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## WILLFUL BLINDNESS OR DELIBERATE INDIFFERENCE: THE UNITED STATES' ABDICATION OF LEGAL RESPONSIBILITY TO REFUGEES

*Abed A. Ayoub & Yolanda C. Rondon\**

*“The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.”<sup>1</sup>*

### ABSTRACT

Bureaucracy placated with discriminatory motives has left refugees in limbo. It is sad that we will probably look back in twenty years and say we should have done more, and we could have done more. Hindsight is 20/20, but it is not an excuse many can understand when we have been here before at the brink of World War II. It is a new day, perhaps a new age, but the same hateful political rhetoric has just been repackaged. With the largest global refugee crisis in history, the value of all human lives must be our priority.

### INTRODUCTION

There are over 65 million people forcibly displaced worldwide, comprising 7.6 million Syrians.<sup>2</sup> There are over 20 million refugees worldwide, encompassing nearly 5 million Syrian refugees.<sup>3</sup> Turkey is providing safe haven to 2.7 million refugees.<sup>4</sup> Iran is hosting nearly 1 million refugees, Lebanon is hosting over 1 million refugees, and Jordan is hosting over 1.4 million Syrian refugees with over 600,000 registered.<sup>5</sup> Canada admitted over 30,000 Syrian refugees—25,000 admitted

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1. Martin Luther King Jr., *Quotes*, FAMOUS QUOTATIONS NETWORK, <http://famous-quotations.com/author.asp?authorID=4046&page=3> (last visited Sept. 26, 2016).

2. *Figures at a Glance*, UNHCR, <http://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited Sept. 13, 2016) (8.7 million Syrians predicted to be forcibly displaced in 2016); *UNHCR: Total Number of Syrian Refugees Exceeds Four Million for First Time*, UNHCR (July 9, 2015), <http://www.unhcr.org/en-us/news/press/2015/7/559d67d46/unhcr-total-number-syrian-refugees-exceeds-four-million-first-time.html>.

3. *Facts and Figures About Refugees*, UNHCR, [http://www.unhcr.ie/about-unhcr/facts-and-figures-about-refugees\\_\\_](http://www.unhcr.ie/about-unhcr/facts-and-figures-about-refugees__) (last visited Sept. 13, 2016); *Syria Regional Refugee Response*, UNHCR, [http://data.unhcr.org/syrianrefugees/regional.php#\\_ga=1.99412702.1960642707.1459204692](http://data.unhcr.org/syrianrefugees/regional.php#_ga=1.99412702.1960642707.1459204692) (last updated Dec. 22, 2016).

4. *Syria Regional Refugee Response*, *supra* note 3.

5. *New report: Developing Countries Host 80% of Refugees*, UNRIC, <http://www.unric.org/en/world-refugee-day/26978-new-report-developing-countries-host-80-of-refugees> (last visited Sept. 26, 2016); Batsheva Sobelman, *Which Countries Are Taking In Syrian Refugees?*, LA TIMES (Sept. 8, 2015), <http://www.latimes.com/world/europe/la-fg-migrants-scorecard-20150908-story.html>.

between November 2015 and May 2016.<sup>6</sup> Germany will host approximately 1 million refugees and is willing to accept 500,000 more each year for the next few years.<sup>7</sup>

However, the United States has only committed to taking 10,000 Syrian refugees in the coming fiscal year of 2016 as part of the admission limit of 85,000 refugees.<sup>8</sup> As a world superpower, the U.S. has the capacity—and the moral responsibility—to do more to help. Refugees in dire need of safe haven are caught in red tape, waiting over two years for processing and vetting prior to admittance.<sup>9</sup>

This article, in Part I, provides a brief summary of the development of the world's largest refugee crisis, with specific focus on the emergence of the Syrian refugee crisis, and the need for protection as a refugee and/or under temporary protected status. Part I also critiques the reactionary tactics of federal and state political leaders targeting Arabs and Muslims under the guise of national security. Part II articulates the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees as customary international law that obligates compliance by the United States. Part II continues with a discussion on how pending legislation in the United States Congress violates international law and the international norms of *non-refoulement* and *anti-discrimination*.

## I. DEVELOPMENT OF THE WORLD REFUGEE CRISIS & POLITICAL RHETORIC

The current refugee crisis has been called the worst refugee crisis since World War II.<sup>10</sup> The numbers show that 54% of the refugees come from three countries: Syria (4.9 million), Afghanistan (2.7 million), and Somalia (1.1 million).<sup>11</sup> In addition to these numbers, there are approximately 5 million Palestinian refugees registered under the United Nations Relief and Works Agency (UNRWA).<sup>12</sup> While there are refugees coming from different parts of the world, this article focuses on countries in the Middle East, particularly Syria. This section provides an overview

6. #WelcomeRefugees: Key Figures, CITIZEN & IMMIGR. CAN., <http://www.cic.gc.ca/english/refugees/welcome/milestones.asp> (last updated Sept. 18, 2016).

7. *Germany Says It Will Take 1 Million Refugees as Europe Closes the Gates*, TIME (Sept. 14, 2015), <http://time.com/4033191/german-border-refugee/>; Helena Smith & Mark Tran, *Germany Says It Could Take 500,000 Refugees a Year*, THE GUARDIAN (Sept. 8, 2015), <https://www.theguardian.com/world/2015/sep/08/germany-500000-refugees-a-year-clashes-lesbos>.

8. *Remarks by Deputy National Security Advisor Avril Haines Commemorating World Refugee Day*, WHITE HOUSE (June 14, 2016), <https://www.whitehouse.gov/the-press-office/2016/06/14/remarks-deputy-national-security-advisor-avril-haines-commemorating>; see also Laura Koran, *Obama Pledge to Welcome 10,000 Syrian Refugees Far Behind Schedule*, CNN POL. (Apr. 1, 2016), <http://www.cnn.com/2016/04/01/politics/obama-pledge-10000-syrian-refugees-falling-short/>.

9. See Hayeoun Park & Larry Buchanan, *Why It Takes Two Years for Syrian Refugees to Enter the U.S.*, N.Y. TIMES (Nov. 20, 2015), <http://www.nytimes.com/interactive/2015/11/20/us/why-it-takes-two-years-for-syrian-refugees-to-apply-to-enter-the-united-states.html>; see also Allan Smith, *Why Middle Eastern Refugees Have to Wait an Astonishingly Long Time to Get into the U.S.*, BUS. INSIDER (Sept. 14, 2015, 5:06 PM), <http://www.businessinsider.com/refugees-wait-a-long-time-to-get-into-us-2015-9>.

10. See Griff White, *New U.N. Report Says World's Refugee Crisis Is Worse than Anyone Expected*, WASH. POST (June 18, 2015), [https://www.washingtonpost.com/world/europe/new-un-report-says-worlds-refugee-crisis-is-worse-than-anyone-expected/2015/06/17/a49c3fc0-14ff-11e5-8457-4b431bf7ed4c\\_story.html](https://www.washingtonpost.com/world/europe/new-un-report-says-worlds-refugee-crisis-is-worse-than-anyone-expected/2015/06/17/a49c3fc0-14ff-11e5-8457-4b431bf7ed4c_story.html).

11. *Facts and Figures About Refugees*, supra note 3.

