

I. Pre-Protocol Development of US Obligations

Tracing the history of the United States’ obligations to refugees under international law begins with understanding US domestic approaches to refugees and displaced persons. This history demonstrates how domestic policies and general attitude towards nation-states can shape state legal obligations, which is an important aspect underlying any analysis of modern tensions between the sovereign state and international obligations. It was not until 1967 that the United States became a State Party to the United Nation’s UNHCR Protocol, and US policy before that crucial ratification, which had the effect of aligning US asylum law with the tenets of the 1951 Convention, was defined by a complex mix of quotas, classes, and protectionism, often in response to the major international crises of the twentieth century.

World War I and the 1920s ushered in a series of restrictive immigration laws (Martin, 2014). The *Immigration Act of 1917* was the United States’ “first widely restrictive immigration law,” passed as a result of national security unrest during World War I (Office of the Historian). This Act introduced a literacy test, a tax increase, and a bar on individuals from certain Asian countries (ibid.). The *Emergency Quota Act of 1921* appended further restrictions, fixing visa availability according to quotas. Applicable only to immigrants from the Eastern hemisphere, an amount only equal to “three percent of the total population of the foreign-born of each nationality in the United States as recorded in the 1910 census” (ibid.). The *Johnson-Reed Act of 1924* continued the quota system, opting for more restrictive quotas: only two percent of members of each nationality—barring Asia—could be admitted, as determined by the 1890 census (ibid.).

World War II changed the way that the United States, and other countries in the world, considered and treated refugees. World War II created “one of the most massive resettlements in history” (Martin & Houstoun, 1982, 31), and in its aftermath, the United States engaged in reconstruction efforts, part of which included settling over 250,00 Europeans who had been displaced (Refugee Council, 2017). A 1945 Directive from President Truman admitted 80,000 Europeans under the traditional quota system (Young, 1979, 41), and soon afterwards, the United States’ first refugee legislation was enacted: the *Displaced Persons Act of 1948*. Designed to alleviate the mass refugee problem following the Second World War, the Act was intended “to authorize for a limited period of time the admission into the United States of certain European displaced persons for permanent residence, and for other persons” (Immigration, “Displaced Persons,” 2015; 80th Congress, 1948). Non quota for the first two years and quota thereafter, visa eligibility was to be determined primarily by a list of limitations and preferences: § 2(c), for example, lists Germany, Austria, and Italy as places indicative of eligibility and also reflects an implicit prejudice against Jews (Evans, 2016, 511), and also includes a temporal-spatial requirement. The Act led to the resettlement of 400,000 individuals (Refugee Council, 2017).

In 1950, the United Nations established the High Commission for Refugees (UNHCR), and in light of the “the atrocities committed before and during the Second World War and the resulting refugee flows” (Bank, 2014, 691), the UNHCR members drafted and retained State Party ratification of the *1951 Convention* (“History,” 2017). The United States did not ratify the Convention, instead opting for a domestic statute; the Cold War was escalating, and US policy was shaped by a new geopolitical reality that would pit the US against its WWII ally in the fight against the Axis. The *McCarran-Walter Act of 1952* (or Immigration and Nationality Act of 1952) “was an attempt to deal systematically with the concurrent cold war threat of communist expansion and the worldwide movement of peoples in the wake of World War II” (“McCarran-Walter,” 2015). Although reminiscent of the more restrictive measures following World War I,

the McCarran-Walter Act based quotas on nationality rather than race (Han, 2016). The Act also established the Immigration and Naturalization Service (INS).

One year after the McCarran-Walter Act, the United States further clarified the status of displaced peoples in the *Refugee Relief Act of 1953*, which created visas for three “classes”: refugees, escapees, and German expellees. Notably, non-quota visas were offered to certain groups, even if each of these groups was defined in terms of communist persecution or residency (Young, 1979; “Refugee,” 2015). This was the first largely non-quota immigration policy (Young, 1979), and upon signing it, President Eisenhower characterized the legislation in hopeful terms: “In enacting this legislation, we are giving a new chance in life to 214,000 fellow humans” (Eisenhower, 1953).

Fourteen years later, the United States became State Party to the *1967 Protocol to the 1951 Convention relating to the Status of Refugees*—one of only three States Parties to be party to the Protocol but not the Convention (“States Parties,” 2017).

