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Beyond the Guantanamo Bind: Pragmatic Multilateralism
in Refugee Resettlement

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BEYOND THE GUANTÁNAMO BIND: PRAGMATIC MULTILATERALISM IN REFUGEE RESETTLEMENT

Melissa J. Durkee*

I. INTRODUCTION

“One of my clients is Huzaiifa Parhat. He’s never been charged with anything. He never will be. In fact, he’s been cleared for release for years. Two weeks ago he began his seventh year at Guantánamo.”

—Sabin Willett, testifying in 2008 before the House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights and Oversight

A group of detainees remains in the detention facility at the U.S. naval station in Guantánamo Bay, Cuba (“Guantánamo”) almost a decade after the facility began to hold suspected combatants arrested in connection with the U.S. conflict in Afghanistan. As U.S. officials have acknowledged, in many cases these supposed combatants turned out to have no connection to al Qaeda or terrorism. Many were foreigners who had fled home countries to escape persecution and lived as undocumented aliens in Afghanistan or Pakistan. When the United States began its military campaign in Afghanistan and offered bounties for the arrest of terrorists, the foreigners were swept up and handed over. The United States unwittingly became the custodian of a population of refugees in

* Associate, Cleary Gottlieb Steen & Hamilton LLP. Yale Law School J.D., 2004. The Author represents a detainee who obtained release from Guantánamo and acquittal of all charges in Algeria. Conversations with other Guantánamo habeas lawyers about the subjects of this paper led to many valuable insights. Particular thanks are due to Susan Akram, Wells Dixon, Zachary Katznelson, Joseph Landau, Tanisha Massie, Christopher Moore, John Sifton, and Doris Tennant. Thanks also to Lindsay Barenz, Oona Hathaway, Catherine Hardee, Mars Saxman, and Bela August Walker for helpful comments on earlier drafts, and to Cleary Gottlieb for generous *pro bono* and research support.

Guantánamo: detainees who fear return to home states with documented histories of human rights abuses such as Algeria, Libya, Syria, China, Tajikistan, and Uzbekistan.¹

The unwitting imprisonment of refugee detainees placed the U.S. executive in a bind: It could either repatriate the detainees to home states where they would face persecution or torture—which would be illegal, morally repugnant, and politically consequential—or resettle them in the United States—which Congress has prohibited and which would ignite a political firestorm. Rather than choosing either unfortunate option, the executive has engaged in a difficult, secretive, and politically charged process through which it peddles refugee detainees for resettlement to potential host countries around the world. While the executive has been able to resettle a number of the refugee detainees, several dozen still remain at Guantánamo in early 2011, almost a decade after the detention center opened.²

This Article asserts that the U.S. approach to resettlement of Guantánamo's detainee refugees is fundamentally flawed. By exploiting loopholes to defend detention and exclude the refugee detainees from protection under domestic and international refugee law, the United States sacrifices the moral goods at the heart of those laws. Moreover, the United States undercuts its own political goals by alarming and alienating the foreign states on whose help it depends, making the approach ultimately ineffective at

1. Not all of the remaining detainees in Guantánamo are refugees. Of the 172 who remain at the time of publication, 91 have been cleared for release. Of those who have not been cleared, 34 will be tried in federal court or by military commission, 45 will not be tried but remain in limbo in Guantánamo, one is serving a life sentence, and one is awaiting sentence after accepting a plea bargain. Of the 91 cleared for release, 58 are Yemenis who cannot currently return to Yemen because the executive issued a moratorium on all transfers to Yemen after news that the attacker who attempted the 2009 Christmas Day plane bombing was recruited in Yemen. See Andy Worthington, *Introducing the Definitive List of the Remaining Prisoners in Guantánamo*, Cageprisoners, Sept. 14, 2010, <http://www.cageprisoners.com/our-work/opinion-editorial/item/560-introducing-the-definitive-list-of-the-remaining-prisoners-in-guantanamo>; *The Guantanamo Docket*, N.Y. Times, <http://projects.nytimes.com/guantanamo?scp=4&sq=guantanamo&st=cse> (last visited Mar. 9, 2011). While it is likely that the remaining 33 detainees are refugees, the exact number of refugees cannot be determined because the U.S. has not offered the detainees any procedures by which they may demonstrate refugee status. See *infra* Part III.A.1.ii. This Article addresses only those detainees who are cleared for release and who are or may be refugees.

2. See sources cited *supra* note 1.

accomplishing U.S. ends. Setting aside the question of whether the United States could be coerced or incentivized to deal with Guantánamo's refugee detainees in an ideal manner, this Article proposes a third way between full compliance with domestic and international law and the current U.S. approach. The United States should request assistance from the United Nations High Commissioner for Refugees ("UNHCR"), the organization responsible for supervising and coordinating international refugee protection under conventions to which the United States is a party.³ The Article further asserts that it is within the UNHCR's mandate to assume responsibility for resettling the refugee detainees and that UNHCR facilitation would solve many of the legal, moral, and political problems of the current U.S. approach.

UNHCR facilitation would not threaten U.S. sovereignty interests, because the UNHCR is structurally predisposed to behave deferentially to the states it assists. A UNHCR-facilitated resettlement approach would rely primarily on existing state commitments to the UNHCR rather than on U.S. political clout, smoothing and speeding the process by decoupling resettlement agreements from approval for U.S. policies. This would safeguard detainees from return to persecution or torture and facilitate quicker release, enabling the United States to honor commitments to close the detention center.

U.S. policy with respect to the Guantánamo refugees mirrors a global trend toward the erosion of international refugee law by states weary of the domestic political costs of rising asylum claims.⁴ Global preoccupation with national security has exacerbated this

3. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter Protocol]. The Protocol is an independent legal instrument that incorporates the Refugee Convention by reference. The United States is a party only to the Protocol, but has assumed Refugee Convention obligations by virtue of its accession to the Protocol. See Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 Yale L.J. 2335, 2340 (1991).

4. See, e.g., James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 Harv. Hum. Rts. J. 115, 143–44 (1997) (declaring that "international refugee law is in crisis"); Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 Am. J. Int'l L. 279, 291–92 (2000) [hereinafter *Temporary Protection*] (citing developed states' increased pressures regarding the asylum system).

trend.⁵ States avoid classes of refugee claims or sidestep specific refugee problems in the way the United States models in Guantánamo: by exploiting loopholes or evading refugee law altogether. Thus, the UNHCR-brokered solution proposed in this Article will be relevant in other contexts. This pragmatic multilateralism allows reluctant sovereigns to serve national interests while also shoring up the international refugee protection system. For contexts like Guantánamo, where states are tempted to skirt international law to avoid responsibility for a politically delicate refugee problem, a UNHCR-brokered solution will benefit the refugees and the states involved. It will also keep those states from codifying in domestic law broad exceptions to international refugee law, or narrow interpretations of it, both of which threaten to erode those international norms.⁶

Part II of this Article describes the factors at play in Guantánamo's refugee detainee problem: the identity of the detainees, U.S. resettlement policies, and the challenge of resettlement in practice. Part III critiques the current resettlement process on legal, moral, and political grounds. Part IV proposes a UNHCR-brokered resettlement process, and addresses anticipated critiques of such an approach. Part V situates this proposal in the larger debate regarding state circumvention of refugee convention requirements.

II. GUANTÁNAMO'S REFUGEE DETAINEES

The U.S. executive established the detention facility in Guantánamo Bay, Cuba in 2002 after the terrorist attacks of

5. See generally Mario-Florentino Cuellar, *The Limits of the Limits of Idealism: Rethinking American Refugee Policy in an Insecure World*, 1 Harv. L. & Pol'y Rev. 401 (2007) (criticizing this trend); Geo. Human Rights Inst., *Unintended Consequences: Refugee Victims of the War on Terror*, 37 Geo. J. Int'l L. 759 (2006) (same); see also Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 Harv. Hum. Rts. J. 107, 134 (2005) (arguing that the war on terror has inspired a fear of the "other" in asylum policies); Bemma Donkoh, *A Half-Century of International Refugee Protection: Who's Responsible, What's Ahead*, 18 Berkeley J. Int'l L. 260, 264 (2000) (discussing how concern for national security has led governments to "unleash a series of stern measures and sanctions to deter and punish any type of irregular entry").

6. See, e.g., Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 Yale L.J. 2391, 2424–25 (1994) (discussing the implications of these narrow interpretations and broad exceptions in human rights policy).

September 11th and the initiation of the U.S.-led “war on terrorism.”⁷ The facility was meant for use in detaining and interrogating enemy combatants.⁸ However, many of the Guantánamo detainees were swept up in error, arrested while fleeing the chaos after the U.S. bombing campaign in Afghanistan, or seized and turned over to U.S. forces by bounty hunters.⁹ These men had little or no information of value to U.S. intelligence, and the United States quickly began to designate them “cleared for release.”¹⁰ Many detainees have languished in Guantánamo for years after being cleared, however, waiting for the United States to make arrangements to transfer them elsewhere. One group of cleared detainees has faced a particularly long and uncertain delay: those who fear mistreatment if they are returned to their countries of citizenship. Several dozen of these “refugee detainees”¹¹ still remain in

7. See *Rasul v. Bush*, 542 U.S. 466, 466–67 (2004) (describing the history of the detention center).

8. See *id.*; Donald H. Rumsfeld, U.S. Secretary of Defense, Department of Defense News Briefing with Secretary Rumsfeld & General Pace, June 14, 2005, <http://www.defenselink.mil/transcripts/2005/tr20050614-secdef3042.html> (“The detention facility at Guantánamo Bay was established for the simple reason that the United States needed a safe and secure location to detain and interrogate enemy combatants.”).

9. See Tim Golden & Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantánamo Detainees*, N.Y. Times, June 21, 2004, at A1 (reporting on interviews with “dozens of high-level military, intelligence and law-enforcement officials in the United States, Europe and the Middle East” and stating that according to those officials “many of the accused terrorists appeared to be . . . innocent men swept up in the chaos of the war”).

10. See *id.* (reporting that according to dozens of high-level military officials, only a handful of Guantánamo detainees were able to provide intelligence to aid terrorism investigations). Note that some of the remaining detainees in Guantánamo have been charged and will face trial. Transfer issues relating to those detainees are beyond the scope of this Article, which addresses only the refugee detainees who have been cleared for release. See *infra* Part II.B.1.

11. A “refugee” is someone outside his country of citizenship, or a stateless person outside his country of habitual residence who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention, *supra* note 3, at 1(A); see also *infra* Part III.A.1.a. For purposes of this Article, the term “refugee” is used to refer both to a person who has been designated a “refugee” and a person who has not been so designated but would likely meet the definition if a refugee status determination were to be conducted. This approach is consistent with the position held by the UNHCR and international law scholars who generally understand that recognition of refugee status is declaratory, not constitutive. See UNHCR, Handbook On Procedure And Criteria For Determining Refugee Status, para. 28 (1979), available at <http://www.unhcr.org/3d58e13b4.html> [hereinafter Handbook]; Helton, *supra* note 3, at 2342–43

Guantánamo in 2011.¹²

Resettling the refugee detainees has been one of the significant obstacles to the U.S. executive's plan to close the facility.¹³ The executive has expressed a commitment not to return detainees to countries where they fear persecution or torture, but the United States will not accept any detainees for resettlement in U.S. territory.¹⁴ Third countries have been reluctant to accept them.¹⁵ In the meantime, the detainees remain imprisoned in Guantánamo without any guarantees that they will not be released back to persecution at the hands of their home states.¹⁶ For some, the prospect of such a release is worse than the prospect of remaining indefinitely in Guantánamo.¹⁷

A. Who Are They?

Many refugee detainees in Guantánamo share a common story: Long before they were taken into U.S. custody, they left their countries of citizenship due to fear of persecution.¹⁸ They traveled in search of refuge and found their way to Pakistan or Afghanistan because it was possible to make a home in those countries as

(asserting that a person claiming to flee persecution is protected by refugee law even before a receiving country grants formal refugee status).

12. Peter Finn, *Most Detainees Low-Level Fighters; Guantanamo Report Task Force Advises 126 be Transferred*, Wash. Post, May 29, 2010, at A03 [hereinafter *Low-Level Fighters*]; see also sources cited *supra* note 1.

13. Immediately after his inauguration in January 2009, President Obama signed an Executive Order announcing an intention to close the detention facility within a year. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E91893.pdf> [hereinafter Executive Order].

14. See *infra* Parts II.B.2 and II.B.3.

15. See *infra* Part II.C.

16. See Emergency Motion for Administrative Stay Pending Resolution of Petitioner's Emergency Motion of March 7, 2010, on the Merits at 2, *Belbacha v. Obama*, 706 F. Supp. 2d 120 (D.D.C. 2010) (No. 05-2349) [hereinafter *Belbacha Motion*] (stating that the government would not disclose whether it intended to transfer a detainee to a country where he fears persecution or torture).

17. See *id.*

18. See Center for Constitutional Rights, *Frequently Asked Questions: International Protection for Guantánamo Prisoners who Cannot be Safely Repatriated*, <http://ccrjustice.org/learn-more/faqs/resettlement-and-refugees-guantanamo> (last visited Mar. 9, 2011) [hereinafter Center for Constitutional Rights, FAQs].

foreigners without obtaining official papers.¹⁹ Then, when the United States began its military campaign in Afghanistan, it offered large bounties to anyone who could hand over “anyone suspected of having ties to al-Qaida.”²⁰ Many of the people arrested and turned over to the United States were foreigners to Pakistan or Afghanistan who, as the CIA has acknowledged, were simply “in the wrong place at the wrong time.”²¹

The Uighurs are perhaps the most famous of Guantánamo’s refugee-detainees. The Uighurs are a group of Chinese citizens who are members of a Turkic Muslim minority from the Xinjiang province in far west China.²² Sometime before September 11, 2001, the Uighurs left China and traveled to the Tora Bora Mountains in Afghanistan, where they settled in a camp with others of their ethnic group.²³ The Uighurs then fled to Pakistan when U.S. aerial strikes destroyed the Tora Bora camp.²⁴ Arab travelers promised to take them to a safe house in Pakistan, but instead turned them over to

19. See Interview with Mustafa Ahmed Hamlily, Algerian Detainee, in Guantánamo Bay, Cuba (Sept. 8, 2007) (on file with Author) [hereinafter Hamlily Interview] (recounting how Hamlily and several family members fled Algeria in 1989 to escape persecution by the Algerian government in Algeria and, after unsuccessfully attempting to obtain residency in Saudi Arabia and Yemen, finally made a home near Peshawar, Pakistan because it was possible to reside in the region in relative peace without official identity papers); see also Center for Constitutional Rights, FAQs, *supra* note 18.

20. See Hamlily Interview, *supra* note 19; see also Center for Constitutional Rights, FAQs, *supra* note 18 (reporting that 86 percent of the detainees at Guantánamo were turned over to the United States by individuals in Pakistan or Afghanistan at a time when the United States was offering a considerable bounty for the handover of anyone suspected of connection with al-Qaida or terrorism). The United States distributed leaflets promising “wealth and power beyond your dreams,” and “millions of dollars for helping the anti-Taliban force catch al-Qaida and Taliban murderers.” *Id.* The pamphlets promised that the bounties would be “enough money to take care of your family, your village, your tribe for the rest of your life.” *Id.*

21. Golden & Van Natta, *supra* note 9; see also City on the Hill or Prison on the Bay? The Mistakes of Guantánamo and the Decline of America’s Image, Part II Before the Subcomm. on Int’l Org., Human Rights and Oversight of the H. Comm. on Foreign Affairs, 110th Cong. 1 (2008) (testimony of Sabin Willett, Partner, Bingham McCutchen LLP) (stating that interrogators informed his client soon after he arrived at Guantánamo that his capture was a mistake); Hamlily Interview, *supra* note 19 (reporting that Hamlily’s interrogators told him that his arrest was by mistake and that he should be released).

22. See *Parhat v. Gates*, 532 F.3d 834, 837 (D.C. Cir. 2008); see also *Kiyemba v. Obama*, 555 F.3d 1022, 1024 (D.C. Cir. 2009).

23. See *Parhat*, 532 F.3d at 837; see also *Kiyemba*, 555 F.3d at 1024.

24. See *Parhat*, 532 F.3d at 837–38.

Pakistani authorities who, in turn, handed them over to the United States, reportedly for large bounties.²⁵ Eventually they were transferred to Guantánamo and detained as enemy combatants.²⁶

Evidence produced at hearings in Guantánamo indicated that at least some Uighurs intended to fight the Chinese government and that they had received firearms training at the camp for this purpose.²⁷ Attorneys for the Uighurs argued that they could not be repatriated to China or any country that would render them to China “because their avowed separatism would likely result in torture or worse.”²⁸ In a proceeding before the D.C. Circuit, the Court agreed that the Uighurs have a legitimate “fear that if they are returned to China they will face arrest, torture or execution,” and concluded, with notable understatement, that “[r]eleasing petitioners to their country of origin poses a problem.”²⁹

Another group of detainees who fear persecution if they are returned to their countries of origin is made up of Algerians who fled persecution at the hands of the Algerian government or Islamist rebel groups around the time of the Algerian civil war.³⁰ One such refugee detainee made a home near Peshawar, Pakistan, married and raised a family.³¹ When arrested by Pakistani police and turned over to the United States, the detainee had been living in the region

25. See Human Rights Watch, Q&A: Resettlement of Guantánamo Bay Detainees, Feb. 23, 2009, <http://www.hrw.org/en/news/2009/02/23/q-resettlement-guantanamo-bay-detainees> [hereinafter Human Rights Watch, Q&A].