12. *Id.*

of the current refugee crisis, as well as background information on steps taken by the administration of President Obama in protecting nationals from Syria in the U.S. Finally, the section focuses on the current climate towards refugees, including political rhetoric in the U.S. and Europe, and how this rhetoric can be attributed to anti-Arab sentiment and Islamophobia.

### A. Development of the World Refugee Crisis

The recent violence in the Middle East, particularly in Syria, is often directly attributed to the refugee crisis the world is witnessing. The continuing conflicts and breakdown of government authority in Libya, Iraq, Yemen, Afghanistan, and Eritrea have also led to the crisis.<sup>13</sup> Closer to the U.S, the Central American refugee crisis has also led to thousands of individuals from El Salvador, Honduras, and Guatemala seeking refuge in America.<sup>14</sup>

The crisis from Syria has resulted in millions of refugees fleeing to neighboring countries and Europe.<sup>15</sup> The events which have led to the current crisis began during the “Arab Spring” in March of 2011.<sup>16</sup> Peaceful protests in the Syrian cities of Damascus and Aleppo called for democratic reforms.<sup>17</sup> Government forces responded to protests in the city of Daraa with gunfire, which left four dead.<sup>18</sup> This sparked the escalation of violence, which continues today.<sup>19</sup>

The first refugees from Syria crossed over to Lebanon in April of 2011.<sup>20</sup> In May of 2011, 5,000 refugees from the city of Talkalakh crossed over to Lebanon.<sup>21</sup> Syrians began fleeing to neighboring countries as the violence intensified.<sup>22</sup> On

13. Theodora Dragostinova, *Refugees or Immigrants? The Migration Crisis in Europe in Historical Perspective*, ORIGINS (Jan. 2016), <http://origins.osu.edu/article/refugees-or-immigrants-migration-crisis-europe-historical-perspective>; Zachary Laub, *Yemen in Crisis*, COUNCIL ON FOREIGN RELATIONS, Apr. 19, 2016, <http://www.cfr.org/yemen/yemen-crisis/p36488>.

14. *Facts and Figures About Refugees*, *supra* note 3; Jonathan T. Hiskey, et al., *Understanding the Central American Refugee Crisis: Why They Are Fleeing and How U.S. Policies Are Failing to Deter Them*, AM. IMMIGR. COUNCIL (Feb. 1, 2016), <https://www.americanimmigrationcouncil.org/research/understanding-central-american-refugee-crisis>.

15. See Kemal Kirişçi, *Why 100,000s of Syrian Refugees Are Fleeing to Europe*, BROOKINGS (Sept. 3, 2015), <https://www.brookings.edu/blog/order-from-chaos/2015/09/03/why-100000s-of-syrian-refugees-are-fleeing-to-europe/>.

16. *Quick Facts: What You Need to Know About the Syria Crisis*, MERCY CORPS. (Aug. 13, 2016), <https://www.mercycorps.org/articles/iraq-jordan-lebanon-syria-turkey/quick-facts-what-you-need-know-about-syria-crisis>.

17. See *Mid-East Unrest: Syrian Protests in Damascus and Aleppo*, BBC NEWS (Mar. 15, 2011), <http://www.bbc.com/news/world-middle-east-12749674>; *Syria's Peaceful Revolution 2011*, SANAD, <http://sanadsyria.org/conflict-timeline/2011-2/> (last visited Sept. 24, 2016).

18. See Joe Sterling, *Daraa: The Spark that Lit the Syrian Flame*, CNN WORLD (Mar. 1, 2012, 9:32 AM), <http://www.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/>; “We’ve Never Seen Such Horror”, HUM. RTS. WATCH (June 1, 2011), <https://www.hrw.org/report/2011/06/01/weve-never-seen-such-horror/ Crimes-against-humanity-syrian-security-forces>.

19. See Janella P., *Graffiti on a Wall Sparked Syrian Conflict*, OPEN DOORS USA (Mar. 9, 2015), <https://www.opendoorsusa.org/christian-persecution/stories/tag-blog-post/graffiti-on-a-wall-sparked-syrian-conflict/>.

20. *The Syrian Refugee Crisis Begins: Up to 5000 Refugees Flee to Lebanon*, SYRIAN REFUGEES, <http://syrianrefugees.eu/timeline/> (last visited Sept. 15, 2016).

21. *Id.*

22. *Id.*

September 11, 2012, up to 11,000 Syrians fled due to violence.<sup>23</sup> The rise of the Islamic State of Iraq and Syria (ISIS), in 2014, worsened the refugee crisis.<sup>24</sup> In June of 2014, ISIS militants declared a “caliphate” in territory from Aleppo to the eastern Iraqi province of Diyala.<sup>25</sup> The violence in Syria has not subsided, and ISIS still has a presence in both Syria and Iraq.<sup>26</sup>

In response to the Syrian crisis, the U.N. Refugee Agency has established camps in Jordan, Lebanon, and Turkey.<sup>27</sup> The Zaatari refugee camp is under the governance of the country of Jordan and provides refuge to almost 100,000 individuals.<sup>28</sup> The camp is currently Jordan’s fourth largest city, and half of the inhabitants are children.<sup>29</sup> The diminishing infrastructure is posing a problem.<sup>30</sup> The challenges faced at the Zaatari camp are similar to those faced by camps in neighboring countries.<sup>31</sup>

While some refugees from Syria, Iraq, and Afghanistan make it to refugee camps in neighboring countries, many of them are forced to take the dangerous journey across the Mediterranean Sea to Europe.<sup>32</sup> Thousands do not reach Europe, dying at sea.<sup>33</sup> The image of a lifeless young toddler, Aylan Kurdi, washing ashore at a beach in Turkey, caught the world’s attention.<sup>34</sup> After the image surfaced of Kurdi lying face down in the sand, dressed “in a red shirt and dark shorts,” the conversation about the crisis was brought to the forefront.<sup>35</sup>

## B. Temporary Protective Status—A Temporary Reprieve

As the conflicts in Syria, as well as in Yemen, escalated and the violence worsened, many nationals from both countries present in the U.S. on nonimmigrant visas faced a daunting decision—do they stay in the country and risk violating their

23. *Fighting in Tripoli, Lebanon Mirrors Syria Conflict*, SYRIAN REFUGEES, <http://syrianrefugees.eu/timeline/> (last visited Oct. 1, 2016).

24. *See ISIS Refugee Crisis Begins: 500,000 Flee Mogul*, SYRIAN REFUGEES, <http://syrianrefugees.eu/timeline/> (last visited Oct. 1, 2016).

25. Marcy Kreiter, *ISIS Declares Caliphate*, INT’L BUS. TIMES (June 29, 2014, 4:31 PM), <http://www.ibtimes.com/isis-declares-caliphate-diyala-province-iraq-aleppo-syria-changes-name-islamic-state-1614854>.

26. *See ISIS’s Advance in Iraq*, FIN. TIMES (Mar. 18, 2016, 7:38 PM), <http://ig.ft.com/sites/2014/isis-map>.

27. *Syria Regional Refugee Response*, *supra* note 3.

28. *Id.*

29. *Life in Za’atari Refugee Camp, Jordan’s Fourth Biggest City*, OXFAM, <https://www.oxfam.org/en/crisis-syria/life-zaatari-refugee-camp-jordans-fourth-biggest-city> (last visited Oct. 1, 2016).