II. “Give me Your Pilates-toned, Your billionaires, Your Botox-ed elites yearning for admission to Mar-a-Lago:”¹ US Legal Obligations under International Law and Possible Enforcement Mechanisms

Peter Bergen’s musing on a Trump rewrite of the Lazarus poem on the Statute of Liberty is hilarious, or maybe not. On Friday, 27 January 2017, President Trump signed an executive order titled “*Protecting the Nation From Foreign Terrorist Entry Into the United States*.” The order bans Syrian refugees from entering the US for an indefinite period of time based on the assessment that they are “detrimental to the interests of the United States”. Domestic refugee law, such as the 1980 Refugee Act and the presidential setting of the number of refugees accepted each fiscal year, serve as the basis for everyday decision-making in the US. These laws are, however, largely based on international law obligations found in the 1951 Geneva Convention, its 1967 Protocol and subject to further human rights law. What happens when domestic law falls short of a state’s international obligations and what precisely are those obligations? Apart from moral outrage, does the international community have legal leverage to address the US ban?

The 1951 Geneva Convention and its 1967 Protocol are the cornerstones of international refugee law. The Convention’s non-discrimination clause, Article 3, explicitly prohibits discrimination of refugees based on their country of origin and religion. As such, neither a “Muslim ban” nor a ban of refugees from certain countries is in conformity with US obligations under the Geneva Convention. Moreover, Article 26 International Covenant on Civil and Political Rights’ non-discrimination rule needs to be taken into consideration here. Article 33 of the Geneva Convention codifies the customary international law principle of non-refoulement (see also Article 3 UN Torture Convention²) whereby *States may not* forcibly return people who are physically present in their territory to countries where they face persecution. Determining Trump’s Executive Order violates non-refoulement is not as straightforward. Refugees can only claim asylum, and demand not to be sent back once they are on US soil. In most cases, the ban will already hinder people from entering the US. As we have seen, as of the Friday night following the order, airlines did not even let people from the seven nations listed in the ban board planes to the US. Thus, the ban is an unfortunately effective means to deny refugees the

¹ <http://www.cnn.com/2017/01/28/opinions/trumps-big-mistake-on-syrian-refugees-benjamin-hinton/index.html>

² <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

precondition to exercise their right under international law, extending the already stringent requirements set forth by the need for visas, never mind the cost of the flight. Moreover, Syrian refugees coming to the US in the course of the resettlement program coordinated by UNHCR will likely not be sent back to Syria, but stay under UNHCR’s protection. Lastly, before this executive order, the US took in Syrian refugees for resettlement. It needs to be stressed however that states do not have a legal obligation under current international law to set up a resettlement program or take in refugees that did not reach their territory. Ongoing debate shows, however, that some countries believe that there is at least a moral obligation to take in refugees. It could even be argued that the EU’s refugee policy leads to the development of regional customary international law establishing a certain legal obligation to that end.

Enforcement mechanisms under international law have less – some might argue no – teeth compared to domestic court proceedings. One enforcement mechanism is for states and organizations to name and shame each other into complying with their international obligations.³ We have seen different levels of condemnation of the ban from the international community, and it does not look like the international community will show concerted diplomatic retaliation. Naming and shaming Tuvalu (a Polynesian island nation located in the Pacific Ocean) into changing its domestic policies is one thing, the US are too powerful to be “convinced” in such a manner (although some combination of protests and legal challenges may achieve the same purpose). Unilateral measures do not seem to take effect either. Iran announced measured retaliation to the ban of its citizens. Other listed countries, like Syria or Somalia, lack any meaningful state structure to react in kind. In the long run, however, other, especially developed, nations have the chance to advance the development of international law in the direction mentioned above. If there is a genuine interest to improve refugee rights and make them less depended on states’ internal politics, committed states should increase their resettlement programs, ensure safety for refugees fleeing their countries and making their way to, for example, Europe to develop customary international law that cannot be ignored.

Finally, the Geneva Convention itself offers a dispute settlement clause. Both Article 38 and Article IV of the Protocol to the Convention allow Contracting States to present disputes with other Contracting States regarding the interpretation and application of the instruments to the International Court of Justice. The ICJ has never been presented with a case under the Geneva Convention, and it is highly unlikely that any other Contracting State would risk a diplomatic fallout with the US by filing a case with the ICJ. Moreover, the effect of an ICJ decision on the matter is doubtful. First, an ICJ complaint alone would be grits for President Trump’s mill, since he is acting in open defiance of the idea of international cooperation. Secondly, the US administration could ignore an ICJ decision or simply withdraw from the Geneva Convention (see Article IX Protocol) before a decision is issued, which would be the least desired outcome.

