of focus on security does not seem to originate exclusively in a semantic distinction about whether focusing on security necessarily implies fielding employees who can use force. The difference in perception seems instead rooted in a deeper question about whether concern about security is almost implicit in the material assistance role of the organization. *See supra* Part III.

³⁷⁵ *See* UNHCR, HANDBOOK FOR EMERGENCIES (2002). UNHCR’s Handbook for Emergencies includes 24 pages on “community services and education,” 26 pages on “food and nutrition,” 20 pages on “environmental sanitation,” and less than two pages to the “physical safety of refugees.” The information contained in that section almost uniformly implores staff to turn over responsibility over all aspects of physical security to the host country. For example, it states:

The authorities of the country of asylum must be made aware of the fact that they retain primary responsibility for security and must ensure the safety and well-being of refugees. 63. Corrective action is in the hands of the authorities and must be taken resolutely... Criminal attacks and banditry against refugees should be addressed by civil authorities and security forces of the host country in close cooperation with UNHCR and the refugee community.

Id. at 19. To be sure, the Handbook’s exhortation for staff to focus on the host countries is understandable given that states do have a measure of responsibility for security under a fair reading of the law. *See supra* Part II. Moreover, in an ideal situation, host states would indeed be far better equipped than UNHCR or international peacekeepers to providing security. The problem is that UNHCR routinely works in situations so far from the ideal that any prospects for the provision of effective law enforcement services in the camps depends on some corrective UNHCR action, involving (for example) measures to fund police provided by the host government or rebel forces, dispute resolution advice technical assistance to law enforcement personnel at the camps, monitoring of the security situation to advise headquarters on the necessity of additional funds or international measures, and recruitment of refugee volunteers or paid workers to assist with security. Virtually none of this is discussed in the Handbook, which advises that “[i]n cases of internal conflicts among the refugee population UNHCR should initially encourage a mediation by the refugee community. If this fails, UNHCR should request the authorities of the host country to resolve the conflict.” *Id.* While agency staff clearly try to fashion case-by-case responses to specific security problems, the Handbook says little about refugee security in comparison to every other topic even arguably relevant to emergencies.

³⁷⁶ This is something that even UNHCR officials have generally found difficult to explain. For example, one official, in response to a question about why UNHCR had taken so long even to start making regular

In short, the facts in this case match the implications of an existing body of research about path dependence in organizational practices such as interpreting a legal mandate. Had locked-in organizational goals not influenced the organization's performance, its staff and sub-units might have responded far more rapidly and forcefully in cases where the High Commissioner and donors decided to prioritize protection and security over generalized assistance. The organization's mid-level staff might have spent more time trying to implement the lawyers' occasional recognition that security was an integral aspect of the organization's mandate and less time insisting on alternative interpretations downplaying such responsibilities. Instead, as one UNHCR staff member put it, "we've always been doing it like that" is ironically a refrain that permeates the organization's interpretation of its legal mandate and conception of its present mission.³⁷⁷

iv. The Structure of Refugee Law

Treaties and legal interpretations gave birth to the modern refugee protection system. It should thus be no surprise that a final factor appearing to exert some impact over the evolution of refugee protection seems to be the structure of the doctrines underlying refugee law. UNHCR officials incessantly discuss and repeatedly cite this as a justification for their actions.³⁷⁸ True, some of the employees' focus on the doctrine may serve to assuage dissonance borne from the inevitable separation between what the organization did and what many of its staff would have wanted it to do. But in other respects, staff members plausibly claim that the legal architecture of refugee protection has impacted their work. The interaction of non-expulsion norms and the power states retain to make discretionary grants of long-term asylum create conditions encouraging (though by no means compelling) the creation of refugee camps. The legal structure of the existing system limits resettlement possibilities. Together with the material assistance that the system makes possible and the difficulties in successfully repatriating refugees to their home countries, these arrangements tend to make camps into long-term human agglomerations. Maintaining and supplying them absorbs much of UNHCR's energies, and those of its partners. The law also makes it relatively easier than it might otherwise be for staff to continue voicing the mantra that security is the host state's responsibility, given the UNHCR Statute's level of generality and traditional international law's focus on states rather than transnational organizations.³⁷⁹

public statements from top officials about security (i.e., well in to the 1980s, with more earnest efforts waiting until after the Great Lakes debacle), said the following:

Why has it taken so long to focus on the key issue of refugee physical protection? I'm not sure... Maybe because UNHCR was not mandated, and certainly not competent to deal with it. I'm not sure... that's a tough one.

Interview with UNHCR Operations Official # 2 (Geneva, 2004). As I note in Part II, the argument that UNHCR's legal mandate excludes security concerns is unpersuasive. Competence, meanwhile, is mostly a function of what the organization's leaders choose to do.

³⁷⁷ Wigley, *supra* note__ at 82.

³⁷⁸ See Interview with UNHCR Protection Official # 1 (Geneva, 2004), Interview with UNHCR Operations Official # 3 (New York, 2004)

³⁷⁹ See UNHCR Statute, *supra* note__, and William D. Coplin, *International Law and Assumptions About the State System*, 17 *WORLD POL.* 615, 620-21 (1965)(describing the traditional focus of international law on countries rather than individuals or organizations).

These legal realities almost certainly contribute to the staff's legalistic discussions of host states' responsibilities and of UNHCR's own mandate. As one staff member noted:

The responsibility for security is vested in the sovereign state. The presumption is that refugee protection in terms of physical security must be the responsibility of the host state. Also – money for education and other services is also important to security. The survival of the family depends on women, so providing for their needs, including “sanitary materials” is security. Education has an impact on security. So providing adequate assistance *is* security.³⁸⁰

Whether or not one agrees with the substance of this observation, its structure of refugee law made it both possible and desirable for UNHCR to fill a relief-focused niche while continuing to pay at least some symbolic heed to the rest of its legal mandate for “protection.” Had existing law not blatantly encouraged the creation of refugee camps, or leave UNHCR's early goals so vaguely defined, or created a separate disaster relief organization from the very beginning, then UNHCR might have approached its job differently.

Refugee law, in short, seems to have played two related roles in shaping UNHCR's evolution. Throughout the tense history of UNHCR, it provided authoritative texts setting up the features of refugee protection that were a backdrop to UNHCR's evolution, and by providing a set of legal norms to justify particular actions. If the law's structure made little or no difference, early High Commissioners such as Lindt and Schnyder would not have so eagerly sought formal legal authorization through United Nations General Assembly resolutions before extending protection and providing assistance to non-mandate refugees. The organization's constant focus on doctrine would make little sense. Neither would national governments' strained but still occasionally meaningful efforts to weave asylum law into their domestic law. High Commissioners like Lindt and Aga Khan constantly put their occasional objections to new UNHCR responsibilities in legal terms and insisted on elaborate legal opinions to overcome them. At the very least, the impact of legal doctrine on UNHCR's evolution cannot be ruled out.

