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A New Era for U.S. Refugee Resettlement

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# A New Era for U.S. Refugee Resettlement

David A. Martin

## **Abstract**

This essay will appear in a volume dedicated to the memory of Arthur Helton, a leading scholar and activist on refugee issues, who was killed in the bombing of the UN Headquarters in Baghdad in August 2003. It sets forth some of the principal analysis from a lengthy report chartered by the U.S. State Department that critically examined this country's refugee resettlement program, which has encountered serious difficulties since September 11, 2001. A revised and updated version of the full report was recently published in book form by the Migration Policy Institute (*The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement*). The essay here discusses the overall context for refugee resettlement in the twenty-first century, noting why the program will have to operate differently from earlier eras, which were dominated by large, long-term resettlement flows from a limited number of locations, notably Vietnam and the former Soviet Union. Future resettlement will be marked by smaller resettlement initiatives drawn from a wide array of locations, reaching populations that will usually have to be processed in unstable or dangerous settings. The key offices in the Department of State and the Department of Homeland Security will need to change their operations in response (some of this is currently under way), to become more nimble at identifying appropriate initiatives and deploying officers to process the cases. This essay discusses the following key elements in the context for resettlement programs: pull factors, migration choices by refugees and potential refugees, host country reactions, and other political considerations, such as the impact of resettlement on other durable solutions; fraud, corruption and distortion; program complexity and sheer luck; and legal difficulties that apply when resettlement is tightly constrained by the definition set forth in the 1951 Convention relating to the Status of Refugees.

# A New Era for U.S. Refugee Resettlement

David A. Martin<sup>1</sup>

## Prologue

Arthur Helton exerted significant influence on refugee law and refugee protection during a tragically shortened life. Lawyers may tend to focus on the legal contributions he made, particularly in his advocacy and scholarship relating to political asylum – and these were considerable. Asylum is generally granted or withheld, at least in developed nations, through a system that relies heavily on skills and procedures familiar to lawyers, and this system absorbed much of Arthur’s early attention. But as his career progressed, his horizons expanded beyond asylum litigation, and he turned his focus to a wider set of systems, policy decisions, military deployments, and management practices that can have a far more extensive impact on the way the world community responds to forced migration and complex emergencies. His last book, *The Price of Indifference*,<sup>2</sup> challenged readers to think more comprehensively about a policy toolbox, including not only asylum and temporary protection for persons who make it on their own to a safe and stable country, but also a host of measures targeted at persons still in the country or region of conflict or persecution. These included, in Arthur’s fine summary, “humanitarian evacuation, humanitarian transfer, resettlement, in-country protection and processing, safe areas, security zones, regional safe havens, humanitarian corridors, orderly departure programmes, protecting and assisting internally displaced persons, voluntary repatriation, and safe/imposed return.” Responding to human displacement, he emphasized, “is a task of humanitarian management, involving a clear-eyed assessment of the problem and the needs of the uprooted, as well as the varied interests of states and the realistic possibilities for reform.”<sup>3</sup>

In early 2003 the Department of State asked me to take a detailed look at several important

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<sup>1</sup> Warner-Booker Distinguished Professor of International Law and Class of 1963 Research Professor, University of Virginia. This article is a slightly revised version of the opening sections of a lengthy report I prepared as a consultant to the U.S. Department of State, reprinted with the gracious permission of the Department. David A. Martin, *The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement* (Aug. 2004). As explained more completely in the preface to the full report, much of the information here derives from extensive interviews, undertaken on a not-for-attribution basis, which I conducted with government officials, scholars, refugees, and staff members of nongovernmental organizations (NGOs), the International Organization for Migration (IOM), and of the Office of the United Nations High Commissioner for Refugees (UNHCR), in Washington, New York, Geneva, Rome, Accra, Abidjan, and Cairo in the second half of 2003 and early 2004. Because of the not-for-attribution pledge, individual interviews are not cited as the source for particular statements, but I maintain a complete file of the interview notes and other documentation on which the statements and conclusions are based. I also want to express my profound gratitude for the candid insights provided by those interviewed, and also for the highly useful research provided by assistants who are not covered by the obligation of anonymity: Elizabeth Reilly-Hodes, Tina Tran, and Thomas Wintner.

<sup>2</sup> Arthur C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (2002).

<sup>3</sup> *Id.* at 4.

components of the policy toolbox, those that are managed under the umbrella of the U.S. refugee admissions program. That program had fallen on difficult times, and I was asked to examine the reasons therefor and to suggest changes that might help overcome the difficulties and place the program on a sound footing as it confronts the humanitarian challenges of the twenty-first century. I tried to approach the task in a spirit similar to that manifested in Arthur's book: starting with clear-eyed and politically realistic assessment of past actions and of the political and operational settings in which the program operates, ultimately aiming toward suggestions that could help shape a determined scheme of effective humanitarian management. The final report contains suggestions for changes in procedures and operations by the Department of State and the Department of Homeland Security, the two most important institutional players in the U.S. program, with some further attention to NGOs and international organizations as well. It also urges modest legislative changes that could facilitate effective operations. But the report begins, like Arthur's book, with an effort to describe the overall policy context in which resettlement must operate in this new century. That segment of the report, slightly revised, is set forth here. Readers interested in the detailed suggestions that build on this analysis of the current context for resettlement initiatives are invited to consult the full report.<sup>4</sup>

## I. Introduction

The U.S. Refugee Program is at a crossroads, and many people would say it is in crisis. The most obvious symptoms are a steep fall-off in refugee admissions for fiscal years (FY) 2002 and 2003, to below 29,000 annually.<sup>5</sup> (For a comparison, actual refugee admissions for the previous five years averaged almost 76,000. See Table I.) Because FY 2002 began 20 days after the September 11 terrorist attacks, observers often attribute the program's travails to the enhanced security measures introduced in response. Those measures played a role, but they are by no means the only source.

