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Yunha Hwang

Brigham Young University, yunha.hwang98@gmail.com

Belle De La Rosa, editor

Brigham Young University, quesadelarosa@gmail.com

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CROSSING BORDERS: THE OVERLAP AND CONFLICT OF INTERNATIONAL AND DOMESTIC LAWS REGARDING REFUGEES AND ASYLUM SEEKERS

Yunha Hwang¹

The devastating death toll was estimated to be over a hundred, with an additional 120 to 140 wounded after two suicide bombings took place near Afghanistan's main airport in Kabul on August 26 of last year.² This recent set of explosions and the consequent deaths thereof came together to form yet another trigger towards displacement for the Afghan people—a grim and unfortunate addition to the country's 40+ years of suffering violent conflict, natural disasters, chronic poverty, and food insecurity. After August of 2021, the United Nations Refugee Agency (UNHCR) reported nearly 6 million Afghans in total that have been forcibly displaced from their homes; the numbers indicating that this is one of the largest as well as long lasting refugee crises in the world.³

Throughout history, the United States has been recognized for having the largest resettlement program for refugees, with a total

1 Yunha Hwang is a senior at Brigham Young University studying Political Science and minoring in International Development. She would like to thank her wonderful editor, Belle De La Rosa for all her hard work, patience, and dedication. She would also like to thank Kaity Marquis, her Board Member, for her help and expertise, as well as the rest of the Prelaw Review Board for their efforts and insights.

2 Matthieu Aikins et al., *Suicide Bombers in Kabul Kill Dozens, Including 13 U.S. Troops*, THE NEW YORK TIMES (Aug. 26, 2021), <https://www.nytimes.com/2021/08/26/world/asia/kabul-airport-bombing.html>.

3 Refugee statistics, USA FOR UNHCR, (Dec. 26, 2021), <https://www.unrefugees.org/refugee-facts/statistics/>

of more than three million refugees that have been settled in its 50 states over time.⁴ Refugee is defined as,

[A]ny person who is outside any country of such person's nationality, or in the case of a person having no nationality, is outside of any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁵

Despite the reputation of having such a generous program historically, reality is that now, thousands of refugees struggle to overcome the barriers of different policies and caps before they are granted asylum in the United States.

“You just wait...You see how the years pass. You get older, you cannot make any plans. You watch your dreams die with every second you spend waiting.” Sarah, who fled from Afghanistan after receiving personal death threats expressed her exasperation as she was yet again faced with the news of another indefinite suspension. Her case is representative of countless others that have waited for years already; the continual reductions in refugee quotas of the United States has extended her status in limbo from over three years to unexpectable once again.⁶

Sarah is only just one of the millions left with no choice but to leave the violent and inhumane conditions of their homeland. Given the highly contentious events evident in some parts of the world, the

4 Refugee Admissions - United States Department of State, U.S. DEPARTMENT OF STATE (Oct. 8, 2021), <https://www.state.gov/refugee-admissions/>.

5 United Nations High Commissioner for Refugees, WHAT IS A REFUGEE? UNHCR, <https://www.unhcr.org/what-is-a-refugee.html> (last visited Feb. 6, 2022).

6 Rod Nordland, Joe Cochrane & Patrick Kingsley, ‘Dreams Die’ for Refugees on Verge of Coming to U.S. as Trump Closes Door, THE NEW YORK TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/world/middleeast/trump-middle-east-refugees-ban.html>

number of refugees hoping to resettle each year is on the rise more so than ever before—not just Afghanistan.

The United Nations, considering the circumstances of the people behind such wars and the conflicts, has deemed the topic of refugee and asylum seeker resettlement as a key global issue.⁷ This declares the refugee crisis to be a responsibility for nations across the world, particularly those in the United Nations, to part take in answering and aiding the issue. However, such expectations have been met with disregard and oversight by the United States in recent years. Concerns and cases have surfaced since many executive actions made by the United States government such as Executive Order 13769, 13676, and the recent ceilings for refugee acceptance appeared to be contrary to the empirical history of refugee acceptance by standards set forth with international laws.

This paper will analyze the discrepancy that exists between international and domestic laws of the United States in a descriptive manner, following the mentioned policies above, and illustrate how that discrepancy impacts the overall immigration climate of the United States. International laws and protocols as existent in the status quo will be referenced, and the different policies from the United States that are not in line with such standards will be pointed out. It will then be contended that such policies need modification to fit with the definitions presented by the international courts and councils of law, especially given the current climate and trends.