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A host of other initially plausible explanations for the evolution of UNHCR and the refugee protection system prove to fit more poorly with the historical record. For instance, one cannot explain UNHCR's evolution purely on the basis of pressure from the United States or Western donor governments. Although such pressure shaped UNHCR's priorities in crucial ways, the evidence does not support the view that their concerns were entirely (or even primarily) responsible for UNHCR's choices. Time and again, UNHCR's leadership endured occasional conflicts with donor governments, particularly during the lengthy term of Aga Khan, but also with respect to decolonization issues before then, and with matters involving Indochina and Central America after Aga Khan's tenure.³⁸¹ Indeed, in some cases it was the U.S. government itself that registered concern

³⁸⁰ Interview with UNHCR Operations Official # 4 (New York, 2004).

³⁸¹ See *supra* notes___ (discussing UNHCR's conflict with the United States and other donor countries).

about UNHCR's apparent lack of concern with refugees' physical security. The following declassified intelligence cable to the State Department from the U.S. Ambassador to Honduras shows just one example, involving UNHCR's location of camps for Nicaraguan refugees in Honduras:

GOH [Govt. of Honduras] could have moved refugees to Mesa Grande more than two years ago if UNHCR... had not developed fancy notions which gave refugee self-sufficiency priority over refugee safety.³⁸²

The Americans' perceptions must be placed in the context of the larger drama playing out in Central America. The cable nonetheless emphasizes the complex and sometimes bellicose relationship between the agency and its chief donor. Explaining UNHCR's behavior on security and other matters therefore takes more than simply ascertaining the position of the U.S. government or other donors (though these undoubtedly have an effect). Nor can UNHCR's performance be blamed on the related notion that all organizations reflexively seek resources as jurisdiction.

It also takes more than an ascription of causal importance to the Cold War. Many of UNHCR's activities and priorities continued unabated after the Soviet Union's eventual whimpering collapse.³⁸³ Key facts about international politics – like the apathy of some powerful nations to the security-related problems of refugees in Africa – continued unchanged after the Cold War.³⁸⁴ The accumulation of financial resources, moreover, is not a reflexive characteristic of every public organization, or even of transnational organizations with complex legal mandates.³⁸⁵ Nor does it appear that UNHCR's focus on material assistance reflects a principled effort to press (or perhaps shame) powerful governments such as the permanent members of the United Nations Security Council and host states into assuming greater responsibility for security-related functions that governments can handle better than UNHCR. After all, the agency's provision of material assistance to actual or potential refugees can also discourage states from acting, as UNHCR's role in the Balkans amply demonstrated.³⁸⁶ Moreover, if the agency genuinely sought to galvanize global attention to security issues, it would have sought to gather more data about security problems as it has about, for example, the nutrition of refugees.³⁸⁷

³⁸² John Negroponte, *Colomoncagua Refugee Camp*, U.S. Embassy, Honduras, Cable/Confidential (April 19, 1984)(Digital National Security Archive, El Salvador, 1977-1984 Collection)(copy on file with author).

³⁸³ See *supra* Part IV.a.

³⁸⁴ See Thomas Weiss, *Researching Humanitarian Intervention: Some Lessons*, 38 J. PEACE RES. 419 (discussing the continuity in the scope of many peacekeeping and humanitarian intervention before and since the Cold War).

³⁸⁵ See *infra* notes __ (describing how organizations don't constantly or obviously seek to self-aggrandize).

³⁸⁶ See *supra* notes __ and accompanying text (describing UNHCR's role in the Balkans during the 1990s).

³⁸⁷ In fact, it is quite difficult to accept the argument – sometimes voiced by UNHCR staff interviewed and by former High Commissioner Ogata – that the assumption of security-related responsibilities by the agency would make it easier for other actors to avoid their responsibilities. Such an argument rests on a number of questionable suppositions, including (for example) that host country governments will do less as UNHCR assumes greater responsibilities, and that the permanent members of the Security Council will move closer to assuming greater responsibilities for refugee security if UNHCR continues to copiously insist on a narrow reading of its mandate with respect to security. If anything, UNHCR's own historical trajectory demonstrates the agency's capacity to galvanize global attention on issues that it *does* consider central to its mandate (such as the provision of material assistance) rather than those it does not. Even if

Finally, it's hard to explain the agency's evolution or its impact on refugee protection simply on the basis of pervasive apathy or inefficiency.³⁸⁸ Though the agency certainly has its share of deadwood,³⁸⁹ the reality of the agency's historical performance juxtaposes a certain feverish intensity about some aspects of its mission against the more conventional perceptions of lethargy in United Nations organizations. The organization's collective skill and efficiency is starkly evident as it endeavors to set up camps and deliver material assistance. And many of its employees show considerable signs of being quite personally dedicated to the welfare of refugees, as evidenced by their willingness to expose themselves to some combination of demanding jobs at salaries that are not competitive with the private sector, challenging working conditions, and in some cases considerable exposure to health and security threats.³⁹⁰

D. UNHCR's Impact on the Grand Compromise

As the agency evolved, UNHCR undeniably molded larger features of the grand compromise, such as the content of treaty and customary law governing refugees, the priorities of some nation states, and the performance of NGOs. This occurred even as UNHCR was itself reciprocally shaped by some of the constraints embodied in that compromise. Though it's hard to disentangle the direction of causation in explaining the overall architecture of the refugee protection system, two things should be noted here to justify the focus on UNHCR as a vehicle for understanding the larger refugee protection system.

First, the organization's agenda has undeniably shaped the legal structure of refugee protection, most notably through the aforementioned expansions in the scope of the refugee concept (as discussed in Part I), and through constantly articulating a version of the refugee protection mandate with material assistance at its core. A recent High Commissioner put it thus:

On refugee protection you are the one. It is a strange role. You are the agency, if you understand what I mean. More modestly you might say the High Commissioner is like a Minister of the Interior – with responsibility for the protection and governance of the people under my mandate. They need access to shelter. They need protection. We provide it.³⁹¹

This is not mere bluster. UNHCR has been instrumental in the drafting and promulgation of the 1967 Protocol to the Refugee Convention, the OAU Convention, legal interpretation, and priority-setting for innovation in the refugee protection system at the domestic and international level.³⁹² It shapes how the public understands refugee

the suppositions above were true, they must be weighed against the benefits that could be achieved for refugees and the people living near camps if UNHCR undertook greater measures to fund and evaluate policing, conflict-prevention, separation of armed elements from refugees, and demobilization.