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4 The full report, David A. Martin, *The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement* (Aug. 2004) [hereafter cited as *Admissions Report*], may be accessed through the website of the Department's Bureau of Population, Refugees, and Migration, <http://www.state.gov/g/prm/>. It is also now available, revised and updated, in book form published in May 2005 by the Migration Policy Institute (ISBN 0-9742819-1-3).

5 Determined efforts by the offices involved in resettlement accomplished a significant increase in admissions for FY 2004, up to 52,875, according to preliminary figures. U.S. Department of State, Press Statement, *Refugee Admissions for Fiscal Year 2004*, available at <http://www.state.gov/r/pa/prs/ps/2004/36717.htm>.

**Table I**  
**Refugee Admissions and Ceilings, FY 1980 – 2004**

<b>FY</b>	<b>Actual Admissions</b>	<b>Original Ceiling</b>	<b>Revised Ceiling</b>	<b>%</b>
<b>1980</b>	207,116	231,700		89%
<b>1981</b>	159,252	217,000		73%
<b>1982</b>	98,096	140,000		70%
<b>1983</b>	61,218	90,000		68%
<b>1984</b>	70,393	72,000		98%
<b>1985</b>	67,704	70,000		97%
<b>1986</b>	62,146	67,000		93%
<b>1987</b>	64,528	70,000		92%
<b>1988</b>	76,483	72,500	87,500	87%
<b>1989</b>	107,070	94,000	116,500	92%
<b>1990</b>	122,066	125,000		98%
<b>1991</b>	113,389	131,000		87%
<b>1992</b>	132,531	142,000		93%
<b>1993</b>	119,448	132,000		90%
<b>1994</b>	112,981	121,000		93%
<b>1995</b>	99,974	112,000		89%
<b>1996</b>	76,403	90,000		85%
<b>1997</b>	70,488	78,000		90%
<b>1998</b>	77,080	83,000		93%
<b>1999</b>	85,525	78,000	91,000	94%
<b>2000</b>	73,147	90,000		81%
<b>2001</b>	69,304	80,000		87%
<b>2002</b>	27,110	70,000		39%
<b>2003</b>	28,422	70,000		41%
<b>2004</b>	52,875	70,000		76%
<b>Total*</b>	2,235,249		2,646,700	84%

\* Ceiling total includes final ceilings for each year, after revision where applicable.

Source: Bureau of Population, Refugees, and Migration, June, Oct. 2004

In fact, FY 2002 brought the United States to the end of several familiar elements of past refugee programs, placing us into a significantly new context for U.S. refugee resettlement – a difficult transition whose dimensions were obscured by the September 11 responses. Largely gone are the massive, steady, and more predictably manageable programs that had dominated U.S.

admissions since the passage of the Refugee Act of 1980 – the Indochinese and Soviet programs, followed for a few years by programs for those fleeing the former Yugoslavia.<sup>6</sup> We are in a distinctively new era for refugee resettlement, and we need to recognize the true dimensions of the change. The new era brings both disadvantages and important new opportunities for the program to reflect on its core objectives and to respond to a wider range of genuine refugee needs.

For the future, refugee admissions will be characterized by the combination of many smaller-scale resettlement programs, mostly originating in difficult locations that will shift from year to year, each presenting significant and distinct policy challenges. The challenges consist not only of processing and logistics, though these are substantial, especially in an era of heightened security concerns. They consist also, and more importantly, of the complicated steps required to achieve agreement among the relevant U.S. government – and often international – players on the groups and individuals that should be the beneficiaries of resettlement. A sensible system that does not make it too hard to say yes to new priority categories for resettlement is absolutely essential to our post-Cold-War refugee admissions program. Without the capacity to approve new resettlement initiatives nimbly, even expansive gains in operations, including in the security screening system, will not achieve significantly improved admissions. Without that capacity, we will also be unable to capitalize on the genuine humanitarian opportunities that this new era presents. The refugee resettlement system must evolve in response to this distinctly new climate, in both outlook and operations. What follows in this article is a more complete description of the constraints, obstacles, and barriers facing resettlement in the twenty-first century.

## II. The New Context for Resettlement

Critique of the past two years' admissions performance often takes this form: "There are 14 million refugees in the world. Why can't they find 70,000 to admit?"<sup>1</sup> To many it seems an obvious question, and its unspoken premise suggests a lack of will, lack of effort, or outright resistance to a vigorous resettlement program on the part of those running the system. The question is well worth asking, but the underlying premise is not fair to the dedicated individuals who work in the various offices responsible for pieces of the admissions system or to the real dilemmas that must be faced honestly in making decisions to resettle. There are often good reasons *not* to resettle particular populations, or at least to defer any resettlement until other possible responses to the situation have been fully explored and allowed to develop. Moreover,

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<sup>6</sup> See Refugee Reports, Dec. 31, 2001, at 10-11 (tables showing U.S. refugee admissions by region, FY 1988-2001); *id.*, Dec. 18, 1987 (same for FY 1975-87). Those data show a total of 573,649 refugee admissions from the Soviet Union/Formal Soviet Union during that period, 1975-2001, and 1,274,630 from Asia/East Asia (almost all of whom were from Vietnam, Cambodia, or Laos), out of a total of 2,445,767 global refugee admissions during those years. Together these two components therefore accounted for 75% of U.S. refugee admissions. The data also include significant numbers of refugee admissions from the former Yugoslavia, dating from 1993 onward, a time when the two previous mainstay programs were declining. From FY 1993 through 2001, the United States admitted 160,194 refugees designated as being from Bosnia, Croatia, or Yugoslavia.