26. See *Parhat*, 532 F.3d at 837–38.

27. See *id.* at 838, 843.

28. Brief of Petitioners at 4, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234) (stating that the parties agree on this point and citing State Department reports and Department of Defense news transcripts and related news reports); see also *Parhat*, 532 F.3d at 838 (finding the parties to be in agreement that the Uighurs would face torture or execution upon return to China).

29. *Kiyemba*, 555 F.3d at 1024. In *Kiyemba*, the D.C. Circuit reversed a district court ruling that the Uighurs be released into the United States. *Id.* The Court held that only the executive branch—and not the courts—has the authority to admit the Uighurs into the United States. See *id.* at 1038–39. The Supreme Court in turn reversed the D.C. Circuit ruling on the ground that the factual circumstances inspiring the grant of certiorari had changed. See *Kiyemba v. Obama*, 130 S. Ct. 1235, 1235 (2010). On remand, the D.C. Circuit found that no further proceedings were necessary in light of the changed factual circumstances and reinstated its prior opinion. On April 18, 2011, the Supreme Court denied certiorari. 563 U.S. ___ (2011). For a discussion of these cases, see *infra* Part III.A.

30. See Hamlily Interview, *supra* note 19.

31. *Id.*

with his wife and five children for nearly a decade.³² Other Algerians have similar stories.³³ Many of these Algerians are afraid to return to their home country.³⁴ State Department and news reports suggest that these fears are credible, as political strife in Algeria has reportedly claimed as many as 200,000 lives since 2002.³⁵ According to human rights groups, the government has employed violent tactics, including torture, to suppress an Islamist insurgency.³⁶ The State Department's report on human rights practices in Algeria in 2009 noted that "local human rights lawyers maintained that torture continued to occur in detention facilities, most often against those arrested on 'security grounds.'"³⁷ After expressing concerns about returning to Algeria, one Guantánamo detainee was tried in absentia and sentenced to twenty years in prison.³⁸ Another immediately

32. *Id.*

33. *See id.* (describing biographical details about a fellow Algerian detainee).

34. *See* Peter Finn, *Six Detainees Would Rather Stay At Guantánamo Bay Than Be Returned To Algeria*, Wash. Post, July 10, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070904926.html?nav=emailpage&sid=ST2010070905128> [hereinafter *Six Detainees*]; Editorial, *Six Algerian Detainees Don't Want To Go Home*, Wash. Post, July 16, 2010, at A18 (reporting that six Algerian detainees have attempted to block their release from Guantánamo out of fear that in Algeria they would face "abuse, torture or worse at the hands of the government or militant Islamic groups").

35. *See* U.S. Department of State, 2009 Human Rights Report: Algeria (Mar. 11, 2011), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136065.htm> [hereinafter *State Report: Algeria*]; *see also Six Detainees*, *supra* note 34 (citing State Department reports).

36. *See supra* note 35; *see also Algerian Troops Begin Major Kabylie Operation*, Magharebia, July 22, 2010, http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/news/awi/newsbriefs/general/2010/07/22/newsbrief-02 (reporting that Algerian soldiers launched a large operation in the south of Algeria "following several terrorist attacks on security services in the region").

37. *State Report: Algeria*, *supra* note 35.

38. *See Six Detainees*, *supra* note 34 (reporting that Ahmed Belbacha was sentenced in absentia to 20 years in prison by an Algerian court in 2009 for alleged association with an illegal armed group). Belbacha is represented by Reprieve, a British human rights organization, which described the events of the conviction as follows:

Ahmed's fears about Algeria were confirmed by an alarming "conviction" delivered in absentia by an Algerian court in November 2009. In a disgraceful show trial, where no lawyer was appointed to defend Ahmed, the court sentenced him to 20 years in prison for belonging to an "overseas terrorist group." Despite repeated requests and extensive investigation, Reprieve's lawyers have been unable to discover what exactly

disappeared after being returned to Algeria against his will.³⁹ In early reports, the government denied any wrongdoing, claiming to know nothing about what had happened to the detainee.⁴⁰

When President Obama took office, approximately sixty refugee detainees remained in Guantánamo; they hail from Algeria, Azerbaijan, China, Egypt, Libya, Palestine, Russia, Syria, Tajikistan, Tunisia, and Uzbekistan.⁴¹ By early 2011, 33 remained.⁴²

B. U.S. Resettlement Policies

1. “Cleared for Release”

The refugee detainees considered in this Article all have been cleared for release by the administration or ordered released by a court. Both the Bush and Obama administrations have cleared detainees for release over the life cycle of the detention facility, and recently U.S. courts have also ordered release after granting habeas corpus petitions brought by detainees.⁴³

In *Hamdi v. Rumsfeld*, the U.S. Supreme Court held that the executive could detain individuals in Guantánamo so long as those individuals were enemy combatants.⁴⁴ Following this ruling, the United States convened Combatant Status Review Tribunals (“CSRTs”) to review the file of every detainee and, in all but a few

Ahmed is supposed to have done. No evidence has been produced to support his “conviction,” which appears to be retaliation against Ahmed for speaking out about the inhumane treatment he would be subjected to if sent to Algeria.

Reprieve, Ahmed Belbacha, <http://www.reprieve.org.uk/ahmedbelbacha> (last visited Mar. 9, 2011).

39. See Lamine Chikhi, Christian Lowe & Jon Hemming, *Algeria Denies Detaining Guantánamo Returnee*, Reuters, July 22, 2010, <http://af.reuters.com/article/worldNews/idAFTRE66L1V120100722>.

40. See *id.*

41. See Center for Constitutional Rights, FAQs, *supra* note 18.

42. See *supra* note 1.

43. See *infra* and *supra* notes 41–51 and accompanying text.

44. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion of O’Connor, J.). In *Hamdi*, the U.S. Supreme Court held that, pursuant to Congress’s authorization for the use of force, the military could detain in Guantánamo “enemy combatants,” who fought against the United States in Afghanistan. The Court held that such detention “for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.*

early instances, designate the detainees “enemy combatants.”⁴⁵ Although the U.S. executive never removed the enemy combatant designation, over time it signaled its understanding that there was no reason to continue to detain many of the detainees.⁴⁶ Rather, under the Bush administration, the executive’s practice was to note in each detainee’s file after a review by an Administrative Review Board (“ARB”) that the detainee was “cleared for release.”⁴⁷ In

45. See *Boumediene v. Bush*, 553 U.S. 723, 734 (2008) (noting that the CSRT process was designed to comply with the due process requirements identified in *Hamdi*); U.S. Department of Defense, *Guantánamo Bay Processes* (Oct. 2, 2007), available at <http://www.defenselink.mil/news/Aug2004/d20040818GTMODetProc.doc> [hereinafter *Processes*] (explaining that the CSRT hearings were instituted as a “formal review of all the information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant” and defining “enemy combatant” as “an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners, [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces”); *Parhat v. Gates*, 532 F.3d 834, 837–38 (D.C. Cir. 2008) (relying upon the definition of “enemy combatant” provided in the Order Establishing Combatant Status Review Tribunal and holding that evidence before the CSRT was insufficient to sustain its determination that the detainee was in fact an “enemy combatant”); see also *The Guantanamo Docket*, N.Y. Times, <http://projects.nytimes.com/guantanamo?scp=4&sq=guantanamo&st=cse> (last visited Mar. 9, 2011) (providing Combatant Status Review Board reports stating enemy combatant status for all detainees in Guantánamo).

46. *Id.* (listing Guantánamo detainee “combatants” who have been transferred out of Guantánamo for detention in other countries).

47. After the CSRT panel made its determination as to each detainee, the Department of Defense conducted regular ARB hearings for all detainees designated as enemy combatants. Press Release, U.S. Department of Defense, *Defense Department Conducts First Administrative Review Board* (Dec. 14, 2004), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=8068> [hereinafter *Press Release*]. The ARB process was meant to “annually assess whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing upon the need for continued detention.” *Id.* According to the ARB implementing instructions:

In every case it reviews, an ARB shall make a recommendation to the [Designated Civilian Official] to:

- (1) Release the enemy combatant without limitations to his home State or a third State as appropriate;
- (2) Transfer the enemy combatant to his home State (or a third State as appropriate) with conditions agreed upon between that State and the United States; or
- (3) Continue to detain the enemy combatant in U.S. control.

practice, the “cleared for release” designation has had little or no relationship to the timing of a detainee’s actual release.⁴⁸ Under the Bush administration, some detainees were held in Guantánamo for many years after being cleared for release.⁴⁹ For example, most of the original group of 22 Uighurs had been cleared for release by 2004, and yet none were released until 2009. Some remain in detention.⁵⁰

Under the Obama administration, the old ARB system was dissolved and the administration convened a task force to re-review the detainee files.⁵¹ Obama’s task force again concluded that many detainees should be released, but did not immediately release any after making this designation.⁵² After a chain of cases regarding the detainees made their way to the U.S. Supreme Court, the Court ultimately determined that detainees have the right to bring habeas corpus petitions in U.S. courts, and thereby challenge the lawfulness

U.S. Department of Defense, Memorandum Regarding Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (Sept. 14, 2004), *available at* <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf> [hereinafter ARB Memo].

48. Human Rights Watch, Q&A, *supra* note 25. This is despite the fact that the Defense Department clearly anticipated that a detainee’s “cleared” status would be the first step in a process culminating in release. According to a Defense Department Memorandum explaining the ARB process, it was intended, among other things, to “help ensure no one is detained any longer than is warranted.” *Processes*, *supra* note 45. To this end, the ARB made its recommendation regarding release or transfer to a Designated Civilian Official (“DCO”) who was to “make[] the final decision whether to release, transfer or continue to detain the individual.” Press Release, *supra* note 47. However, Defense Department materials established no protocol governing what to do with a detainee who had been “cleared for release” by an ARB and ordered released by the DCO but who was not in fact released. *See* ARB Memo, *supra* note 47. By contrast, the procedure for detainees who had not been “cleared” was well-defined: a new date would be scheduled for a further hearing by the ARB panel and the detainee would remain in the custody of the Defense Department until that date. *Id.*

49. Human Rights Watch, Q&A, *supra* note 25.

50. *See id.*; *Kiyemba v. Obama*, 555 F.3d 1022, 1029 (D.C. Cir. 2009) (recognizing that administrative and diplomatic difficulties have resulted in the continued detention of detainees cleared for release).

51. *Low-Level Fighters*, *supra* note 12.

52. *See id.* The Washington Post reports that when President Obama took office, of the 240 detainees remaining in Guantánamo, 59 detainees had been cleared for release by ARB panels. The Obama administration task force increased that number to 126 of the 240 detainees, and also recommended that 30 more detainees be released if security conditions in their home countries improved. *Id.*

of their detentions.⁵³ Many of the detainees who remain in Guantánamo have availed themselves of this opportunity, and been successful.⁵⁴ When successful, the detainees have obtained rulings from Article III courts that mandate their release from Guantánamo.⁵⁵ Yet many of these successful detainees remained in Guantánamo long after a court demanded their release; at the time of publication, 12 of the 38 men who won their habeas petitions are still being held.⁵⁶

53. *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (holding that Guantánamo detainee petitioners “may invoke the fundamental procedural protections of habeas corpus”); see also Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 Wash. L. Rev. 661, 673–75 (2009) (describing the detention rulings and executive responses that eventually led to the Supreme Court’s decision in *Boumediene*).

54. See Brief of Petitioners at 20, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234) (stating that by early 2010 courts had ruled in 39 habeas cases and that in all but eight of the cases the courts held that the detainees were not enemy combatants); see also *The Guantanamo Docket*, N.Y. Times, <http://projects.nytimes.com/guantanamo?scp=4&sq=guantanamo&st=cse> (last visited Mar. 9, 2011) (providing release information for all Guantánamo detainees); Center for Constitutional Rights, *Guantánamo Habeas Decision Scorecard*, <http://ccrjustice.org/learn-more/faqs/Guantánamo-bay-habeas-decision-scorecard> (last visited Mar. 9, 2011) [hereinafter *Scorecard*] (providing an overview of habeas case outcomes for Guantánamo detainees and archiving court opinions granting or denying habeas).

55. Rather than ordering the executive to release the detainees in the United States, the courts issued what have come to be referred to as “*Kiyemba* orders,” directing the government to engage in diplomacy to try to arrange the prisoner’s transfer abroad. See Brief of Petitioners at 20, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234).

56. See *id.* (reviewing instances where detainees remained in Guantánamo long after winning habeas cases); see also Richard Bernstein, *A Detainee Freed, But Not Released*, N.Y. Times, Sept. 23, 2009, available at <http://www.nytimes.com/2009/09/24/us/24iht-letter.html> (“Saber Lahmar celebrated the anniversary of his habeas win in Guantánamo.”); *Excerpts from rulings in Guantánamo Bay Cases*, Assoc. Press, Nov. 15, 2009, http://seattletimes.nwsour.com/html/politics/2010278991_apusguantanamojudgesexcerpts.html (summarizing post-writ history of Guantánamo habeas cases); Andy Worthington, *Introducing the Definitive List of the Remaining Prisoners in Guantánamo*, *Cageprisoners*, Sept. 14, 2010, <http://www.cageprisoners.com/our-work/opinion-editorial/item/560-introducing-the-definitive-list-of-the-remaining-prisoners-in-guantanamo>.

2. Release to Persecution or Torture?

It is U.S. policy not to transfer individuals to countries where they will be subjected to torture.⁵⁷ In *Kiyemba v. Obama*, the government affirmed before the Supreme Court that “[t]he United States assesses humane treatment concerns in determining destinations for detainees at Guantánamo Bay, and follows a policy of not repatriating or transferring a detainee to a country where he more likely than not would be tortured.”⁵⁸ However, the government does not disclose in every case whether it considers this policy applicable, so a detainee and his counsel may not know whether the U.S. considers the detainee’s transfer to his home country to be a transfer to torture.⁵⁹ Moreover, the government has not extended this policy to situations in which a detainee fears mistreatment upon return that would not rise to the level of torture, but would nevertheless entitle a detainee to “refugee” status under international standards.⁶⁰

3. Release to the United States?

Although the executive branch has determined that many Guantánamo detainees are eligible for release, and has committed not to return detainees to torture, it has not exercised its discretion to accept the detainees for resettlement on U.S. soil.⁶¹

57. See *Munaf v. Geren*, 553 U.S. 674, 702 (2008) (“[T]he Solicitor General states that it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result.”) (emphasis in original); *Kiyemba v. Obama*, 555 F.3d 1022, 1024 (D.C. Cir. 2009) (“United States policy is not to transfer individuals to countries where they will be subject to mistreatment.”); see also Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo. Wash. L. Rev. 1333, 1375–76 (2007) (“Curiously, although the United States has argued repeatedly that its *non-refoulement* obligations do not apply outside its territory, it has also stated that it implements the rule *as a matter of policy* in relation to anyone within U.S. custody.”) (emphasis in original). Satterthwaite argues that the Bush administration used this statement of “policy” as a shield to obfuscate its practice of transferring individuals to countries where they are at risk of torture. *Id.* at 1376.

58. See Brief of Respondents at 6, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234).

59. See Belbacha Motion, *supra* note 16.

60. For a discussion of the international standards governing the definition of a “refugee,” see *infra* Part III.A.1.

61. See, e.g., *Kiyemba*, 555 F.3d at 1026 (stating that with respect to the Uighur petitioners, “the Executive Branch has determined not to allow them to enter the United States”); Telephone interview with a Habeas Attorney (who does not wish to be identified to protect the safety of her client) (May 17, 2010).

The judiciary has refused to force the executive's hand. In *Kiyemba*, the D.C. Circuit held that habeas corpus jurisdiction does not entitle the judiciary to order the government to bring Guantánamo detainees to the United States and release them.⁶² The Supreme Court vacated and remanded the D.C. Circuit opinion without reaching the substantive merits, on the grounds that the factual circumstances inspiring the grant of certiorari had changed: Each detainee petitioner had received an offer of resettlement in a foreign country, and so "release into the United States [was not] the only possible effective remedy."⁶³ On remand, the D.C. Circuit found that no further proceedings were necessary in light of the changed factual circumstances and reinstated its prior opinion. On April 18, 2011, the Supreme Court denied certiorari.

Even if the executive were to choose to bring the refugee-detainees to the United States, Congress has prohibited this. In June 2009, after the Obama administration proposed to resettle some of the Uighurs in Virginia, a political storm ensued.⁶⁴ Congress stapled

[hereinafter Habeas Attorney Interview] (stating that her client's asylum petition in the United States was rejected on the ground of extraterritoriality).

62. See *Kiyemba*, 555 F.3d at 1029. The D.C. Circuit found that the executive has "the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion or admission." *Id.* at 1025 (citing, among others, *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952)). Unless some statute provides otherwise, it is not "within the province of any court" to review the executive's political decision to exclude particular aliens. *Id.* at 1026 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950)). Finding no statute circumscribing the executive's discretion to exclude the Guantánamo detainees from U.S. soil, and noting that the Immigration and Nationality Act does not treat Guantánamo as part of the United States, the Court concluded that the detainees are not within United States territory and so are not eligible for admission under the immigration laws as refugees or asylum seekers. *Id.* at 1031 (stating that the detainees are not eligible for admission because they have never "entered or attempted to enter the country" or applied for admission under the immigration laws). The Court ultimately held that the federal courts have "no power to require anything more" from the executive in the context of Guantánamo detainees than a representation that the executive "is continuing diplomatic attempts to find an appropriate country willing to admit" them. *Id.* at 1029.

63. *Kiyemba*, 130 S. Ct. at 1235.