30. *See id.*

31. *See* Ariane Rummery, *Jordan’s Za’atari Refugee Camp Turns Three, Challenges for the Future of Thousands Living There*, UNHCR (July 28, 2015), <http://www.unhcr.org/en-us/news/latest/2015/7/55b7737b6/jordans-zaatari-refugee-camp-turns-three-challenges-future-thousands-living.html>.

32. *See* Adam Withnal, *Aylan Kurdi’s Story: How a Small Syrian Child Came to Be Washed Up on a Beach in Turkey*, INDEP. (Sept. 3, 2015), <http://www.independent.co.uk/news/world/europe/aylan-kurdi-s-story-how-a-small-syrian-child-came-to-be-washed-up-on-a-beach-in-turkey-10484588.html>.

33. *See Mapping Mediterranean Migration*, BBC NEWS (Sept. 15, 2014), <http://www.bbc.com/news/world-europe-24521614>.

34. *See* Withnal, *supra* note 32.

35. Anne Barnard & Karam Shoumali, *Image of Drowned Syrian, Aylan Kurdi, 3, Brings Migrant Crisis into Focus*, N.Y. TIMES (Sept. 3, 2015), <http://www.nytimes.com/2015/09/04/world/europe/syria-boy-drowning.html>.

immigration status or do they return to their homeland where their lives are at risk? In an effort to provide a temporary reprieve for these individuals, the American-Arab Anti-Discrimination Committee requested that the Department of Homeland Security designate Syria and Yemen for Temporary Protective Status.<sup>36</sup>

Under 8 U.S.C. § 1254(a), the Department of Homeland Security may designate any foreign state or part of a foreign state for Temporary Protective Status if “there is an ongoing armed conflict within the state” and, due to the conflict, requiring the return of nationals to that state or part of a state would “pose a serious threat to their personal safety.”<sup>37</sup> In the context of escalating and “ongoing armed conflicts,” requiring nationals to return to Syria or Yemen “would pose a serious threat to their personal safety.”<sup>38</sup> The Temporary Protective Status designation also allows for qualified nationals to apply for an Employment Authorization Document (EAD), which allows for the national to gain legal employment while in the U.S.<sup>39</sup>

Department of Homeland Security initially designated Syria for Temporary Protective Status on March 29, 2012, on the basis that “there exist[s] extraordinary and temporary conditions in Syria that prevent Syrian nationals from returning in safety, and that permitting such aliens to remain temporarily in the United States would not be contrary to the national interest of the United States.”<sup>40</sup> At that time, Department of Homeland Security noted that “[o]bservers generally agree that the conflict has become increasingly violent and militarized.”<sup>41</sup> Department of Homeland Security’s notice cited the United Nations and estimates that “approximately 7,500 Syrians have been killed since the violence began,” “100,000 to 200,000 Syrians are internally displaced,” and “approximately 35,000 Syrians have sought shelter in the neighboring countries.”<sup>42</sup>

Since the initial designation, Temporary Protective Status for Syria has been renewed and re-designated an additional four times.<sup>43</sup> The most recent renewal and re-designation was issued on August 1, 2016.<sup>44</sup> The most recent notice extends the designation of Temporary Protective Status for Syrian nationals to eighteen months, from October 1, 2016 through March 31, 2018, and grants re-designation to allow recent arrivals to qualify for the protection who were in the U.S. on August 1, 2016.<sup>45</sup> “The extension allows [Temporary Protective Status] beneficiaries to retain TPS

36. See *TPS*, AM. ARAB ANTI-DISCRIMINATION COMM., <http://www.adc.org/legal/tps-request> (last visited Oct. 26, 2016).

37. 8 U.S.C. § 1254(b)(1)(A) (repealed 1996).

38. *U.S. Gives Yemeni (Al Qaeda Hotbed) Nationals “Temporary” Amnesty*, JUD. WATCH (Sept. 17, 2015), <http://www.judicialwatch.org/blog/2015/09/u-s-gives-yemeni-al-qaeda-hotbed-nationals-temporary-amnesty/>; *Extension and Redesignation of Syria for Temporary Protected Status*, FED. REG. (Aug. 1, 2016), <https://www.federalregister.gov/documents/2016/08/01/2016-17933/extension-and-redesignation-of-syria-for-temporary-protected-status> [hereinafter *Extension and Redesignation*].

39. 8 U.S.C. § 1254(a)(1)(B) (repealed 1996).

40. *Designation of Syrian Arab Republic for Temporary Protected Status*, 77 FED. REG. 19 (Mar. 29, 2012), <https://www.regulations.gov/document?D=USCIS-2012-0007-0001>.

41. *Id.*

42. *Id.*

43. See *Extension and Redesignation*, *supra* note 38.

44. *Id.*

45. *Id.*

through March 31, 2018, so long as they continue to meet the eligibility requirements for TPS.”<sup>46</sup>

Department of Homeland Security designated Yemen for Temporary Protective Status on September 3, 2015.<sup>47</sup> In the published decision it is stated, “The Secretary has determined, after consultation with the Department of State and other appropriate Government agencies, that there is an ongoing armed conflict within Yemen and, due to such conflict, requiring the return of Yemeni nationals to Yemen would pose a serious threat to their personal safety.”<sup>48</sup> The notice went on to state, “the United Nations (UN) is reporting that approximately 42,000 people, in 7,000 households, were identified as needing shelter as a direct result of the conflict since March 2015. The UN has reported that nearly 1.3 million people in Yemen have become internally displaced since the start of the conflict.”<sup>49</sup>

In addition to Syria and Yemen, Temporary Protective Status is currently in place for El Salvador, Guinea, Haiti, Honduras, Liberia, Nepal, Nicaragua, Sierra Leone, Somalia, South Sudan, and Sudan.<sup>50</sup> In granting Temporary Protective Status for these nations, the administration of President Barack Obama rose above the political rhetoric surrounding refugees and immigrants and made it possible for thousands of individuals to benefit from the temporary reprieve.

### C. Anti-Refugee and Immigrant Rhetoric

As the worldwide refugee crisis worsens, so does the political rhetoric here within the U.S. Over the past year, many politicians have used the refugee crisis to divide the country.<sup>51</sup> Many of these politicians are promoting fear and bigotry, often linking refugees and immigrants to the worst humanity has to offer.<sup>52</sup> The reactionary tactic of federal and state political leaders has been to target Arabs and Muslims under the guise of national security—this is happening with the refugee debate.<sup>53</sup>

The presidential campaign of Donald J. Trump, the new President of the U.S., was based on promoting fear of refugees and immigrants.<sup>54</sup> Many of his statements made headlines<sup>55</sup> and proved popular enough to win him the presidency.<sup>56</sup> In addition

46. *Id.*

47. Designation of the Republic of Yemen for Temporary Protected Status, 80 Fed. Reg. 171 (Sept. 3, 2015).

48. *Id.*

49. *Id.*

50. *Temporary Protected Status*, USCIS, <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Jan. 3, 2017).