III. Additional Obstacles for Syrian Refugees Seeking Legal Protection in the US.

This section demonstrates that monitoring and enforcing US legal obligations under international refugee and human rights law falls to domestic courts and civil society in the US. International options are scarce and underwhelming.

³ see for example <http://politheor.net/un-summit-time-to-name-and-shame>

In addition to the uncertainty created by the discretionary nature of domestic enforcement of international norms regarding refugee law, Syrian refugees in particular face myriad obstacles to securing legal protection in the United States. Perhaps most obvious in the way of obstacles Syrian refugees face is the geographic and financial burden of traveling to the United States. For refugees approved for resettlement in the United States, the International Organization of Migration (IOM) coordinates travel to a designated United States city. However, the refugees must reimburse the U.S. government for the cost of their flight,⁴ which is cumbersome because even well-educated and highly-skilled Syrians are forced to find work in low-skilled jobs, like hotel services or manufacturing, since full credit for their previously attained credentials is almost uniformly denied. The result may be years of labor to pay off the debt of humanitarian aid, and for Syrians who arrive in the U.S. seeking asylum, the cost of passage may be much higher, and the journey itself more dangerous. The average cost incurred by refugees fleeing Syria in order to seeking asylum in Europe or the United States is estimated to be \$3,000 USD⁵ an amount that is put into brutal perspective when we consider that the average annual income in Syria is \$300. Once a pathway to escape is determined, refugees must then undertake the substantial risk of experiencing further violence, starvation, or even drowning during the journey.⁶

The journey is only the beginning, because upon arrival in the host country legal obstacles are monumental, and for many, insurmountable. To gain admission as refugees, Syrians must be screened by multiple U.S. agencies, and individuals must show that they have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁷ They must undergo in-person interviews, medical screenings, and a battery of security screenings before they can be admitted into the United States. All refugees are subject to background checks conducted by the Department of Homeland Security (DHS) prior to arrival in the U.S., a process that routinely takes 18 months or more. For those who arrive in the United States seeking asylum, they must similarly prove that they meet the definition of a “refugee” under 8 U.S.C.A. § 1101(a)(42)(A) and are unwilling or unable to return to their country of origin.

Syrian nationals who are able to establish that they meet the definition of refugee may still be barred from protection in the United States based on grounds of inadmissibility. For example, refugees involved in terrorist activity are specifically barred entry, and the Department of Justice (DOJ) and DHS have construed the terrorist provisions broadly, to include even minimal support given under duress.⁸ Under the INA, the Attorney General, together with the Secretary of State or the Secretary of Homeland Security, has the “sole unreviewable discretion” to exempt individuals from this bar and others,⁹ In practice, many Syrian nationals who merit protection based on refugee status may be prohibited from entering the United States based on such grounds for inadmissibility, and in fact some kind of “terrorist activity”, like resisting

⁴ <http://refugees.org/explore-the-issues/refugees-facts/>

⁵ <https://www.theatlantic.com/international/archive/2015/10/syrian-refugees-resettlement-us/411178/>

⁶ <https://www.nytimes.com/2015/12/28/world/.../syria-refugees-alan-aylan-kurdi.html>;
<https://www.nytimes.com/2016/05/30/world/europe/migrants-deaths-mediterranean-libya-italy.html>;
https://www.washingtonpost.com/world/most-syrian-refugees-are-just-too-poor-to-flee-to-europe/2015/09/30/06cb785a-673a-11e5-9ef3-fde182507eac_story.html?utm_term=.babe1756f0d1

⁷ 8 U.S.C.A. § 1101(a)(42)(A).

⁸ Aleinikoff, et al, *Immigration and Citizenship Process and Policy* (2016).

⁹ INA § 212(d)(3)(B).

oppression by Syrian forces, should in many cases be evidence of a refugee’s need for protection.