³⁸⁸ See John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205 (2000) (developing an inefficiency critique of the United Nations).

³⁸⁹ See Interview with High Commissioner Ruud Lubbers (Geneva, July 2004) (describing staff lethargy as his single biggest problem at UNHCR).

³⁹⁰ See Wigley, *supra* note __.

³⁹¹ *Id.*

³⁹² See, e.g., Goodwin-Gill, *supra* note __, at (describing UNHCR's centrality in developing the refugee protection system as it exists today).

problems through funding priorities that, in turn, provide the basis for fundraising appeals focused on providing shelter, medical care, nutrition programs, and education for millions of refugees and displaced persons.³⁹³

Second, UNHCR has had an important effect on the priorities of its partners, a point which needs some elaboration. Different kinds of NGOs work on refugee and humanitarian issues. Some, like the International Rescue Committee, focus on providing relief services.³⁹⁴ Others, like Human Rights Watch, eschew operational involvement and focus on advocacy.³⁹⁵ Because UNHCR helps fund relief NGOs, it is likely to exert an impact on what they prioritize, and how they carry out their work. Because of its strategic position as the official agenda-setter of refugee protection problems, it's even likely to have some effect on advocacy NGOs. The agency itself is certainly not immune from the impact of NGOs themselves. Staff often move back and forth between UNHCR and NGOs, and the NGOs have had a particular effect on UNHCR's approach to sexual and gender-based violence.³⁹⁶ But historical developments (and my interviews) suggest the influence is somewhat lopsided in UNHCR's favor. From Lischer's perspective, UNHCR's influence lies in part in its ability to help NGOs overcome coordination problems:

In the refugee relief regime, UNHCR is the dominant actor. Despite the constraints described above, UNHCR could coordinate humanitarian action in situations where most organizations agree that their efforts are worsening conflict... Because of the coordination problems afflicting NGOs, they will not be able to encourage change among donor governments or refugee receiving states without UNHCR leadership. It is probable that agencies that feel to helpless to seek change might follow the UNHCR lead, were it to do so.³⁹⁷

Advocacy NGOs reach a similar conclusion, attributing NGOs' lack of responsiveness to manipulation problems in Guinea and the Great Lakes in large measure to UNHCR's decisions³⁹⁸

In short, UNHCR deserves particularly close scrutiny in understanding the fate of refugee security problems and the evolution of the refugee protection system. First, it has garnered sufficient autonomy to have an important hand in building the overall refugee

³⁹³ See *supra* Part II.a.

³⁹⁴ See, e.g., Interview with NGO Official # 2 (New York, 2005)

³⁹⁵ See, e.g., Interview with NGO Official # 3 (Stanford, 2004)

³⁹⁶ See Interview with NGO Official # 1 (Geneva, 2004).

³⁹⁷ See Lischer, *supra* note __, at 164.

³⁹⁸ The problem in Guinea, according to Human Rights Watch, was UNHCR's agenda shaped that of the NGOs which is was funding and on whose behalf it was advocating with host governments:

UNHCR generally plays an intermediary role between international nongovernmental humanitarian agencies and the authorities of the refugee-hosting country; but in Guinea UNHCR appeared unwilling to do so, creating a climate in which aid workers were also unwilling or unable to speak out. UNHCR's failure to press for access to the border region in particular posed a major obstacle to the work of its partner agencies.

Human Rights Watch, *Liberian Refugees in Guinea: Refoulement, Militarization of Camps, and Other Protection Concerns*, 22 (November 2002).

protection system.³⁹⁹ Understanding the organization's priorities therefore helps explain how the grand compromise that has contributed to refugee insecurity came about. Second, despite its many shortcomings and political, the organization represents one of the few viable avenues through which refugee security problems may be at least partially mitigated and receive greater global attention. Put differently, although the argument below explains how UNHCR's priorities are largely locked in by past political circumstances, its priorities may ultimately prove easier to change than those of host and advanced industrialized nations with even fewer reasons to be concerned about refugee protection. Third, as the following section explains in detail, UNHCR and its partner organizations could undertake work that would at least mitigate certain security problems. Efforts in this area would depend, among other things, on creating bureaucratic sub-units to gather expertise in various types of security problems and integrate such concerns into overall planning for refugee assistance and legal protection. They would also depend on raising dedicated funds to assist and reward willing host states in the provision of security services and building coalitions of NGOs and donor nations to place pressure on host states that deliberately undermine the refugees' security. Finally, what limited prospects exist for gradual changes in host and donor nations' interest in resolving various kinds of refugee security problems depend on UNHCR's ability to articulate connections between those players' interests and improved security. Such evolution in national governments' perceptions of their interests may seem unlikely to some observers. An analysis of UNHCR's evolution thus helps underscore how organizations with ambiguous legal mandates make appeals to national governments, their elites, and (in some cases) their larger publics in order to shape perceptions about the underlying nature of the problem entrusted to their care.

V. THE FUTURE OF REFUGEE SECURITY UNDER THE GRAND COMPROMISE

The preceding analysis illuminates theoretical questions about how organizations restructure their legal mandates to navigate their political circumstances. But the analysis also sheds light on practical problems that UNHCR inherits because of the very essence of its legal mandate.⁴⁰⁰ Contrary to accepted wisdom, not all of the problems identified depend on Security Council action, peacekeepers, exorbitant sums of money, or radical restructuring of international politics to be resolved.⁴⁰¹ There have always been things

³⁹⁹ By "autonomy," I mean an agency's ability to influence its political environment and engage in significant legal and policy innovation despite the existence of political constraints. Cf. DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* (2002).

⁴⁰⁰ Compare Terry, *supra* note __, at __ (contending that humanitarian actors such as UNHCR do not "inherit" the security problems that other international actors fail to solve) with UNHCR, *Personal Security of Refugees*, *supra* note __, at __.

⁴⁰¹ For a particularly severe polemic emphasizing the perceived futility (or, indeed, perversity) of expecting humanitarian actors to navigate security-related problems, see generally Rieff, *supra* note __. Although Rieff's trenchant insights reveal some of the potential paradoxes associated with the assumption that humanitarian action is intrinsically pure or inherently defensible, his project largely sidesteps practical questions about how humanitarian actors like UNHCR can respond to security problems. Moreover, in an effort to develop his argument that humanitarian actors should not assume responsibilities for promoting international law or human rights, he fails to grapple with the reality that transnational organizations like UNHCR already have legal responsibilities that entail a concern with human rights and security. If Rieff's critique is to apply to transnational organizations like UNHCR, then it must devote some attention to explaining why pre-existing legal mandates should be changed or ignored.