51. See generally Benjy Sarlin, *Trump's Turn Toward Racially Charged Fiction Challenges the GOP*, MSNBC (Nov. 23, 2015, 9:47 PM), <http://www.msnbc.com/msnbc/donald-trump-racially-charged-fiction-challenges-gop> (demonstrating the divide in ideology behind presidential candidates and state and federal legislators); see also *Refugee Crisis Dividing Americans, but Some Public Figures, Like Malloy, Continue Support*, FOX61 (June 9, 2016, 11:43 AM), <http://fox61.com/2016/06/09/refugee-crisis-dividing-americans-but-some-public-figures-like-malloy-continue-support/> [hereinafter *Refugee Crisis*] (discussing the reaction split among party lines).

52. See Sarlin, *supra* note 51.

53. See *id.*

54. See *id.*

55. See *id.*

56. Lincoln Blades, *Trump Won by Turning Bigoted Dog Whistles into Megaphones*, ROLLING STONE (May 4, 2016), <http://www.rollingstone.com/politics/news/trump-won-by-turning-bigoted-dog-whistles-into-megaphones-20160504>.

to proposing the building of a wall along the southern border,<sup>57</sup> Trump also proposed a complete ban on Muslims entering the U.S.<sup>58</sup> He later revised his position to a complete ban on individuals coming from countries with conflict.<sup>59</sup> Trump continues to play into the notion that Arabs and Muslims are a threat to national security and that Muslims hate the United States.<sup>60</sup>

Trump was not alone: other candidates during the 2016 presidential election, realizing the popularity of such absurdity, jumped into the fray and touted the same nonsensical rhetoric. During the GOP Primary, Senator Ted Cruz proposed a complete ban on Syrian refugees who were Muslim, going as far as proposing a bill in the U.S. Senate.<sup>61</sup> The anti-refugee voices and positions got louder after the November 2015 attack in Paris, France, which left over 100 dead.<sup>62</sup> Both Trump and Cruz used the Paris attacks to push forward the flawed argument that allowing refugees into the country will pose a national security risk.<sup>63</sup>

On the state level, governors and legislative bodies from many states, including Louisiana, Florida, Arizona, and South Carolina, each proposed refugee bans.<sup>64</sup> A total of twenty-six governors put forth efforts to stop the settlement of refugees in their states.<sup>65</sup> Many critics were quick to point out that the anti-refugee rhetoric was driven by anti-Arab sentiment and Islamophobia.<sup>66</sup>

One state which adamantly pursued an anti-refugee position was Indiana, with Indiana Governor Mike Pence among those taking the lead.<sup>67</sup> Governor Pence was subsequently announced as the running mate of Donald Trump.<sup>68</sup> Governor Pence

57. *Donald J. Trump: Compelling Mexico to Pay for the Wall*, DONALDJTRUMP.COM (April 5, 2016), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-compelling-mexico-to-pay-for-the-wall>.

58. Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 4:18 PM), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/>.

59. See Colin Campbell, *CNN's Jake Tapper to Donald Trump: Do You Think All 1.6 Billion Muslims Hate Us?*, BUS. INSIDER (Mar. 10, 2016, 10:03 PM), <http://www.businessinsider.com/donald-trump-debate-islam-hate-jake-tapper-2016-3>.

60. See *id.*; see also Diamond, *supra* note 58 (“Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life.”).

61. Jonathan Swan & Julian Hattem, *Cruz to Offer Bill Banning Syrian Refugees*, THE HILL (Nov. 16, 2015, 5:20 PM), <http://thehill.com/policy/national-security/260317-cruz-to-offer-bill-banning-syrian-refugees>.

62. Steve Almasy et al., *Paris Massacre: At Least 128 Killed in Gunfire and Blasts, French Officials Say*, CNN (Nov. 14, 2015, 9:48 AM), <http://www.cnn.com/2015/11/13/world/paris-shooting/>.

63. See Campbell, *supra* note 59 (Trump announces plan to ban all Muslim tourists and immigrants after the terrorist attacks in Paris and San Bernardino, California.); see also Swan & Hattem, *supra* note 61 (Cruz saying it is lunacy to allow refugees into the United States in light of the attack in Paris).

64. Sara Rathod, *The Freak-Out Over Syrian Refugees Is Continuing in These States*, MOTHER JONES (Feb. 26, 2016, 7:00 AM), <http://www.motherjones.com/politics/2016/02/anti-syrian-refugee-legislation-states/>; *Louisiana Committee Advances Anti-Sanctuary Legislation*, FED. FOR AM. IMMIGR. REFORM (Apr. 27, 2016), <http://immigrationreform.com/2016/04/27/louisiana-committee-advances-anti-sanctuary-legislation/>; Jesse Byrnes, *Growing Number of States Refuse Refugees*, THE HILL (Nov. 16, 2015, 10:07 AM), <http://thehill.com/policy/national-security/260249-alabama-michigan-governors-refuse-syrian-refugees>.

65. Patrick Strickland, *Islamophobia Seen as US States Shun Syrians*, AL JAZEERA (Nov. 17, 2015), <http://www.aljazeera.com/news/2015/11/islamophobia-syrian-refugees-usa-governors-151116164708308.html>.

66. See *id.*

67. Polly Mosendz, *Map: Every State Accepting and Refusing Syrian Refugees*, NEWSWEEK (Nov. 16, 2015, 6:19 PM), <http://www.newsweek.com/where-every-state-stands-accepting-or-refusing-syrian-refugees-395050>.

68. Michael Finnegan & Michael A. Memoli, *Trump Chooses Mike Pence as His Running Mate, a Pick that Could Soothe Nervous Republicans*, L.A. TIMES (July 15, 2016, 2:15 PM), <http://www.latimes.com/nation/la-nap-trump-vice-president-pence-20160715-snap-story.html>.



tried to block the resettlement of a Syrian refugee family.<sup>69</sup> Governor Pence put forth his refugee policy only days after the terror attack in Paris, France.<sup>70</sup> By using the Paris attacks as a backdrop, Governor Pence wrongly framed the refugee issue as a matter of national security.

The decision by Governor Pence to refuse refugees was overturned by a federal court judge in the case of *Exodus Refugee Immigration, Inc. v. Mike Pence et al.*,<sup>71</sup> which was brought by the ACLU-Indiana on behalf of Exodus, a refugee resettlement agency.<sup>72</sup> The court “order prohibits the State of Indiana from taking any actions to interfere with or attempt to deter the resettlement of Syrian refugees by Exodus in Indiana, including by withholding funds and services due Exodus and the refugees it serves.”<sup>73</sup>

The refugee policy of some politicians, such as Trump and Pence, are clearly driven by anti-Arab sentiment and Islamophobia rhetoric. The position that refugees bring with them an influx of crime and drug use is not supported by any data and is merely a reflection of the flawed policies and positions taken by these politicians.<sup>74</sup> By perpetuating on people’s fears, politicians are using anti-Arab sentiment and Islamophobia to frame the refugee issue as a national security matter. It is under the guise of national security that these politicians aim to exclude refugees from entering the U.S. based on race, religion, and national origin. Such exclusionary tactics are not only morally wrong, but also go against international law, as discussed in Section II.