<sup>1</sup>See, e.g., Empty Seats in a Lifeboat: Are There Problems with the U.S. Refugee Program?, Hearing Before the Subcomm. on Immigration, S. Comm. on the Judiciary, 107th Cong. 22 (Feb. 12, 2002) (statement of Lenny Glickman, Chairman, Refugee Council USA). Glickman's numerical reference is to the ceiling established by the President for refugee admissions in FY 2002. See Table I.

even when a preliminary decision to resettle a particular group is made, actual movements may be delayed for lengthy periods because of difficulties in securing the cooperation of the host country or other key international actors, or as a result of unforeseen political complications or simple bad luck. Many of these factors – combined with the historical reality that we now lack a large and steady anchor resettlement program from a particular region that can be counted on to bring tens of thousands as part of an established pipeline – helped to account for the low admissions totals in FY 2002 and 2003.

Critics of the U.S. Refugee Program’s recent performance often underestimate or obscure these challenges, while government officials take exception to critiques that do not do justice to the constraints under which they labor. In fact, refugee migrations and refugee resettlement represent highly complex phenomena. Refugee admissions cannot be based solely on any single-factored analysis. Instead, resettlement decisions must take careful account of the inherent dynamics of refugee situations, which vary greatly from place to place. A candid and rigorous look at those challenges is not antithetical to the vital humanitarian aims of refugee resettlement; in fact, it is necessary in order for the program to serve those aims more effectively. Nonetheless, to acknowledge these points – to be more judicious in giving them their due weight – does not require surrendering to them. Reasons not to resettle a particular population may be legitimate, but they are rarely decisive. A major flaw in the current system is the lack of an institutional framework that consistently brings to bear the good reasons *in favor of resettlement*, at least for specific and carefully chosen groups, so that balanced and sensible choices can be reached to produce a U.S. Refugee Program (USRP) on the scale made possible by the President at the beginning of the fiscal year.<sup>7</sup>

#### ***A. Pull factors, migration choices, and host country considerations***

Decisions to resettle have political impact, arousing political support and political resistance, both domestic and international, that must be worked through before deciding whether, and if so exactly whom, to resettle. A key feature is this: *The refugee populations that make up the generally used estimate of 12-14 million refugees worldwide are not a static pool* that can simply be dipped into to ladle out however many the United States or other resettlement countries might want to admit. The act of resettling, even the act of openly discussing a major resettlement program, affects both future migration and the attitudes and actions of existing camp populations. It can affect the politics in the country of origin as well as the country of asylum, and it can have unintended consequences in discouraging other – and sometimes superior – durable solutions (voluntary repatriation or local integration in the current country of asylum). Effective resettlement must take into account each of these elements, realistically and tough-mindedly.

Refugees are not a breed apart. Nearly all have had prior settled lives, often thriving existences – as farmers, merchants, herders, teachers, businesspeople, students, government officials. They are not just the passive objects of domestic or international policy – the helpless or inert victims – often portrayed in the media. They are subjects, persons with objectives and life-

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<sup>7</sup> U.S. refugee admissions are authorized pursuant to a Presidential Determination issued at the beginning of each fiscal year, setting the total spaces to be made available and allocating those spaces by region or country. Immigration and Nationality Act (INA) § 207, 8 U.S.C. § 1157 (2000). See, e.g., Presidential Determination No. 2004-06, 68 Fed. Reg. 63979 (2003) (setting admission levels for FY 2004).

plans and the capacity to take action to better their own lot if given a reasonable chance. Most never expected to find themselves tagged with the label of refugee, and most find the restrictions and boredom that are characteristic even of a well-run refugee camp stifling and diminishing.

Although we often speak of refugees as having been driven from their homes, in fact the exit decision is rarely so stark. Short of truly desperate emergency evacuations, refugees exercise choice over whether and when to leave and, to some extent, where to go.<sup>8</sup> Moreover, the escalation of dangers is often gradual. Conditions deteriorate in the home country, economically, politically, militarily, or a combination. At some point the conditions – threats, persecution visited on associates, ethnic conflict, the depredations and dangers of a civil war – reach a point that an individual or a family or a clan or a village decides to pick up and leave. They may head for another part of their own country, becoming internally displaced persons, or they may cross an international border, definitionally a key element in their being counted as refugees.<sup>9</sup> But in most such situations, even when the dangers are great or the persecution widespread, others choose to remain behind – based on courage, optimism, foolhardiness, misinformation, patriotism, inertia, or simple devotion to their own home or farm or village.

Where refugees go and when they leave their country of origin is influenced by their understanding of what awaits them in the destination – measured against the dangers if they remain at home. This dynamic is the source of one of the major complications in resettlement decisions. Dangers in the home country are always matters of degree. Many choose to stay in familiar territory and cope with risks, even severe risks – particularly if life across the border appears to offer little prospect for a meaningful existence for oneself and one’s children. But if that cross-border picture changes because the chance for resettlement out of the camps to a prosperous and stable country is introduced, the dynamic is altered. If the resettlement offer is perceived as open-ended, then the potential refugee’s calculus for departure can be significantly influenced. Resettlement offers therefore can create a magnet effect – what the Office of the UN High Commissioner for Refugees (UNHCR) often calls a “pull factor.” Carelessly managed resettlement, even on a large scale, may actually wind up increasing the size of camp populations in the first-asylum country, if out-migration fails to keep pace with new arrivals drawn largely by chances for resettlement. To say this is not to disparage the real dangers that propel refugee movements. It is simply to recognize that human beings often choose to put up with dangers. Refugee flight is rarely a clear-cut decision, and refugees consider more than just the condition of their home territory when deciding whether to leave.

Host countries are certainly aware of these effects. They, or at least certain key factions within the host government, such as the military, may resist the beginnings of a U.S. resettlement

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<sup>8</sup> See David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1275-79 (1990).