I. INTERNATIONAL LAWS REGARDING REFUGEES

A. The International Standard of Human Rights

In December of 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR).⁸ The Declaration is composed of 30 different articles that outline basic rights

7 Global Issues: Refugees, UNITED NATIONS, <https://www.un.org/en/global-issues/refugees> (last visited Feb 22, 2022).

8 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

and fundamental freedoms for individuals across the international sphere. Article 14 specifically establishes the following standards: 1. “Everyone has the right to seek and to enjoy in other countries asylum from persecution” and the related 2. “This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”.⁹ This indicates and ensures protection towards non-discrimination, non-penalization, and non-refoulement, and is both status and rights based.

In 1969, the United States’ adoption of this international standard was visible through the American Convention of Human Rights. Looking at the Preamble, it states,

Recognizing that the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protecting provided by the domestic law of the American states;¹⁰

According to this premise, the United States has agreed to uphold the internationally understood principle of human rights, acknowledging there is no distinction existent between nationals and non-nationals. It may be argued that in Article 22, although the right to leave any country is easily granted¹¹, the right to enter another is dependent on factors such as the possession of nationality, however, refugees are exceptions to this because Article 14 of the Universal Declaration of Human Rights extends such protection for those who hold valid humanitarian reasons.¹²

9 *Id.*

10 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

11 *Id.*

12 See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

B. Convention and Protocol Relating to the Status of Refugees

Inspired by the UDHR, three years later the Convention and Protocol Relating to the Status of Refugees was declared by the UN General Assembly. The Protocol Relating to the Status of Refugees of 1951 was then followed by a consequent convention in 1967, as well as Resolution 2198.¹³ Deriving from Article 14 of UDHR, the collective Convention and Protocols emphasized the international standard and duty for protecting persons from political and other forms of persecution. This covers both status and rights-based protections, ranging from non-discrimination, non-penalization, and non-refoulement. Additionally, it assures refugees that they will not be penalized for their illegal entry or forced to stay in foreign states.

In the case of *INS v. Stevic*, although a primary decision to deport Yugoslav national Stevic was declared, the circuit courts after an appeal ruled in favor of Stevic, citing the Protocol.¹⁴ In the case, the standard of “well-founded fear of persecution” from the Convention overrode the previous decision based on federal law requiring an evidentiary standard to demonstrate a “clear probability of persecution” by the asylum seeker.¹⁵ This decision would set the precedent standard for basing rulings off of the UNHCR Handbook.

C. The General Significance of International Law

Although UN legislation and international law oftentimes is not legally binding, states international actors in general are socially or politically obligated to comply for self-interest reasons. Despite the non-legality of the UDHR, a wide consensus upholds that the Declaration holds provisions that are incorporated into customary

13 G.A. Res. 2198 (XXI), Convention Relating to the Status of Refugees, (July 28, 1951).

14 *INS v. Stevic*, 467 U.S. 407 (1984) (After being ordered to surrender for deportation, Stevic appealed for relief under § 243(h) of the Immigration and Nationality Act of 1952, which had been amended by the Refugee Act of 1980 to reflect the language in Article 33 of the 1967 United Nations Protocol Relating to the Status of Refugees).

15 UN G.A., *supra* note 13.

international law itself. Customary international law signifies actions to be expected to be upheld by those in the international community, simply because it is created through generally accepted principles.

Customary international law is usually understood to be consisting of two parts: the consistent practice of states, and *opinio juris*, the states' understanding of their legally binding obligations. It is evident that the United States both understands and intends to uphold international standards, starting with the American Convention of Human Rights, of which the United States is a signatory. The American Convention of Human Rights is at the core of the Organization of American States (OAS), and although non-binding like the UHDR, it has come to be accepted as a part of the Inter-American System, which all OAS State Parties are to promote.¹⁶

Following this was the Refugee Act of 1980 being passed in reflection of the 1967 Refugee Protocol.¹⁷ This piece of domestic legislation not only just answered the ongoing international crisis, but also better mirrored the objectives set forth through standards set by the UN. The Refugee Act of 1980 was passed at a time of hundreds of thousands of refugees fleeing Vietnam and Cambodia during the aftermath of the Vietnam War. The Refugee Act came as an amendment of the earlier Immigration and Nationality Act, as well as the Migration and Refugee Assistance Act. Part of the Act included raising the annual ceiling for refugees from 14,500 to 50,000 and overall set a more stable system of immigration and resettlement.¹⁸

Also, as per the Vienna Convention of the Law of Treaties of 1969 (VCLT), by being a party of the 1967 Protocol, the United States has given its consent of policies carried out by the UN.¹⁹ The VCLT requires its member states and signatories to follow any treaties and conventions that have been established. Additionally, the legal obligations of the VCLT indicate that a party State agrees, in good faith,

16 See Organization of American States Charter art. 91.

17 Refugee Act of 1980, PL 96-212, 94 Stat. 102 (1980).

18 *Id.*

19 See U.N. Conference on the Law of Treaties, *Codification Division Publications Diplomatic Conferences*, U.N. Doc (26 March–24 May 1968 and 9 April–22 May 1969).

to “not to defeat the object and purpose” as stated by Article 18 and to accept the obligations thereof.²⁰ Given that the United States is not only a charter member of the UN, but also because they are one of the five permanent members of the UN Security Council, there is more weight to their actions in the international sphere.