Refugees may meet yet another obstacle in the form of numerical limits to humanitarian relief under domestic immigration law. Under the Refugee Act of 1980, the United States sets a numerical limit on how many refugees will be admitted for humanitarian reasons each year. The President, in consultation with Congress, authorizes specific number of refugees to be resettled, and designates broadly which situations will be the focus of resettlement.¹⁰ Former President Obama authorized the resettlement of 85,000 refugees in 2016, reserving 10,000 of those available slots to Syrian refugees. The current administration has temporarily suspended refugee admissions, and plans to admit less than 50,000 refugees during fiscal year 2017.¹¹ Barriers to refugee protection for Syrian nationals, in particular, have expanded since the new administration took power. Under the executive order issued by the President, Syrian refugees are indefinitely barred from entering the United States.¹² The United Nations high commissioner for refugees estimated that 20,000 refugees worldwide would be affected by this order, with Syrian nationals bearing the greatest burden.

Syrian nationals may seek family-based or employment-based entry to the United States, though the waiting period for such visa allocation currently hovers somewhere between years and decades, depending on the relief sought.¹³ Furthermore, in addition to the cap on refugees established by the executive branch, the INA provides that no country may receive more than seven percent of the total visas available to all immigrants in one year. Taken together, the numerical ceilings, geographic location, and current refugee ban powerfully restrict the options available to Syrian refugees seeking shelter in the United States.

IV. You Can’t Come Here; but We’ll Send Weapons There

In a leaked draft of Trump’s Executive Order denying all Syrian refugees entry into the United States, there was a section titled “Establishment of Safe Zones to Protect Vulnerable Syrian Populations”¹⁴ which, curiously enough, was cut out of Trump’s final Executive Order.¹⁵ In the context of Trump’s actions, this seemed to say that Syrians are not welcome in the United States, but that the United States will make efforts to make refugees safe in Syria.

Just weeks before the Presidential elections, Hillary Clinton affirmed her support for establishing a no-fly zone in Syria, sometimes using the term ‘safe zone,’ as Trump is now.¹⁶ In a 2013 speech, Clinton detailed what a no-fly zone would entail: “To have a no-fly zone you have to take out all of the air defense, many of which are located in populated areas. So our missiles, even if they are standoff missiles so we’re not putting our pilots at risk—you’re going to kill a lot of Syrians.” At the time, Trump criticized Clinton as paving the way for

¹⁰ INA § 207.

¹¹ <http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/>

¹² <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>

¹³ <https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2017/visa-bulletin-for-february-2017.html>

¹⁴ <https://assets.documentcloud.org/documents/3416383/Trump-EO-Draft-on-Refugees.pdf>.

¹⁵ <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

¹⁶ <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

“World War Three.”¹⁷ Now, he seems to have changed his mind (or, after removing the section from his Executive Order, having his mind in a constant state of flux). In some sense, the issue of refugees would ideally be non-political; a form of outreach and welcoming to people fleeing intolerable situations. But, of course, the situations that refugees must leave are many times political creations, in this case involving the Syrian regime and its opponents, Russia, Turkey, Saudi Arabia, Iran, Kurdish nationalists, Islamic state, and, of course, the United States working to arm and train anti-regime fighters through overt and covert methods.¹⁸

There are two important points that become clearer in looking at the relationship between refugees and interventions. First, the simple moral and ethical principle that when a state intervention makes a situation more violent and unlivable, that state has an obvious duty to welcome refugees fleeing the destruction. Maybe an analogy is when you burn down your neighbor’s house, you must invite him to stay in yours, or at least make sure he has somewhere to live. The second important point is that states use the issue of refugees as a justification for so-called humanitarian wars. Whatever the US interests at stake were in removing Assad from power under Obama and Clinton’s state department, and whatever Trump’s interests are in aligning the US with Saudi Arabia in his nascent attempts to create ‘safe zones,’¹⁹ the protection of displaced Syrians is obviously at least a cover and justification.

Perhaps the conclusion here is trite; how states intervene in crisis zones is as important as how they treat those fleeing. Or, more cynically; be wary of those sending guns and armies to protect fleeing populations. But recognizing the interplay of interventions and taking in refugees can also show the way to a more humane policy: do no harm in the crisis zone, and welcome those who are forced to leave. Given the unlikelihood of reopening our doors to the neighbors whose houses we have helped burn down, we would settle for at least doing no more harm in Syria.

¹⁷ <https://www.theguardian.com/world/2016/oct/25/hillary-clinton-syria-no-fly-zones-russia-us-war>.

¹⁸ <https://www.nytimes.com/2016/06/27/world/middleeast/cia-arms-for-syrian-rebels-supplied-black-market-officials-say.html>.

¹⁹ <https://www.ft.com/content/d9d6f33a-e6c5-11e6-967b-c88452263daf>.

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