<sup>9</sup> The most widely used definition of “refugee” derives from article 1 of the Convention relating to the Status of Refugees, *done* July 28, 1951, 189 U.N.T.S. 137, as modified by the Protocol relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. It centrally defines a refugee as a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, *is outside the country of his nationality* and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” (Emphasis added.) U.S. law employs a largely identical definition. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2000).

program from their country, precisely because of fears about the potential for new migration – migration that otherwise would be deterred by knowledge of the conditions of camp life. (Host countries sometimes keep those conditions stark in order to discourage additional movements.) U.S. ambassadors too may be acutely sensitive to such concerns or factions within the host government, and they may weigh in with this viewpoint forcefully early in the internal U.S. government process for considering new resettlement initiatives.

In the large refugee programs of the past, for reasons specific to each, the magnet effect was of more limited concern, at least during crucial stages. In Indochina, the United States felt a sufficient historical responsibility for the persons fleeing Vietnam that early moves (from 1975 through the mid-1980s) were essentially premised on the idea that this country and its international partners would find room for all who escaped.<sup>3</sup> When the numbers leaving Vietnam moved upward in the late 1980s after an earlier decline, however, the international community became more openly concerned about pull factors. In response, the Comprehensive Plan of Action, adopted in 1989, introduced a screening process, coupled with potential returns, that was meant to reduce further outflows.<sup>4</sup> With the Soviet program, a similar Cold War dynamic undergirded a broad welcome for virtually all who could manage to leave.<sup>5</sup> Significantly, in that context, any magnet effect was counterbalanced by the continuing presence of Soviet exit controls, which in fact generally kept outmigration to levels that the United States and other transit or resettlement countries considered manageable. When the Soviet Union disbanded, some observers predicted huge new outflows, especially to Europe.<sup>10</sup> Had they occurred, resettlement programs would probably have had to adjust in response. But flows on that scale did not materialize, and the continuing U.S. resettlement program from the former Soviet Union experienced a significant decline during the succeeding decade, despite especially generous eligibility standards introduced by the Lautenberg Amendment in 1989.<sup>6</sup>

As that experience indicates, predictions about pull factors are not an exact science. But any responsible system must factor the risk of a magnet effect into resettlement decisions – an effect that may be more easily triggered today, given the development of instantaneous global

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<sup>3</sup>See Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door 1945-Present*, at 138-46 (1986).

<sup>4</sup>See Sten A. Bronée, *The History of the Comprehensive Plan of Action*, 5 *Int'l J. Refugee L.* 534 (1993); Yen Tran, *Comment, The Closing of the Saga of the Vietnamese Asylum Seekers: The Implications on International Refugees and Human Rights Laws*, 17 *Hous. J. Int'l L.* 463 (1995). See also 1 *Int'l J. Refugee L.* 574 (1989) (text of the Comprehensive Plan of Action).

<sup>5</sup>Julia Vadala Taft, David S. North, & David A. Ford, *Refugee Resettlement in the U.S.: Time for a New Focus* 94 (New TransCentury Foundation Report 1979), reprinted in Congressional Research Service, *Review of U.S. Refugee Resettlement Programs and Policies* 114, 217 (Comm. Print, Sen. Comm. on the Judiciary, 96th Cong., 2d Sess. 1980).

<sup>10</sup> See, e.g., Johanna Suurpää and Jonas Widgren, *Can Displacements from Russia to the West be avoided?: A study on the possibility of increased migration co-operation with Russia* (working paper of the ICMPD, Vienna 1995).

<sup>6</sup>Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. No. 101-167, Title V, § 599D, 103 Stat. 1195, 1261 (1989), as amended, 8 U.S.C. § 1157 Note (2000).

communications. Moreover, it can certainly be expected that host governments, as well as U.S. ambassadors and the State Department's regional bureaus, among others, will upon occasion press this consideration during debates over new resettlement initiatives. Obviously, in the absence of host government support or at least acquiescence, resettlement processing cannot take place. This element of resettlement decisionmaking is sometimes downplayed or overlooked by critics, believing that U.S. pressure or inducements can always overcome such resistance. That view is an exaggeration. U.S. officials wishing to launch a resettlement initiative often find host governments quite entrenched on such issues, particularly if the latter believe that resettlement will trigger an increased inflow or that the international community's support will wane after an initial enthusiasm, leaving them with sole responsibility for an expanded population.

Nonetheless, several deliberate tools can be used to minimize the magnet effect. Prominently mentioned during interviews for this study project was a strategy of focusing resettlement initiatives on well-defined groups whose boundaries are clearly marked – so that persons contemplating new cross-border migration understand that they simply will not qualify. These observers also counseled withholding publicity about such a plan, most of the time, until the basic selection or access groundwork is nearly complete. The wave of the resettlement future is probably what some persons interviewed for this project called “finite groups.”

### ***B. Effects on other possible durable solutions***

Resettlement also has an impact on the decisions of existing camp populations. Voluntary repatriation is usually considered the most desirable of the three main durable solutions for refugee crises (the others being resettlement or local integration in the first-asylum country).<sup>11</sup> Over the past 15 years, international action has helped broker the settlement of many long-standing civil wars, permitting wide-scale returns. Other international initiatives during this period, including the increasing use of humanitarian military intervention, have helped to remove abusive regimes from power, allowing the regime's past targets to repatriate in relative safety.<sup>7</sup> Successful repatriation has reached a surprising and gratifying level that few might have expected in 1990, and resettlement should not serve to discourage or hamper such outcomes.

Repatriation often requires careful negotiations involving the host country, the source country, and various international actors, importantly including the UNHCR, and it must take account of reactions by the refugees and their leaders.<sup>8</sup> Initiatives to this end may be skewed or complicated if a resettlement country introduces an offer of resettlement for camp populations at

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<sup>11</sup> See UNHCR, *Agenda for Protection* 74 (3d ed. Oct. 2003).

