

Peter Skerry*

Lost in the Fog: Immigrants and Refugees, Bureaucrats and Activists

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Abstract: At least since Emma Lazarus’s famous sonnet became associated with the Statue of Liberty, Americans have confounded important differences between immigrants and refugees. Cold War politics contributed further to that misapprehension. In recent years the continuing crisis at our southern border has rendered this confusion more evident and problematic. At the same time, a global refugee crisis of genuinely historic proportions has been unfolding. More than ever, it is critical to delineate carefully between the needs of refugees and the preferences of immigrants. Yet now there are strong counter-pressures at work, blurring critical distinctions between these two categories. These are particularly evident in the international political arena, where the United Nations Commissioner for Refugees (UNHCR) is highly susceptible to pressure from the media, academics, and activists to once again confound the two.

“I have the impression that some of the fiercest nationalisms and ethnocentrisms of the world are fueled in part by resentment toward people like ourselves: happily situated members of large, powerful nations, prosperous and mobile individuals, able to serve on UN commissions, who participate in symposia, who plan the fates of other peoples while flying around the world and staying in splendid hotels. Shouldn’t this reality be the starting place of such discussions – or at least included in them? Shouldn’t we recognize that our own view, too, is local?”

– Robert Pinsky, Poet Laureate of the United States¹

The influx of humanity attempting to cross the U.S.-Mexican border in the last couple of years has been a critical source of the attention and controversy that have enveloped the Trump administration. In this as in other policy areas, criticism of Trump and his policies have become part of the problem, resulting in

¹ Robert Pinsky, “Eros Against Esperanto,” in *For Love of Country*, ed. Martha C. Nussbaum, (Boston: Beacon Press, 2002), 87.

*Corresponding author: Peter Skerry, Department of Political Science, Boston College, Chestnut Hill, MA, USA, e-mail: peter.skerry@bc.edu

a pattern of self-indulgent over-reaction on the part of his critics and political adversaries. And in a curious way, both Trump and his critics have helped foster the impression that this crisis somehow pertains uniquely to this president and this administration. Depending on one's perspective, either Trump is the cause of the on-going human tragedy at our southern border, or he is the one leader willing and capable of tackling this threat to the republic.

What tends to get overlooked here is not simply the on-going human tide at the US border as well as into Europe, but the still more sobering reality of a refugee crisis of global proportions. As Oxford scholars Alexander Betts and Paul Collier emphasize, global refugee numbers are at their highest since the early 1990's. Yet "the policy and media focus has been on the 10 percent who try to reach the developed world, rather than the 90 percent who do not."² Moreover, the type of refugees driving this crisis diverge sharply from those upon whom established policies and institutions have been predicated. From this perspective, some of the approaches that are being pursued by the Trump administration are not unreasonable and have in fact been suggested or tried by others, however much Trump's noxious rhetoric obscures this reality – for example, safe third-country agreements that would encourage or require those fleeing Central American nations to be accorded refugee status closer to home, especially in Mexico.

Even more fundamentally, virtually no attention gets paid to the critical distinctions to be drawn between migrants motivated primarily by economic motives and aspirations versus refugees driven by the need for shelter and safety. Indeed, for a variety of reasons I will elaborate on here, this important distinction is being obfuscated by many advocates, sympathetic elected officials and policy makers, and especially the media.

Similarly neglected are the changing global conditions – whether climactic, economic, technological, or political – that are contributing to increased migration. These forces are not among the long-recognized factors upon which refugee claims have been based, but they nevertheless reflect varying degrees of distress and duress.

On the other hand, more attention gets paid to bringing in new groups under the protection of previously established international refugee norms – such as victims of domestic violence as well as gays, lesbians, and transsexuals. But, here again, there has been little effort to examine how claims made by such populations might be evaluated relative to those of more economically motivated migrants. There is among critical sectors of American society a reluctance to draw

² Alexander Betts and Paul Collier, *Refuge: Rethinking Refugee Policy in a Changing World* (New York: Oxford University Press, 2017), 6.

distinctions and make decisions among various individuals and groups seeking to enter the United States. More typically, at least in the on-going debate, the basic needs and situations of various such claimants are more or less equated, and the American people are urged to open up their country to all who seek opportunity or refuge here, almost regardless of their reasons for doing so. Meanwhile, the only alternatives on the horizon are the dramatic and draconian reductions in overall refugee admissions promulgated by the Trump administration.

Amidst these various debates and controversies, it is striking how little analysis there has been of the institutional context within which the definitions, categories, and policies pertaining to refugees get debated and formulated, particularly among nations. Such an analysis will be a prime concern of this essay. For in addition to individual nation-states and their governments, there are various international organizations as well as non-governmental institutions (NGO's) that play important roles in this policy domain – especially when it comes to those claiming protection away from their usual place of residence. Among these, most prominent is the United Nations High Commissioner for Refugees (UNHCR). Particular attention will be paid to the evolution and development of this institution as well as to the broader environment of other international organizations and NGO's with which UNHCR must inevitably cooperate but also compete.

This essay is then a preliminary effort to examine the evolving institutional context of refugee policy. What makes this challenging is Chapter 1, Article 2 of the UNHCR Statute, which states: “The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.” What makes this task intriguing is the contradictory statement by Antonio Guterres, former UN High Commissioner for Refugees – and current UN Secretary-General: “There are no humanitarian solutions to humanitarian problems, only political ones.”³

Immigrant or Refugee?