UNHCR and its partners could have done to mitigate security problems, even though some of these would have required the agency to make very different strategic choices. Those choices cannot guarantee success. They *can* advance the prospects for more reasonable trade-offs involving refugee security. Accordingly, this Part outlines promising, analytically-grounded changes to refugee law and policy that could contribute materially to striking the aforementioned balance. Its aim is to undermine the predictable but deceptive embrace of arguments maintaining the futility of reforms meant to enhance refugee security in a complicated and uncertain world. It then considers how the dynamics and challenges associated with implementing such changes have implications beyond refugee security, in other realms where organizations with complex legal mandates navigate an imperfect world.

A. *Rethinking Refugee Security in a Second- (or Third-) Best World*

It is difficult to think rigorously about how to mitigate the various physical security threats without first setting aside implausible solutions, such as assuaging the “root causes” of refugee problems, or simply exhorting developed countries to absorb more refugees. Root causes are simply much harder to uproot than the people who flee across borders.

The fate of the infamous Great Lakes region, for instance, shows just how hard it is to address some of the structural dynamics making it exceedingly difficult to simply turn off the refugee spigot. For over four decades the Great Lakes region of Africa has been both a fertile source of, and a fragile home for, refugees. Even as Rwandan government officials were signing the Genocide Convention, the central African nation was already subject to growing resource constraints that would almost inexorably exacerbate the ethnic tensions and political opportunism commonly associated with mass atrocities. With its population growing rapidly, Rwanda nonetheless lacked mechanized agriculture or any other means for obtaining the resources to keep up with its growing internal resource demands.⁴⁰² In some regions, its farms were shrinking to an average of less than two acres each by the 1990s.⁴⁰³ Whatever forces were driving Rwanda towards mass slaughter, their impact was almost certainly exacerbated by the country’s agricultural mismanagement, leading to erosion and dwindling food stocks.⁴⁰⁴ It’s no wonder that in some regions, killings proceeded with the same brutal efficiency even in regions with virtually no Tutsis for the Hutus to kill, and why well-to-do Rwandans (including Hutus) were disproportionately subject to murders.⁴⁰⁵ As André and Platteau put it:

The 1995 events provided a unique opportunity to settle scores, or to reshuffle land properties, even among Hutu villagers... It is not rare, even today, to hear

⁴⁰² See Diamond, *supra* note __, at __.

⁴⁰³ See Catherine André and Jean-Philippe Platteau, *Land Relations Under Unbearable Stress: Rwanda Caught in the Malthusian Trap*, 34 J. ECON BEHAVIOR & ORG. 1 (1998).

⁴⁰⁴ See Diamond, *supra* note __, at 324-25 (“When one compares crime rates for people of age 21-25 among different parts of Rwanda, most of the regional differences prove to be correlated statistically with population density and per-capita availability of calories: high population densities and worse starvation were associated with more crime”).

⁴⁰⁵ *Id.* at __.

Rwandans argue that a war is necessary to wipe out an excess of population and to bring numbers into line with available land resources.⁴⁰⁶

Rwandans faced added risks from the existence of people who, like many African warlords, were ready to invest heavily in fomenting conflict to pursue private gain (whose influence is often enough, even without the problems plaguing Rwanda, to spark conflict). Together these factors make it clear how well-meaning refugee assistance itself can be overwhelmed by forces dissipating its effectiveness and perverting the legal norms associated with that assistance. All of this suggests that actual refugee flows are unlikely to fall dramatically. And getting first-world nations to accept sharply greater numbers of refugees is almost as unlikely as witnessing the complete short-term success of efforts to turn off the refugee spigot altogether.⁴⁰⁷

A number of other initially attractive solutions prove similarly unavailing. In the Balkans during the mid-1990s, UNHCR made efforts to preclude refugee flows altogether by emphasizing the besieged Bosnians' "right to remain." As Hathaway has cogently explained, these efforts have proven unavailing or downright counterproductive.⁴⁰⁸ Both Hartling and Lubbers sought to coax from the agency greater sustained attention to repatriation.⁴⁰⁹ Despite occasional past successes by UNHCR and its partners in facilitating repatriation of refugees from a host country to their country of origin, there is no good reason to believe that its ability to achieve large-scale repatriations in a short amount of time will dramatically improve in the coming years. Instead the agency is likely to continue confronting structural problems making repatriation an unreliable strategy. Host countries might compel refugees to repatriate against their will, as were some Cambodians in Thailand and Burmese in Bangladesh in the 1980s, or East Pakistanis in India in 1971. Countries of origin routinely resist repatriation as did Sudan during the 1960s, fearing a destabilizing influx of political opponents or populations likely to deplete scarce resources. Problems also arise for those trying to solve the security by simply insisting that UNHCR behave in ways that are strictly "neutral," thereby avoiding situations where its aid supports the continuation of conflict.⁴¹⁰ There is no easy way to make sense of neutrality in the recurring situations where assistance flows through a war zone. Indeed, it may not be possible have a policy be politically "neutral" when the very fact of humanitarian assistance can prolong conflict.

⁴⁰⁶ See André, and Platteau, *supra* note __, at __.

⁴⁰⁷ See Peter Schuck, *A Response to the Critics*, 12 HARV. HUM. RTS. J. 385 (1999); David A. Martin, *Reforming Asylum Adjudication: On navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990).

⁴⁰⁸ See Hathaway, *Palliative Role*, *supra* note __, at __.

⁴⁰⁹ See Interview with High Commissioner Ruud Lubbers (Geneva, July, 2004)

⁴¹⁰ The difficulty in defining neutrality is rooted in the fact that assistance is valuable, and regardless of how neutrally it is delivered, it can affect the evolution of political struggles. For example: Vietnam imposed a Cambodian government that it controlled during the 1980s, formed in exile at Vietnamese camps supplied with international assistance. Even leaving this aside, sometimes it's hard to argue that neutrality is as normatively compelling as it might appear on the surface. The Khmer Rouge's brutality was not obviously owed neutrality, and as Reiff has pointed out, the ICRC's commitment to neutrality was at the core of its justification for keeping secret the genocide playing out in German camps during World War II while it was going on. See Rieff, *supra* note __, at __.