64. See Brief of Petitioners at 13, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234) ("Political opposition to this plan was swift and highly charged, and the President shelved it.") (citing Massimo Calabresi & Michael Weisskopf, *The Fall of Greg Craig*, *Time*, Nov. 19, 2009, at 34; Michael Isikoff & Mark Hosenball, *Next Stop Nowhere*, *Newsweek*, May 23, 2009, <http://www.newsweek.com/2009/05/22/next-stop-nowhere.html>; Peter Finn & Sandhya Somashekhar, *Obama*

a rider to a “must-pass” defense-funding bill, the Supplemental Appropriations Act of June 2009, prohibiting release of detainees into the United States.⁶⁵ Specifically, the bill barred the use of defense funding to release into the United States anyone detained at Guantánamo on the date of the bill’s enactment.⁶⁶ The June bill expired in October 2009, but was replaced by the Department of Homeland Security Appropriations Act of 2010⁶⁷ and the National Defense Authorization Act for the Fiscal Year 2010.⁶⁸ Each of these acts bars the agencies in question from spending funds to facilitate release in the United States of detainees or aliens who were present in Guantánamo on a specified day.⁶⁹ Congress’ control of the purse strings functionally blocks the executive from transferring the refugee detainees to the United States.⁷⁰

C. United States Practice: “A Huge Problem and a Complicated One”

The tension between the United States’ commitment not to return refugee detainees to countries where they will be tortured and its refusal or inability to accept these detainees for asylum in the United States has produced a long and arduous resettlement process. With a high level of secrecy under both Presidents Bush and Obama, the executive has approached other countries to attempt to find countries willing to accept the asylum-seeking refugee detainees.⁷¹ In

Bows on Settling Detainees; Administration Gives Up on Bringing Cleared Inmates to U.S., Officials Say, Wash. Post, June 12, 2009, at A1).

65. *Id.* (citing Pub. L. No. 111-32, 123 Stat. 1859, add. 1a (2009)).

66. *Id.*

67. Pub. L. No. 111-83, 123 Stat. 2142.

68. Pub. L. No. 111-84, 123 Stat. 2190.

69. Brief of Petitioners at 13, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234).

70. See Andrew Taylor, *Senate Votes to Block Funds for Guantánamo Closure*, Assoc. Press, May 20, 2009, <http://www.webcitation.org/5jPWyaCDq>. While the executive could conceivably solicit funds from private sources, doing so would be in bold defiance of Congress.

71. The Bush Administration was ambiguous about this for years, publicly litigating while privately encouraging allies to resettle the Uighurs. See Brief of Petitioners at 3, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234) (citing classified declarations). The process has been somewhat more transparent under President Obama with the public appointment of a Special Envoy charged with detainee resettlement. See, e.g., Jon Manel, *U.S. Envoy Confident on Guantánamo Closure*, BBC News, Sept. 16, 2009, <http://news.bbc.co.uk/2/hi/8260081.stm> (reporting on Special Envoy Daniel Fried’s efforts to resettle detainees). Even under Obama, the process is still highly secretive. See *E.U.*

the resulting process of political maneuvering, the United States tries to find resettlement countries that will accept the detainees, but could resort to sending detainees back to their countries of origin if a resettlement country is not found.⁷² Return to a detainee's country of origin is especially likely for those detainees who fear persecution that does not rise to the level of torture, as the United States has not publicly committed itself to any policy against returning detainees to mistreatment that falls short of torture.⁷³ This process of peddling detainees around the world has been long, difficult, and fraught with uncertainty for the detainees, the courts, and the executive branch itself. While it goes on, the refugee detainees live in fear of repatriation and the United States is prevented from closing Guantánamo.⁷⁴

The executive branch has been attempting to resettle some detainees for nearly the entire time the detention center in Guantánamo has existed. Classified declarations submitted by attorneys for the Uighurs reveal that the United States began searching for a country that would offer the Uighurs asylum as early as 2002.⁷⁵ Now, the process is less covert. Daniel Fried, appointed by President Obama to be the special envoy on Guantánamo, is entrusted with the task of negotiating repatriation or resettlement for detainees who have been cleared for release.⁷⁶ Fried, accompanied by a staff of three, spends his time globetrotting and meeting with

Wants Answers Before It Accepts Guantánamo Detainees, Int'l Herald Tribune, Mar. 17, 2009 (stating that the Obama administration has "continued to keep a tight reign" on information about the detainees); *Low-Level Fighters*, *supra* note 12 (quoting a letter from seven Republicans on the House Appropriations Committee complaining to Obama's national security advisor that the detainee "transfers have been done under a cloak of secrecy . . . which ensures that most Members [of Congress] and the general public will remain unaware of the actions taken"); *see also* Belbacha Motion, *supra* note 16 (complaining that "only the government knows" whether detainee petitioner will be transferred to Algeria).

72. *See* Michelle Shephard, *How To Empty Guantánamo*, Toronto Star, Dec. 6, 2009, at IN1 (describing the resettlement process under "Guantánamo czar" Special Envoy Fried). Because the United States will not disclose whether it considers detainees to be refugees or certain transfers to be risky, it maintains freedom to transfer at will without openly violating its own policy.

73. *See supra* Part II.B.2.

74. *See* Belbacha Motion, *supra* note 16 (expressing detainee's fear of sudden return without notice); Shephard, *supra* note 72, at IN1 (reporting that detainee resettlement issues could derail closing Guantánamo).

75. Brief of Petitioners, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234).

76. Shephard, *supra* note 72, at IN1; Manel, *supra* note 71.

ambassadors, prime ministers, and other state officials, in an effort to broker agreements with foreign states to accept the Guantánamo detainees. Fried travels with portfolios of the detainees, so that he can put a name, face, and story to each detainee he attempts to “sell.”⁷⁷ The negotiations have included discussions about what support the United States will provide to assist the foreign state with resettling the detainee.⁷⁸ In addition, the United States has attempted to secure assurances from the potential resettlement state that the state will monitor the detainees upon their return.⁷⁹ By Fried’s own admission, determining how and where to resettle the remaining refugee detainees is “a huge problem and a complicated one.”⁸⁰ The project faces an array of challenges:

First, countries are reluctant to accept detainees in light of the United States’ own refusal to accept any detainees for resettlement. Special Envoy Fried says, “[i]t is fair to say, as just an objective statement, that the U.S. could resettle more detainees, had we been willing to take in some.”⁸¹ In fact, to secure Germany’s agreement to accept detainees, the United States reportedly had to agree to promise to “consider” taking some.⁸²

Second, many countries resist accepting detainees because of the fear that they are potentially dangerous.⁸³ Even while the United States compiles profiles on the detainees in an effort to persuade foreign states that the detainees will not pose a security risk when they are resettled, the United States deliberately maintains the

77. See generally *id.*; Shephard, *supra* note 72, at IN1; William Glaberson & Mark Landler, *Top Diplomat to Be Named Special Envoy on Guantánamo*, N.Y. Times, Mar. 11, 2009, at A18.

78. See Shephard, *supra* note 72, at IN1.

79. See *id.*

80. Manel, *supra* note 71.

81. *Id.*; *Germany’s Guests from Guantánamo—Are the Former Prisoners a Security Threat?*, Spiegel Online (Jul. 12, 2010), <http://www.spiegel.de/international/germany/0,1518,705955,00.html> [hereinafter *Germany’s Guests*].

82. See *id.* (reporting that the U.S. government “expressly promised” to “work on ways to find humanitarian solutions for all detainees approved for release” and clarifying that “[t]he phrase ‘humanitarian solutions’ refers to inmates being accepted in the United States”) (internal quotation marks omitted).

83. See E.U. “Fact-Finding” Mission on Guantánamo Inmates, Agence France Presse (English Wire), Mar. 17, 2009, 3/17/09 AFRP 01:37:00 (quoting E.U. Justice Commissioner Jacques Barrot as stating, “[t]here is a very deep wariness on the part of EU interior ministers, who are concerned about the difficulties of hosting one or another inmate. To do that, we need to know a lot about the candidates.”).

“enemy combatant” designation and issues alarming statements about the threat of releasing detainees from Guantánamo.⁸⁴ This double-speak arises from dueling motivations in the executive branch. While the State Department paints the detainees in a sympathetic light to persuade states to accept them for resettlement, the Defense Department defends its arrest and continued detention of the detainees by claiming that they are dangerous combatants.⁸⁵ These contradictory positions lead the Government to engage in strange, self-defeating moves, such as sharing uncorroborated and inflammatory information from the refugee detainees’ files with potential resettlement countries.⁸⁶ In effect, the Government is expressly sending mixed messages to foreign counterparts: at once attempting to sell the detainees as safe for resettlement while simultaneously maintaining that they are properly detained as enemy combatants.

Third, the United States must negotiate extensive agreements with potential resettlement countries before detainees can be resettled. These agreements cover issues such as the immigration status the detainees will be afforded, repatriation costs

84. See, e.g., Vice President Dick Cheney, Address at the American Enterprise Institute (May 21, 2009), <http://www.aei.org/speech/100050> (“1 in 7 [detainees] cut a straight path back to their prior line of work and have conducted murderous attacks in the Middle East.”); Elisabeth Bumiller, *Later Terror Link Cited for 1 in 7 Freed Detainees*, N.Y. Times, May 20, 2009, at A1 (reporting that “an unreleased Pentagon report concludes that one in seven” of the Guantánamo detainees already transferred abroad from Guantánamo “are engaged in terrorism or militant activity”). For a discussion of the substantial press coverage given to the recidivism figures based on the New York Times article, see Dan Kennedy, *The Myth of Guantánamo Recidivism*, The Guardian, June 9, 2009, <http://www.guardian.co.uk/commentisfree/cifamerica/2009/jun/09/guantanamo-new-york-times> (reporting on the political storm and the conclusion in the press that the supposed recidivism numbers were uncorroborated and ultimately discredited).

85. See *infra* note 209 and accompanying text.

86. See Andy Worthington, *Finding New Homes For 44 Cleared Guantánamo Prisoners*, The Public Record (Oct. 13, 2009), <http://pubrecord.org/world/5751/finding-homes-cleared-Guantánamo> (reporting that during a visit to Guantánamo by Swiss officials, U.S. officials “opened up their files,” showing the Swiss evidence in detainees’ files including discredited statements made by other detainees under duress, “multiple levels of unacceptable hearsay, and ‘mosaics’ of intelligence that do not stand up to independent scrutiny”). After the visit, Swiss media reported that the officials had determined that some detainees were “medium” or “high” risk, despite the fact that those detainees had been cleared for release by both the Bush and Obama administrations. *Id.*

covered by the United States, services the host country will provide to facilitate the detainees' integration, and whether the host country will monitor the detainees once they are transferred.⁸⁷ The potential arrangements can and reportedly do break down if agreement is not reached on any of these thorny issues.⁸⁸

Fourth, the resettlement process faces complex global political problems. For example, the Chinese government actively sought repatriation of the Uighurs to China, where it is widely believed the Uighurs would be tortured or executed for their avowed separatism from the Chinese government. Classified documents submitted into the record before the D.C. Circuit in *Kiyemba* contain evidence of "extensive diplomatic resistance from China to resettlement of the Uighurs abroad and failed efforts over six years to obtain asylum from more than 100 countries."⁸⁹ Although Albania accepted six Uighur detainees who had never been designated enemy combatants very early in the resettlement process, neither the Bush nor the Obama administration was able to find countries willing to accept the remaining detainees until 2009 and 2010, despite the extensive effort the administrations had invested in the task.⁹⁰ Finally, in 2009 and 2010, the Obama administration convinced two geopolitically weak allies, Palau and Bermuda, to accept all but five of the remaining Uighurs.⁹¹ This arrangement came at a cost. Officials negotiated the agreement with Bermuda in secret behind closed doors and only publicly announced the final details after the detainees arrived in Bermuda via a clandestine, midnight flight.⁹² As soon as the news broke, Great Britain, of which Bermuda is a protectorate, expressed its disapproval. Fried, the U.S. envoy, claimed that he was "admonished by the British government in very clear terms" after concluding arrangements to transfer the Uighurs

87. See Manel, *supra* note 71; Shephard, *supra* note 72.

88. See Manel, *supra* note 71 (quoting Fried as stating that "[t]he British government, it is fair to say, cannot be considered part of the deal" and that, furthermore, he had been "admonished by the British Government in very clear terms").

89. Brief of Petitioners at 4, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234).

90. See *id.* at 9.

91. *Id.* at 14, 15.

92. Erik Eckholm, *Out of Guantánamo, Uighurs Bask in Bermuda*, N.Y. Times, June 15, 2009, at A4; see also Manel, *supra* note 71.

to Bermuda without consulting the British Government.⁹³ As of early 2011, several Uighurs still remain in Guantánamo.⁹⁴

Fifth, the extreme secrecy of the resettlement process has triggered exasperation in Congress. As seven Republicans on the House Appropriations Committee complained in a letter to President Obama's national security advisor, "[t]hese transfers have been done under a cloak of secrecy with notifications sent to Congress in classified form—which ensure that most Members and the general public will remain unaware of the actions taken."⁹⁵ In response to the perceived secrecy and unilateral nature of the transfers, Congress demanded that the executive branch provide Congress with 15 days' advance notice before transferring detainees, subjecting the process to yet more potential delays and preventing the swift execution of a deal with a foreign state.⁹⁶

Finally, because accepting detainees can be as politically unpopular abroad as it is in the United States, some countries will postpone an agreement until after elections or until a sister state agrees to accept detainees.⁹⁷ Even where agreements between states have been made, such as the agreement among European Union member states concluded in June 2009,⁹⁸ these agreements have had

93. Eckholm, *supra* note 92. Presumably, it was important to Britain to send a message to China that it had nothing to do with the resettlement deal.

94. *Kiyemba v. Obama*, 563 U.S. ___ (2011) (No. 10-775) (stating that the United States continues to imprison five Uighers).

95. Peter Finn, *Guantanamo Detainee Review Complicated, but Political Implications Remain*, Wash. Post, May 28, 2010, WP-BUS (no page).

96. See Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 552(e), 123 Stat. 2177, 2178–79 (2009) (prohibiting transfer of any detainees away from Guantánamo until 15 days after Congress is notified); see also *Low-Level Fighters*, *supra* note 12 (reporting that prior to the enactment of the law requiring 15-days' notice prior to transfer, members of Congress complained to the Obama Administration that the detainee transfer process was too secretive).

97. See, e.g., *Guantánamo Detainees—German Government Plays for Time*, Spiegel Online (Apr. 26, 2010), <http://www.spiegel.de/international/germany/0,1518,691216,00.html> (stating that Germany's federal government is "unlikely to make a decision on whether to accept three inmates" from Guantánamo until after state elections because "[r]esistance to taking in prisoners is still strong in states led by the conservatives").

98. See Joint Statement of the E.U. and its Member States and the United States of America on the Closure of the Guantánamo Bay Detention Facility and Future Counterterrorism Cooperation, Based on Shared Values, International Law, and Respect for the Rule of Law and Human Rights, Brussels Council of the European Union (June 16, 2009), http://www.europa-eu-un.org/articles/en/article_8794_en.htm [hereinafter Joint Statement] (expressing the "readiness" of certain

limited value in furthering resettlement agreements. For many European Union member states, the Joint Statement has served as little more than a statement of intent. After signing the agreement, some countries came forward to assist, but seven months later only seven former detainees had been accepted into European countries.⁹⁹

III. CRITIQUE OF THE U.S. APPROACH

The method by which the United States manages resettlement of refugee detainees in Guantánamo inhabits grey areas of domestic and international law, arguably satisfying those laws in letter, but violating them in spirit and sacrificing moral goods in the process. The questionable legality and morality of this process requires the United States to sacrifice needless political capital on the international stage.

A. Exploiting Legal Shadows

In the separate context of forcible interstate transfer of suspected terrorists, Joan Fitzpatrick argues that the Bush Administration adopted the legal term “rendition” to “clothe [the Administration’s] enforcement techniques with a veneer of quasi-legal respectability, while acknowledging no binding limits on ‘operational flexibility.’”¹⁰⁰ Fitzpatrick notes that states have increasingly turned to “quasi-formal” methods of rendition—a concept that has no fixed meaning in international law—to escape the “formalities of the extradition process.”¹⁰¹

Fitzpatrick’s observations extend to the refugee-detainee context as well. The United States evades formal limitations on its capacity to transfer refugee detainees by claiming exemption from the domestic and international laws that govern treatment of

E.U. Member States to assist with the reception of former detainees on a case-by-case basis).

99. See Press Release, Amnesty Int’l, European States Must Take Concrete Steps to Help Close Guantánamo (Jan. 11, 2010), <http://www.amnestyusa.org/document.php?id=ENGNAU2010011114899&lang=e> (stating that “only a few European governments have stepped forward to help those in need of protection” and that human rights organizations have “expressed disappointment” that many EU member states “had not taken concrete steps in line with the [Joint Statement]”).

100. Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond*, 25 Loy. L.A. Int’l & Comp. L. Rev. 457, 457 (2003) [hereinafter *Rendition*].

101. *Id.*

refugees.¹⁰² At the same time, the United States invokes Fitzpatrick's "quasi-legal veneer of respectability" by announcing an unenforceable "policy" against transfer to torture, which may or may not purport to protect against transfers that would violate the *non-refoulement* principle of the Refugee Convention, as outlined below. This strategy, although only questionably legal, is as of yet undisturbed by U.S. and international courts.