<sup>7</sup> See, e.g., Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* 145-281 (1996); Sadako Ogata, *Humanitarian Responses to International Emergencies*, in *Peacemaking and Peacekeeping for the New Century* 215 (Olara O. Otunnu & Michael W. Doyle eds., 1998).

<sup>8</sup> See *Voluntary Repatriation*, UN Doc. EC/GC/02/5, paras. 1-13 (April 25, 2002) (document prepared for 4th Meeting of the Global Consultations on International Protection), reprinted in *22/2-3 Refugee Survey Quarterly* 225-28 (2003). See generally UNHCR *Handbook – Voluntary Repatriation: International Protection* (1996), available at <[www.unhcr.ch](http://www.unhcr.ch)>.

an inopportune moment.<sup>9</sup> Similarly, negotiations to achieve agreement on local integration could be disrupted if resettlement elsewhere is suddenly on offer. UNHCR has on several occasions counseled against resettlement for given populations that otherwise might seem eligible for U.S. resettlement, precisely because the Office believes that negotiations might soon open the way for voluntary repatriation – or indeed for local integration. Of course, such predictions are themselves always open to debate, and they can sometimes be employed simply to avoid taking a fresh look at a wider range of possible solutions. But they cannot be simply dismissed. Moreover, UNHCR opposition to resettlement can prove a substantial obstacle to the launching and administration of a successful initiative, because of the crucial role UNHCR often plays in managing refugee camps.

### *C. Other political effects, including equity concerns*

Some refugee situations do not lend themselves to resettlement for other reasons. Possibly the largest single group among the conventional total of 12-14 million refugees worldwide consists of an estimated three million Palestinians.<sup>10</sup> The politics of both the host countries and the United States have precluded any significant U.S. resettlement program for Palestinians.

Other populations, though lacking the same political obstacles, may present other difficulties. For example, the scale may simply be so large that resettlement could never conceivably produce a durable solution for more than a tiny proportion of the population. This was the judgment for many decades regarding Afghans displaced to nearby countries, whose ranks once numbered as many as six million refugees.<sup>11</sup> Viable resettlement must then be based on a transparent selection principle that both is logistically manageable and avoids creating tensions in the relations among various subgroups that will remain in the camp population (or at least minimizes such tensions). Family or other close ties to the United States could provide a basis for selection, or length of stay in the camps. Still, determining those features is often difficult, particularly if the chaos of flight or the disorder of camp governance has prevented the maintenance of reasonable civil records (births, deaths and marriages), or in the absence of a reliable registration system that can be used to demonstrate the length of a refugee's stay. And if the selection grounds are not clear or easily determined, the risk of a pull factor rises.

Some such selection criteria can be challenged on equity grounds: is it really fair to resettle, say, the few who have made their way to a more easily accessible processing site, while ignoring others who face more severe dangers in other locations? On the other hand, the equity concern has sometimes been significantly overplayed in debates over U.S. resettlement. Taken to its extreme, it would bar virtually any resettlement unless all who are similarly (or more severely) threatened

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<sup>9</sup>Resettlement possibilities, of course, are not to be wholly excluded in these circumstances. Sometimes a modest opening for distant resettlement of “residual populations,” for example, can provide a critical ingredient enabling agreement on repatriation by a host government and the government of the source country. (The term refers to a small percentage of the displaced population who for some reason are unlikely to find a safe place in the repatriation program – for example, families that derive from ethnically mixed marriages.)

<sup>10</sup>See U.S. Committee for Refugees, World Refugee Survey 2003, at 6 (Table 5).

<sup>11</sup>UNHCR, The State of the World's Refugees: Fifty Years of Humanitarian Action 119 (2000).

can be included – a virtually impossible standard to meet. The inability to respond to all need of a certain kind or magnitude is not a valid argument against responding to any part of the need. The humanitarian premises of the admissions program call for response when possible, even when it is messy and incomplete, and even when accompanied by genuine anxiety over the inability to offer a solution to others.

#### ***D. Fraud, distortion, and corruption***

In any selective system, fraud is an inescapable problem. After all, resettlement usually represents major gains in life prospects, often well beyond even what the nondisplaced local population living near the refugees could ever reasonably expect. Hence the temptation is great. Out of desperation or manipulation, or based on the coaching of an entrepreneur collecting a fee for such advice, applicants for resettlement may tailor their stories to fit what they understand to be the requirements of the program (often called the “camp story” problem) – as a great many persons interviewed for this study took pains to emphasize.<sup>12</sup> Importantly, these warnings about the likelihood of fraud in connection with a resettlement program were heard at least as much and as vehemently from humanitarian workers as they were from persons with enforcement roles.

It is probably true that this problem has worsened in recent years. With the expanded reach of criminal enterprises, including human traffickers, and with improved global communications,<sup>13</sup> anecdotal evidence suggests that organized fraud crops up earlier and in more sophisticated forms in refugee situations. For this reason, several persons interviewed for this project emphasized the need for what some called a “stealth approach” to resettlement. That is, preliminary work that will

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<sup>12</sup>An account of the tangled process of resettling Somali Bantu refugees from Kenya (initially from a large camp in Dadaab), published in the U.S. Committee for Refugees’ monthly periodical *Refugee Reports*, aptly captures this dynamic:

Going to America is the holy grail of refugee life. People will cajole, bribe, threaten and kill for the opportunity. Dadaab’s other desperate refugees are angry that they have been neglected in this [Somali Bantu] resettlement process. People have been devising schemes and strategies to access the program. When the resettlement interviews began, urban refugees from Nairobi arrived in droves, looking for opportunities to buy ration cards from people scheduled for an interview. . . .

All the interviewing officers were struck by the naivete of the Bantus [when UNHCR verification interviews began]. The majority had never been exposed to resettlement in a way that would influence their stories and responses. In Nairobi, urban refugees pay for coaching lessons before resettlement interviews. They often present stock stories and rehearsed responses, and there is never an empty slot in a family. If a real family member has passed away or is not present at the time of interview, that slot can be sold for as much as \$5,000. The Bantus [in contrast] spoke honestly about the people who had passed away or left Dadaab.