## II. UNITED STATES’S OBLIGATIONS UNDER INTERNATIONAL LAW AND REFUGEE POLICIES

### A. Recognition Under International Law

The Refugee Convention is derived from the asylum protected status enumerated under the Article 14 of the 1948 Universal Declaration of Human Rights—to provide immediate safe haven to those in danger.<sup>75</sup> It may surprise some that the 1951 Refugee Convention (1951 Convention) did not grant refugee status to all those who qualified as refugees by demonstrating 1) a well-founded fear of future persecution

69. *Syrian Family Rejected by Indiana Welcomed in Connecticut*, CHI. TRIB. (Nov. 19, 2015, 8:46 AM), <http://www.chicagotribune.com/news/opinion/chapman/ct-syrian-refugees-indiana-20151118-story.html>.

70. Polly Mosendz, *In Light of Paris Attacks, 26 GOP Governors, One Democrat to Refuse Syrian Refugees*, NEWSWEEK (Nov. 16, 2015, 11:22 AM), <http://www.newsweek.com/after-paris-attacks-26-republican-governors-one-democrat-refuse-syrian-394859>.

71. *Exodus Refugee Immigration Inc. v. Pence*, No. 1:15-cv-01858-TWP-DKL, 2016 WL 772897, at \*18 (S.D. Ind. Feb. 29, 2016).

72. *Victory! ACLU Wins Preliminary Injunction for Exodus Refugee Immigration*, AM. CIV. LIBERTIES UNION OF IND. (Feb. 29, 2016), <http://www.aclu-in.org/news/36-news-with-photos/392-victory-aclu-wins-preliminary-injunction-for-exodus-refugee-immigration>.

73. *Id.*

74. Kevin Roose, *Show This Chart to Everyone Who’s Scared of Allowing Syrian Refugees into the U.S.*, FUSION (Nov. 17, 2015, 7:51 AM), <http://fusion.net/story/234172/syrian-refugee-chart-explains-everything/>.

75. See UNHCR, *Convention and Protocol Relating to the Status of Refugees 2*, <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (last visited Nov. 5, 2016) [hereinafter *Convention and Protocol*].

based on race, nationality, membership in a particular social group, and religion; 2) a causal nexus; and 3) an unwillingness or inability to return to their home country.<sup>76</sup> The 1951 Convention was subject to the geographic and temporal limitations of Europe.<sup>77</sup> It may also surprise some that the U.S. did not ratify the 1951 Convention.<sup>78</sup>

However, we must remember that the 1951 Convention was moved forward in response to the Holocaust and persecution of Jews by the German government and in German-controlled areas.<sup>79</sup> Also, remember that the U.S. refused to accept Jewish refugees fleeing to the U.S., classifying Jewish refugees as a “risk” for entry and a “threat.”<sup>80</sup> Nevertheless, the U.S. is bound by the 1951 Convention and 1967 Protocol because the Convention is recognized as *jus cogens*,<sup>81</sup> and the U.S. must abide by customary international law.

*Jus cogens* is defined as a peremptory norm of international law accepted by the international community of states as a whole from which no derogation is ever permitted.<sup>82</sup> The 1951 Refugee Convention and 1967 Protocol have been ratified by 142 countries.<sup>83</sup> Additionally, the United States did ratify the 1967 Protocol<sup>84</sup> and enacted it as law under the Immigration and Nationality Act § 101(a)(42).<sup>85</sup>

Equally important is the recognition of the principles of *anti-discrimination* and *non-refoulement* as established international norms rooted in customary international law.<sup>86</sup> The five protected grounds under the 1951 Convention and the 1967 Protocol are rooted in the principles of immutability and anti-discrimination.<sup>87</sup> Protection is afforded to individuals discriminatorily targeted and/or subject to risk because of who he or she is—an immutable characteristic fundamental to his or her identity or

76. See *id.*

77. See *id.*

78. See UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, <http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> (last visited Nov. 5, 2016) [hereinafter *States Parties*].

79. Francis Deng, *International Response to Internal Displacement: A Revolution in the Making*, 11 AM. U. WASH. L.J. 24, 24 (2004).

80. See Daniel A. Gross, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing that They Were Nazi Spies*, THE SMITHSONIAN (Nov. 18, 2015), <http://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324>; Ishaan Tharoor, *What Americans Thought of Jewish Refugees on the Eve of World War II*, WASH. POST (Nov. 17, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/what-americans-thought-of-jewish-refugees-on-the-eve-of-world-war-ii/>.

81. See Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, COALITION FOR THE INT’L CRIM. CT., 1, 10–14, <http://www.iccnw.org/documents/WritingColombiaEng.pdf> (last visited Oct. 26, 2016).

82. See *id.* at 8.

83. See *Convention and Protocol*, *supra* note 75; Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees Protocol Relating to the Status of Refugees*, U.N. AUDIOVISUAL LIBR. OF INT’L L., <http://legal.un.org/avl/ha/prsr/prsr.html>.

84. *States Parties*, *supra* note 78.

85. See *Convention and Protocol*, *supra* note 75, at 2; see also 8 U.S.C. § 1101 (2016).

86. See JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INT’L LAW 155 (2005); see also Sigit Riyanto, *The Refoulement Principle and Its Relevance in the International Law System*, SOC. SCI. RES. NETWORK 734 (Feb. 4, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2211817](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211817).

87. UNHCR, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (May 7, 2002), <http://www.unhcr.org/3d58de2da.pdf>.

conscience.<sup>88</sup> These principles, particularly the principle of anti-discrimination, have been recognized through state domestic courts including, but not limited to, Canada in *Attorney General of Canada v. Ward* and the United Kingdom in *Ex parte Shah v. Secretary of State for the Home Department*.<sup>89</sup>

The principles of *anti-discrimination* and *non-refoulement* are not principles in the mere sense of the word. The principles as recognized international norms are rules that impose duties.<sup>90</sup> Recognition of *anti-discrimination* and *non-refoulement* principles as *jus cogens* are further supported by international instruments.<sup>91</sup> Articles 1 and 2 of the International Convention on the Elimination of all Forms of Racial Discrimination affirm the non-discrimination principle, specifically providing:

Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure [sic] that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations.<sup>92</sup>

Article 4 of the International Covenant on Civil and Political Rights affirms the non-discrimination duty even in times of war or threats to national security. The Covenant provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.<sup>93</sup>

<sup>88.</sup> See *In re. Acosta*, 19 I. & N. Dec. 211 (1985); see also *Islam v. Sec'y of St. for the Home Dep't.*, [1999] UKHL 1, [1999] 2 AC 629, 641.

<sup>89.</sup> See *Ward v. Canada (Minister of Emp't & Immigration)*, [1993] 2 S.C.R. 689, para. 76 (Can.); *Ex parte Shah v. Sec'y of State for the Home Dep't.*, [1999] UKHL 20, [1999] 2 AC (HL) 629, 641 (appeal taken from Eng.); see also *Cheung v. Canada (Minister of Emp't & Immigr.)*, [1993] 2 F.C. 314, para. 10, 20–21 (Can.).

<sup>90.</sup> See UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Jan. 26, 2007), <http://www.unhcr.org/4d9486929.pdf>.

<sup>91.</sup> See Charter of Fundamental Rights of the European Union 2012 O.J. C 326/02; Pact of San Jose, Costa Rica, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (Nov. 22, 1969); African Charter on Human and People's Rights, 21 I.L.M. 58 (1981).