Once it becomes clear that security problems realistically cannot be solved by simply eliminating refugee flows altogether or expecting humanitarian actors to follow a simplistic version of neutrality, it is easier to grasp how the fate of refugee protection depends on achieving two interrelated tasks: radically enhancing the global capacity to deploy military or civilian police assets to promote security, and gradual reform of the grand compromise. For instance, reform of the much-maligned UN Department of Peacekeeping Operations (DPKO) is among the most potentially useful policy changes for enhancing refugee security but also fraught with complications.⁴¹¹ At present DPKO endeavors to limit its responsibility for refugee-related matters as much as possible. The peacekeeping department obviously cannot control the Security Council's willingness to shoulder the burdens of securing refugee camps. Nonetheless, DPKO's role as the technical architect of peacekeeping missions gives it some sway over the Council's deliberations.⁴¹² A reformed peacekeeping organization can forcefully articulate the value of enhanced security in refugee camps and expand the number of circumstances where the provision of such services – particularly in the context of separation and disarmament of asylum seekers – is identified by the Council as being both practically feasible and sufficiently within the scope of DPKO's existing mandate. Although the prospect for such reform is dim, unexpected political developments can change these possibilities, or allow regional agreements to deploy civilian police forces or even military contingents in refugee camp settings. Moreover, even in the absence of further changes in DPKO, below I discuss a number of practical measures UNHCR can still take to enhance the willingness and capacity of host countries to provide effective policing and security services.

The payoff from these actions would be enhanced if they were accompanied by changes in other features of the grand compromise, such as expanding UNHCR's capacity to entice host states to modify existing laws and policies governing refugee management. Since proximity to water sources is such an important criterion in deciding on the site for refugee camps,⁴¹³ obtaining locations that are more favorable in preventing violence may depend on securing funding for refugees to obtain water and other resources from further away. Although UNHCR's influence on camp locations is far from absolute, its negotiations with host states may be enhanced through the creation of financing mechanisms to compensate such states for making available more favorable camp locations.⁴¹⁴

Loosening the constraints of the grand compromise also depends on the continued engagement of advanced industrialized countries. While national governments from such countries currently shoulder the bulk of the financial burden for refugee protection, in recent years they have stepped up efforts to limit refugee flows to their territory. Policies coupling refugee status and long-term immigration benefits tend to discourage wealthier

⁴¹¹ For a cogent and thoughtful approach to doing precisely this, see *Report of the Panel on United Nations Peace Operations*, P 19, U.N. Doc. A/55/305-S/2000/809 (2000) (“Brahimi Report”).

⁴¹² *See id.*

⁴¹³ *See UNHCR Emergencies Manual, supra note __, at __.*

⁴¹⁴ *Cf. Karen Jacobsen, Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes*, 30 INT'L MIGRATION REV. 655 (1996) (availability of financial support influences host country flexibility to different policy arrangements for responding to mass refugee influxes).

countries from admitting refugees.⁴¹⁵ Under the existing system, thousands have access to a new life while millions more are stuck in refugee camps that so often face poor security conditions. Hathaway and his collaborators have suggested changes to create temporary protection regimes that decouple refugee protection from permanent immigration status.⁴¹⁶ Burden-sharing agreements, similar in spirit to the framework for the resettlement of the Indochinese boat-people during the 1980s, might also engender more opportunities for people to gain temporary resettlement protection away from conflict zones.⁴¹⁷ There is no guarantee that such a system would allow a greater number of people to be protected. But simply insisting on some of the implausible solutions described above effectively ratifies an arrangement that constantly places refugee safety at risk and can exacerbate conflicts that threaten millions more.⁴¹⁸

Principled refugee advocates should also reassign priority to funding for, and evaluation of, dispute resolution, camp policing, and demobilization strategies.⁴¹⁹ UNHCR should provide funds to assist host countries or international contingents in delivering security services, along with a strategy for minimizing the moral hazard impact of funding activities that the host states are already supposed to provide. In extreme situations, UNHCR and the United Nations could make available special funding mechanisms to finance the relocation of refugees altogether, or to defray the costs of deploying host country or other security forces to manage an emergency. They could consider suspending funding for camps where refugees are subject to brutal coercion.

Even this limited agenda may prove too ambitious. The intractability of peacekeeping reform, the constraints imposed by donor countries, and UNHCR's own locked-in organizational goals may therefore militate in favor of an even more incremental agenda, fitting for a "third-best" world of locked-in organizational goals and intricate political complexities.⁴²⁰ Accordingly, the final list of strategies for refugee

⁴¹⁵ See *supra* note __ (discussing how immigration status and refugee status are interconnected in advanced industrialized countries).

⁴¹⁶ See Hathaway and Neve, *supra* note __, at __.

⁴¹⁷ See Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997).

⁴¹⁸ Schuck's proposal has (perhaps not surprisingly) been subjected to vigorous criticism from refugee advocates in advanced industrialized countries who understandably want to protect at least the limited humanitarian impulse underlying the current system. See, e.g., Deborah Anker, Joan Fitzpatrick, and Andrew Shacknove, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295 (1998). Part of the disagreement over these reform proposals is undoubtedly over whether, at core, the current system is viewed primarily as a means of promoting the protection of refugees while they face the most acute threat of persecution and violence, or whether it's viewed as the best possible means to help at least a few people gain access to better lives.

⁴¹⁹ One of the challenges UNHCR faced when it briefly considered deploying private security forces to camps in Eastern Congo involved the extraordinarily steep financial cost of commencing such deployment on short notice. The legal and prudential concerns governing a decision to proceed in these circumstances are undoubtedly complicated, but they are moot if resource constraints (or, conversely, a failure to anticipate the problem) are pronounced enough to preclude the option entirely. Surprisingly, it was not until 1998 that UNHCR officials articulated in earnest that "host States might require extra resources to establish and maintain the rule of law in refugee populated areas." See UNHCR, *Operationalizing the Ladder of Options*, *supra* note __, at ¶ 6.

⁴²⁰ Although this article has documented how such constraints are difficult to overcome at the level of the organization, it would be wrong to treat those constraints as impossible to overcome. For one, UNHCR, its partners, and NGOs boast sufficient autonomy to continue shaping the evolution of the refugee protection system, even at the margins. For another, refugee advocates' humanitarian efforts over the past half-

might therefore reflect what a High Commissioner essentially could undertake *tomorrow*, though admittedly not without encountering some resistance. In recognition of the fact that past agency leaders had proven far more successful than they might have guessed in transforming UNHCR into an operational agency, the High Commissioner could make an enlightened and counter-intuitive move to *separate* UNHCR assistance from its role as overseer of the entire refugee protection system. Such separation could enhance the prospects for making latter oversight function more meaningful – perhaps in the hands of a separate organization able to analyze and forcefully report on the quality of refugee determinations and the extent of threats to refugees’ physical integrity.⁴²¹ The agency’s leadership could create a dedicated security unit to ensure a focus on mitigating violence in routine agency decisions, hire substantial numbers of people who know about security, collect data and evaluate everything that touches security. Changes in bureaucratic structure can affect what organizations do, not only by creating the possibility of gradually recasting an agency’s entire culture and priorities, but more immediately by creating an organizational advocate for a particular set of concerns.⁴²² Finally, it could create a fund to promote security and fundraise aggressively for it in order to create a more limited version of the financing mechanism described above.