1. Avoiding Safeguards Against Release to Persecution or Torture

As a party to the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention"),¹⁰³ the United States has obligations under international law to (a) refrain from returning non-excludable refugees to a state where they will be persecuted or tortured and to (b) provide potential refugees with a status determination prior to issuing a final order of removal.¹⁰⁴ Whether the United States is bound by these obligations to detainees in Guantánamo falls into a legal grey area.

a. Scope of Protection

For every person who has been forced to flee his or her home country out of fear of persecution, international law guarantees protections against being returned to that country. The Refugee Convention provides for the right of *non-refoulement*, or non-return.¹⁰⁵ Article 33 of the Refugee Convention defines the *non-refoulement* obligation: State parties may not "expel or return

102. Similarly, Margaret Satterthwaite notes in the rendition context that U.S. government officials do not "explicitly support" the practice of "informal transfer to a risk of torture," but nevertheless defend their right to engage in it by "pointing to . . . lacunae in the relevant legal frameworks." Satterthwaite, *supra* note 57, at 1333 ("The administration suggests that where lacunae are found prohibitions give way to permission; territories outside the United States are conceptualized as locations where the United States may act as it pleases.").

103. The United States is a party to the Refugee Convention by virtue of its accession to the Protocol. *See supra* note 3.

104. *See supra* Part III.A.1.

105. Refugee Convention, *supra* note 3, art. 33. The term "refoulement" is derived from the French term "refouler" which stands for the act of returning or sending back. *See* Guy S. Goodwin-Gill, *The Refugee in International Law* 117 (Clarendon Press, 2d ed. 1996) (stating that *non-refoulement* is a fundamental principle of international law establishing that "no refugee should be returned to any country where he or she is likely to face persecution or torture"); *see also* Helton, *supra* note 3.

(‘*refouler*’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁰⁶ A parallel provision in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) prohibits *refoulement* to a location where the person will be subject to torture.¹⁰⁷ The United States is bound by the Refugee Convention’s *non-refoulement* requirement because it is a party to the Convention through its accession to the 1967 Protocol.¹⁰⁸

106. Refugee Convention, *supra* note 3, art. 33. Article 32 sets constraints on the ability of state parties to expel a refugee in their territory lawfully:

- (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
- (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

Id. art. 32.

107. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 at 197 (Dec. 10, 1984) (entered into force June 26, 1987) [hereinafter Torture Convention] (“No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”). The Refugee and Torture Conventions offer distinct but overlapping spheres of protection; a petitioner may be entitled to relief under one or both. This Article focuses on the Refugee Convention throughout, but with the understanding that refugees under the Refugee Convention will often also fall under the Torture Convention, and the same resettlement strategies are applicable to both. For further analysis of Torture Convention relief in the Guantánamo detainee context, see Satterthwaite, *supra* note 57, at 1367, and Robert Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 673 (2006).

108. Protocol, *supra* note 3. Moreover, Professor Goodwin-Gill and others suggest that the *non-refoulement* principle has also become part of *jus cogens* international law, and so binds even states that are not parties to the Refugee Convention. See Goodwin-Gill, *supra* note 105, at 167 (“There is substantial, if not conclusive, authority that the principle is binding on all States, independently of specific assent.”); Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 Int’l J. Refugee L. 533, 538–41 (2001) (stating that *non-refoulement* has not only become a norm of international law, but has reached the status of

According to Article 1(A)(2) of the Refugee Convention, “refugee” means any person who:

[O]wing 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁰⁹

Thus, to qualify for refugee status such that the *non-refoulement* principle is triggered, the Refugee Convention requires an applicant to prove that he or she fears persecution in his or her home state due to his or her race, religion, nationality, membership of a particular social group, or political opinion.¹¹⁰

The prohibition of *refoulement* presupposes that there will be an effective way of determining who is and who is not a “refugee.”¹¹¹

ius cogens); Elihu Lauterpacht & Daniel Bethlehem, Opinion: The Scope and Content of the Principle of Non-Refoulement, 61–62, 64–65 (June 20, 2001), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=3b33574d1&query=Elihu%20Lauterpacht%20&%20Daniel%20Bethlehem> (citing UNHCR, Executive Committee, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, No. 6 (XXVII) and No. 25 (XXXIII)).

109. Refugee Convention, *supra* note 3.

110. *Id.*

111. See Mark Pallis, *The Operation of UNHCR’s Accountability Mechanisms*, 37 N.Y.U. J. Int’l L. & Pol. 869, 880 (2005). Pallis argues that for the *non-refoulement* principle to be meaningful or effective, it must include a refugee status determination:

When the rule of *non-refoulement* is combined with the “guarantee of effective legal protection”—a general principle of law—the [Refugee Status Determination] obligation is created: an obligation to conduct refugee status determination in a manner which provides effective legal protection against the possibility of *refoulement* or denial of rights due under the Refugee Convention.

Id.; see also Reinhard Marx, *Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*, 7 Int’l J. Refugee L. 383, 405 (1995) (arguing that the *non-refoulement* obligation encompasses an obligation to determine whether potential claimants are refugees); UNHCR, Advisory Opinion Regarding Minimum Standards for Refugee Status Determination Procedures 2 (Oct. 16, 2006), available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3b389254a> [hereinafter Advisory Opinion]. The

The Refugee Convention does not set out guidelines as to what should constitute refugee status determination procedures, leaving implementation of such procedures to the discretion of state parties to the Convention.¹¹² The consensus of these state parties, expressed through the Executive Committee to the UNHCR, is that the Convention requires states to provide access to such procedures to everyone who seeks the protections of refugee status.¹¹³ States must institute a process for identification of refugees in order to give effect to their obligations under the Convention and ensure compliance with the principle of *non-refoulement*.¹¹⁴

If a person meets the definition of a refugee, a state may then evaluate whether the refugee is “excludable” based on criminal history, or “expellable” because they pose a national security risk.¹¹⁵

refugee status obligation is an asylum seeker’s “right . . . to a hearing in order to determine whether that person meets the criteria of the Convention.” Pallis, *supra*, at 879–80 & n.33 (citing The Haitian Centre for Human Rights et al. v. United States, Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser.L.V/II.95, doc. 7 rev. P 155 (1997)).

112. See Advisory Opinion, *supra* note 111, at 2.

113. See Pallis, *supra* note 111, at 885 (citing UNHCR Executive Committee Conclusion No. 81 (XLVIII) (1997), para. (h); UNHCR Executive Committee Conclusion No. 82 (XLVIII), “Safeguarding Asylum,” para. (d)(iii) (1997); UNHCR Executive Committee Conclusion No. 85 (XLIX), “International Protection,” para. (q) (1998)). The UNHCR Executive Committee is a group of United Nations member states that advises the UNHCR in the exercise of its mandate. See *id.* (describing the significance of Executive Committee conclusions, which “are not formally binding” but “relevant to the interpretation and application of the international refugee protection regime”; the conclusions “constitute expressions of opinion, which are broadly representative of the views of the international community. . . . [t]he specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight”); see also Goodwin-Gill, *supra* note 105, at 7–18.

114. Advisory Opinion, *supra* note 111, at 2.

115. International refugee law excludes specific categories of persons regardless of whether they meet the criteria of refugee set forth in Article 1 (A) of the Refugee Convention, so long as there are “serious reasons” for considering that they have engaged in criminal acts, in their State of origin or elsewhere, before entering a host State. Refugee Convention, *supra* note 3, art. 1F. Persons may be excluded from refugee protections when there is sufficient evidence to show that the person has committed any of the following:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that

If the refugee is not excludable or expellable, a state signatory to the Refugee Convention must not remove the refugee from its territory, although the state party may exercise its discretion as to whether it will grant asylum.¹¹⁶ While no international law or norm restricts a state's right to deny entry,¹¹⁷ binding treaties—including the International Covenant on Civil and Political Rights¹¹⁸ and the Geneva Conventions¹¹⁹—prohibit states from holding a refugee in detention for an excessive period of time.¹²⁰ Read together, the prohibitions on *refoulement* and indefinite detention require that a state choosing not to offer asylum to a refugee must find some other

country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Id.; see also UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, HCR/GIP/03/05 (September 4, 2003) (providing guidance on interpretation and application of Refugee Convention Article 1F); Universal Declaration of Human Rights, G.A. Res. 217A, art. 14(2), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR] (stating that the right to asylum “may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”).

116. See Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 Harv. Hum. Rts. J. 229, 245 n.71 (1996) [hereinafter Fitzpatrick, *Revitalizing*] (citing Article 14 of the UDHR, which provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution”). There is no corresponding duty on states to admit asylum seekers. *Id.*

117. See Fitzpatrick, *Temporary Protection*, *supra* note 4, at 281 n.14 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 706–12 (1893) for a discussion of the absolute sovereign power to control the presence of foreigners and its roots in pre-twentieth-century public international law).

118. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 9(4), 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976 and ratified by the United States in 1992) [hereinafter ICCPR] (stating that every detainee has a right to judicial review of his detention by a competent court that may “order his release if the detention is not lawful”); see also Brief of International Law Experts as *Amici Curiae* Supporting Petitioners, at 21–28, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234) [hereinafter Int’l Law *Amici*] (examining ICCPR requirements). Moreover, all of the major human rights instruments recognize a right not to be arbitrarily detained by the state. See *id.*

119. See *infra* Part III.A.2 (outlining Geneva Convention requirements against prolonged arbitrary detention).

120. See Donkoh, *supra* note 5 (noting the illegality of prolonged arbitrary detention in lieu of asylum).

solution to the refugee's plight. In many cases, the refugee goes on to enjoy asylum in the country of refuge.¹²¹

b. Refugee Protection at Guantánamo?

The United States has rejected asylum petitions by detainees in Guantánamo on the grounds of extraterritoriality.¹²² This means that the United States has concluded that the refugee detainees in Guantánamo are not eligible for Refugee Convention protections because they are not within U.S. territory. This conclusion follows the landmark case of *Sale v. Haitian Centers Counsel*, in which the Supreme Court held that domestic law implementing the Refugee Convention does not restrain the executive's discretion to return refugees interdicted outside U.S. territory.¹²³ The Supreme Court also

121. See UNHCR, History of UNHCR: A Global Humanitarian Organization of Humble Origins, <http://www.unhcr.org/pages/49c3646cbc.html> (last visited Feb. 5, 2011) [hereinafter History of UNHCR]. *But see infra* note 237 (discussing practices by countries wishing to avoid granting asylum to all claimants, which violate or circumvent international law).

122. Habeas Attorney Interview, *supra* note 61.

123. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 170–77 (1993) (finding that section 243(h)(1) of the Immigration and Naturalization Act applies only in the context of domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States, particularly in the context of deportation and exclusion hearings, which do not take place outside the United States); *see also* Keith Highet, George Kahale III & Thomas David Jones, *International Decisions: Sale v. Haitian Centers Council, Inc.*, 88 Am. J. Int'l L. 105, 114–121 (1994) (summarizing *Sale*: the domestic law prohibition against *refoulement* applies only for those who are at the border or who have been temporarily paroled into the country, and so Haitian refugees interdicted on high seas had no legally cognizable rights under domestic law). The Refugee Convention leaves implementation to domestic law. *See* Fitzpatrick, *Temporary Protection*, *supra* note 4, at 281 n.13 (noting that implementation of the Refugee Convention occurs within domestic legal systems and is not supervised by a treaty body or international court). Fitzpatrick notes that refugee treaties are incorporated in domestic law to an unusual degree and the Refugee Convention is the subject of frequent interpretation and application by national courts and administrative agencies charged with refugee status determination. *Id.* The United States implemented the Convention by enacting the Refugee Act of 1980. *See* 8 U.S.C. § 1101 (1982); *see also* Daniel J. Smith, *Political Asylum—Well-Founded Fear of Persecution*, 13 Am. Jur. 3d Proof of Facts § 2 (2005) (outlining the statutory basis for asylum in the United States). The Refugee Act amended the U.S. Immigration and Nationality Act (“INA”) to establish a statutory basis for granting asylum in the United States consistent with the 1967 Protocol and provided the Attorney General with the power to establish an administrative system for processing asylum-seekers and discretion to grant asylum if an alien meets the definition of a refugee. *Id.*

held that the United States has no responsibility under international law to apply Refugee Convention protections extraterritorially.¹²⁴ Indeed, the United States takes the position that none of its international human rights treaty obligations apply extraterritorially.¹²⁵

The U.S. invocation of an extraterritoriality exception to the Refugee Convention has dubious validity under international law.¹²⁶ In addition, commentators suggest that the *jus cogens* customary international norm against *refoulement* applies beyond state borders and should inform the interpretation of Refugee Convention norms.¹²⁷

124. See *Sale*, 509 U.S. at 155 (holding that Article 33 of the 1951 Refugee Convention and the 1967 Protocol do not apply extraterritorially, and holding that signatory states are obligated only with respect to aliens within a state's territory); see also Highet, et al., *supra* note 123, at 121 (reviewing the decision). For critiques of this conclusion, see Koh, *supra* note 6, at 2391 and Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 43 (1994) (stating that the court majority did not "acknowledg[e] the primacy of the principle of *nonrefoulement* in customary international law" notwithstanding the fact that the statute at issue was enacted pursuant to a multilateral treaty, making customary international law particularly relevant).

125. See Chesney, *supra* note 107, at 673.

126. See Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 Colum. Hum. Rts. L. Rev. 625, 627 (2009) (reviewing inconsistent rulings by a number of international human rights bodies, including the Inter-American Commission on Human Rights, regarding the legality of U.S. policy of interception and forced return of refugees).

127. See Goodwin-Gill, *supra* note 105, at 123–24 (suggesting that the customary international law principle of *non-refoulement* has come to encompass non-rejection at the frontier); Blackmun, *supra* note 124, at 43 (critiquing U.S. policy based on the extraterritorial nature of *non-refoulement*); UNHCR, *Executive Committee Report: Determination of Refugee Status*, No. 8 (XXVIII) (Oct. 12, 1977), available at <http://www.unhcr.org/refworld/docid/3ae68c6e4.html> (concluding that the principle of *non-refoulement* of asylum-seekers applies both at the borders and within the territory of states); Savitri Taylor, *Australia's Implementation of its Non-Refoulement Obligations Under The Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights*, 17 U.N.S.W. L. J. 432, 435 (1994) (stating that "[t]he danger against which article 33(1) of the Refugee Convention provides protection is the return (refoulement) by a state party of any 'refugee' to a country where his or her 'life or freedom would be threatened'" and that "state practice appears to establish that the prohibition against refoulement extends to preventing state parties rejecting asylum seekers at their borders"). *But see* Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 Wash. U. L. Q. 833, 858 (1993) (concluding that given substantial uncertainty about whether the *non-refoulement* principle applies beyond state borders, the principle must be clarified).

Moreover, as some commentators have suggested, the extraterritoriality exception may not be appropriate under U.S. domestic law. The executive's legal argument that *Sale* applies to detainees in Guantánamo ignores the ways in which Guantánamo petitioners are within the jurisdiction and control of the United States, and may conflict with the Supreme Court's opinion in *Rasul*.¹²⁸ In *Sale*, the Supreme Court found that the United States was not violating the Refugee Convention in failing to provide refugee status determinations for Haitians interdicted on the high seas.¹²⁹ In *Rasul*, however, the Supreme Court held that Guantánamo detainees are within U.S. jurisdiction for the purposes of habeas corpus on the ground that habeas jurisdiction extends to places where the U.S. exercises plenary and exclusive jurisdiction even without "ultimate sovereignty."¹³⁰ No court has yet determined whether *Rasul* must change U.S. asylum policy with respect to the Guantánamo petitioners.¹³¹ However, in *Rasul*, the Supreme Court found that the U.S. facility at Guantánamo is completely under the U.S. military's custody and control.¹³² Unlike the Haitian refugees in *Sale* who were interdicted at sea, the detainees in Guantánamo have no opportunity to apply for refugee determinations in other countries.

128. *Rasul v. Bush*, 542 U.S. 466, 466–67 (2004); see, e.g., Satterthwaite, *supra* note 57, at 1375 (arguing that the United States is pointing to the wrong rule of international human rights law when it argues that the *non-refoulement* norms do not apply in the context of extraordinary rendition and concluding that instead of using a "territorial rule of jurisdiction," it should be applying the "personal control doctrine"); Chesney, *supra* note 107, at 674–75 (concluding that if Guantánamo is "within 'the territorial jurisdiction' of the United States" for the purposes of the habeas statute, as *Rasul* held, there is no ground for concluding that it is not also U.S. territory for purposes of U.S. treaty obligations). Chesney concludes that *Rasul* is not in tension with *Sale* because the latter "merely addressed the Refugee Convention's *non-refoulement* language in connection with U.S. actions that take place on the high seas." *Id.*; see also Helton, *supra* note 3, at 2342 (arguing that the principle of *non-refoulement* has an extraterritorial aspect and that prospective asylum seekers are entitled to protection and "procedures sufficient to assess entitlement to refugee protection").

129. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 155 (1993).

130. *Rasul*, 542 U.S. at 475.

131. In *Kiyemba*, the D.C. Circuit considered the question whether the U.S. must extend Refugee Convention rights to detainees through immigration law, but declined to answer. *Kiyemba v. Obama*, 555 F.3d 1022, 1029–31 (D.C. Cir. 2009). The D.C. Circuit did not consider *Rasul*. *Id.* The *Kiyemba* decision was vacated, remanded, and reinstated without the Supreme Court weighing in on this question. See *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010); 559 U.S. ____ (2010) (per curiam), *cert. denied*, 563 U.S. ____ (2011).

132. *Rasul*, 542 U.S. at 466.