<sup>92.</sup> G.A. Res. 2106 (XX), annex, Int'l Convention on the Elimination of All Forms of Racial Discrimination, art. 1 & 2 (Dec. 21, 1965).

<sup>93.</sup> G.A. Res. 2200 (XXI), annex, Int'l Covenant on Econ., Soc. and Cultural Rights, Int'l Covenant on Civil and Political Rights and Option Protocol to the Int'l Covenant on Civil and Political Rights art. 4 (Dec. 16, 1966).

The Convention on the Elimination of all Forms of Discrimination has 88 signatories and 177 state parties.<sup>94</sup> The Covenant on Civil and Political Rights has 74 signatories and 168 state parties.<sup>95</sup> The European Charter on Human Rights, American Convention on Human Rights, and African Charter on Human and People's Rights affirmed international recognition of the anti-discrimination principle.

However, current refugee legislation, policies, and practices violate customary international law, the recognized international norms. Arguably, the actions implemented and/or proposed by the United States government violate the anti-discrimination principle and international law. For the first time in recent history, the United States has set out to discriminate against the admittance of refugees, singling out Arabs (specifically Syrians and Iraqis) and Muslims for no admittance and heightened screening based on their identity alone.<sup>96</sup> This directly contradicts the purpose of the Refugee Convention and the protective status.

### B. United States Refugee Policy in Action

In 2015, the U.S. House of Representatives voted 289–137 to pass the “American Security Against Foreign Enemies Act of 2015,” also known as the “SAFE Act”.<sup>97</sup> The SAFE Act specifically singled out refugees coming from Syria or Iraq.<sup>98</sup> The SAFE Act required unanimous certification by the Secretary of the U.S. Department of Homeland Security, the Director of the Federal Bureau of Investigation, and the Director of National Intelligence that each Syrian and Iraqi refugee is not a threat to the security of the United States.<sup>99</sup> This unanimous certification is required to be submitted to the appropriate congressional committees including, but not limited to, Homeland Security and Government Affairs.<sup>100</sup>

No other groups of refugees are required to meet this distinct burden.<sup>101</sup> Only Iraqi and Syrian refugees, persons of Arab identity, are essentially put through a separate test and must undergo extra scrutiny—not because there was an actual case and fact-specific flag or concern, but because there was an automatic blanket test

94. *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N. TREATY SERIES, 2, 195, <https://treaties.un.org/doc/Publication/UNTS/Volume%20660/v660.pdf>.

95. *International Covenant on Civil and Political Rights*, 999 U.N. TREATY SERIES 3, 171 <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/v999.pdf>.

96. The United States is not isolated in these discriminatory actions with many European countries turning refugees back against the principle of *non-refoulement* and United Nations Protocols and Policies. For example, the EU Agreement with Turkey provides that Greece can return refugees that have arrived after March 20, 2016, back to Turkey in exchange for increasing resettlement efforts and financial support for Syrian refugees residing in Turkey. See Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POL'Y INST. (March 2016), <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>. These political decisions violated the anti-discrimination principle, as decisions made on the cusp of political rhetoric, and hate rhetoric targeting Syrian refugees based on their identity. EU officials and politicians who did not want Syrians, Muslims, or Arabs in their country set out to implement blanket returns.

97. H.R. 4038: American Safe Act of 2015, GOVTRACK, <https://www.govtrack.us/congress/votes/114-2015/h643> (last visited Dec. 7, 2017); American Security Against Foreign Enemies Act, H.R. 4038, 114th Cong. (at the time of writing, the SAFE Act had not passed the United States Senate).

98. *Id.* § 2(e)(1).

99. *Id.* § 2(b).

100. *Id.*

101. See *id.* § 2(e).

based on their identity.<sup>102</sup> The requested federal intelligence and government agencies are already required to go through their respective strict policies and procedures, including multiple cross-security checks to verify and assess the national security risk of each refugee.<sup>103</sup> This is enforced through a stringent and robust vetting process.<sup>104</sup> Furthermore, our governmental agencies properly screen refugees prior to entrance into the U.S.<sup>105</sup> The U.S. has one of the most comprehensive and vigorous in-depth security check processes for screening refugee applications.<sup>106</sup>

In addition, U.S. immigration law bars entry to the U.S. for any person who is believed to be seeking to enter the United States to engage in “unlawful activity” and people who have been associated with a terrorist organization and intend to engage in “activities that could endanger the welfare, safety, or security of the United States.”<sup>107</sup> This was clearly an attempt by congressional members to add additional burdens to elongate the process, creating more bureaucratic loopholes and hurdles, and ultimately preventing refugee resettlement of particular groups of people based on their identity. This violates customary international law and the international norm of the anti-discrimination principle, in direct conflict with the U.S.’s obligations under international law.<sup>108</sup>

Another example is the Refugee Program Integrity Restoration Act, H.R. 4731, a bill introduced into the United States House of Representatives.<sup>109</sup> Section 6 of H.R. 4731 authorizes the continuous mass surveillance of refugees based solely on the fact that they were admitted to the U.S. as refugees.<sup>110</sup> Criminal suspicion should not be flagged on refugees based solely on their immigration status. The monitoring of any group and/or individual, without probable cause of criminal activity, is unconstitutional and a violation of human rights.<sup>111</sup> Refugees are not afforded less

102. It is important to note that this unanimous certification is virtually impossible to obtain. Unanimous certification by all three heads of the designated government agencies has only been required in the transferring of Guantanamo detainees, and even in that instance, that burden and certification has only been satisfied a handful of times. David Manners-Weber, *Congress’s New Tactic to Keep Refugees Out and Guantanamo Open*, LAWFARE (Jan. 22, 2016, 7:27 AM), <https://www.lawfareblog.com/congress-new-tactic-keep-refugees-out-and-guantanamo-open>.

103. USCIS, *Refugee Processing and Security Screening* (Dec. 3, 2015), <https://www.uscis.gov/refugeescreening>.

104. See generally Amy Pope, *Infographic: The Screening Process for Refugee Entry into the United States*, WHITEHOUSE.GOV (Nov. 20, 2015, 7:09 PM), <https://www.whitehouse.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states> (outlining the nine steps of the refugee screening process, which includes interviews and background and medical checks).

105. See generally *U.S. Refugee Admissions Program*, U.S. DEP’T OF STATE, <http://www.state.gov/j/prm/ra/admissions/index.htm> (last visited Oct. 7, 2016) (Application processing takes eighteen to twenty-four months on average.).

106. See Alex Altman, *This Is How the Syrian Refugee Screening Process Works*, TIME (Nov. 17, 2015), <http://time.com/4116619/syrian-refugees-screening-process/>.

107. 8 U.S.C. § 1182(a)(3)(A)(iii) (2016); *id.* § 1182(a)(3)(F).

108. See G.A. Res. 2200 (XXI), annex, Int’l Covenant on Econ., Soc. and Cultural Rights, Int’l Covenant on Civil and Political Rights and Option Protocol to the Int’l Covenant on Civil and Political Rights art. 1 (Dec. 16, 1966).