In February 2016, in the midst of a presidential campaign during which immigration figured more prominently than at any other time in postwar America, Pope Francis celebrated mass at the U.S.-Mexican border, right across from El Paso, TX, USA. In his homily the Pope criticized the United States, virtually in the same breath, for denying entry both to Mexican migrants seeking to work or join relatives here *and* to Central American women and children fleeing gang violence

³ Alexander Betts, Gil Loescher, and James Milner, *UNHCR: The Politics and Practice of Refugee Protection*, 2nd ed. (New York: Routledge, 2012), 191.

and civil disorder. Indeed, the Pontiff failed to draw any distinctions between the very different circumstances, needs, or claims of these two groups. So as I will address shortly, while in law we distinguish between immigrants and refugees, in public discourse such critical distinctions are increasingly clouded by the emotions now so routinely aroused by this topic.

Yet to be fair, such confusion begins in America, not Rome. And it has been with us for a long time, in large part because ambiguity and obfuscation have been especially useful when grappling with this particularly intractable set of issues. Take, for example, the Statue of Liberty, the most vivid symbol of Americans' deeply engrained, virtually mythological understanding of their history as "a nation of immigrants." A critical element in Liberty's emergence as a national shrine is Emma Lazarus's sonnet, "The New Colossus." Now affixed to the statue's pedestal, the poem celebrates the "Mother of Exiles," who "cries . . . with silent lips":

"Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!"

Yet note that these lines depict not the stresses experienced by those freely choosing to migrate, but the challenges confronting those fleeing adversity and danger. And indeed, as historian John Higham has pointed out, Lazarus, the assimilated daughter of a successful Jewish merchant, was moved to write by the plight of her coreligionists fleeing pogroms in Tsarist Russia.⁴ Today, such individuals would be designated as refugees.

So, too, after World War II did Liberty greet – however belatedly and begrudgingly – Jews and other "displaced persons" fleeing war-ravaged Europe. She was somewhat more welcoming of those fleeing Communist oppression after popular uprisings in Hungary, Czechoslovakia, and Poland. Then she reached out to Soviet Jews during the final decades of the Cold War. But once again, none of these were "immigrants," but rather "refugees," individuals who arrive here in desperation and typically have no intention or ability of returning home. To be sure, in specific cases, as I will discuss shortly, this line can be extremely difficult to draw – witness the on-going catastrophe at our southern border. But in broad terms, this has been the accepted understanding of what it means to be a refugee.

⁴ John Higham, "The Transformation of the Statue of Liberty," in *Send These to Me: Jews and Other Immigrants in Urban America*, ed. John Higham, (New York: Atheneum, 1975), 78–87.

Yet there is also a critical difference between refugee policy today and law and practice during the second half of the twentieth century. For however enduring the popular (mis)understanding of the distinction between immigrants and refugees, throughout most of the post-war era the definition of refugee status was based primarily on Cold War criteria. Indeed, the much-praised Immigration and Nationality Act of 1965 codified postwar practice and for the first time created a specific preference category for refugees, who were defined almost exclusively in Cold War terms. According to that statute, those eligible for refugee status were almost exclusively “aliens who . . . because of persecution or fear of persecution on account of race, religion, or political opinion have fled . . . from any Communist or Communist-dominated country or area . . .”⁵ As historian Maria Cristina Garcia recently observed: “During the Cold War, the majority of refugees came from just three countries: the Soviet Union, Vietnam, and Cuba. Smaller numbers came from Hungary, Poland, Czechoslovakia, East Germany, and other countries of the Eastern bloc, as well as the People’s Republic of China, Cambodia, and Laos.”⁶ The noted scholars of refugee policy, Gil Loescher and John A. Scanlan, have similarly noted that during the first four decades of the postwar era, over 90 percent of those admitted to the United States as refugees had fled Communist countries.⁷

More directly relevant to our concerns here is that fact that throughout the second half of the twentieth century, U.S. refugee policy essentially ignored the 1951 United Nations Refugee Convention’s significantly more encompassing, less ideologically charged definition of refugee status. Yet even after the U.S. essentially adopted the Convention’s criteria in the Refugee Act of 1980, its implementation was heavily skewed by Cold War politics. For example, those fleeing the Marxist Sandinista regime in Nicaragua and the ensuing civil war were granted refugee status more readily than individuals fleeing civil strife and violence in Guatemala and El Salvador, though the latter were typically accorded temporary protected status (TPS), which might be regarded as a weak, but not insignificant alternative to refugee status. But the most salient example of the sustained Cold War slant of U.S. refugee policy was the sustained welcome of Soviet emigres to this country throughout the 1980s and into the 1990s. As immigration policy analyst and later Commissioner of Immigration and Naturalization under President Clinton, Doris

5 Quoted in Gil Loescher and John A. Scanlan, *Calculated Kindness: Refugees and America’s Half-Open Door, 1945 – Present* (New York: Free Press, 1986), 73.