As with all defensible judgments on questions of legal policy, these prescriptions here offered reflect a normative presumption regarding the value of refugee security, as well as a set of plausible empirical premises that are worth making explicit. First, other things being equal, exhaustive research and evaluation efforts help an organization develop strategies to solve problems like those involving refugee security.⁴²³ Second, UNHCR shares with its actual and potential partners the scarcity of financial resources to devote to security, or to anything. Potential reforms accordingly must be evaluated at least in part on the basis of their financial cost. Third, changes in hiring and promotion

century have repeatedly displayed determination and ingenuity in the face of adverse conditions and limited resources, sometimes at great personal risk. Such reservoirs of organizational autonomy from the most direct constraints of the international system and determination on the part of refugee advocates make it particularly worthwhile to consider steps that may be gradually implemented to promote the physical integrity and security of refugees.

⁴²¹ The spirit of this idea is not unlike that suggested in the work of Arthur Helton, who called for the creation of a transnational research and oversight agency to monitor humanitarian developments. See ARTHUR C. HELTON, *THE PRICE OF INDIFFERENCE: REFUGEES AND HUMANITARIAN ACTION IN THE NEW CENTURY* (2002). See also Ralph Wilde, Note, *Quis Custodiet Ipsos Custodes? Why and How UNHCR Governance of “Development” Refugee Camps Should Be Subject to International Human Rights Law*, 1 YALE HUM. RTS. & DEV. L.J. 107 (1998).

⁴²² Such organizational changes have the potential to reallocate resources, to reshape formal lines of authority at the margin by creating a persistent organizational advocate for particular concerns, and to alter the expressive impact of the organization’s work and policies by providing a signal of organizational priorities to external constituencies. Regarding the impact of formal organizational structure on performance, see generally HERBERT SIMON, *ADMINISTRATIVE BEHAVIOR* XVI (3RD ed. 1976) (“If organization is inessential, why do we insist on creating a position for the man [sic]?”).

⁴²³ Research efforts may even yield strategies with the potential to improve security *without* a material increase in the financial or political costs faced by the organization. This premise reflects a plausible assumption that, at least to some extent, crucial aspects of security are technical problems and addressing those problems depends on expertise. UNHCR’s experience with sexual and gender-based violence, and its belated efforts on projects such as the creation of guidelines to separate combatants from refugees suggests that security problems encompass that sort of technical dimension to it.

patterns are likely to affect how organizations implement their mandate.⁴²⁴ Fourth, other things being equal, creating dedicated bureaucratic units to focus attention on a particular issue materially increases the probability that an organization will devote attention to that issue.⁴²⁵ Fifth, refugee advocates can enhance security through interventions addressing different facets of refugee protection. These include: (a) managing the influx of arriving asylum seekers; (b) emphasizing prevention by incorporating security into camp planning and design; (c) providing security and dispute resolution services; and (d) responding to special problems that arise when a situation has already deteriorated, such as when combatants pervasively control the camps. Finally, while the three actors most immediately able to shape refugee security are UNHCR, the host state, and the refugees themselves, improvements in security depend on enhancing the capacity of UNHCR and refugees themselves to assume a greater share of the security responsibility that is unlikely to be effectively discharged by anyone else. Yet discussions of refugee security over the last few decades have overwhelmingly focused on host states.

These changes are unlikely to resolve a situation definitively where the host state actively encourages militarization or the bulk of assisted refugees vigorously embrace the prospect of ongoing conflict. Unfortunately, the perceptions of futility often associated with security concerns among refugee advocates have made it harder for the organization to do some things that are not impossible.⁴²⁶ In 2000, fully a half-decade after the Great Lakes crisis and a half-century after its creation, UNHCR finally decided to seek a “limited number” of the Humanitarian Security Officers to “liaise” with local police and the military, “assess the capability” for providing security services, and “provide expertise on criminal investigations and procedures.”⁴²⁷ UNHCR’s leadership could have proposed such a tentative step two decades before, as criminal bands routinely attacked Congolese refugees in Angola.⁴²⁸ Incremental changes in UNHCR’s legal interpretations and organizational structure along the lines described above are meant to nudge the organization to act where it can without waiting decades to do so.

B. Implications Beyond Refugee Security

Though my primary concern in this article has been with the fate of refugees, at the outset I asked the reader to consider the present subject as an example of a more general dynamic. Refugee security problems open a window for envisioning how organizations with ambitious legal mandates recast their missions in response to complicated political circumstances, and to the risk of failure. From Geneva to Ghana, humanitarian workers, lawyers, and organizational staff would have been hard pressed to

⁴²⁴ Cf. STEPHEN PETER ROSEN: *INNOVATION AND THE MODERN MILITARY* (1991).

⁴²⁵ Cf. Wilson, *supra* note __, at __. See also Interview with Senior UNHCR Official # 3 (emphasizing how creation of units to focus on environmental issues and sexual and gender-based violence issues have forced the organization to increase attention to those issues).

⁴²⁶ Matching an organization’s interpretation of its mandate to a normatively desirable standard of what that mandate should be is, as with statutory interpretation, a dynamic process. Cf. WILLIAM ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994). Thus, the mere designation of security as an organizational priority does not guarantee success in enhancing refugee security. But the absence of such a priority almost certainly works against efforts to galvanize attention both within and beyond the organization) that is critical to mitigating the problem over time. See *supra* Part IV.

⁴²⁷ See UNHCR, *Operationalizing the Ladder of Options*, *supra* note __, at ¶ 15.

⁴²⁸ See Elly-Elikunda, *supra* note __, at 96.

avoid a disquieting reality: under almost any defensible understanding of the term, refugee “protection” was difficult to deliver, sometimes too opaque to measure, and impossible to guarantee. Refugee *security*, though clearly encompassed by “protection,” repeatedly posed thorny political problems for the organization – regardless of whether the problems in question were of the more tractable law enforcement variety or the more intractable state-in-exile form. In contrast, refugee *assistance* filled a crucial niche, delivered opportunities for organizational relevance, was visually compelling, and its delivery could be readily measured.