109. Refugee Program Integrity Restoration Act of 2016, H.R. 4731, 114th Cong. (2016).

110. *Id.*

111. See *Dangerous Practice of Digital Mass Surveillance Must Be Subject to Independent Checks and Balances* – Pillay, UNHCR (July 16, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14875> (“[I]t will not be enough that the measures are targeted to find certain needles in a haystack; the proper measure is the impact of the measures on the

protection simply because they do not have permanent status in the U.S. The Equal Protection Clause and Due Process Clause protect all persons within the U.S.<sup>112</sup> Additionally, arbitrary surveillance, misuse and abuse of law enforcement authority, and suppression are the exact persecution many refugees have fled their home country trying to escape.

Section 9 of H.R. 4731 would allow state and local governments who “disapprove” of refugees to veto resettlement in their localities.<sup>113</sup> As naturally tied to the discussion in Part I, Section 9 is a product of the hate rhetoric, and state governors enacted executive orders and sweeping policies vowing to not allow refugees to resettle in their respective states. State governors also made statements that only the “good Syrian” or Christian refugees are allowed to resettle. This inherently violates the anti-discrimination principle.

H.R. 4731 also separates out Christians for selective special treatment based on their religion.<sup>114</sup> Refugee status is granted and/or extended to provide protection in the U.S. for all persons subjected to persecution or in fear of persecution based on the five protected grounds—immutable characteristics.<sup>115</sup> The legal standard for qualifying for refugee status is a person who

owing to a 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.<sup>116</sup>

However, H.R. 4731 picks and chooses admittance and grants of refugee status into the U.S., not based on this legal standard, but based on the religion alone. Section 4 of H.R. 4731 provides:

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haystack, relative to the harm threatened.”); *see also* Universal Declaration of Human Rights, Art. 12, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); ICCPR, *supra* note 95 (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”); Special Rapporteur on the Right to Privacy, U.N. Doc. A/HRC/31/64, 31st Sess., Mar. 8, 2016 (exploring the importance of cyberspace security while still respecting the privacy rights of citizens); Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. Doc. A/HRC/31/65, 31st Sess. Feb. 22, 2016 (“States should ensure that their counter-extremism measures do not negatively impact on civil society’s rights to freedom of association, expression, assembly, and privacy, and that the principles of necessity, proportionality and non-discrimination are respected.”).

112. U.S. CONST. amend. XIV § 1.

113. *See* Refugee Program Integrity Restoration Act, *supra* note 109.

114. *See id.*

115. *See id.*

116. *Convention and Protocol, supra* note 75.

When processing refugee applications from individuals seeking refuge from a country listed as a “Country of Particular Concern” in the annual report of the Commission on International Religious Freedom under section 203 of the International Religious Freedom Act of 1998 for the year prior to the current year, the Secretary of Homeland Security shall grant priority consideration to such applicants whose claims are based on persecution or a well-founded fear of persecution based on religion by reason of those applicants being practitioners of a minority religion in the country from which they sought refuge.<sup>117</sup>

The bill is not just merely prioritizing, which in some cases may be problematic in itself as each refugee claim and case must be individually assessed and must demonstrate a causal nexus to that particular person being targeted for persecution. The bill effectively, and arguably intentionally, excludes refugees who are Muslim and may otherwise qualify for admittance as a refugee into the U.S.

Persecution based on religion is a protected ground where Christians are targeted individually or as a minority group, and individuals within that group can qualify for refugee status under the 1951 Convention and the 1967 Protocol.<sup>118</sup> Thus, there are categorical protections in place to provide protections for religious minority groups without imposing special privilege at the expense of other persecuted groups.<sup>119</sup> Both Christian and Muslim refugees are being subjected to persecution, and Muslims inherently at higher numbers because a majority of the Syrian population identifies as Muslim.<sup>120</sup> If the U.S. were to accept only Christian refugees, the U.S. would be denying over 80% of Syrian refugees because of their religion.<sup>121</sup>

Section 13 of H.R. 4731 seeks to add a legal requirement to the definition of a refugee and refugee eligibility by requiring that refugees demonstrate that they would be “singled out” for refugee status.<sup>122</sup> This bill would reverse long-established refugee case law precedent that holds that individuals must only demonstrate a well-founded fear of persecution including future persecution, in violation of international law.<sup>123</sup> The expressed intent and impact of a policy like H.R. 4731 demonstrates that the U.S.: 1) refuses to abide by its international obligations and shared responsibility in providing safe haven as required under international law;<sup>124</sup> and 2) derogates from the legal standard for the status of refugees in a discriminatory and arbitrary manner.

117. Refugee Program Integrity Restoration Act of 2016, *supra* note 109.

118. See *Convention and Protocol*, *supra* note 75 (refugee status provides protections for persecution based on religion and membership in a particular social group).

119. See *id.*

120. See *The World Factbook*, CIA (Dec. 19, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>.

121. See *id.*

122. See Refugee Program Integrity Restoration Act of 2016, *supra* note 109.

123. See *Convention and Protocol*, *supra* note 75.

124. The U.S. has only allowed 10,000 refugees, and that number is not enough. The United States is resettling far less refugees than historically resettled. In 1980, the United States resettled over 200,000 Indochinese refugees. In 1993 and 1994, the United States resettled over 110,000 refugees each year. In 1997, the United States brought hundreds of thousands of refugees fleeing the Socialist Republic of Vietnam. The United States also welcomed over

When a country derogates from the legal standard, it enters into dangerous territory of conditioning safety and affording preferential treatment to desired subgroups, which is prohibited.<sup>125</sup> We also have an interest in applying the legal standard equally, for fairness, and an interest in uniformity of the law, which gives legitimacy to decision-making.<sup>126</sup> Legitimacy is what makes the legal standard work and be effective. The 1951 Convention and 1967 Protocol do not allow states to derogate from their obligations even in times of war or national security emergency.<sup>127</sup> For the U.S. Congress to condition safety and refuge based on national origin and/or religion is discriminatory and violates customary international law, international norms, and the principle of anti-discrimination.

The “Visa Integrity and Security Act of 2016” (H.R. 5203) is another illustration of legislation in violation of the principle of anti-discrimination and international law. H.R. 5203 requires security advisory opinions to be completed and approved for only refugees from Iran, Iraq, Libya, Somalia, Syria, Sudan, and Yemen.<sup>128</sup> This bill once again imposes discriminatory hurdles to obtain refugee status based solely on their national origin. This is extremely problematic where the largest refugee populations in immediate need are from the designated countries of Iran, Iraq, Libya, Somalia, Syria, and Sudan.<sup>129</sup>

Foremost, security advisory opinions are also an insurmountable burden that requires multi-agency review.<sup>130</sup> Security advisory opinions are generally implemented and/or required on case-specific factual evaluation of the immigration application.<sup>131</sup> Security advisory opinions are not blanket provisions as they require immense resources and time, and also must be particularized to assure appropriate use of resource allocation to actual risk and to not waste time on irrelevant applications.<sup>132</sup> In other words, if you are trying to locate a signal on the radio, but you continue to increase the noise volume, it will inherently become more difficult to hear the signal.