6 Maria Cristina Garcia, *The Refugee Challenge in Post-Cold War America* (New York: Oxford University Press, 2017), 6.

7 Loescher and Scanlan, *Calculated Kindness*, xviii.

Meissner, observed in a 1988 op-ed in the *Los Angeles Times*: “Refugee officials have always been troubled by the notion that people leaving the Soviet Union are automatically assumed to be refugees.”⁸

Of course, the prime example of the ideological impact of the Cold War on U.S. refugee policy is Cuba. But even here, a thick fog envelops the Statue of Liberty and obscures whether it is a symbol of welcome primarily to refugees or to immigrants generally. Or perhaps both. After all, it was at the base of the statue where in October 1965 President Lyndon Johnson signed the Immigration and Nationality Act, which abolished the reviled national-origins quotas from the 1920s. Yet on that same occasion, Johnson also announced a large-scale program to receive refugees from Castro’s Cuba. “Emma Lazarus would have approved,” notes John Higham, who then goes on to conclude that “the revival of the myth of America as a refuge for the oppressed” was thereby affirmed.⁹

No wonder, then, that 50 years later, Senator Marco Rubio morphed – whether intentionally or not – the actual story of his family voluntarily departing Batista’s Cuba as emigrants into the more compelling narrative of *refugees* fleeing Castro’s Communist dictatorship and becoming part of Florida’s exile community.¹⁰ The only surprise here was that Rubio was widely criticized for confounding these two different scenarios, when politicians and advocates do the same thing all the time.

UNHCR’s Mission, Its Environment, and the Refugee Crisis

Given Americans’ deeply engrained and ideologically inflected tendency to confuse and confound critical distinctions between immigrants and refugees, we might reasonably turn to an alternative source for guidance: the United Nations High Commissioner for Refugees (UNHCR). For while the United States has a long and somewhat schizophrenic history of affording this agency substantial financial resources while at the same time ignoring its determinations and rulings, many observers on the global stage accord it enormous deference. Indeed, they may do so in part *on account of* U.S. behavior. Yet despite its enormous visibility and prestige, UNHCR’s authority is nevertheless clearly constrained and

⁸ Quoted in Garcia, *Refugee Challenge*, 21.

⁹ Higham, “Transformation of Statue of Liberty,” *Send These To Me*, 87.

¹⁰ Manuel Roig-Franzia, “Marco Rubio’s Compelling Family Story Embellishes Facts, Documents Show,” *Washington Post* (October 20, 2011).

restricted by the institutional structures from which it has emerged and within which it continues to function.

Let us begin with the relevant language from UNHCR's foundational document, the 1951 Convention Relating to the Status of Refugees. As stipulated in Article 1(A)(2):

the term "refugee" shall apply to any person who . . . as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; 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.

There are four points worth emphasizing here:

First, in light of Americans' tendency to confound refugees with immigrants, it is worth emphasizing that the Convention implicitly draws a bright line between the two categories. Echoing this delineation, migration researchers Alexander Betts and Paul Collier emphasize that ". . . refugees are not migrants . . . Migrants are lured by hope; refugees are fleeing fear. Migrants hope for honeypots; refugees need havens."¹¹ Yet as we will see shortly, this critical distinction on which UNHCR is founded is being challenged and undermined.

Second, this language is retrospective. As originally conceived, the Convention pertained only to events that occurred prior to January 1, 1951. And though not indicated in the above passage, relevant events were exclusively in Europe. These limitations were not lifted until a 1967 Protocol made the Convention applicable beyond 1951 as well as globally.

Third, this language clearly reflects the recent horrors of World War II, especially Hitler's persecution and attempted genocide of Jews, Roma, and other groups. Yet the Convention affords relief only to *individuals* fearing persecution on account on their membership in designated groups. Nowhere does the Convention offer blanket relief to any or all members of groups targeted for persecution.

Fourth, the Convention applies only to individuals who are outside their country of nationality due to a fear of persecution. Those fearing persecution in their home country are not covered and are not eligible for refugee status. This means that so-called "internally displaced persons" (IDP's) are, according to the Convention, ineligible for refugee status, a topic that we will revisit shortly.

¹¹ Betts and Collier, *Refuge*, 30.

Although UNHCR enjoys considerable respect and deference, it is critical to note that the Convention's criteria for refugee status are hardly definitive. After all, UNHCR has no formal enforcement powers at its disposal to ensure compliance with the Convention by individual state actors.¹² Instead, it must rely on its diplomatic skills and moral authority, which are not insubstantial "based on its role as protector and diffuser of international refugee law and standards."¹³ Indeed, Betts, Loescher, and Milner observe that UNHCR has become "an important norm-making and socializing agent in world politics" and has gone "from being a marginal international agency encumbered with numerous restrictions to a global organization with growing autonomy and authority to shape the behavior of states as well as provide protection and assistance to the world's displaced."¹⁴

Yet in addition to lacking enforcement powers, UNHCR must compete with other actors on the international stage to identify and articulate the needs and interests of refugees. As historian Maria Cristina Garcia points out, at the end of the Cold War and into the 1990s, the number of refugees worldwide doubled from 7.3 to 16 million, most of whom were women and children and concentrated in the Near East, Asia, and Africa. Despite committing hundreds of millions of dollars to UNHCR and other agencies and organizations, both the Bush and Clinton administrations clashed with UNHCR over how to respond to those not meeting the strict definition of refugee in the Convention and Protocol (so-called "non-convention refugees"), but who had fled their homes, crossed an international border, and were living in extremely adverse conditions. And while the US held to its narrow reading, the Organization of African Unity (OAU) defined a refugee as "every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing the public order or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."¹⁵

Similar pressures on UNHCR (as well as on the United States) arose in other contexts. In response to the wars in Central America, the 1984 Cartagena Declaration on Refugees enlarged its definition of refugees to include persons who flee their country "because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, mass violations of human rights or other circumstances which have seriously disturbed public order." And in this same era, the International Committee for Migration

¹² Betts, Loescher, and Milner, *UNHCR*, 149.