UNHCR’s sleight-of-hand in redefining its legal mandate is not unique.⁴²⁹ The Customs Service, for example, turned a broad charge to investigate money laundering into a more specific mandate to sniff out bulk aggregations of currency at airports, and to heighten punishments faced by mid-level drug activity in American cities like Miami, Houston, and Los Angeles serving as nodes in a global network of international trade.⁴³⁰ The FBI avoided involvement in organized crime and narcotics, preferring to focus on communist subversives and bank robbers. Loath to change its internal routines, procedures, personnel and policies, the agency deliberately interpreted its mandate to avoid the turf battles and corruption risks enmeshed with drug enforcement.⁴³¹ It also avoided involvement in potentially risky areas that could damage its reputation and thereby its autonomy. But budgets and jurisdiction were given up in the process. The State Department long rejected opportunities to absorb USIA and USAID.⁴³² Local fish and game departments routinely avoid responsibility for controlling predators, a task that tends to be controversial among their primary public constituencies. Indeed, in a study of 25 domestic U.S. agencies threatened with the loss of a program or sub-unit, ten of 25 either supported or did not oppose the change.⁴³³ A compelling question for further research is *when* organizations choose to stick loyally to a mission faithful to their original mandate despite the constraints they may face, or to challenge those constraints by pursuing different kinds of autonomy, or to sound the alarm and, exercising a

⁴²⁹ Cf. W. Keith Warner and A. Eugene Havens, *Goal Displacement and the Intangibility of Organizational Goals*, 12 ADMIN. SCI. Q. 539 (1968)(hypothesizing that “goal attainment” in organizations is maximized when goal displacement is minimal, which occurs when goals are “tangible”). Warner’s and Havens’ synthesis of the small literature on “goal displacement” provides a reasonable point of departure for thinking about the implications of organizations’ interpretation of their legal mandate. It does not, however, capture the subtleties arising beyond the context of the “tangibility” dimension on which they focus. The precise degree of “tangibility” in UNHCR’s organic statute is a question that invites considerable hermeneutic dissection. Regardless of the outcome of that discussion, both theoretical and empirical work could richly inform critical questions about *how* transnational organizations such as UNHCR (and their domestic regulatory counterparts) enshrine commitments to particular kinds of goals. The proposed framework suggests that such choices may be understood in part through attention to organizational leaders’ perceived risk associated with different interpretations of their legal mandate.

⁴³⁰ See Cuéllar, *Tenuous Relationship*, *supra* note __, at __.

⁴³¹ Wilson, *supra* note __, at 189 (“The FBI’s opposition to any involvement in narcotics investigation was based not only on a fear of corruption but also on a desire to avoid taking on a task already performed by other organizations that would then become its rivals.”).

⁴³² MORTON HALPERIN, *BUREAUCRATIC POLITICS AND FOREIGN POLICY* 37 (1974).

⁴³³ See Marc Tipermas, *Jurisdictionalism: The Politics of Executive Reorganization*, Ph.D. Dissertation, Dep’t of Govt., Harvard Univ., 159 (1976)(on file with author).

prerogative akin to the “voice” from Hirschmann’s work,⁴³⁴ implore others to mitigate an insoluble problem.⁴³⁵

The potential role of organizational autonomy suggests a second implication of the refugee security story, regarding the role of law in a context lacking traditional features of judicial review. Far from being some esoteric feature of international organizations, a number of crucial bureaucratic decisions in domestic settings also involve legal determinations subject little or no judicial review.⁴³⁶ In UNHCR’s case, the time, energy, and resources consumed by UNHCR in articulating legal interpretations suggests that the law here plays distinct but interrelated functions. It has an intimate connection to institutional redefinition. Not only does it provide the organization with a reason to act, but it furnishes a means to justify *inaction*. Legal interpretations defined core tasks of organizations to the world and internal work groups, making it possible for people to see the organization’s choices less as a discretionary act and more as a laudable attempt to comply with a higher mandate. The content of legal rules even served as a convenient scapegoat when the institutional redefinition process is no longer able to suppress the recognition that a serious problem exists. The debate about legal reform provides a convenient conduit for achieving key goals that organizational leaders and mid-level managers might find appealing, including the channeling of frustrations into a less threatening activity and signaling to key external constituencies that a problem is being addressed.⁴³⁷ Law, too, may serve as the basis for persuasive appeals to individuals who value compliance even in the absence of an obvious coercive mechanism. In the enduring drama of refugee protection, across a range of countries, those persuasive appeals were repeatedly believed by refugee advocates to have some kind of payoff in advancing

⁴³⁴ See ALBERT HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970)

⁴³⁵ A plausible theoretical model of this dynamic would need to encompass the following factors: (a) perceptions of risk of different courses of action for leaders, (b) extent to which external constituencies can discern the long-term implications of different conceptions of the institutional mandate, (c) professional and institutional constraints forcing organizations to stick to particular interpretations of law, and (d) the organizational lock-in phenomenon described in Part IV, *supra*. Given the interplay between strategic action and organizational routines in this context, an analysis of institutional redefinition would almost certainly benefit from drawing on two distinct strands of scholarship that are often (prematurely) treated as being incompatible, one rooted in political economy, the other in sociology and social cognition. For a particularly cogent example of a political economy account of organizational politics, see, e.g., LAWRENCE S. ROTHENBERG, *REGULATION, ORGANIZATIONS, AND POLITICS: MOTOR FREIGHT POLICY AT THE ICC* (1994) (persuasively demonstrating that the “capture” metaphor ill-fits the development of the Interstate Commerce Commission). In contrast, Diane Vaughan draws instead from sociology and social psychology to provide a rich portrait of organizational decisionmaking leading to the Space Shuttle *Challenger*, showing how organizational routines and bureaucratic procedures led actors to normalize the risk of an inherently risky technology, thereby blinding them to the accumulating dangers of a launch like the one that produced the *Challenger* disaster. See Vaughan, *supra* note __, at __. For another cogent application of institutional sociology and social cognition, see Ian F. Haney López, *Institutional Racism: Judicial Conduct and a new Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

⁴³⁶ See, e.g., Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, Stanford Public Law & Legal Theory Working Paper (December 2005) (on file with author).

⁴³⁷ See Jacquemet, *supra* note __, at __. The danger with all these dynamics is the same one encountered with the larger process of institutional redefinition they support – that the cold, hard, practical complexities of a problem are downplayed, that certain narrow ways of thinking about the problem are locked in, and that potential solutions and opportunities are not pursued.

their organization's agenda. Precisely how much respect that agenda should command awaits the judgment of history.

CONCLUSION

This article has explored the implications of two crucial characteristics of the modern refugee protection system. First, in a world where asylum in industrialized countries is tightly rationed and a major touchstone of refugee protection is a network of sprawling camps in the developing world, refugee law is in large measure defined by how organizations and humanitarian workers use their discretion. Second, whatever the merits of the normative case for refugee protection, the reality is that vulnerable populations fleeing persecution and violence in their home countries are routinely afflicted by violence and physical insecurity in the refugee camps where most of them are housed. By considering both of these features together it becomes clear that security problems are, to some extent, inherent in the structure of the protection system itself, generally ignored by the core organizational actor implementing international legal mandates for refugee protection, and occasionally exacerbated by that actor's role and that of its relief organization partners.