The Executive Orders signed on January 27, 2017 and reissued for effective implementation on March 16, 2017, are an Arab and Muslim ban.<sup>133</sup> These Executive Orders unequivocally violate the United States’s core obligation to provide safe haven and the policy of non-refoulement by instituting a 120-day ban on the entry of

120,000 refugees from Cuba. *See America Has Accepted 10,000 Syrian Refugees. That’s Still Too Few*, WASH. POST, Sept. 2, 2016, [https://www.washingtonpost.com/opinions/global-opinions/america-has-accepted-10000-syrian-refugees-thats-still-too-few/2016/09/02/470446e2-6fc0-11e6-8533-6b0b0ded0253\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/america-has-accepted-10000-syrian-refugees-thats-still-too-few/2016/09/02/470446e2-6fc0-11e6-8533-6b0b0ded0253_story.html).

125. *See* HATAHWAY, *supra* note 86, at 155.

126. *See id.*

127. *See id.* at 155–56.

128. *See* Visa Integrity and Security Act of 2016, H.R. 5203, 114th Cong. (2016).

129. *See generally Tackling the Global Refugee Crisis: From Shirking to Sharing Responsibility*, AMNESTY INT’L (Oct. 16, 2016), <https://www.amnesty.org/en/documents/pol40/4905/2016/en/> (explaining the movement of refugees and identifying what countries have contributed to the solution).

130. *See* Off. of Inspector Gen., *The DHS Visa Security Program*, DHS (Sept. 2014), [https://www.oig.dhs.gov/assets/Mgmt/2014/OIG\\_14-137\\_Sep14.pdf](https://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-137_Sep14.pdf).

131. *See id.*

132. *See id.*

133. *See* Glenn Thrush, *Trump’s New Travel Ban Blocks Migrants from Six Nations, Sparing Iraq*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html>. The constitutionality of the Executive Orders are being reviewed in the federal courts.



refugees that can be extended.<sup>134</sup> The Executive Order drastically reduces refugee admissions for the current fiscal year to 50,000 from the initial 110,000 commitment under the Obama Administration.<sup>135</sup>

The first Executive Order provided for an indefinite ban on Syrian refugees and exempt religious minorities—code word for Christians—from the 120-day refugee suspension ban.<sup>136</sup> Inevitably, most of the Syrian refugees fleeing violence were Muslim as Syria is a Muslim majority country, and they represent one of the largest populations of refugees.<sup>137</sup> Both Christian and Muslim refugees are being subjected to persecution, and Muslims inherently at higher numbers because a majority of the Syrian population identifies as Muslim.<sup>138</sup> If the U.S. were to accept only Christian refugees, the U.S. would be denying over 80% of Syrian refugees because of their religion.<sup>139</sup>

While the second Executive Order removed this particular provision,<sup>140</sup> it is perhaps indicative of internal policy and implementation going forward of how refugee and asylum seeker applications will be evaluated, with special preference provided to Christians, and extra scrutiny and/or a higher burden placed on Muslim refugees and asylum seekers based on their identity alone. This policy directly contradicts the purpose of the Refugee Convention and protective status. When a country derogates from the legal standard, it enters into dangerous territory of conditioning safety and affording preferential treatment to desired subgroups, which is prohibited.<sup>141</sup>

Many refugees slated to arrive in the United States when the First Executive Order was signed were sequestered for hours, denied access to counsel, and subject to removal.<sup>142</sup> Within hours of the first Executive Order, the Department of Homeland Security suspended refugee resettlement interviews abroad.<sup>143</sup> Since each part of the refugee screening process has a narrow validity period, refugees only have about a two-month travel window during which all their security checks are complete and valid.<sup>144</sup> Thus, all refugees approved when a suspension begins will see at least

134. See *id.*; *supra* note 75 and accompanying text.

135. Alicia Parlapiano et al, *How Trump's Executive Order Will Affect the U.S. Refugee Program* (Jan 27, 2017), <https://www.nytimes.com/interactive/2017/01/25/us/politics/trump-refugee-plan.html>.

136. Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017).

137. *Syria's Refugee Crisis in Numbers*, AMNESTY INT'L (Dec. 20, 2016), <https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/>.

138. See *The World Factbook*, CIA (Dec. 19, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>.

139. See *id.*

140. See Protecting the Nation From Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

141. See HATAHWAY, *supra* note 86, at 155.

142. See, e.g., Graham Rayman, *Trump's Order Already Blocks Green Card, Visa Holders at Airports*, N.Y. DAILY NEWS (Jan. 28, 2017), <http://www.nydailynews.com/news/politics/trump-order-blocks-green-card-visa-holders-airports-article-1.2957910>.

143. Yeganeh Torbati, *Homeland Security Department Suspends Refugee Resettlement Interviews*, REUTERS, Jan. 26, 2017, <http://www.businessinsider.com/homeland-security-department-suspends-refugee-resettlement-interviews-2017-1>.

144. Rita Medina & Philip E. Wolgin, *Pausing the Refugee Resettlement Program Will Harm the Most Vulnerable of Arrivals*, CTR. FOR AM. PROGRESS (Mar. 1, 2017),

one of their checks expire, and during the time that it takes to repeat that check and reprocess an interview date, another check could expire, creating a domino effect of expiring validity periods.<sup>145</sup>

There are several anti-refugee and anti-asylee protection bills that continue to be introduced that raise many of concerns discussed in this article. Notably, the Asylum Reform and Border Protection Act of 2017 introduced this congressional term would: 1) detain asylum seekers; 2) raise the expedited removal screening standard to an unduly high level; 3) deny asylum to large numbers of refugees based on transit or stays in countries where they have no permanent legal status for which they can stay in that country; and 4) allow asylum applicants, including unaccompanied children, to be bounced to third countries in the absence of any agreement between the United States and the countries in question for the reception of asylum seekers<sup>146</sup>—leading to refugee ping pong.

The Executive Order shuts the door on those fleeing prosecution and violence on the basis of their identity, religion and national origin. Asylees and refugees are victims of human rights abuses, and the most susceptible and vulnerable populations to human rights violators and perpetrators that commit violence against women and children, ethnic killings, and persecution, while they continue to wait for resettlement, many already in limbo for over three to four years or more. History warns us of the tragic denial of refugees fleeing persecution from Germany under arbitrary and discriminatory laws and policies—the U.S. sent thousands of human beings back to their death.<sup>147</sup> The U.S. discriminatorily classified these refugees in the same vein as it does today as a “risk” and a threat to “national security” based solely on their identity.<sup>148</sup> For a country to discriminate against refugees—people who have fled their home country because of discrimination—is absurd and violates international law.

### CONCLUSION

This article discusses the Syrian refugee crisis and the reactionary tactics of political leaders targeting Arabs and Muslims under the guise of national security. These discriminatory policies and hateful political rhetoric, if implemented into law, constitute violations of international law. We must remember to uphold the spirit of American values, the purpose of the Refugee Convention, and international law.

<https://www.americanprogress.org/issues/immigration/news/2017/03/01/427135/pausing-the-refugee-resettlement-program-will-harm-the-most-vulnerable-of-arrivals/>.

145. Erol Kekic, *Homeland Security Chief John Kelly Says Waiting 120 Days Won't Hurt Refugees. He's Wrong*, TIME, Feb. 10, 2017, <http://time.com/4666828/refugees-john-kelly-president-trump/>.

146. Asylum Reform and Border Protection Act of 2017, H.R. 391, 115th Cong. (2017).

147. See Gross, *supra* note 80.

148. See *id.*