¹³ Betts, Loescher, and Milner, *UNHCR*, 20.

¹⁴ Betts, Loescher, and Milner, *UNHCR*, 20–21.

¹⁵ Garcia, *Refugee Challenge*, 46.

recognized two types of refugees: political refugees, defined as persons subjected to persecution and violence; and displaced refugees, defined as indirect victims obliged to emigrate because of the destruction of their means of subsistence.¹⁶

UNHCR has also had to contend with independent experts and academic analysts. Examples here abound, but two of the more influential voices have already been mentioned. Alexander Betts is the Leopold W. Muller Professor of Forced Migration and International Affairs at Oxford, where he is also Director of the Refugee Studies Centre. From this prominent perch Betts has collaborated with his Oxford colleague, Paul Collier, professor of economics and public policy, to produce a kind of manifesto, *Refuge: Rethinking Refugee Policy in a Changing World*, that confronts directly and authoritatively the assumptions and categories on which UNHCR has been operating now for almost seven decades.

As Betts and Collier declare: “Refugee law is no longer effective, and is increasingly ignored by governments.” And as they elaborate: “A growing number of signatory states from Europe to East Africa to Australasia are increasingly prepared to ignore the 1951 Convention.”¹⁷ To put refugee law on a firmer footing, they advocate fundamental rethinking of the assumptions and categories on which UNHCR and the international refugee regime have been functioning.

Most notably, Betts and Collier argue that the prevailing focus on persecution should be rejected as unworkable, and replaced with what they regard as the much more basic and intuitive criterion of fear of serious physical harm.¹⁸ They point out that one important consequence of their proposal would be to designate as refugees IDP’s, who are not currently covered under the UNHCR Convention but whose growing numbers around the globe are of increasing concern.¹⁹ So, too, are the numbers of those displaced not so much by international wars, which framed the context of the Convention at its inception, as by contemporary civil wars, which tend to last longer and therefore displace populations for longer periods of time.²⁰ Recognizing that global refugee numbers are already at their highest since the early 1990s – 21.3 million, Betts and Collier acknowledge that their proposals imply much higher numbers, perhaps as many as 65.3 million!²¹

On the other hand, Betts and Collier advocate for a much more rigorous differentiation between refugees and mere migrants. As they put it: “The claims of refugees on the rest of us are morally far more powerful than those of

¹⁶ Garcia, *Refugee Challenge*, 46–47.

¹⁷ Betts and Collier, *Refuge*, 208–209.

¹⁸ Betts and Collier, *Refuge*, 44.

¹⁹ Betts and Collier, *Refuge*, 28.

²⁰ Betts and Collier, *Refuge*, 77.

²¹ Betts and Collier, *Refuge*, 15.

economic migrants. They rest not on some dubious global right to migrate, but on the granite-strong duty of rescue, derived ultimately from our core sense of humanity.”²² Arguing strenuously against the tendency to conflate refugees with migrants, Betts and Collier point out that while “the primary objective of migration is to improve the quality of life . . . the objective of the duty of rescue is not to improve the quality of life, but to restore it as near to pre-flight normality as is possible.”²³ What this points to is more realistic assessment of the basic needs of refugees closer to where they originally come from and at the same time avoiding the warehousing of hundreds of thousands of people in refugee camps that sap them of self-sufficiency and dignity.

Betts and Collier are particularly critical of the inclination of affluent, advanced Western societies to open their doors – however controversially or begrudgingly – to distant populations in distress. They focus on German Chancellor Angela Merkel’s 2015 decision to unilaterally suspend the EU’s Dublin Regulation (stipulating that refugees were to be settled in the first EU country they arrived at), effectively opening up her nation to all comers. The result, they argue, was to exacerbate an already tragic situation. Specifically, they maintain that suddenly tens of thousands of Syrian refugees sheltering in Turkey realized that instead of remaining there or eventually returning home to Syria, they could greatly improve their life chances by migrating to affluent Germany. In one stroke, they effectively became economic migrants.²⁴

And as Betts and Collier further note, individuals from other countries quickly came to the same decision, even from a relatively stable, middle-class country like Morocco. Even the Syrian government got in on the action, and began selling passports at \$400 each to all comers. Betts and Collier also point out that Merkel’s decision put still others at risk by “encouraging more people to embark on dangerous journeys.” More specifically, intense price-competition among people-smugglers responding to the greatly increased demand for their services led to more and more unsafe, sometimes fatal journeys across treacherous stretches of ocean.²⁵

The Evolution and Development of UNHCR

As I have already suggested, the definitional and conceptual confusion that pervades on-going debates over immigration and refugee policies is shaped by

²² Betts and Collier, *Refuge*, 117.

²³ Betts and Collier, *Refuge*, 124.

²⁴ Betts and Collier, *Refuge*, 107.

²⁵ Betts and Collier, *Refuge*, 109.

the institutional setting within which such policies get formulated and then contested. This is hardly surprising, but it is seldom acknowledged. And while perhaps self-evident at the national level, this point is particularly worthy of attention in the international context.