Generally, it is also worth noting that although legislation may not be intended to be legally binding, customary international law is one of the main sources of international law; Article 38 of the Statute of the International Court of Justice (ICJ) sets forth the significance of customary international law by stating,

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. International conventions, whether general or particular, establishing rules expressly recognized by contesting states;
 - b. International custom, as evidence of a general practice accepted by law;
 - c. The general principles of law recognized by civilized nations;²¹

Despite the ICJ’s rulings ultimately being non-binding as per Article 59 of the Statute, because the core purpose of international law is to regulate the relationships between states, it can be seen to be binding to a certain degree, and it is the case for international customary humanitarian law.²²

20 *Id.*

21 Statute of the International Court of Justice, art. 38.

22 *Customary international humanitarian law: questions & answers*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Aug. 15, 2005). <https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm#a1>.

II. THE IRREGULARITIES IN U.S. POLICIES TOWARDS REFUGEES

A. Executive Order 13769

Beginning with Executive Order 13769, the United States significantly lowered its numbers of refugees to be admitted in 2017 down to 50,000. Along with suspending the Refugee Admissions Program (USRAP) for 120 days, the executive order also suspended the entry of Syrian refugees indefinitely and directed several cabinet secretaries to suspend the entry of those whose countries do not meet the adjudications standards under the U.S. immigration law for 90 days. The executive order was set to be in effect from January 27, 2017, to March 6, 2017.²³

Overall, refugee resettlement was halted as individuals from seven majority Muslim nations (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) seeking asylum in the United States were banned from legal entry. The State of Washington was first to raise a lawsuit, finding that sections of the policy violated the Due Process, Equal Protection, and Establishment Clauses of the Constitution. The argument brought forth claimed that states have an interest in protecting the “health, safety, and well-being of its residents”, along with “ensuring that its residents are not excluded from the benefits that flow from participation in the federal system”. Eventually, claims went to argue that Immigration and Nationality Act, the Foreign Affairs Reform and Restructuring Act, the Religious Freedom Restoration Act, as well as the Administrative Procedure act were violated.²⁴

The next lawsuit was filed by Hawaii Attorney General Douglas S. China, citing the same violations as *Washington v. Trump*.²⁵ The Hebrew Immigrant Aid Society (HIAS), then joined the legal action

23 Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>.

24 *States of Washington & Minnesota v. Trump*, 2:17-cv-00135 (Nov. 2017)

25 Brief for Human Rights First et al. as Amici Curiae, *State of Hawai'i & Ismail Elshikh v. Trump*, (2010) (No. 1:17-cv-00050-DKW-KSC).

by bringing forth other organizations in the creation of an amicus curiae brief on two aspects of violations: The first being that the administration shows explicit favoring of one religion over another, and the second being that it halts the reuniting of vulnerable refugee families that were about to be resettled to the United States.²⁶ On March 10, 2017, HIAS resumed its legal challenge of the refugee ban, along with other plaintiffs to file a motion blocking the Executive Order.²⁷

B. Executive Order 13888

On September 26, 2019, President Trump signed Executive Order 13888, titled “Enhancing State and Local Involvement in Refugee Resettlement” along with another significant decrease in the cap regarding the number of refugees allowed into the country. A few governors jumped on the initiative and publicly refused the settlement of new refugees, such as Texas.²⁸

Another consequent lawsuit led by HIAS was founded on the basis that the EO attempts to dismantle the Refugee Act of 1980, as well as have the potential to restrict the entering of refugees that have passed all vetting and have been waiting for years to enter the United States to be reunited with families. The U.S. Court of Appeals for the 4th Circuit blocked President Trump’s policy, stating that the administration’s act undermines the national resettlement program created by Congress.