Sasha Chanoff, *After Three Years: Somali Bantus Prepare to Come to America*, *Refugee Reports*, Nov. 2002, at 1, 3-4.

<sup>13</sup>See generally Rey Koslowski, *Economic Globalization, Human Smuggling, and Global Governance*, in *Global Human Smuggling: Comparative Perspectives* 337 (David Kyle & Rey Koslowski eds., 2001).

fix or record key individual characteristics or histories – such as detailed questioning as part of camp registration or a UNHCR population verification exercise – should be completed to the greatest possible extent well before any public mention of a possible resettlement initiative. At such an early time, the interviewer is far more likely to obtain a full and candid picture of the person's true situation, undistorted by his guesses about what will maximize chances for resettlement (or by the coaching of a third party).<sup>12</sup> Such secrecy is difficult to achieve, however, because complex programs necessarily require the early and sustained involvement of a great many players from governmental, international, and nongovernmental ranks.

Another, related form of distortion is also possible, particularly if the priorities for resettlement are not well-conceived. For example, I heard concerns expressed that some of UNHCR's traditional categories for resettlement referrals, especially the category for "women at risk,"<sup>13</sup> can become self-fulfilling. When it becomes known that resettlement is possible on this ground, families may separate to enable the woman to win a referral for herself and the children – and perhaps be able to bring the husband later. Further, some women successfully heading households in a refugee settlement may begin to portray their situations in a sharply different light, or even expose themselves to greater dangers, so as to try to come within the category. This potential distortion deserves closer attention, and it may well be that more carefully described or context-specific categories could achieve much of the objective without inducing such manipulation.

The temptations in this field have also sometimes resulted in damaging corruption or manipulation on the part of certain UNHCR officials or others in a responsible role, who find they can extract large bribes or other personal favors for moving certain cases to the head of the resettlement line.<sup>14</sup> On occasion, as happened in Nairobi in 2000, resettlement was suspended until UNHCR fully dealt with the issue. It is important to note that UNHCR has taken serious steps in response, and is working to implement genuine checks and balances to counter corruption in new management and registration systems.<sup>14</sup>

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<sup>12</sup> UNHCR has launched an impressive project to standardize and improve registration practices, as part of its Project Profile. See Executive Committee of the High Commissioner's Programme, Conclusion No. 91 (2001); Practical Aspects of Physical and Legal Protection with Regard to Registration, UN Doc EC/GC/01/6\* (19 Feb. 2001) (document submitted in connection with the Global Consultations on International Protection), reprinted in 22/2-3 Refugee Survey Quarterly 70 (2003). One of the early advances produced in connection with Project Profile is the UNHCR Handbook for Registration: Procedures and Standards for Registration, Population Data Management and Documentation (provisional release, September 2003), available on the UNHCR website <[www.unhcr.ch](http://www.unhcr.ch)>.

<sup>13</sup> See UNHCR Division of International Protection, Resettlement Handbook, Section 4.5 (July 2002), available at the UNHCR website, <[www.unhcr.ch](http://www.unhcr.ch)>.

<sup>14</sup> See Report of the Office of Internal Oversight Services on the investigations into allegations of refugee smuggling at the Nairobi Branch Office of the United Nations High Commissioner for Refugees, UN Doc. A/56/733 (Annex) (21 Dec. 2001). Another incident involved the former UNHCR representative based in Accra – leading to a reorganization of that office and a thorough revision of its procedures. Joanne van Selm, Tamara Woroby, Erin Patrick, & Monica Matts, Feasibility of Resettlement in the European Union 12 (Migration Policy Institute 2003), available at [http://www.migrationpolicy.org/pubs/resettlement-study-full\\_2003\\_en.pdf](http://www.migrationpolicy.org/pubs/resettlement-study-full_2003_en.pdf).

<sup>14</sup> See Strengthening and Expanding Resettlement Today: Dilemmas, Challenges and

Some programs, particularly family-based resettlement programs in West Africa, have been marred by a high level of fraudulent claims. But U.S. government initiatives over the last two years, many developed in close coordination with refugee NGOs, have provided important new tools to detect and deter fraud.<sup>15</sup> Continued vigilance is necessary, but measures are available to address these problems, and the agencies involved are capable of refining their techniques as needed. The system must remain closely attentive to fraud and corruption at each stage, but these risks should be addressed directly, rather than be used as a basis for diminishing U.S. response.

### *E. Definitional issues*

A further factor complicates efforts to agree on which refugees to resettle out of a conventionally counted world total of 12-14 million. The popular conception of refugee differs from the legal definition governing U.S. refugee admissions. That legal definition, based on the 1951 UN Convention relating to the Status of Refugees,<sup>15</sup> defines a refugee as a person who is outside his or her country of origin owing to a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” When applied with precision (as it is in the U.S. asylum program, which is administered solely in U.S. territory), the definition requires a rather specific showing that the person, or a group with which he or she is identified, is likely to be targeted for persecution on the basis of one of the five grounds. Civil war and domestic disturbances, without more, do not provide a basis for meeting the Convention refugee definition. Those who flee even intense fighting are not covered, unless the combatants had one of the stated reasons for targeting the individual or group that has fled.<sup>16</sup> Even though the definition is usually applied with a somewhat more generous approach in the overseas refugee program than for purposes of asylum, overseas officers still must find a sound basis in the information provided during the interview, or in other circumstances affecting the applicant, for making the legally required findings.