As already mentioned, UNHCR's original mandate was restricted, both geographically and temporally. Not only was its jurisdiction limited to events in Europe that occurred before January 1, 1951, its life was time-limited to three years. At the end of 1953, UNHCR was expected to go out of business. In the same vein, UNHCR began operations with a staff of 34, based predominantly in Geneva, and a budget of only \$300,000.²⁶ By contrast, UNHCR's annual budget is currently \$8.6 billion, with a worldwide staff of approximately 12,000 (plus approximately 5000 affiliates on contract) working in 134 countries. Less than a decade ago, in 2010 UNHCR's staff was around 7190 working in 123 countries with an annual budget of \$1.8 billion.²⁷

This growth has in part been fueled by UNHCR's expanded mission from its originally exclusive focus on Europe to its current global purview. Moreover, the organization's initial mandate was limited to providing technical and legal guidance to impacted governments toward the goals of protecting refugees and finding them some permanent resolution of their situation.²⁸ At its inception UNHCR was deemed "non-operational" and was not authorized to provide material assistance directly to refugees, which has over time nevertheless become its prime focus.²⁹ Such constraints reflected the clear preference of members states – but especially the dominant power at the dawn of the post-war era, the United States – to keep UNHCR on a short leash in order "to serve very specific functions within narrow parameters and with almost no institutional or material autonomy."³⁰

Yet a critical juncture in the evolution of UNHCR arose early. With a grant from the Ford Foundation, it took the lead in responding to a refugee crisis that arose in Berlin toward the end of 1952 and the opening months of 1953. Because those events were not technically under UNHCR's purview, the result was an enlargement of the scope of the agency's original mandate.³¹ Similarly, the crisis that arose in November 1956, when the Soviet Union invaded Hungary, provided further opportunities for UNHCR to expand its mission beyond formal limits.

²⁶ Betts, Loescher, and Milner, *UNHCR*, 110–111.

²⁷ UNHCR, *Global Report – 2018*, 4.

²⁸ Betts and Collier, *Refugee*, 37, 40.

²⁹ Betts, Loescher, and Milner, *UNHCR*, 14.

³⁰ Betts, Loescher, and Milner, *UNHCR*, 14.

³¹ Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (New York: Oxford University Press, 2002), 66–69; see also Betts, Loescher, and Milner, 22.

(After all, Hungarians fleeing Soviet repression in 1956 were not technically refugees reacting to events that occurred *before* the agency's January 1, 1951 start date). UNHCR's eventual designation by the UN General Assembly as the "lead agency" directing emergency operations in response to the Hungarian crisis afforded the organization visibility and gratitude from previously unappreciative publics and governments, especially the United States.³²

Similarly, during the 1980s and then into the 1990s UNHCR became heavily involved in the management of refugee camps, which emerged as one of its primary functions. And in so doing the agency managed to transcend not only its World War II origins but its subsequently acquired Cold War responsibilities. Moreover, management and oversight of refugee camps also contributed importantly to the agency's growing manpower and budgets. Whether such settlements are the optimal response to the world's refugee crisis is another matter. The otherwise sober Betts and Collier suggest bureaucratic empire-building when they observe: "Camps provided jobs: not just for refugees."³³

As indicated at the outset of this article, UNHCR's enabling statute stipulates that its work is to be "humanitarian and social" and, especially, "non-political."³⁴ And once again, it is worth emphasizing that as with the other defining aspects of UNHCR's charter, this was promulgated by various sovereign states, especially the United States, determined to ensure that this agency not impinge on their sovereignty. Nevertheless, such concerns and the implementing language have obviously not prevented various High Commissioners and their staffs to engage in the kind of bureaucratic politics that have allowed the organization not only to grow in size, but to adapt and expand its mission in response to changing social, economic, and political developments.

This pattern would not be unfamiliar to students of American politics. Yet as an international organization operating on the global stage, UNHCR has structural characteristics that tend to go unnoted and deserve particular attention. For example, from its origins UNHCR has never been able to rely on any dedicated income streams or multi-year budgets that would facilitate strategic planning and coordination. On the contrary, the agency has had to rely primarily and overwhelmingly on annual *voluntary* contributions from UN members.³⁵ Indeed, this budgetary stricture remained unchanged even after UNHCR's life was extended

³² Betts, Loescher, and Milner, *UNHCR*, 23–24.

³³ Betts and Collier, *Refuge*, 41.

³⁴ Statute of the Office of the United Nations High Commissioner for Refugees; Chapter 1, Article 2.

³⁵ Betts and Collier, *Refuge*, 49.

and it was made a permanent UN agency. Moreover, much of the support that UNHCR receives from various such sources gets earmarked for specific programs and purposes. Finally, a small but critical segment of UNHCR's annual contributions – around 10 percent – comes from private donors, including individuals, corporations, and foundations.³⁶

The implications of such a funding structure are significant. An obvious one is that UNHCR's longevity and growth reflect deft entrepreneurship on the part of its leadership over an extended period of time. Less evident perhaps is that while sovereign nations are presumptively preoccupied with balancing humanitarian obligations against domestic political concerns, private funders – whether individuals or organizations – are likely to have more specific, idiosyncratic programmatic agendas.

Indeed, in deft leadership hands private sources of funding can not only be helpful but strategically valuable. Recall how the Ford Foundation proved to be so critical at a pivotal juncture in UNHCR's evolution beyond its original, temporary mandate. Yet at the same time it is worth pointing out that such private support is particularly dependent on the idiosyncratic agendas of individual donors or on the fads that typically sweep through philanthropic funding circles. So, too, does UNHCR's reliance on celebrities as goodwill ambassadors inevitably render the organization dependent, to varying degrees, on the priorities of amateurs who may be well-intentioned but who are nevertheless denizens of a highly volatile milieu sustained more by style and appearances than by substance.