The language of *Rasul* thus strongly implies that Guantánamo is within the territorial jurisdiction of the United States for the purposes of the Refugee Convention as incorporated in U.S. law.¹³³

Exploiting the legal uncertainty regarding whether Refugee Convention rights attach via international or domestic law, the United States has declined to offer detainees at Guantánamo the opportunity to demonstrate their status as refugees.¹³⁴ There is no official mechanism in place to determine which detainees fear torture or persecution upon return. Some would likely meet the refugee definition under the Convention if status determinations were to be conducted,¹³⁵ but in the absence of such a determination it is difficult to tell whether the refugee detainees face a risk of persecution on a protected ground if returned to their countries of nationality.¹³⁶ A policy against returning detainees to torture or persecution is ineffective when the United States does not determine whether a detainee is a refugee and a transfer would constitute a *refoulement*.¹³⁷

133. See Chesney, *supra* note 107, at 675.

134. See *Kiyemba*, 555 F.3d at 1030–31 (stating that the executive did not consider whether the petitioners were eligible for asylum or refugee status because they did not apply for this relief in the United States).

135. For example, there is universal agreement that the Uighurs would face torture or worse on account of their ethnic group or political opinion. See *supra* Part II.A.

136. Without some sort of refugee status determination, the United States may not even know whether the detainees it is returning are *potentially* refugees. Only a small number of detainees have petitioned for asylum in the United States, and those petitions have been summarily denied on the ground of extraterritoriality without a refugee status determination being made. See, e.g., Habeas Attorney Interview, *supra* note 61. Since the asylum route in the United States is generally perceived among detainees and counsel to be a dead end, many detainees have not petitioned for asylum even if they do fear persecution. See *Kiyemba*, 555 F.3d at 1031 (stating that the Uighurs had not petitioned for asylum). Aside from declining to petition because the exercise is futile, some detainees hesitate to do so because they fear publicly criticizing home states when there is a real possibility that they will be repatriated to those states. See Habeas Attorney Interview, *supra* note 61 (indicating that her client was reluctant to file an asylum petition because he feared repercussions from his home country, but eventually did so); Reprieve, *supra* note 38 (stating that immediately after Ahmed Belbacha publicly announced his fear of persecution in Algeria he was tried in absentia and sentenced to 20 years in prison there on dubious charges).

137. Administration officials reportedly evaluate transfers based on the safety of the receiving country. See *Six Detainees*, *supra* note 34 (quoting administration officials as stating, “We take some care in evaluating countries for repatriation. In the case of Algeria, there is an established track record and we have given that a lot of weight . . . The Algerians have handled this pretty well:

2. Redefining “Release”

In addition to exploiting the legal uncertainty regarding the status of the detainees under domestic and international refugee law, the United States also exploits legal ambiguity regarding (1) where detainees must be released, (2) what constitutes “release,” and (3) when release must take place.

a. Release Where?

Detainees who have been cleared by habeas courts are entitled to release—on this point there is no serious debate.¹³⁸ The question now on the table is whether this is a right without a remedy. In holding that U.S. courts do not have the power to force the executive’s hand and order release into the United States, the D.C. Circuit in *Kiyemba* did not quarrel with the proposition that the detainees must be released.¹³⁹ However, it held that petitioners had invoked no law entitling them to release in the United States.¹⁴⁰ Because the Supreme Court vacated the D.C. Circuit’s ruling without addressing this point, and denied certiorari when the D.C. Circuit reinstated that ruling, the question remains open: What power do the district courts have to demand release in the United States?¹⁴¹

You don’t have recidivism and you don’t have torture.”). The executive’s determination that some countries are safe for resettlement does little to protect detainees against *refoulement*. A country may be safe for some and not for others.

138. See Brief for the Respondents at 1, 25, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234) (conceding that petitioners—who had obtained habeas review and prevailed—were entitled to release). The government conceded that in the usual case, a petitioner who brings a successful habeas petition is entitled to “release . . . to his home country.” *Id.* at 18–19 (citation omitted).

139. *Kiyemba*, 555 F.3d at 1028 (characterizing petitioner’s request as “an extraordinary remedy” above and beyond “simple release”).

140. *Id.* at 1028 n.13 (“[P]etitioners have cited no case in which a federal court ordered the Executive to bring an alien into the United States and to release him here, when the alien was held outside our sovereign territory.”). Finding that “[t]he government has represented that it is continuing diplomatic attempts to find an appropriate country willing to admit petitioners,” the Court concluded that it had no “power to require anything more.” *Id.* at 1029.

141. The *Kiyemba* rule is that the courts cannot order release into the United States while the government represents that it is continuing diplomatic efforts to resettle habeas-cleared detainees. *Kiyemba v. Obama*, 563 U.S. ___ (2011) (No. 10-775). Though under-theorized and ripe for further analysis, the question is beyond the scope of this Article.

b. What Is “Release”?

To avoid a court determination that the detainees must be released in the United States, and after conceding that detainees are entitled to release when a habeas court orders it, the executive chiseled down the meaning of that entitlement.¹⁴² To avoid the conclusion that U.S. courts are empowered to enforce the release orders, the executive draws a dubious distinction between “military detention at Guantánamo . . . in an enemy status” and “custody at Guantánamo . . . in a non-enemy status.”¹⁴³ The government relied upon this supposed distinction to argue that transferring a detainee to the “non-enemy” status has not been considered “a constitutionally inadequate response to a habeas court’s order of release.”¹⁴⁴ In doing so, the government explained that detainees of that status have “significantly more living privileges” than those held by detainees “in military detention,” implying that these privileges amount to some sort of quasi-release.¹⁴⁵

The government’s inventory of liberties that add up to “significantly more living privileges” demonstrates the poverty of this form of “release.” Habeas-cleared detainees have an air-conditioned living space, and they have access to a variety of entertainment and recreational equipment, special food items, and library materials.¹⁴⁶ They can also make telephone calls to family members—a privilege denied to the general population at Guantánamo—and send and receive mail, which the military screens for “operational purposes.”¹⁴⁷ Finally, cleared detainees are afforded the privilege of communicating with counsel outside, albeit through a chain-link fence.¹⁴⁸

142. See Brief for the Respondents at 18, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234).

143. *Id.* at 1.

144. *Id.* at 21. The government also argued that “[a] habeas court acts appropriately in granting the writ and ordering that the government cease detaining the individuals in an enemy status, while allowing the government to pursue opportunities for resettlement in other countries, as well as to hold the individuals in suitable conditions of custody.” *Id.* at 25.

145. *Id.* at 21 (citation omitted).

146. *Id.*

147. *Id.* at n.25 (noting the exception of “legal mail,” which is not screened).

148. *Id.* (noting that in the future if detainees wish to meet with counsel indoors they will be permitted to do so without being chained to the floor, as was the previous practice).

c. Release When?

After the Supreme Court rejected the executive's initial attempt to carve out an exception for terrorist combatants from international law,¹⁴⁹ the executive switched tactics, applying the window-dressing of universal "enemy combatant" designations to justify continued detention.¹⁵⁰ The designations present another legal challenge, this time to the contours of international law: When the United States refuses to lift the "enemy combatant" designation, even while "clearing" detainees for release, at what point does continued detention become "prolonged" and "arbitrary," in violation of the Geneva Convention and other international law obligations?¹⁵¹

Some commentators conclude that the United States is obligated under international law to release detainees once the reason for detention has ended.¹⁵² This obligation is expressed, among

149. See Satterthwaite, *supra* note 57, at 1408 (noting the debate over whether the Geneva Conventions' guarantees apply to al-Qaida operatives picked up in Afghanistan).

150. See *Rasul v. Bush*, 542 U.S. 466, 466 (2004) (holding that alien detainees could invoke the federal habeas statute to challenge detention); *Hamdan v. Rumsfeld*, 548 U.S. 557, 634 (2006) (plurality opinion) (applying common Article 3 of the Geneva Conventions to the conflict with al Qaeda); *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that constitutional habeas corpus protections apply at Guantánamo); see also Carlos Manuel Vásquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 Am. J. Int'l L. 73, 93–94, 96 (2007) (analyzing the court decisions in the detention cases and the executive's response); Landau, *supra* note 53, at 661 (describing and analyzing the interplay between courts and the executive in the detention cases).

151. Cf. Helton, *supra* note 3, at 2336–39 (considering the content of the right against "arbitrary and prolonged" detention in the immigration context).

152. *Id.* at 2338 n.19 ("All of the major human rights instruments recognize a right not to be arbitrarily detained by the state.") (citing human rights instruments: American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 7(3), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 147 (entered into force July 18, 1978) [hereinafter American Convention] ("No one shall be subject to arbitrary arrest or imprisonment."); ICCPR, *supra* note 118, art. 9(1), 999 U.N.T.S. 171, 175 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 5(3), Europ. T.S. No. 5, 213 U.N.T.S. 221, 226 (entered into force Sept. 3, 1953) [hereinafter European Convention] (stating that anyone arrested or detained "shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial"); UDHR, *supra* note 115, art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile."); see also Daryl L. Hecht, *Controlling the Executive's Power to Detain Aliens*

other places, in Article 75 of Protocol I to the Geneva Conventions, which provides that all detainees held in connection with armed conflict “shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”¹⁵³ The Third Geneva Convention, governing the detention and treatment of prisoners of war, provides that detained combatants “shall be released and repatriated without delay after the cessation of active hostilities.”¹⁵⁴ The Fourth Geneva Convention, governing the treatment of civilians in interstate conflicts, similarly requires release, this time even before the end of active hostilities: “as soon as the reasons which necessitated . . . internment no longer exist.”¹⁵⁵ Finally, and in

Offshore: What Process is Due the Guantánamo Prisoners?, 50 S.D. L. Rev. 78, 101 & n.209 (2005) (indicating that freedom from arbitrary detention is a widely recognized right).

153. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75, 1125 U.N.T.S. 3, 37 (entered into force Dec. 7, 1978) [hereinafter Protocol I]; see also *Hamdan*, 548 U.S. at 634 (finding that Article 75 is “indisputably part of the customary international law”). The *Kiyemba* international law amici noted that although Article 75 is not itself binding on the United States, Common Article 3 of the Geneva Convention is binding. Int’l Law Amici, *supra* note 118, at 2 (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention]). Common Article 3 requires that detainees be “treated humanely.” *Id.* The international law amici argue that in light of Article 75, “humane” treatment includes the requirement that detainees be promptly released “as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.” *Id.* But see Chesney, *supra* note 108, at 736–37 (arguing that the particular circumstances of the Guantánamo detainees do not trigger any of the provisions of the Geneva Convention concerning detainee transfers).

154. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118, 6 U.S.T. 3316, 92, 75 U.N.T.S. 135, 224 (entered into force Oct. 21, 1950) [hereinafter Third Geneva Convention]. The injunction to release and repatriate detainees without delay attaches regardless of whether there is a formal peace treaty or armistice. *Id.*; Int’l Law Amici, *supra* note 118, at 29 (stating that the official commentary of the International Committee of the Red Cross (“ICRC”) “interprets this provision as providing prisoners of war with ‘an inalienable right’ to repatriation and establishing a duty for detaining authorities to ‘carry out repatriation and to provide the necessary means for it to take place.’”) (citing 3 Int’l Comm. of the Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 546 (Jean S. Pictet ed., 1960)).

155. Fourth Geneva Convention, *supra* note 153, at art. 132, 6 U.S.T. 3516, 3606, 75 U.N.T.S. 287, 376 (“Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.”). To ensure that civilian detainees are not detained longer than

addition to the Geneva Convention requirements, the Universal Declaration of Human Rights mandates prompt release of detainees, stating that “[n]o one shall be subjected to arbitrary arrest, detention or exile,”¹⁵⁶ and directing that an “effective remedy” should be available if the detention is found to violate the law.¹⁵⁷

The United States exploits these uncertainties: What constitutes the cessation of active hostilities? When has the reason for detention ended? By conducting an ill-defined and borderless “war against terror,” the United States evades laws triggered by the end of a conflict.¹⁵⁸ By maintaining a blanket “enemy combatant” designation long after admitting that many detainees were civilians swept up in error, the United States invokes the more permissive detention laws applicable to combatants.¹⁵⁹ Further, by “clearing” detainees for release, the executive has signaled its conclusion that further detention is not justified, yet it continues to buy time by claiming that detention is not prolonged and arbitrary while the United States is making good-faith diplomatic efforts to resettle the detainees.¹⁶⁰

The maneuvering outlined above reflects the U.S. executive’s attempt to cope with a quandary of its own making. The executive’s legal strategies constitute an effort to save face before domestic courts and on the international stage and to continue to detain the refugee detainees while resettlement solutions are identified and negotiated.

necessary, the Fourth Geneva Convention requires that detaining authorities provide detained individuals with a semi-annual review of the basis for detention. *Id.* art. 43, 6 U.S.T. 3516, 3544, 75 U.N.T.S. 287, 314 (requiring review for detained aliens “at least twice yearly”); *Id.* art. 78, 6 U.S.T. 3516, 3568, 75 U.N.T.S. 287, 338 (requiring review for detained civilians “if possible every six months”). When the detaining authority finds that the detention is no longer warranted, the detention must end. *See Int’l Law Amici, supra* note 118, at 33 (citing 4 Int’l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 261 (Jean S. Pictet ed., 1958)). If the civilian detention continues to the close of hostilities, it must end “as soon as possible” afterwards. Fourth Geneva Convention, *supra* note 153, art. 133, 6 U.S.T. 3516, 3608, 75 U.N.T.S. 287, 378.

156. UDHR, *supra* note 115, art. 9.

157. *Id.* art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”).

158. *See Satterthwaite, supra* note 57, at 1417–18 & n.436.

159. *See Int’l Law Amici, supra* note 118, at 34–35.

160. Press Release, *supra* note 47; *Int’l Law Amici, supra* note 118, at 34–35.

B. Moral Risk

Whether or not the United States can legally defend its right to continue to detain the refugee detainees, the almost decade-long detention of individuals who have never been charged violates the spirit of the law. Detainees who have spent nine years in detention, some of it in solitary confinement, have been the most obvious casualties of the U.S. resettlement quagmire.¹⁶¹ Moreover, the executive's quasi-legal approach to resettlement of Guantánamo's refugee detainees creates an incentive for behavior that sacrifices the dignity and humanity of those detainees.

The secrecy surrounding the resettlement process creates an environment of fear. The United States' "policy" of *non-refoulement* without an obligation to announce which detainees it considers to be refugees allows it to retain maximum "operational flexibility."¹⁶² When the United States does not conduct a refugee status determination to clearly establish that a detainee is a refugee, it is accountable only to its own soft *non-refoulement* policy, not the hard-law obligations enshrined in the Refugee and Torture Conventions. A secretive process enables the executive to return marginal cases—detainees for whom refugee status is not so clear as to be publicly apparent—and to freely change course as to whether it

161. Sabin Willett, counsel to Huzaifa, a Uighur detainee, describes the conditions in "Camp Six," where his client and other detainees were held for many years:

The men call it the "dungeon above the ground." Each lives alone in an isolation cell. There is no natural light or air. There is no way to tell whether it is day or night. . . . For 2 hours in 24, the MPs shackle and lead Huzaifa to the rec[reation] area. This is a two-story chimney, about four meters square. It is your only chance to talk to another human being or see the sun. But the rec[reation] time might be at night. It might be after midnight. Weeks go by during which you never see the sun at all. . . . In the cell, he can crouch at his door. He can yell through the crack at the bottom. The guy in the next cell might actually hear him if he is not curled and facing the wall in a fetal position. Another Uighur told us of the voices in the head. The voices were getting the better of him, he said. His foot was tapping on the floor as he said this to me. I don't know what has happened to him. He doesn't come out of the cell to see us anymore. Huzaifa believes he will die in Guantánamo. He told us to tell his wife to consider that he has died and remarry.

Willett, *supra* note 21, at 31–32.

162. *Rendition*, *supra* note 100, at 457.

will return certain detainees.¹⁶³ These possibilities are undoubtedly valuable to the executive, but they come at the expense of the refugee detainees who do not know whether they will be returned to a place where they fear torture or worse.¹⁶⁴ For example, in a pleading before a federal district court, one Algerian detainee petitioned for an emergency administrative stay of transfer on the ground that petitioner's counsel had heard that the U.S. Attorney General was scheduled to meet with the Algerian Minister of Justice.¹⁶⁵ The detainee turned to the court for an administrative stay just in case the meeting "may presage his early transfer to Algeria."¹⁶⁶ The government scoffed at the implication, dismissing the concern as "unfounded speculation," but did so without denying that the detainee's transfer would be considered at the meeting.¹⁶⁷ As is clear from this pleading, the government's secrecy caused the detainee to live with an ear to the ground, in fear that news of a government meeting could lead to a transfer with potentially devastating consequences.¹⁶⁸

A system in which the United States refuses to recognize that some detainees are refugees also allows those detainees to become pawns in a political game. For example, the United States listed the Uighurs' political organization on a watchlist in order to garner China's support for U.S. Iraq policy.¹⁶⁹ The department of defense later allowed China to interview those detainees when it needed further political favors.¹⁷⁰ If the United States had performed a refugee status determination and determined that the Uighurs could

163. See *supra* note 136 and accompanying text.

164. The lack of transparency also hinders the executive's ability to facilitate transfers. A transparent system would allow the executive to marshal all governmental and non-governmental actors to broker the best solution, rather than entrusting the task to one small government office with limited external input.

165. See Belbacha Motion, *supra* note 16, at 1.

166. *Id.* at 4.

167. *Id.*

168. *Id.* (concluding that the detainee "can only raise a concern, because only the government knows. But for Mr. Belbacha, the impending meeting is ominous. Where there is smoke, there may be fire. Mr. Belbacha cannot afford to wait to see how it all turns out").