Some persons readily labeled refugees by the press and public cannot make this showing. That is, the popular conception of “refugee” is more expansive than the legal definition. Quite understandably, the popular view tends to include anyone who has crossed a border because of real dangers in the home country, whatever their precise nature. Those who have fled civil war are routinely called refugees, and flight from a country where persecution goes on, without any close attention to whether the individual can show good reason why he or she is likely to be targeted (much less whether the harm would be based on one of the five Convention grounds), can also

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Opportunities, UN Doc. EC/GC/02/7, para. 17 (25 Apr. 2002) (document prepared for 4th Meeting of the Global Consultations), reprinted in 22/2-3 Refugee Survey Quarterly 249, 254 (2003); UNHCR Resettlement Handbook, especially the revised Chapters 5 and 7 (July 2002). Other reforms implemented at that time are listed in UNHCR Receives Report on Nairobi Investigation (UNHCR press release, 25 Jan 2002), available at <[www.unhcr.ch](http://www.unhcr.ch)>.

<sup>15</sup> See Admissions Report, *supra* note \_\_, at 85-90.

<sup>15</sup> See note \_\_ *supra*.

<sup>16</sup> See Thomas Alexander Aleinikoff, David A. Martin & Hiroshi Motomura, *Immigration and Citizenship: Process and Policy* 796-805 (5th ed. 2003).

result in popular application of the label. Moreover, in many circumstances, broader legal definitions than the one enshrined in U.S. law are employed. For example, the Organization of African Unity's treaty on refugees embraces both the UN Convention refugee definition and also those who have been compelled to leave their homes and cross a border "owing to external aggression, occupation, foreign domination or events seriously disturbing public order."<sup>16</sup> UNHCR uses this latter definition as the basis for much of its work in Africa. It is also authorized, in some settings, to use group-wide "prima facie determinations" of refugee status as the basis for its involvement, particularly to provide assistance to displaced individuals. And for certain purposes, other UN legal instruments also bring populations that do not meet the Convention refugee definition within the UNHCR's mandate.<sup>17</sup> In each case, there are good reasons, founded in an overall assessment of genuine dangers, for treating the group as refugees, particularly for purposes of generating broad and urgent international action to feed and shelter the displaced and to provide them elementary protection. The usual estimates of global refugee populations (including the most widely used current estimates of 12-14 million) employ the broader definitions, at least for some regions.<sup>17</sup>

The law governing U.S. admissions provisions does not incorporate these wider conceptions, however, even when they have been the basis for international assistance in which the U.S. generously participates. (This report later argues for a statutory amendment that would expand eligibility for U.S. refugee admissions in a carefully structured manner.<sup>18</sup>) Criticism of U.S. admissions performance sometimes overlooks these constraints. Planners cannot uncritically use these global totals in choosing groups to process for U.S. resettlement, but instead must be sensitive to the legal constraints that ultimately govern decisions by the interviewing officers deployed by the Department of Homeland Security (DHS).

### ***F. Complexity and luck***

Even when a decision is made to resettle a particular group, the actual movement to the United States may be delayed by months or years, owing to operational factors that are not wholly under the control of U.S. government officers. The refugee resettlement machinery is highly

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<sup>16</sup>Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 1, entered into force June 20, 1974, 1001 U.N.T.S. 45.

<sup>17</sup>See David A. Martin, *Refugees and Migration*, in *The United Nations and International Law* 155, 159-62 (Christopher C. Joyner ed., 1997).

<sup>17</sup> See UNHCR, *Statistical Yearbook 2002: Trends in Displacement, Protection, and Solutions* at 14-15 (July 2004) (discussing the different categories included in UNHCR data, which can vary by region). Even controlling for shifting definitions of refugees would leave significant doubts about conventional refugee counts in many circumstances. See U.S. Committee for Refugees, *World Refugee Survey 2002*, at 1 (explanatory note to Refugee Statistics section, mentioning limitations on refugee statistics, including concerns about host government incentives to inflate counts, that can make the totals "inexact and controversial").

<sup>18</sup> See Admissions Report, *supra* note \_\_\_, at 186-98.

complex, and dozens of pieces must line up successfully before resettlement takes place.<sup>19</sup> If one piece is knocked out, a host of other good work to promote resettlement may produce no concrete results – and may then go totally unnoticed by critics. At the very least, time will be lost while that one piece is brought back into alignment. For example, just when the Department of State's Bureau of Population, Refugees, and Migration (PRM) expected to move significant numbers of approved refugees from Nairobi toward the end of FY 2003, the Kenyan government suddenly and unexpectedly announced that all departures would require approved exit permits, which virtually none of the persons in Nairobi awaiting travel to the United States possessed. (Further negotiations succeeded in overcoming much of the problem, but movements were impaired for a brief time.) On other occasions, populations that had undergone most of the pre-interview processing could not receive final Immigration and Naturalization Service (INS) or DHS review because sudden deterioration in the security situation at the interview site resulted in canceling or postponing a circuit ride.

Often the program cannot simply pick up where it left off once the immediate problem is overcome. Delay often requires redoing certain laborious steps in the process, because fingerprints and other security clearances, for example, as well as medical clearances, are valid only for a limited period – usually for six or 12 months. The various delays and complications that arose with new procedures adopted in late 2001 have frequently necessitated new clearances of this sort before actual movements could resume. That the resettlement pipeline has functioned relatively smoothly over most of the life of the U.S. resettlement program is a testament to the government officials and NGOs, along with UNHCR and IOM personnel, who play the key roles and are often quite resourceful in coping with sudden complications. But the effects of the program's unavoidable complexity, which has compounded since September 11, 2001, are sometimes overlooked by critics of recent performance.