Such matters seem particularly relevant in light of what seasoned observers describe as the transformed political and institutional environment within which UNHCR operates. Particularly since the end of the Cold War, the agency has experienced increased competition for visibility and funding from a variety of organizations. Some of these are international institutions affiliated with the European Community (such as the Justice and Home Affairs Council), or organizations such as the International Committee of the Red Cross or the World Food Program.

Perhaps most noteworthy is the International Organization for Migration (IOM), an international organization whose origins can be traced back to the same period as UNHCR's founding and to parallel efforts addressing the settlement of persons displaced by the war. Yet unlike UNHCR, IOM is not an agency of the UN, though it has recently been designated “a UN-related organization.”³⁷ And although it has a significantly smaller budget than UNHCR, IOM has been

³⁶ UNHCR, *Global Report – 2018*, 6.

³⁷ Megan Bradley, “The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime,” *Refuge*, 33, no. 1 (2017), 97.

described as playing “an increasingly prominent and competitive role to that of UNHCR.”³⁸

Another critical component of this “crowded” and complex “humanitarian marketplace”³⁹ are non-governmental organizations (NGO’s) such as the Lutheran World Federation, the International Rescue Committee, and OXFAM, whose numbers have also proliferated since the end of the Cold War.⁴⁰ Here again, UNHCR works closely with these organizations. Yet it must also compete with them – not only for personnel, visibility, and funding from potential supporters but also for potential clients, especially state actors.

One consequence of this competition is what Betts and colleagues refer to as “mandate expansion,” which has nudged UNHCR into new areas of activity. Notable among these is the increased attention the organization pays, especially in its publications, to IDP’s as well as to populations devastated by natural disasters. So, too, has UNHCR gotten more involved in issues pertaining to so-called “mixed migration,” which occurs when economic migrants and refugees, such as we have seen coming across the US-Mexican border in recent years, come to rely jointly on smugglers who then transport them mixed together, thereby confronting authorities with complicated enforcement challenges.⁴¹

This latter outcome is one of many changing on-the-ground realities that confound the long-established, institutionalized categories of immigrants and refugees. To be sure, such changes are not always problematic and indeed may open up, as we saw with UNHCR in its early years, new opportunities for resourceful bureaucratic entrepreneurs. Yet the outcome, especially in today’s highly competitive environment, can also be organizational confusion and incoherence as leaders straining to cope stray from their declared goals and objectives. In recent years this certainly seems to have been the case with UNHCR.

In a word, UNHCR’s response to such developments has been schizophrenic. On the one hand, the organization has addressed specific events of the last few years and noted with disapproval how the terms “refugees” and “migrants” have come to be used interchangeably in the media. Indeed, UNHCR has gone out of its way to assert the absolute imperative of maintaining the clarity of this distinction. As it has noted: “Conflating refugees and migrants can have serious consequences for the lives and safety of refugees. Blurring the two terms takes attention away from the specific legal protections refugees require. It can undermine

³⁸ Betts, Loescher, and Milner, *UNHCR*, 37. Apparently, IOM’s budget in 2018 was \$1.8 billion. See https://en.wikipedia.org/wiki/International_Organization_for_Migration.

³⁹ Betts, Loescher, and Milner, *UNHCR*, 130, 55.

⁴⁰ Betts, Loescher, and Milner, *UNHCR*, 54–55.

⁴¹ Betts, Loescher, and Milner, *UNHCR*, 131.

support for refugees and the institution of asylum at a time when more refugees need such protection than ever before.”⁴²

Yet UNHCR has also engaged in just such blurring. Indeed, in recent annual reports, it has taken pains to present data not only on refugees, properly understood and strictly defined, but also on IDP’s as well as persons in “refugee-like situations” and “other groups or persons of concern,” defined as “individuals who do not necessarily fall directly into any of these groups but to whom UNHCR has extended its protection and/or assistance services, based on humanitarian or other special grounds.”⁴³ These are all then identified as “populations of concern” to UNHCR. Hence, the significance of the imprecise (with respect to the precise language of UNHCR’s mandate) language in the title of one of the agency’s reports: *UNHCR Global Trends: Forced Displacement in 2014*.⁴⁴

The danger here is that the goals of UNHCR – and of similar international organizations with broad responsibilities and accountable to multiple constituencies – get distorted by the agendas of advocates, whether individuals or organizations, with much narrower orientations, commitments, and objectives. The dynamic at work is analogous to what observers have noted about Washington think tanks, especially those older, more established institutions that understood their mission as producing disinterested public-policy research and saw themselves as “universities without students.” In recent years, such institutions have come to be seen as allowing their missions and perhaps their findings to be influenced by funders.⁴⁵

The challenges facing UNHCR and other international humanitarian organizations are similar but also subtler and more insidious. To be sure, their goals and even missions can be influenced and perhaps perverted by financial incentives. But since their authority lacks the force of law and (especially in the case of UNHCR) rests on hard-earned expertise developed after decades of work with distressed populations, as well as on the moral authority generally accorded those engaged in such work, the stakes are much higher. In return for that grant of moral authority, those who work in these organizations are expected not only to make sacrifices but also to exercise prudence and good judgment. Conversely, for such individuals the temptations of moral righteousness and presumption are

⁴² Adrian Edwards, “Refugee or Migrant? Word Choice Matters,” *UNHCR Viewpoint* (July 11, 2016), 3.