169. Brief of Petitioners at 5–6, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234).

170. *Id.* (citing Office of Inspector General, U.S. Dep't of Justice, A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq 183–84 & n.134 (2008), available at <http://www.justice.gov/oig/special/s0805/final.pdf>).

not be returned to China, they could not have used those detainees as pawns in political gamesmanship.¹⁷¹

C. Political Cost

The legal and moral errors that the United States makes in failing to release and resettle the refugee detainees drains the country's political capital. Today, the government provides generous "living privileges" for habeas-cleared detainees, but this change follows nine years of abuse and inhumane treatment, which was noted around the world.¹⁷² Additionally, the United States creates the perception that it is a rule-breaker by failing to (i) conduct refugee status determinations, (ii) accept any detainees for resettlement in the United States, or (iii) release detainees after proclaiming that the reason for their detention has ended.¹⁷³ If the United States makes the poor decision to transfer a refugee to persecution or torture, international scrutiny and political backlash could intensify.

The political costs of the U.S. approach defeat the United States' own goals—to resettle the detainees and close Guantánamo—because those goals are dependant on international cooperation. Now that the United States needs assistance from foreign states to resettle refugee detainees, it faces understandable resistance. As a result, the United States is forced to spend its political capital on persuading other states to provide solutions to a refugee problem that the United States itself has created and continues to perpetuate. The United States' difficulty in concluding the resettlement process delays closing Guantánamo, which further

171. Additionally, a process by which the United States peddles detainees around the world depends on the United States' capacity to "sell" detainees to foreign states, raising concerns about the commoditization of the refugee detainees. See *Temporary Protection*, *supra* note 4, at 287 (noting the "commodification" concern when the system is left to political bargaining rather than legal standards).

172. See, e.g., Sarah Mendelson, *The Guantánamo Countdown*, Foreign Policy, Oct. 1, 2009, available at http://www.foreignpolicy.com/articles/2009/10/01/the_guantanamo_countdown [hereinafter Mendelson] (stating that Guantánamo symbolized controversial U.S. counterterrorism policies).

173. See *supra* notes 71–99 and accompanying text; Manel, *supra* note 71; see also *Germany's Guests*, *supra* note 81 (quoting Special Envoy Fried: "It is fair to say, as just an objective statement, that the U.S. could resettle more detainees, had we been willing to take in some . . ."). According to the German press, in order to secure Germany's cooperation with detainee resettlement, the U.S. had to at least agree to *consider* taking some detainees. *Id.*

harms the U.S. reputation—thus, ironically, creating further resettlement delays.¹⁷⁴

IV. PROPOSING A THIRD WAY: A ROLE FOR THE UNHCR

Criticisms of the United States' management of the refugee problem in Guantánamo outlined in Part III flow in large part from the United States' reluctance to submit refugee detainees to international and domestic law mechanisms. Ideally, the United States would comply with the Refugee Convention's requirement that each potential refugee in Guantánamo be afforded a refugee status determination. Under the Refugee Convention, if a detainee is found to be a "refugee" and is neither excludable nor expellable, the executive should grant asylum or withhold removal in the United States until it is possible to repatriate the detainee.¹⁷⁵ In such a utopian scenario, the United States would have performed the review and completed the transfer immediately after each detainee was "cleared for release," so as to comply with the Geneva Convention's prohibition on arbitrary detention. This would have had positive international political effects, saved the executive branch

174. See, e.g., Shephard, *supra* note 72, at IN1 (stating that President Obama's announcement that the administration would close Guantánamo "was a very important building block for the Obama Administration . . . The Obama campaign, and then the administration, staked a lot on turning the page on those counterterrorism policies"). Moreover, the United States' success in refugee resettlement depends in part on the country's political clout at any given time and international goodwill towards the United States. The Obama administration resettled 20 refugees in the administration's first six months, while under the six years of the Bush administration only eight detainees were given refuge, and they all went to Albania. *Id.*

175. See *supra* Part III.A (discussing that release is required at cessation of active hostilities or when reason for detention has ended); Int'l Law *Amici*, *supra* note 118, at 14–15; see also Kara Simard, Note, *Innocent at Guantanamo Bay: Granting Political Asylum to Unlawfully Detained Uighur Muslims*, 30 *Suffolk Transnat'l L. Rev.* 365, 398 (2006–07) (arguing that the Uighurs should be granted asylum in the United States). Under U.S. immigration laws, the United States could choose to withhold removal without granting asylum and allow refugees to remain in detention until an alternate solution is found, Helton *supra* note 3, at 2337 (stating that detention is permitted to facilitate removal), although at some point the detention becomes "prolonged and arbitrary" under international law standards, and must end. *Id.* (examining parameters of prohibition against "prolonged arbitrary" detention in the immigration context). In the Guantánamo context, additional U.S. Geneva Convention obligations apply, because the detainees are held as wartime combatants. The United States conceded that it is not holding the detainees under immigration laws. See Brief of Respondents at 19, *Kiyemba v. Obama*, 130 U.S. 1235 (2010) (08-1234).

international political capital, facilitated a quicker end to the chapter of U.S. history shadowed by Guantánamo, and demonstrated U.S. commitment to international law and institutions—thereby supporting the U.S. claim to global moral leadership.¹⁷⁶

The United States' failure to follow such a model approach resulted partly from the political challenge of convincing the U.S. public to accept detainees labeled as “enemy combatants,” with perceived connections to terrorism and the events of September 11, 2001.¹⁷⁷ The failure may also have been due to real or perceived security concerns, or mere lack of political will.¹⁷⁸ These historical questions are beyond the scope of this Article. Because no change in course has occurred over the many years since the first detainees were cleared for release—despite President Obama's campaign promise to close Guantánamo—this Article assumes that the U.S. executive branch will not change course in the future.¹⁷⁹ This Article also sets aside the question of whether the United States could be coerced or incentivized to deal on its own with Guantánamo's refugee detainees in an ideal manner.

This Article proposes a third way, which charts the territory between the current U.S. approach and full compliance with domestic and international law. According to this third way, the United States should solicit and obtain assistance from the UNHCR.¹⁸⁰ It is within the mandate of the UNHCR to perform refugee status

176. See Taylor, *supra* note 70 (“In the eyes of the world the [Guantánamo] prison has come to exemplify harsh U.S. anti-terror tactics and detention without trial[.]”).

177. See *id.* (quoting Senator John Thune: “The American people don't want these men walking the streets of America's neighborhoods. . . . [or] held at a military base or federal prison in their backyard”).

178. See *id.* (quoting FBI Director Robert Mueller as reporting to Congress his “concern” that “Guantánamo detainees could support terrorism if sent to the United States”).

179. See Mendelson, *supra* note 172.

180. The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism also suggested that the UNHCR participate in the resettlement of Guantánamo's detainees, although this proposal has so far gone without notice in the academic literature. See Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Statement Delivered to the General Assembly, Third Committee, U.N. DOC. A/62/263 (Oct. 29, 2007) [hereinafter Special Rapporteur] (recommending that the UNHCR “be involved in the resettlement of Guantánamo detainees claiming to be in need of international protection,” including by conducting status definitions and assisting with resettlement).

determinations for Guantánamo detainees and to broker agreements with foreign states to secure asylum for those who are refugees. UNHCR participation would be effective in resolving many of the Guantánamo refugee resettlement problems outlined in Part III. Specifically, UNHCR assistance would help the United States out of the bind that its current policies and legal strategies cannot easily resolve and would also help protect the moral and political goods threatened by the current U.S. approach.

Because the United States has resettled many Guantánamo refugee detainees through its arduous peddling process, it has missed the opportunity to capture the benefits that UNHCR participation from an earlier stage would have afforded. Nonetheless, several dozen refugees remain detained, and as one commentator has noted, the final refugee cases are likely to be the most intractable.¹⁸¹ The UNHCR could assist the United States to resolve these cases.

A. The UNHCR as Assistant

The UNHCR has a broad mandate to assist the international community in protecting refugee rights, and does so in many different capacities around the globe. The UNHCR functions primarily as an assistant to sovereign states, not as a police or watchdog entity.¹⁸²

The United Nations' General Assembly established the UNHCR in 1950—just after the flows of World War II refugees and just prior to the adoption of the Refugee Convention—to assist governments in carrying out their obligations to protect refugees under then-existing international instruments.¹⁸³ The UNHCR was mandated to serve:

[T]he function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the [UNHCR] Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the

181. See Shephard, *supra* note 72, at IN1 (“While no deal has been easy for Fried, the final few cases will likely pose the most problems—and could derail closing the prison.”).

182. See Pallis, *supra* note 111, at 887 (“States . . . are regarded as the power-wielders, with the UNHCR acting as the trustee who will perform the duties of office faithfully.”); Donkoh, *supra* note 5, at 265 (noting that the UNHCR’s role in refugee protection is to be “a facilitator,” while states are the implementers of refugee protection).

183. See Goodwin-Gill, *supra* note 105, at 7–15.

approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.¹⁸⁴

The UNHCR now manages refugee flows under the Refugee Convention, the Protocol, and regional agreements.¹⁸⁵ The organization articulates its mandate as “safeguard[ing] the rights and wellbeing of refugees, to lead and coordinate international action for their worldwide protection and . . . seek[ing] permanent solutions to their plight.”¹⁸⁶

Among other tasks, the UNHCR conducts refugee status determinations required by the Convention’s *non-refoulement* provision, and assists with resettling detainees when a host state is

184. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), U.N. Doc A/1775 (Dec. 14, 1950) [hereinafter UNHCR Statute]; see also Memorandum, UNHCR Advisory Committee, Memorandum By The High Commissioner On Certain Problems Relating To The Eligibility of Refugees (Conference Room Doc. No. 1) (Nov. 15, 1951), available at <http://www.unhcr.org/4419921c2.html> [hereinafter UNHCR Advisory Committee, Memorandum] (outlining UNHCR’s obligations under the statute); Goodwin-Gill, *supra* note 105, at 7–8 (explaining that the UNHCR’s mandate is determined by its statute, by resolutions of the General Assembly, and by the U.N. Economic and Social Council).

185. Refugee Convention, *supra* note 3; Protocol, *supra* note 3; see also UNHCR, History of UNHCR: A Global Humanitarian Organization of Humble Origins, <http://www.unhcr.org/pages/49c3646cbc.html> [hereinafter History] (explaining the Refugee Convention as “the basic statute guiding UNHCR’s work” and stating that the UNHCR also works to safeguard the protections afforded by the Protocol and other agreements).

186. Ninette Kelley, et al., UNHCR Evaluation & Policy Analysis Unit, Enhancing UNHCR’s Capacity to Monitor the Protection, Rights and Well-Being of Refugees, at 17, EPAU/2004/06 (June 2004), available at <http://www.unhcr.org/40d9781d4.pdf>; see also UNHCR, An Introduction to International Protection, Protecting Persons of Concern to UNHCR, at 1, 7 (Aug. 1, 2005), available at <http://www.unhcr.org/refworld/docid/4214cb4f2.html> (“UNHCR’s mandate is to provide, on a non-political and humanitarian basis, international protection to refugees and to seek permanent solutions for them”; “[UNHCR] States have the primary responsibility for protecting refugees . . . [The UNHCR] works to ensure that governments take all actions necessary to protect refugees, asylum-seekers and other persons of concern who are on their territory or who are seeking admission . . . [and] also strives to secure durable solutions for refugees”); Won Kidane, *An Injury to the Citizen, A Pleasure to the State: A Peculiar Challenge to the Enforcement of International Refugee Law*, 6 Chi.-Kent J. Int’l & Comp. L. 116, 176 (2006) (“As far as refugees are concerned, the UNHCR is . . . the only possible substitute for the traditional diplomatic protection that states provide to their citizens in foreign lands.”).

overwhelmed by refugee flows or requests assistance.¹⁸⁷ The UNHCR manages refugee camps, issues travel papers, tracks refugee flows, and performs many other functions, holding itself responsible to the international community “for all aspects of the complete life-cycle of a refugee situation.”¹⁸⁸

Under the terms of the UNHCR Statute, the organization carries out its mandate by working with and by the permission of state governments, serving “at all times in close collaboration with Governments, and frequently through them.”¹⁸⁹ The UNHCR is charged with formulating refugee policies by facilitating state action, rather than by acting independently.¹⁹⁰

In practice, the UNHCR is highly deferential to state parties. The organization negotiates agreements with individual states that outline the tasks the UNHCR is entrusted to perform under the agreement, and will generally confine its activities in a State to the terms of the negotiated agreement.¹⁹¹ In some states, the UNHCR

187. See UNHCR Advisory Committee, Memorandum, *supra* note 184, at 4 (announcing the High Commissioner’s conclusion that it is within the UNHCR’s mandate to conduct refugee status determinations); UNHCR, Partnership: An Operations Management Handbook for UNHCR’s Partners, 1.5 subsec. 1 (Feb. 2003), available at <http://www.unhcr.org/4a39f7706.html> [hereinafter Partnership]; see also Pallis, *supra* note 111, at 877 (noting that the UNHCR has engaged in a “tacit quid pro quo” with states that have trouble bearing the high financial cost of conducting refugee status determinations whereby the UNHCR conducts the determinations in exchange for accession by the state to international refugee conventions, with the result that “while most western states conduct refugee status determinations for themselves, the UNHCR conducts it in many of the poorest states of the world”). The UNHCR conducts refugee status determinations in 80 countries worldwide, processing at least 75,000 asylum applications in 2004. *Id.*

188. UNHCR, Partnership, *supra* note 187, at 1.5 subsec. 1.

189. UNHCR Advisory Committee, Memorandum, *supra* note 184, at 1; see also UNHCR Statute, *supra* note 184.

190. UNHCR Advisory Committee, Memorandum, *supra* note 184, at 1 (explaining that the UNHCR was not designed to “take the place of the authority of States in the field of refugee policy” but to support them).

191. See Pallis, *supra* note 111, at 881–82 (finding that these agreements often “govern refugee status determination and make explicit reference to the tasks which the UNHCR is entrusted to perform” in a given State); see also Ralph Wilde, *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, 119–20 (1998) (noting that “there is no limit on the sorts of obligations that can be included, and they may well include the UNHCR’s own guidelines,” which may interpret international norms differently in different contexts). In a Memorandum issued shortly after the Refugee Convention was adopted, the High Commissioner concluded that, under

will assume essentially all refugee-processing functions, including performing refugee status determinations.¹⁹² In others, the UNHCR performs only a few general functions, such as publicizing refugee issues and fundraising.¹⁹³ The UNHCR's deference to state parties is influenced by the fact that it is funded by many of the states it assists.¹⁹⁴ Commentators point out that this funding structure gives the UNHCR incentive to refrain from confrontational behavior.¹⁹⁵ For example, while the UNHCR is empowered to review State action, including reviewing a host state's basis for denying individual refugee petitions, the organization rarely performs these functions or criticizes the actions of host states for fear of jeopardizing funding sources.¹⁹⁶

The UNHCR's cooperation with state parties for the protection of refugees was designed to be a reciprocal arrangement. The U.N. General Assembly Resolution instituting the UNHCR called upon states to "recognize the High Commissioner's right to act and mediate on behalf of refugees" and to "assist him in his work."¹⁹⁷ In Article 35(1) of the Refugee Convention, signatory states committed to cooperate with the UNHCR:

The contracting states undertake to cooperate with the Office of the [UNHCR], or any other agency of the United Nations which may succeed it, in the exercise

the UNHCR Statute, the UNHCR could conclude agreements with States who wished to solicit UNHCR assistance with various tasks. UNHCR Advisory Committee, Memorandum, *supra* note 184, at 2 ("In accordance with the terms of Article 8b of his Statute, interested Governments are at liberty to seek the co-operation of the High Commissioner, in an agreement which would define the particular services which they may wish to entrust to his Office.").

192. *See* Wilde, *supra* note 191, at 119–20.

193. For instance, in North America, the UNHCR "monitors and supports national refugee protection mechanisms, builds awareness of the rights of refugees and asylum-seekers, and seeks to secure political and financial support for its operations." UNHCR, 2010 Regional Operations Profile: North America and the Caribbean, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492086> (last visited Feb. 24, 2011); *see also supra* note 187 and accompanying text.

194. The United States leads the world in financial contributions to the UNHCR. In 2009, the United States contributed US \$641 million to the UNHCR. UNHCR, Government Contributions to UNHCR, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492086> (last visited Mar. 9, 2011).

195. *See* Kidane, *supra* note 186, at 176–77 ("Evidently, however, the UNHCR's existing obligations, coupled with a fear of endangering relations with host governments, has had a significant impact on the UNHCR's ability to supervise the due implementation of the Convention.").

196. *Id.*

197. UNHCR Statute, *supra* note 184.

of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this convention.¹⁹⁸

Before the establishment of the UNHCR, direct state-to-state agreements concerning refugee resettlement were common.¹⁹⁹ Now the UNHCR carries out the bulk of refugee resettlement, referring refugees to various states for resettlement according to the specifications of each state.²⁰⁰ Although there is nothing to prohibit states from concluding direct state-to-state agreements, in practice this occurs in a very small number of cases.²⁰¹ Most states now refer resettlement issues to the UNHCR, and accept refugees only on referral from the UNHCR or through domestic processes.²⁰²

B. The UNHCR in Guantánamo

In a 2007 report to the U.N. General Assembly, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism (“Special Rapporteur”) recommended that the UNHCR should be involved in the resettlement of Guantánamo detainees claiming to be in need of protection from resettlement to their countries of origin. The Special

198. Refugee Convention, *supra* note 3, art. 35(1).

199. See Goodwin-Gill, *supra* note 105, at 7–18; *Temporary Protection*, *supra* note 4, at 280–81 (noting that when pressured the international community resorts to “a traditional model of reciprocal international obligation”).