There is no denying that refugee security has suffered greatly from neglect, and even manipulation, by powerful actors controlling the brunt of the globe's military, economic, and political power. While this reality must be acknowledged, the full story is more complicated. Indeed, the very legal and institutional structure of refugee protection – what has given with one hand asylum and assistance to millions – has with another hand neglected the physical security of massive numbers of people. Refugee advocates have at times ignored the chronic failure of host states to solve refugee security problems, and the multiple forms that those security problems take: spurred by a major power as in Southeast Asia, complicated by genocide and staggering human stampedes as in Rwanda, abetted by a host country as in Pakistan, and afflicted by rampant disorder as in Northern Kenya. And the institutions that most readily “own” refugee protection have little incentive to set their entrepreneurial vigor towards securing ownership of the security problem. Far from encouraging powerful nation states to step in, the relative neglect of security by refugee advocates contributes to episodes of refugee assistance plainly at odds with the law, as with the continued flows of resources reaching tightly militarized camps in the Goma region of Eastern Congo in the mid 1990s and in southern Africa in the early 1980s.⁴³⁸

The people and institutions that must cope most directly with such chaos can be forgiven for suppressing the latent conflict between law and lending a hand. But that suppression comes at a cost. In the organizational rush to disown security problems, potential solutions (though surely only partial ones) almost certainly go underdeveloped, and deep-seated problems in the current system are not fully appreciated. Changing that would require refugee protection organizations to recognize what they should have

⁴³⁸ This observation does not imply that UNHCR or its partners are capable of assuming complete operational control over a spate of near-insoluble refugee security problems. Nonetheless, if the agency's identity as an operational player is to be maintained, then its mandate should either plainly expand to encompass critical aspects of the security problem (as it once expanded to encompass the delivery of material assistance), or it should be recognized as incompatible with the agency's core legal mandate.

grasped at the dawn of the modern era of instant cities for displaced people: sound policy and fidelity to the principles underlying their legal mandates requires them to become experts in the management of conflict within and around the camps. This is not what UNHCR and its relief partners have become. Organizations with complex legal mandates can, at their best, serve as a voice of conscience, even problems cannot readily be solved, as with the question of what to do when the states-in-exile harden their grip on the camps and are sustained in this by material chunks of the refugee population itself. Any chance of addressing that reality depends on organizational leaders taking a measure of risk, borne from asserting ownership over problems they cannot readily solve. When organizations with difficult legal mandates assume such risk, at a minimum they help assure that the problems are not far from the minds of those who study, administer, fund, support, or judge the legal machinery purporting to perform tasks like refugee protection.

Ironically, the only thing more remarkable than the perils of continuing to ignore those problems is how much of the refugee protection system has managed to do precisely that. The civilian and humanitarian character of asylum is no mere technicality. In a world where peacekeepers and responsible police are hard to come by, no one can expect UNHCR or its partners to conjure up security for the camps out of thin air. Nonetheless, sustained analysis reveals many aspects of those problems to be neither intractable nor impossible to solve. Law enforcement services in the instant cities that refugee camps have become, for example, almost certainly depend on more than host country resources and desires. The management of camp conflict is also likely to benefit from the existence of specialized bureaucratic units, fundraising appeals, research and development efforts, evaluations of security incidents across camps, and the hiring of expert personnel. One payoff of this analysis is therefore to highlight the strategies UNHCR and its partners can pursue over time to close the gap between the High Commissioner's compelling picture of the world and the more disturbing reality afflicting millions of refugees in Asia and Africa.

Another payoff is decidedly bleaker. It involves discerning what problems are *not* suitable for simple fixes. Dealing with state-in-exile situations commanding substantial refugee support is such a problem. No amount of wishful thinking, legal clarification, or technical precision will resolve this problem. The current architecture of refugee law and politics ensures that, absent a miracle or a stark transformation in powerful nations' conception of their own interests, a solution to this last problem will continue eluding refugee advocates, some of whom paradoxically insist on the contradictory goals of refugee self-determination and preservation of asylum's vaunted civilian and humanitarian character.

At the core of the elaborate legal machinery those advocates till is a still larger paradox rooted in the fact that legal mandates have an organizational logic. Little can be accomplished without excluding some parts of the problem from immediate consideration. But that very act of exclusion blinds organizations to the full range of possible solutions to legal problems. A version of this paradox touches nearly every organization with an ambitious legal mandate facing complicated political environments, whether they are protecting a fragile ecosystem or an elaborate cyber-system. Legal mandates almost never get carried out perfectly by the organizations to which they are imparted. Police don't investigate crimes perfectly. Tax collectors engage in patterns of

enforcement that leave certain nodes of the economy effectively untaxed. Occupational safety or environmental inspectors (if they exist at all) provoke derision among some segments of society – and so it goes. Part of the problem is how notoriously difficult it is for vital constituents to agree on what “perfectly” means.⁴³⁹ But another complication is how the organizations themselves shape their responsibilities and the world’s thinking about that mandate as they navigate their environment. UNHCR’s contribution to the refugee protection system is an example of how that navigation plays out. When organizations are given near-impossible responsibilities and resources that fall far short of what they need to live up to those mandates, they often redefine their task. This provides more of what’s easy for them to provide, less of what’s not, and a distorted image of the underlying problem to the constituencies who may on occasion wield the power to nudge circumstances in a different direction. And nothing about this is likely to change.

Or is it? Tempting as it is to end on a pessimistic note, a more nuanced conclusion is in order. Somewhere in the tortured process that turns the UNHCR Statute, the Refugee Convention, the United Nations Charter and humanitarian law into refugee camps and paper guarantees, small windows of opportunity sporadically emerge for incremental reforms. So it was when sexual and gender based violence became a concern in the mid-1980s, and when the Ladder of Options was in its heyday after the desultory chaos of the Great Lakes Crisis. But those windows tend to close in the absence of the kind of goading by refugee advocates, or the rich troves of evaluative information, that can make key actors in the system rethink their interests. What hampers these developments in the refugee protection world is how the present system has managed to assume much of the security problem away – by either pretending it’s not there, that it’s someone else’s problem, or that it cannot be solved. Ultimately, whether something will change depends in underappreciated ways on the prospects for building organizations that – despite the enormity of the legal responsibility entrusted to them – learn to do something other than ignore their thorniest predicaments.

⁴³⁹ Cf. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).