⁴³ See *UNHCR Global Trends: Forced Displacement in 2014* (Geneva: UNHCR, 2015).

⁴⁴ *UNHCR Global Trends: Forced Displacement in 2014* (Geneva: UNHCR, 2015).

⁴⁵ Eric Lipton et al., “Foreign Powers Buy Influence at Think Tanks,” *New York Times* (September 6, 2014).

great. And perversely, for those who support and sustain their work but are not so directly engaged, such temptations can be even greater.

Refugees and Their Advocates

Legal scholar Philip Schrag highlights similar challenges confronting not international organizations but refugee advocates. Typically part of large, ad hoc coalitions made up of conventional interest groups as well as immigrant advocacy groups and networks, refugee advocates find themselves at a particular disadvantage. Because they represent the interests of people who in addition to being non-citizens and non-voters are often not even physically present in the United States, refugee advocates do not have much clout with their adversaries. Yet as Schrag emphasizes, they also get short shrift from their more potent coalition partners. Indeed, the interests of such weak coalition members are routinely pushed to one side.⁴⁶

Even when included in the bargaining, refugee advocates experience difficulties. As Schrag elaborates, they have a particularly hard time coming to terms with compromise. The sticking point is not compromise itself, but the secrecy required by complicated, multiparty, behind-the-scenes negotiations. Such secrecy can be problematic in rigidly structured, hierarchical organizations. But it is downright disruptive for such advocates, who are typically part of large, informal coalitions that, because they lack formal decision-making procedures, are easily disrupted and divided by decisions made in camera.

Exacerbating these dynamics is the “sense of stewardship” felt by advocates mindful of the fact that they are representing the interests of individuals who did not choose them as their representatives, “even in the fictitious sense that stockholders choose their boards of directors.”⁴⁷ As Schrag pointedly concludes, such advocates “perpetually doubt their right to take less than an absolutist position, even when it is clear that advocating an absolutist position will result in worse legislation than seeking a compromise.”⁴⁸

One virtue of Schrag’s analysis is its focus on the structural, as opposed to the merely subjective dynamics at work among advocates generally. Yet attitudinal factors should not be overlooked. For example, the literature on so-called “cause lawyers” – very similar to the advocates depicted in Schrag’s study – indicates

⁴⁶ Philip G. Schrag, *A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America*, 248–251.

⁴⁷ Schrag, *Well-Founded Fear*, 251.

⁴⁸ Schrag, *Well-Founded Fear*, 251.

that one of their primary concerns is that, despite their earnest efforts to the contrary, their skills and authority as high-status professionals tend to subvert and coopt the political energies and dynamism of genuine social movements.⁴⁹

Such preoccupations are not without foundation, as I myself have argued in another context.⁵⁰ Nevertheless, it is striking how rarely such cause-oriented activists question or express concerns about the wisdom of their overall goals and agendas. In this regard, they may not be all that different from other political actors, especially in the era of Trump, when introspection and self-scrutiny are hardly at a premium. It might also be argued that such cause-oriented individuals spend a great deal more time scrutinizing their interests and motives than do most of us.⁵¹ If so, then it has not been to not much effect, I fear.

Some cause-oriented lawyers push the logic of their advocacy still further, maintaining that broader political objectives transcend any conventional duties or loyalties to their clients. As Georgetown law Professor David Luban has put it: “The politically motivated lawyer acts ethically not by evading the essentially political character of relationships but by responsibly representing the political aims of her entire client constituency even at the price of wronging individual clients. The key point is that a responsible representative must keep one eye on the interests of future generations.”⁵² Making the same point, Austin Sarat and Stuart Scheingold, the foremost students of “cause lawyering,” observe that for at least some “radically disposed cause lawyers . . . their primary loyalty is not to clients, to constitutional rights, nor to legal process but to a vision of the good society and to political allies who share that vision.”⁵³

At this point, we are left with two different but convergent perspectives on advocacy on behalf of refugees and similarly situated populations. Schrag highlights how an awareness and commitment to clients to whom one is not accountable pushes some advocates toward maximalist positions. On the other hand, Sarat and Scheingold point out that for some advocates the interests of clients take a back seat to broader political or ideological commitments. From either perspective, there is a decided drift toward maximalism. And what goes unaddressed in both these accounts is who gets to hold such advocates

49 See, for example, the essays in Austin Sarat and Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998).

50 Peter Skerry, *The Ambivalent Minority* (New York: The Free Press, 1993), 323–346.

51 See the various essays in Sarat and Scheingold, eds., *Cause Lawyering*.

52 Quoted in Austin Sarat and Stuart Scheingold, “Cause Lawyering and the Reproduction of Professional Authority,” in Sarat and Scheingold, *Cause Lawyering*, 4.

53 Sarat and Scheingold, “Cause Lawyering and the Reproduction of Professional Authority,” in Sarat and Scheingold, *Cause Lawyering*, 7.

accountable? Or if the standard is the interests of future generations, who gets to determine what those interests are and how?

The Media and Global Politics

Such questions point to the role of media in contemporary politics, a critical topic that can barely be touched on here. There can be little doubt that media – print, broadcast, and digital – play a more pivotal role in the nation’s political life than at any previous time in our history. And on the global stage, where refugee issues play out, that role is even more dispositive, indeed unrivaled. After all, even in today’s media-saturated domestic political marketplace, there are concrete reality checks that journalists, political actors, and citizens alike can and do make use of to test the reliability of what they learn from the media. But on the global stage, such local knowledge is necessarily much harder to come by. There certainly isn’t anything roughly equivalent to increasingly ersatz but still valuable grassroots campaigns, whether in Iowa or New Hampshire every four years or closer to home more frequently.