200. Memorandum to Interested Guantánamo Legal Teams Regarding Potential Mechanisms for Obtaining Third-State Resettlement for Detainees with Viable Refugee/Torture Claims from Susan Akram, Clinical Professor, Boston University Civil Litigation Program, at 2 (Oct. 5, 2005) (on file with Author) (describing strategies for how detainees with putative refugee claims might have such claims reviewed by third states for possible resettlement); see, e.g., *New Zealand Resisted US Requests To Take Guantanamo Refugees*, New Zealand Herald, Aug. 21, 2007, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10458944 [hereinafter New Zealand] (reporting that New Zealand refused a U.S. request to accept detainees because the detainees were not referred by the UNHCR).

201. See Akram, *supra* note 200 (explaining that states will commit to making a certain number of refugee slots available and will sometimes designate a preferred category of refugee population, such as unaccompanied minors, humanitarian cases, or single women without families). In 2009, the UNHCR employed a staff of 6,650 members working in 118 countries, with a budget of US \$2 billion to carry out this task. See UNHCR, History, *supra* note 185. The number of people under UNHCR supervision that year amounted to a total of 34.4 million, including displaced people, refugees, returnees, stateless people, and asylum seekers. See *id.*

202. See Akram, *supra* note 200.

Rapporteur recommended that this involvement include refugee status determinations, or “an assessment, including through confidential interviews, of the situation of each individual detainee,” and assistance with resettlement.²⁰³ The advice of the Special Rapporteur has fallen on deaf ears.

Resettlement of Guantánamo’s refugee detainees differs from the standard resettlement cases. First, the United States is solely responsible for the fact that the refugees are within U.S. jurisdiction and control, and second, the burden to the United States is not in the size, urgency, or economic cost of the refugee situation, but in the fact that resettling the detainees poses a domestic political problem. Yet neither of these differences prevent the UNHCR from assisting the United States in solving the Guantánamo refugee issues. The UNHCR has wide latitude under its statute, and its roles around the world are varied and flexible; state parties craft agreements that are suitable to their needs.²⁰⁴ The United States could choose to entrust both the conduct of refugee status determinations and coordination of resettlement entirely to the UNHCR, or it could retain some control over the process. The United States and the UNHCR could agree upon terms that are reasonable in the Guantánamo context. Despite the benefits and flexibility of UNHCR involvement, however, the United States has not heeded the Special Rapporteur’s recommendation to invite the UNHCR to assist in Guantánamo.²⁰⁵ The section that follows explains why the U.S. failure to extend this invitation is unfortunate. Rather than causing the United States to sacrifice its national interests for the greater good, UNHCR participation would in fact further U.S. national interests. This solution would also provide other benefits, such as protecting detainee rights and furthering the legitimacy of international refugee law.

1. Benefits to the United States

The United States should solicit and obtain UNHCR assistance in order to accomplish its own goals. Delegating to the UNHCR the responsibility to conduct refugee status determinations and negotiate on behalf of detainees for resettlement in foreign states would enable the United States to close Guantánamo more swiftly and with fewer political costs.

203. Special Rapporteur, *supra* note 180, at 4.

204. *See supra* Part IV.A.

205. *See Akram, supra* note 200.

The UNHCR's designation of a detainee as a "refugee" and referral of the detainee for resettlement would carry legitimacy the United States cannot replicate. As discussed in Part II, *supra*, the United States engages in double-speak in connection with the detainees.²⁰⁶ On the one hand, the U.S. executive refuses to withdraw "enemy combatant" status designations²⁰⁷ and to accept detainees for resettlement in the United States.²⁰⁸ On the other hand, it compiles sympathetic profiles for detainees it wishes to resettle—outlining detainees' life experiences, family connections and pacifist sentiments—and reassures potential resettlement countries by touting stories about the successful integration of detainees resettled elsewhere.²⁰⁹ Given this context, even a formal refugee status determination by the United States would be perceived as little more than another hand to be played in the resettlement game. The UNHCR, by contrast, is experienced and politically neutral.²¹⁰ A UNHCR determination that a detainee is a refugee and safe for resettlement would carry authority.

UNHCR participation in the status determination process would not pose a meaningful challenge to U.S. interests in national security or sovereignty. As for security, the status determination

206. See *supra* Parts II.B.1, II.C.

207. See *supra* Part II.B.1.

208. See Taylor, *supra* note 70 (reporting that FBI Director Robert Mueller testified before Congress about his "concern" that Guantánamo detainees could support terrorism if sent to the United States).

209. In addition to conflicting motivations, the double-speak may also be due to crossed signals between the Department of Defense, which attempts to justify continued detention of the detainees in court and elsewhere, and the State Department, which is responsible for persuading foreign states that the detainees are safe for resettlement. In Sabin Willett's testimony before Congress, he pointed out that the State Department's difficulty in resettling detainees was due in part to the fact that U.S. statements have instilled fear. Willett, *supra* note 21, at 1 ("[O]ur allies read the same shrill rhetoric about Guantánamo that you have read."); see also Worthington, *Finding New Homes*, *supra* note 86 (reporting that the United States freely reveals to potential host states facts in detainee files that suggest that the detainees may be potentially dangerous, even when those facts are suspect, unsubstantiated, or the product of bribery or torture). Chesney also notes the duality of the U.S. approach, framing the Guantánamo transfer paradigm as a "clash between competing interests that neither side can simply dismiss." Chesney, *supra* note 107, at 746. The "clash" results from the military's need for "sufficient latitude" to decide against repatriation given U.S. legal and moral obligations to prevent torture and the government's diplomatic need to negotiate transfers to home states. *Id.*

210. See UNHCR, Partnership, *supra* note 187; Pallis, *supra* note 111, at 910 (emphasizing that the UNHCR is non-political).

process would require nothing more than an interview with each potential refugee detainee in Guantánamo by UNHCR representatives.²¹¹ The United States has invited numerous countries to Guantánamo to interview detainees when it has served U.S. political interests to do so, demonstrating that the United States is equipped to manage any security risks attendant to such interviews.²¹² Inviting the UNHCR to conduct refugee status determinations does implicate sovereignty concerns: The approach would obligate the United States to abide by UNHCR refugee designations and the *non-refoulement* obligation that those designations entail. Under current U.S. practice, by contrast, the United States does not publicly state whether it considers a given detainee to be a refugee, and so avoids any accountability.²¹³ Without knowing whether a detainee has a legitimate claim to refugee status, one cannot know whether repatriation of that detainee constitutes *refoulement*.²¹⁴ While UNHCR status determinations would impose accountability, the United States can mitigate the damage by also inviting the UNHCR to shoulder some of the burden of those

211. See UNHCR Handbook, *supra* note 11, at para. 28 (setting out the core elements of the refugee status determination process). Cf. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (finding that while not legally binding on U.S. officials, the Handbook provides “significant guidance” in construing the Protocol and in giving content to the obligations established therein); UNHCR, Advisory Opinion: Minimum Standards for Refugee Status Determination Procedures, Oct. 26, 2006 (Letter from UNHCR to Barbara Olshansky, Director Counsel, Guantánamo Global Justice Initiative) (on file with Author) (explaining that applicants should receive a personal interview before decision-makers with the opportunity to present evidence and call witnesses, in conditions which ensure appropriate confidentiality, and with a legal representative present).

212. For example, the United States invited Chinese officials to come to Guantánamo to question the Uighurs at a time when President Bush was attempting to secure the acquiescence of Chinese President Jiang to U.S. Iraq policy. See Office of Inspector General, U.S. Dep’t of Justice, *A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan and Iraq*, at 183–84 & n.134 (2008), available at <http://www.justice.gov/oig/special/s0805/final.pdf>; see also Brief in Support of Petitioners at 6, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (08-1234) (citing White House news release). Nevertheless, the United States denied access to five U.N. Special Rapporteurs who sought interviews with individual detainees. The Special Rapporteurs were offered such restricted access that they declined to visit Guantánamo at all, issuing a scathing report on the situation instead. See U.N. Commission on Human Rights, *Situation of Detainees at Guantánamo Bay*, E/CN.4.2006/120 (Feb. 27, 2006).

213. See *supra* Part III.B.

214. See *supra* Part III.A.1.ii.

designations by assisting with resettling the detainees, as explained below.

Involvement by the UNHCR in the status determination process would also eliminate political delicacies that may deter the United States from making refugee designations. Refugee scholarship has noted that one state's designation of another state's citizen as a refugee is a politically loaded act.²¹⁵ A refugee designation constitutes transparent criticism of another state's human rights policies.²¹⁶ The delicacy is exacerbated for the United States in the Guantánamo context because some states, such as Algeria, are safe for some detainees but hazardous for others.²¹⁷ Designating some Algerians as refugees could damage the United States' attempts to persuade Algeria to accept other detainees for repatriation on favorable terms. Since resettlement of Guantánamo detainees is a matter of global scrutiny, a determination that some detainees are refugees will not pass unnoticed. If the UNHCR assumes the duty of determining refugee status, the United States will not have to answer for those designations.

UNHCR facilitation of refugee detainee resettlement would benefit the United States by speeding up the process and reducing its cost. States have no international law obligations to accept refugees from another state, and direct state-to-state resettlement agreements are now rare.²¹⁸ By contrast, state parties to the Refugee Convention are obligated to assist the UNHCR in carrying out its refugee protection agenda.²¹⁹ In accordance with this mandate, there is a well-established process by which states accept refugees upon referral from the UNHCR.²²⁰ Many states agree to accept a certain

215. See, e.g., James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l L. J. 129, 145–51 (1990) (arguing that both Western countries and the Soviet Union saw development of the refugee concept as an attempt to bolster condemnation of the Soviet bloc); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (noting that recognizing refugees “may affect our relations with [the refugee’s home] country or its neighbors” and that “diplomatic repercussions” of refugee determinations are beyond the ken of the judiciary).

216. See *supra* Part IV.A.

217. See *supra* notes 135–137 and accompanying text.

218. Akram, *supra* note 200; *New Zealand*, *supra* note 200 (reporting that New Zealand refused a U.S. request to accept detainees because the detainees were not referred by the UNHCR).

219. Refugee Convention, *supra* note 3, art. 35; Protocol, *supra* note 3, art. 11; see also *supra* Part IV.A.

220. See *id.*

quota of refugees from the UNHCR each year.²²¹ UNHCR referral would thus give states an incentive to accept Guantánamo detainees, since the detainees would make up part of their quota.²²² The United States can offer no similar incentive and must use other methods of persuasion. Although the details of the state-to-state detainee resettlement agreements in the Guantánamo context are not made public, it is safe to assume that the costs to the United States—stated or implied—are significant. The UNHCR could appeal to states to fulfill duties to the international community under Refugee Convention ideals, minimizing the reliance on political favors, clout, or goodwill toward the United States.

By facilitating resettlement, UNHCR assistance would help the United States out of its bind. The executive could make good on promises to close Guantánamo and reap domestic political approval from that achievement without being forced to resettle detainees on U.S. soil. Although the United States may be able to accomplish these goals without UNHCR assistance, UNHCR participation would have many advantages and few risks. Moreover, UNHCR involvement in the resettlement process could help the United States meet its international obligations, by ensuring that the refugees receive the status determinations required by the Refugee Convention, and by facilitating a swifter satisfaction of the United States' Geneva Convention obligation to release detainees as soon as the reason for their detention has ended. Submission of some autonomy to an international body would signal to the international community that although the United States is unable or unwilling to accept detainees for resettlement, it nevertheless considers itself to be committed to the rule of law and international ideals enshrined in the Refugee Convention. The suggested approach, in combination with other foreign policy and rule-of-law-related changes, would help the United States to regain moral standing lost on account of Guantánamo abuses, and reclaim the international political benefits of being perceived as a rule-abider.²²³

221. *Id.*

222. *See, e.g., New Zealand, supra* note 200 (reporting that New Zealand had already committed to accepting a quota of refugees from the UNHCR and would not take Guantánamo detainees).

223. *See* Interview by George Stephanopoulos with President-elect Barack Obama, ABC News (Jan. 11, 2009) (quoting President-elect Obama as acknowledging that closing Guantánamo is necessary to regaining standing internationally: "We are going to close Guantánamo That is not only the right thing to do, but it actually has to be part of our broader national security

In sum, UNHCR assistance would be valuable to the United States in carrying out difficult resettlements, emptying Guantánamo of cleared detainees as quickly as possible in compliance with international law, and allowing the United States to begin regaining the political capital the Guantánamo issue has drained.²²⁴

2. Benefits to Detainees and Foreign States

A swifter detainee resettlement process would clearly benefit any refugee detainees who leave Guantánamo sooner by enabling them to begin new lives in freedom months or years earlier.²²⁵ A UNHCR-facilitated refugee status determination process would safeguard refugees against *refoulement*, especially in light of the U.S. commitment to respect the *non-refoulement* norm. The UNHCR status determinations would also eliminate incentives to the United States to engage in a cloak-and-dagger approach to resettlement—peddling detainees to third countries while refusing to designate them as refugees just in case it might eventually decide to repatriate them to home countries.²²⁶ Likewise, involvement by the UNHCR would minimize the extent to which detainee resettlement could be used as a political bargaining chip, commoditizing refugee detainees.²²⁷ Entrusting the process to the UNHCR would further benefit detainees by increasing the transparency of the process, so

strategy, because we will send a message to the world that we are serious about our values”).

224. Indeed, had the United States solicited UNHCR assistance earlier in the process President Obama may have been able to meet commitments to close Guantánamo within a year of his inauguration. See Executive Order, *supra* note 13, at 4898 (“The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order.”); see also Christina Bellatoni, *Obama Sees Campaign Promises Fade*, Wash. Times, Jan. 11, 2009, <http://www.washingtontimes.com/news/2009/jan/11/obama-sees-campaign-promises-fade/?page=1> (noting that President-elect Obama retreated from an earlier campaign promise to close the facility within 100 days of his inauguration).

225. This benefit could extend to cleared detainees who are not entitled to “refugee” status under the Convention but who are also in need of international assistance, such as detainees who are stateless, or who are excluded from Refugee Convention protections because they have committed a crime. See *supra* Part III.A.1.a. (listing Refugee Convention exclusions); Special Rapporteur, *supra* note 180, at 1–4 (recommending that UNHCR assist persons who are not refugees but who need international protection).

226. For a critique of the “cloak-and-dagger” approach, see *supra* Part II.C.

227. See *Temporary Protection*, *supra* note 4, at 287 (noting commoditization concern).

detainees are not forced to live in constant fear of repatriation to persecution at the hands of a hostile country of origin. UNHCR assistance would also benefit foreign states that accept detainees for resettlement, since working with the UNHCR would reduce the political consequences of accepting Guantánamo detainees.²²⁸

C. Critiques

There are several possible criticisms of the proposed UNHCR-facilitated approach. First, enlisting UNHCR assistance could threaten U.S. sovereignty interests. The United States has a historic reluctance to submit to international law—why make an exception here?²²⁹ The answer is that the UNHCR is motivated to be deferential to U.S. interests because the United States is the UNHCR's top funder worldwide.²³⁰ Additionally, the United States does not submit itself to any additional enforcement measures by securing UNHCR assistance: The only enforcement mechanism under the Refugee Convention is state referral to the International Court of Justice (“ICJ”). No state has ever been referred to the ICJ for Refugee Convention violations, however, and the UNHCR does not have the power to make this referral.²³¹ Finally, the United States has demonstrated by extensive resettlement efforts that it will go to great lengths to make good on its policy against *non-refoulement*.²³²

A second possible criticism of the proposed UNHCR-facilitated approach is that the United States would be avoiding its

228. Many states agreed to accept detainees as a form of political favor to the Obama administration, while fewer detainees were successfully resettled under the Bush administration. See Shephard, *supra* note 72, at IN1. With the UNHCR to broker agreements, states could have accepted refugees during the Bush administration without fearing that doing so would send a message of approval of the Bush administration policies. For both administrations, foreign states criticized the United States for not accepting detainees for resettlement in the United States, suggesting that the United States should take steps to solve a problem of its own creation before asking foreign States for help. See *supra* Part III. Clearly states are concerned about the possibility that they might signal approval or support of U.S. policies by offering to accept detainees for resettlement. See *id.*

229. See, e.g., Helton, *supra* note 3, at 2235 (describing how American courts are wary of looking to international law to uphold the rights of individuals against violations by governments).

230. See *supra* note 194 and accompanying text.

231. See Kidane, *supra* note 186, at 176.

232. See *supra* Part III.A.

Refugee Convention obligations by placing the burden of resettlement on the UNHCR. Perhaps the United States should be forced to clean up its own mess. Given that other countries are already accepting Guantánamo detainees for resettlement and will likely continue to do so, the resettlement burdens on the international community will not increase under the proposed approach. Moreover, the United States takes at least some responsibility for the problem by securing UNHCR assistance to manage the problem in its stead, and would likely have to grant the UNHCR additional funding to take on this additional role.²³³

A third possible criticism of the proposed approach regards its potential for success. After all, the United States' difficulty in resettling the Uighurs has arisen primarily from the reluctance of foreign states to anger China, a powerful state that strongly objects to resettlement of the detainees in any third country.²³⁴ Could the UNHCR actually resettle refugee detainees more quickly than the United States? While UNHCR participation may not be a silver bullet, it can only improve upon the current U.S. approach. Moreover, even with UNHCR participation, it will still be in the United States' interest to close Guantánamo quickly. If U.S. political clout is needed in addition to the UNHCR's strengths to strong-arm a solution or sweeten the pot for potential host countries, there will be nothing prohibiting U.S. participation in a UNHCR-mediated process.