The resettlement of the Somali Bantu provides an example of the possible difficulties, as well as the role that bad luck can play. Here the problem was not any difficulty in reaching U.S. government agreement on designating the group for priority resettlement, because some 11,000 Somali Bantu were approved as a P-2 priority group in late 1999. They were not expected to move immediately, because time was clearly needed for UNHCR to undertake a challenging verification exercise to assure the integrity of the lists that would be used for access to U.S. interviews. As it happened, it took until December 2001 to complete that exercise. Meantime PRM decided it had to move the Somali Bantu to another camp in Kenya, because processing in the original camp was too dangerous. That expensive move, a bus trip of 900 miles, was completed in the summer of 2002. It was then expected that the Somali Bantu would provide a substantial portion of the resettlement caseload at least by FY 2003, as the system worked to regain its balance in the aftermath of September 11. Owing to a striking series of complications and even natural disasters, however, interviews had to be postponed on several occasions, and movement to the United States in that period was limited to about 800. Much of that population resettled in the United States in FY 2004, although ongoing security concerns in Kenya wound up delaying the initial 2004 dispatch of DHS officers to the processing camp for interviewing. Overall admissions performance could have been some 20-30 percent higher in FY 2003 if the Somali Bantu program

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<sup>19</sup> Chapter V, Section A of the Admissions Report, *supra* note \_\_, contains a detailed description of the processing machinery.

had not encountered these difficulties.<sup>20</sup>

Fortunately, few programs have been as relentlessly beset by misfortune and delay as the Somali Bantu effort, but that history and the pitfalls it exemplifies need to be kept in mind in judging admissions performance. It also signals that the Program needs to manage the refugee pipeline in a way that can accommodate such complications and delays without losing all momentum for a robust admissions level.

### III. Toward a future of case-by-case decisions to resettle finite groups

For all these reasons, one cannot simply throw a dart at a map, even in a region marked by large refugee flows and genuine privation, and begin resettling refugees. Nor should the U.S. program be based on fixed criteria that trigger resettlement when a single factor is satisfied (such as populations who have spent more than X years in a camp, or women and children at risk of specified harm<sup>18</sup>). The factors that must be considered are inevitably complex and interconnected. Because of host-country or UNHCR resistance, desires not to torpedo chances for repatriation, difficulties of equitable and manageable selection through processes that assure integrity, definitional disconnects, and particularly concern not to induce unmanageable further migration, *choices to resettle specific groups or categories must be done carefully and case-by-case.*

This is a crucial feature of the modern refugee resettlement era. We are extremely unlikely in this new century to find the United States or any other country willing to make a virtually open-ended commitment to resettlement of virtually all who escape a designated nation – the type of commitment that prevailed for refugees from the Soviet Union and, for the first decade of the program, for Vietnamese refugee resettlement. Absent that sort of political decision, resettlement initiatives will be marked by the need to draw clear lines around the group to be admitted, so as to minimize fraud and to discourage future migration of others who might hope to be included in the resettlement. The quest will be for *finite groups*, and resettlement will work best if much solid work on identification and line-drawing can be completed before resettlement plans become known in the refugee camp or settlement.

A further caveat is in order. For almost any refugee situation, serious reasons can be presented as to why resettlement should not be pursued, or at least not now. Postponement might

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<sup>20</sup> See Sasha Chanoff, *After Three Years: Somali Bantus Prepare to Come to America*, Refugee Reports, Nov. 2002, at 1; Andrew Hopkins, Report on the UNHCR P-2 Somali Bantu Verification Exercise in Dadaab (UNHCR report, 18 Feb. 2002); Refugee Interviews to Resume in Kenya, U.S. Refugee Admission Program News, Sept 16, 2003, available at <[www.state.gov/g/prm/rls/other/24174.htm](http://www.state.gov/g/prm/rls/other/24174.htm)>. A more complete account of the history of the Somali Bantu resettlement appears in the Annex to Chapter I of the Admissions Report, *supra* note \_\_.

<sup>18</sup>A proposed “Widows and Orphans Act of 2003,” S. 1353, 108th Cong., 1st Sess. (2003), appeared to set forth such a set of fixed criteria, provided that the woman or child was referred by designated U.S., international, or nongovernmental organizations. The bill would have provided for admission as special immigrants in accordance with INA §§ 101(a)(27) and 203(b)(4), 8 U.S.C. §§ 1101(a)(27) and 1153(b)(4) (2000), but the design and operation would have made it a *de facto* refugee program. Its beneficiaries were expressly made eligible for domestic refugee assistance under INA § 412, 8 U.S.C. § 1522 (2000).

allow other solutions to the displacement to develop. If each refugee situation is viewed only in isolation, those reasons can be made to appear far more concrete and solid than the arguments in favor of resettlement. In almost any such circumstance, voices will be heard stating that the less risky course for American policy is to deny or defer any resettlement initiative.

But to note these real and important complexities is not to suggest acceptance of the current performance. All these factors may deserve attention, but they are *simply cautionary considerations, not absolute trumps that should defeat the initiation of significant refugee resettlement from given regions*. In an era that will require multiple decisions each year on resettling specific groups, the challenge is to reform the U.S. decisionmaking system, as well as certain operational practices, so that we can take better account of the positive arguments in favor of resettlement and fully deploy available measures that minimize the obstacles.

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The balance of my full report sets forth suggestions for how to achieve those ends and escape the situation that Arthur Helton so effectively diagnosed.<sup>21</sup> He saw past humanitarian action (not only in the resettlement field) as “largely a series of ad hoc responses characterized by situational frenzy.” But he believed that it was possible to achieve “more concerted proactive approaches” that might learn the lessons of the past and create a more comprehensive and effective system.<sup>22</sup> That broad objective, I was happy to learn in the course of my year-long study, is shared by those in the Departments of State and Homeland Security who gave strong support to my research. I look to their continued ingenuity and determination to accomplish the changes we need to meet refugee needs in the altered climate of the twenty-first century.

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<sup>21</sup> Admissions Report, *supra* note \_\_\_, Chaps. II-VII.

<sup>22</sup> Helton, *supra* note \_\_\_, at 271.