A pertinent example of the media’s influence on today’s global refugee crisis is suggested by Betts and Collier. To begin with, their analysis challenges the popular, one-dimensional image of refugees and highlights the enormous range of motives and background characteristics among them. Focusing on those who fled Syria and made their way toward Germany in the fall of 2015, the authors emphasize the selectivity of that cohort. Not only was it skewed toward those with the skills, education, and resources to take advantage of Chancellor Merkel’s invitation, it consisted mostly of single males sent ahead by their families to brave the dangerous sea-crossings and then find work in Europe.

Yet this was hardly the image of the refugees originally conveyed by the media. Nor was this an accident. For as Betts and Collier observe: “The photographers of the exodus knew that the most marketable images were of children, so those were the images that appeared in the media.”⁵⁴ Indeed, it was only gradually that the public became aware of the numbers of young, unattached males from Syria and other societies who had entered Europe – perhaps not until the disturbing events at the 2016 New Year celebrations in Cologne and other German cities, during which waves of young Muslim men, often in groups, robbed and sexually assaulted hundreds of women.⁵⁵

⁵⁴ Betts and Collier, *Refuge*, 118.

⁵⁵ Betts and Collier, *Refuge*, 89.

It is worth noting, however, that it took days for the public to be fully informed of these shocking events. And only then did the more complete picture begin to slowly emerge of the migrant stream being made up largely of young men on their own, without their families to anchor them. In any event, it appears that public authorities and the media both endeavored – and arguably conspired – to keep the lid on the events of that night. Such episodes obviously confirm the suspicions of many Western publics that media as well as political elites are not to be trusted.

But if the media is viewed by many as a problem or even an enemy, others still regard it as an opportunity or an ally. This is evident from even a preliminary survey of the work of social movement-oriented, human rights-focused scholars of transnational and global politics. As Margaret E. Keck and Kathryn Sikkink point out in *Activists Beyond Borders: Advocacy Networks in International Politics*: “The media is an essential partner in network information politics. To reach a broader audience, networks strive to attract press attention. Sympathetic journalists may become part of the network, but more often network activists cultivate a reputation for credibility with the press, and package their information in a timely and dramatic way to draw press attention.”⁵⁶

Or as Alison Brysk observes in *Speaking Rights to Power: Constructing Political Will*: “The availability and use of appropriate media is also a determinant of the reception of human rights appeals . . . In the network society, media increasingly substitutes for the physical public sphere, and information politics are increasingly salient.”⁵⁷

Such analysts regard the media as central to the work of human rights and other such activists on the world stage. And because such global communication relies less on hierarchical organizations than information networks, they emphasize “the power of performance . . . to raise consciousness of suffering, build empathetic bonds with its victims, and create understanding of its causes and consequences.”⁵⁸ Similarly, they counsel global activists to exercise “moral leverage” in the service of the “mobilization of shame.”⁵⁹ In the same vein, they emphasize that “issues that involve ideas about right and wrong are amenable to advocacy networking because they arouse strong feelings, allow networks to recruit volunteers and activists, and infuse meaning into these volunteer activities.”⁶⁰

⁵⁶ Margaret E. Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press, 1998), 22.

⁵⁷ Alison Brysk, *Speaking Rights to Power: Constructing Political Will* (Oxford: Oxford University Press, 2013), 13.

⁵⁸ Brysk, *Speaking Rights to Power*, 131.

⁵⁹ Keck and Sikkink, *Activists Beyond Borders*, 23.

⁶⁰ Keck and Sikkink, *Activists Beyond Borders*, 26.

Overwrought, Overwhelmed, and Confused

It is hardly news that politics in America is overwrought and overwhelmed. Nor are we the exception among Western democracies. In each, migration is at or near the center of the turbulence. And now, as Americans witness the on-going human drama at our southern border, what we see looks more like an overseas refugee crisis than what we normally think of as immigration to America. And the sight is discomfiting, because it brings home the inescapable connection between the plight of refugees and other distressed populations around the globe and our own generations-long mismanagement of migration issues.

Complicating this already complicated scenario is the long-standing confusion of most Americans about the critical distinction between refugees fleeing here out of desperation, and immigrants arriving here with economic and other aspirations – not to mention all the mixed cases in between. Further confounding American understanding of refugee issues is the legacy of the Cold War, whose positive association of refugees with the rejection of communism lingers, while the embrace of liberty has been tarnished of late by the Trump administration's attempts to equate refugees with radical Islamism.

Already fraught in our nearly dysfunctional domestic arena, these issues are further complicated by a global stage whose loudest and most influential voices reflect the facile cosmopolitanism so delicately but firmly criticized by Robert Pinsky in the epigraph to this essay. This state of affairs is further exacerbated by the vulnerability of international organizations such as UNHCR to outside pressures – whether from sovereign states, private donors and funders, or academics and activists pushing simplistic or moralizing agendas. All this plays out in a media environment that comes closer to “defining reality” than we dare admit. And meanwhile, in the background, the global refugee crisis continues at unfathomable human cost.

Peter Skerry teaches political science at Boston College, and is a member of the editorial board of *The Forum* and a contributing editor to *The American Interest*.