V. GUANTÁNAMO AS A ROADMAP: REDEFINING THE UNHCR'S ROLES

Part IV argued that the United States could satisfy its objectives by invoking UNHCR assistance with the Guantánamo refugee problem without sacrificing any important national interests, and that this solution would improve the resettlement process for all parties concerned. In essence, the UNHCR could help the United States out of the double bind created by its dueling national interests: either close Guantánamo or keep detainees off U.S. soil,

233. See Donkoh, *supra* note 5, at 265 (“[The] UNHCR’s role is to prompt, facilitate, and oversee the process of State responsibility, but can never substitute for it.”) (quoting Erika Feller, Director of UNHCR’s Department of International Protection).

234. See Willett, *supra* note 21, at 1 (explaining that the United States had not been successful in finding a resettlement state for his client because “the shadow of the communists falls over all the capitals of Europe”).

and either defend its right to detain or persuade foreign states to accept detainees for resettlement. UNHCR participation would decouple the contradictory messages that hamper U.S. progress and promote legal, moral, and political goods sacrificed under the current U.S. approach.

This part broadens the focus beyond Guantánamo and considers the location of the Guantánamo problem in the global refugee context. The proposed solution to Guantánamo's refugee problem involves using an existing tool, the UNHCR, in a new way. This strategy will likely be relevant elsewhere, and may produce systemic benefits such as shoring up refugee law and supporting the development of international institutions.

Refugee flows have increased in size and complexity since the Refugee Convention was adopted.²³⁵ Countries have responded with an increasing reluctance to grant asylum to all seekers.²³⁶ States avoid what they see as excessive refugee claims by exploiting or inventing loopholes to evade Refugee Convention requirements and

235. The internally displaced people, refugees, returnees, stateless people, and asylum seekers under UNHCR supervision in 2009 amounted to a total of 34.4 million people. See UNHCR, History, *supra* note 185; Donkoh, *supra* note 5, at 264 (noting the increase in complexity of refugee flows, consisting of refugees in the classic sense, as well as those escaping general violence, national disasters, and extreme poverty).

236. See Hathaway & Neve, *supra* note 4, at 143–44 (declaring that “international refugee law is in crisis” and lamenting that while armed conflict and human rights abuses continue to force individuals and groups to flee home countries, many governments are increasingly “withdrawing from the legal duty to provide refugees with the protection they require”); *Temporary Protection*, *supra* note 4, at 291–92 (citing increased pressures such as the costs of status determination and the maintenance of asylum seekers, concerns about disguised economic migration, and the growing prevalence of organized smuggling and domestic political pressure from anti-migrant groups). Recently, commentators have noted that global restrictions on asylum flows come from a fear of foreigners inspired by national security and terrorism concerns. See, e.g., Cuellar, *supra* note 5, at 401 (criticizing this trend); Geo. Human Rights Inst., *supra* note 5, at 763 (arguing that the material support statute is indicative of this trend because, as written, it “precludes protection for countless refugee victims of terrorist groups”); Kapur, *supra* note 5, at 134 (arguing that the war on terror has inspired a fear of the “other” in asylum policies and exploring Australia’s legal response as an example); Donkoh, *supra* note 5, at 264 (arguing that a concern for national security has led governments, particularly in “Western industrialized countries,” to “unleash a series of stern measures and sanctions to deter and punish any type of irregular entry”).

diminish total numbers of refugee claims.²³⁷ The Guantánamo refugee crisis is, in some ways, another manifestation of this trend: The United States, finding itself unable or unwilling to take responsibility for the detainees under normal Refugee Convention mechanisms, has skirted the obligations of international refugee law, with many unfortunate consequences.

The Guantánamo situation suggests that UNHCR participation could enable states in similar situations to satisfy Convention requirements without sacrificing national interests. In the Guantánamo crisis, the burden to the United States is not in the total number of refugee claims but in the identity of the refugees.²³⁸ The United States cannot or will not afford the detainee refugees Convention rights because the domestic political consequences of granting asylum are too costly and the United States wants a free hand in determining what to do with them.²³⁹ This is a context we will likely see again. Consider the following hypotheticals:

- (i) *State A* faces an influx of asylum-seekers of an ethnic minority linked to terrorism or separatism in *State B*. There is no reasonable basis to believe that the asylum-seekers have any connection to terrorist or separatist groups, or harbor militant sentiments of any kind. Nevertheless, public sentiment in *State A* is strongly against acceptance of any refugees of that ethnic minority due to negative stereotypes about their ethnic

237. See Hathaway & Neve, *supra* note 4, at 116 (arguing that governments “proclaim a willingness to assist refugees as a matter of political discretion or humanitarian goodwill,” but “appear committed to a pattern of defensive strategies designed to avoid international legal responsibility” toward refugees); Donkoh, *supra* note 5, at 264 (noting that states are increasingly “insisting on their prerogative to offer asylum on their own terms, [which] rarely comply with international law principles”). One example of this trend is a “safe third country” agreement, where two states agree that refugees moving from one state to the other may be immediately returned to the first. See Hathaway & Neve, *supra* note 4, at 115–16; Donkoh, *supra* note 5, at 264. Another example is temporary protection, a practice where states grant a displaced group entrance and refugee status only until the group can be repatriated. See *Temporary Protection*, *supra* note 4, at 279. A third example is an extraterritoriality exclusion. See Koh, *supra* note 6, at 2408; see also Donkoh, *supra* note 5, at 264 (listing “negative trends in asylum practice” such as systematic detention, expedited removal procedures, interdiction, and forced repatriation of refugees and asylum seekers, and rigid time limits for filing asylum applications).

238. See Worthington, *supra* note 1 (estimating the refugee detainee population in Guantánamo at 34 or less).

239. See *supra* Part III.A.

group. In fact, public sentiment is so strong that it would be politically disastrous for democratically elected leaders of *State A* to accept the potential refugees.

- (ii) *State Y* and *State Z* are engaged in negotiations to conclude an important trade agreement. *State Y* receives an influx of asylum-seekers who are part of a political minority in *State Z*. If *State Y* concludes that the asylum-seekers from *State Z* are in fact refugees, it risks alienating *State Z* and jeopardizing the trade negotiations.²⁴⁰

In the first hypothetical, *State A* could reject the asylum-seekers while maintaining a “vener of quasi-legal respectability”²⁴¹ by asserting that they pose a national security risk, despite no evidence of any individual connections to terrorist or separatist groups.²⁴² In the second, *State Y* could avoid the risk of irritating its relations with *State Z* by rejecting *State Z*’s citizens on the grounds that they do not meet the “refugee” definition. As demonstrated by the Guantánamo context, both of these strategies have negative consequences: Rejecting the *State B* asylum-seekers on national security grounds could codify in domestic law broader national security risk exclusion criteria. Rejecting *State Z* petitioners could narrow the domestic law “refugee” definition. The implications of this extend beyond the domestic realm by contributing to the body of international state practice that helps define the contours of the *non-refoulement* and other Refugee Convention obligations. In addition, although *State A* and *State Y* reject the asylum-seekers on arguably legal grounds, they violate the spirit of the law when *State B* and *State Z* asylum-seekers are returned to persecution, and they risk developing a negative reputation in the international community.

In both of these hypothetical situations, as in Guantánamo, UNHCR participation in the refugee resettlement process would be in the receiving state’s best interest. The first is closely analogous to Guantánamo: *State A* could refer the *State B* refugees to UNHCR for assistance with resettlement elsewhere. In the second hypothetical, the UNHCR’s designation of the asylum-seekers as “refugees” would

240. See *supra* note 234 and accompanying text (describing how one state’s grant of refugee status to another’s citizens can be an irritant to the relationship between the two states).

241. *Rendition*, *supra* note 100, at 457.

242. See *supra* note 115 (defining the “national security” exclusion under the Refugee Convention).

carry no political message from *State Y* to *State Z* and would not jeopardize the trade agreement.

As the two hypothetical situations show, relying on assistance from the UNHCR in more contexts would not only assist the states involved, but would also promote the worldwide refugee protection system. Many current academic debates surround strategies to accommodate the increased refugee burdens and to prevent erosion of Refugee Convention norms.²⁴³ Among these are suggestions to make better use of enforcement mechanisms or institute new ones, draft supplemental international conventions, or recognize and regulate extra-legal approaches in a more formalized regime.²⁴⁴

Turning to the UNHCR in a wider variety of contexts should take a place among these strategies.²⁴⁵ In current practice, the

243. See, e.g., James C. Hathaway et al., *The Michigan Guidelines On Protection Elsewhere*, 28 Mich. J. Int'l L. 207, 210–19 (2007) [hereinafter *Michigan Guidelines*] (presenting results of colloquium considering challenges to refugee regime and presenting views); *supra* note 228 and accompanying text (explaining the political challenges facing states considering resettlement of detainees).

244. See generally Walter Kalin, *Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond* (2001) (discussing the improvement of existing enforcement mechanisms); *Temporary Protection*, *supra* note 4 (proposing a new convention for temporary protection); *Michigan Guidelines*, *supra* note 243 (addressing formal implementation of “protection elsewhere” policies such as safe third country and extraterritorial processing rules); Donkoh, *supra* note 5 (noting these debates).

245. This Article’s proposal is narrower than a related suggestion that the UNHCR assume review of all instances in which a state rejects an asylum petition or makes a final removal order. See Kidane, *supra* note 186, at 178–82. Kidane argues that the UNHCR should conduct its own independent review of the receiving state’s refugee status determination and look for an alternate state party that might be willing to take the refugee before the removal order is executed. *Id.* at 178. The UNHCR could thus facilitate the transfer of refugees to places where they may be recognized prior to their forced repatriation. *Id.* at 182. Kidane’s proposal would require a sea change in the role and function of the UNHCR. At a minimum, executing this proposal would require some mechanism to ensure referral of all cases to the UNHCR, which states would likely resist on sovereignty grounds. Kidane’s proposal does not explain how this process could be made politically palatable. There are also practical difficulties, such as the fact that, without new sources of funding, review of every order of removal would overload the UNHCR system. Kidane’s system would create incentives for abuse: because the UNHCR would serve as a safety net, states could reject asylum petitioners on improper grounds without fearing the political repercussions of a practice of *refoulement*. The Guantánamo refugee situation supports a more limited version of Kidane’s proposal, however, by suggesting that in some cases

poorest states frequently request UNHCR assistance in order to diminish refugee burdens, while economically advantaged states do not.²⁴⁶ At the same time, economically advantaged states control refugee flows by exploiting real or invented Convention exceptions and by manipulating definitions to exclude some refugees from Convention protection.²⁴⁷ Encouraging economically advantaged states to use the UNHCR when it would be in their interests to do so would support the development of international refugee law and strengthen the UNHCR as an institution.

First, UNHCR management of a refugee crisis facilitates state compliance with international refugee law, which furthers the legitimacy and global acceptance of that law.²⁴⁸ In the case of the *non-refoulement* principle, compliance serves to maintain the principle's status as *jus cogens*.²⁴⁹ UNHCR participation also supports the development of domestic refugee laws that express international refugee law norms: If a state entrusts a refugee problem to the UNHCR, it is less likely to take the approach modeled by the U.S. Supreme Court in *Sale*—solving the problem by creating narrow interpretations of the Refugee Convention or new exceptions to it that will outlive the crisis at hand and shape domestic law for years to come.²⁵⁰ UNHCR participation in managing a refugee crisis

signatory states are not willing to assume burdens under the Convention, and yet are politically motivated to find a durable solution for asylum-seekers. In those circumstances, UNHCR review would be both beneficial in all of the ways Kidane proposes, and also palatable to the receiving state. Since it will be in the receiving state's interests to seek UNHCR assistance, the UNHCR can request funding from that state to accomplish the necessary tasks, and no special referral mechanism is necessary.

246. See Pallis, *supra* note 111, at 903–14 (explaining how the UNHCR's role varies across regions).

247. See *Temporary Protection*, *supra* note 4, at 287 (explaining how developed states “weary of their obligations under refugee law” are seeking strategies “to shift refugee protection from the realm of law to that of politics and voluntary humanitarian assistance”); Donkoh, *supra* note 5, at 264 (“Western industrialized countries” in particular have adopted restrictive policies that “rarely comply with international law principles”).

248. The erosion of refugee law could catapult refugee protection into the “uncertain realm of political bargaining and humanitarian assistance.” *Temporary Protection*, *supra* note 4, at 305.

249. See *supra* note 108 and accompanying text.

250. See *supra* note 123. The UNHCR considers *Sale* to be a “setback to modern international refugee law which has been developing for more than forty years . . . [and] sets a very unfortunate example.” *UNHCR Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, 32 I.L.M. 1215, 1215 (1993). Donkoh notes that “restrictive asylum policies are easy to export and have

ensures that the fundamental purposes of the refugee law are carried out. As the Guantánamo refugee resettlement saga shows, when refugees are in the hands of an unwilling state, they are at risk of abuses such as prolonged detention without a refugee status determination—causing uncertainty and fear—and *refoulement*.²⁵¹ Allowing the UNHCR to take responsibility when a state is unwilling to do so ensures that the refugees will be afforded basic protections and resettlement advocacy.

Second, there are multilateral benefits to a UNHCR-facilitated approach to refugee resettlement. The proposition is somewhat counterintuitive: States seeking to avoid refugee burdens have an opportunity to improve refugee law and policy by inviting the UNHCR to assume responsibility. Kathleen Newland notes that, as a historical matter, reliance by powerful states on multilateral institutions like the UNHCR for assistance in times of crisis boosts the legitimacy and competence of those institutions, particularly when reliance is accompanied by increased financial assistance.²⁵² Newland argues that such reliance builds the knowledge and legitimacy of those institutions because it allows them to develop competence in new areas and to borrow political authority from the delegating state.²⁵³ These effects endure after the immediate crisis ends.²⁵⁴

Possible criticisms of this approach will largely mirror criticisms of UNHCR participation in Guantánamo.²⁵⁵ One deserves further consideration here: Does the approach carry moral risk by encouraging states to shrug off responsibility for refugee flows they would otherwise have managed on their own? The answer is that

a tendency to spread” and warns of a “troubling” trend: states that are just beginning to construct refugee laws and structures are disregarding or reinterpreting the content and scope of basic refugee law principles in ways that Western industrialized countries have modeled. Donkoh, *supra* note 5, at 264–65.

251. *See supra* Part III.

252. *See* Kathleen Newland, *Impact of U.S. Refugee Policies on U.S. Foreign Policy: A Case of the Tail Wagging the Dog?*, in *Threatened Peoples, Threatened Borders: World Migration & U.S. Policy* (Michael S. Teitelbaum & Myron Weiner, eds., 1995), available at www.carnegieendowment.org/publications/index.cfm?fa=view&id=229.

253. *Id.*

254. *Id.* Newland also observed that “[h]anding over responsibility for refugees to the UN agencies, the Red Cross movement, and international private relief agencies has to some extent pushed the US government toward the ‘assertive multilateralism’ foreseen in the 1992 presidential campaign, from which in other areas it has pulled back.” *Id.*

255. *See supra* Part IV.C.

encouraging states to invoke the UNHCR is a better solution when the alternative is rejection of international law responsibilities, which leads to many negative consequences. Also, to avoid abuse, the UNHCR could set policies to serve as safeguards. For example, the UNHCR could demand compensation and support in exchange for performing refugee status determinations and brokering resettlement arrangements. If the UNHCR sets the costs high enough, states will be deterred from abusing the system. The UNHCR could also establish a *quid pro quo* system—agreeing to accept resettlement cases from a given country only if that country agrees to accept a given number of refugees on referral from other countries. The UNHCR could also police the process by rejecting particular requests for assistance if it perceives an abusive trend. Finally, because a state’s referral of a problem to the UNHCR will in essence constitute an acknowledgment of responsibility for that problem, abuses should be rare. The more likely challenge will be to persuade states to accept UNHCR assistance, rather than to deter them from doing so to excess.

VI. CONCLUSION

One of the original purposes of the Refugee Convention was to organize states around the common goal of refugee protection in order to coordinate efforts so that the burdens would not fall entirely on the shoulders of individual states.²⁵⁶ Refugee mechanisms were designed to further the national interests of state parties.²⁵⁷ Indeed,

256. See Donkoh, *supra* note 5, at 261. Donkoh argues that the refugee protection system established by the Refugee Convention had burden-sharing purposes at its heart:

The rationale underlying such an institutionalized, multilateral approach, as opposed to the ad hoc initiatives launched in previous eras to assist displaced groups, was explained in the Preamble to the 1951 Convention, [which] recognized that, “the grant of asylum may place an unduly heavy burden on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.”

Id.

257. Hathaway & Neve argue that refugee law was intended as a “politically and socially acceptable way to maximize border control.” Hathaway & Neve, *supra* note 4, at 116. The goal of refugee law is not to enforce human rights norms, but to serve as a functional mechanism to assist states in managing the problem of refugees. See *id.* (explaining that refugee law is “a mechanism by which governments agree to compromise their sovereign right to independent

the preamble to the Refugee Convention recognized that to avoid “unduly heavy burdens” on any state, the refugee problem could be solved with international cooperation.²⁵⁸ By failing to make use of the institution designed to facilitate such international cooperation, the United States chooses to shoulder alone an unnecessarily heavy burden. The consequences are unfortunate for everyone, especially for the refugee detainees who languish in Guantánamo. Rather than dispensing with international refugee mechanisms, the better solution is to revitalize them.²⁵⁹ By inviting the UNHCR to Guantánamo, the United States could point the way.

action in order to manage complexity, contain conflict, promote decency, or avoid catastrophe”).

258. *Id.* at 169 n.245.

259. *Cf. id.* at 116 (stating that refugee law is disfavored and under threat because its mechanisms no longer achieve its “fundamental purpose,” which is to balance the rights of involuntary migrants and those of the states to which they flee).