The ruling written by Judge Keenan along with Judges King and Harris rejected the government’s claims and concluded that the policy would allow the officials in question to refuse the matter at hand “for any reason or for no reason at all and need not provide

26 *Id.*

27 *Id.*

28 Reis Thebault, *Texas Is Rejecting New Refugees Under Trump Executive Order*, THE WASHINGTON POST (Jan. 10, 2020), <https://www.washingtonpost.com/immigration/2020/01/10/texas-becomes-first-state-publicly-reject-new-refugees-under-trump-order/>.

any explanation for their decision”²⁹ It was also stated by the U.S. District Judge Messitte that the Order gave power to states that are “arbitrary and capricious as well as inherently susceptible to hidden bias”³⁰. This decision to uphold the Refugee Act of 1980 passed by Congress emphasizes the standards that are set internationally and highlights the necessity of following international law.

C. The Trend of Refugee Admittance

Included within the Refugee Act of 1980 is the power reserved for the president in setting the cap for refugee admissions annually.³¹ However, there is a clear pattern of restrictiveness presented by the Trump presidency when revisiting the past few years’ worth of the annual refugee resettlement ceilings. Starting with the year 2017, the Administration reduced the annual ceiling from 85,000 to 50,000—the lowest since the passing of the Refugee Act of 1980.³² However, this was only the start of the trend: in 2018, the 50,000 dropped even further down to 45,000, 2019, 30,000, with the finale of 18,000 set for in 2020.³³ Given the high numbers of refugees at this time, and by looking at how in 2019, there were exactly 30,000 refugees admitted, it is evident that the caps were devastating on populations desperate to escape from persecution.³⁴

29 Manny Fernandez, Federal Judge Tosses Texas’ Lawsuit to Bar Syrian Refugees, *THE NEW YORK TIMES* (Jun. 16, 2016), <https://www.nytimes.com/2016/06/17/us/federal-judge-tosses-texas-lawsuit-to-bar-syrian-refugees.html>

30 *Id.*

31 Refugee Act of 1980, PL 96-212, 94 Stat. 102 (1980).

32 U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted 1980-Present, *MIGRATION POLICY INSTITUTE* (Jan. 28, 2022), <https://www.migrationpolicy.org/programs/data-hub/charts/us-annual-refugee-resettlement-ceilings-and-number-refugees-admitted-united>.

33 *Id.*

34 *Id.*

III. LASTING IMPACTS OF THE POLICIES

Just revisiting the ratio between the annual refugee admittance ceilings and the actual numbers of refugees accepted into the United States each year, it's clear that the refugee crisis is more imminent than ever. Considering not only the Afghan refugee crisis, but the events taking place in Ukraine, as well as considering the general impact of the COVID-19 pandemic suggests that this discussion is critical, as are the needs of those that are being forced to leave their homes, those have already been displaced, and those that have been waiting to find relief after years of being on hold in their reunion with loved ones.

Through examining both international policies, as well as domestic policies, it is evident that the past few years have brought nothing but digression. When the Refugee Act of 1980 was first passed, it was done so in order to have a clearer and more flexible basis for policies regarding refugees and immigrants; the amendments of previous policies were undertaken to accommodate for current events and better admit refugees.³⁵ At a time where civil wars, terrorism, and other forms of violence ravage the world, these policies have been just a reversal in progress, and a backward step from the original intentions of legislation made decades ago.

Although with the new Biden administration, there are changes being brought forth, such as the raise of the refugee cap to 62,500 in 2021, and 125,000 for the fiscal year 2022, the impacts of previous policies are still imminent.³⁶ The ongoing pandemic is often at the center of blame for the drop of numbers, but the policy decisions by the Trump administration is also at the cause of decline in refugee admissions as they are behind the lowest refugee admissions caps since 1980, when Congress created the modern refugee program.³⁷

35 Refugee Act of 1980, PL 96-212, 94 Stat. 102 (1980).

36 Key Facts About U.S. Immigration Policies and Biden's Proposed Changes, PEW RESEARCH CENTER (Jan. 11, 2022), <https://www.pewresearch.org/fact-tank/2022/01/11/key-facts-about-u-s-immigration-policies-and-bidens-proposed-changes/>

37 *Id.*

Although the recent caps, especially for 2022, are highly ambitious and suitable for the global climate in the status quo, given that the past five years have brought nothing but desperation and difficulties for many refugees attempting to settle in the United States, it is likely that there will be some time needed to adjust back to where we were before the beginning of stricter policies. The underwhelmingly lower numbers of refugees still admitted after the cap raise in 2021 is suggestive of this. However, overall, this is a direction towards improvement as raising the refugee cap realigns the U.S. with common legal precedent and serves to strengthen our international legal compliance.

VI. CONCLUSION

We return to the story of Sarah and the others that have been displaced during what was introduced to the world as the Afghan refugee crisis. Also, we think back to the hundreds, if not thousands of others that have been impacted because of the restrictive policies that came in the way of their successful resettlement. This comes as an inconsistency in the realm international standards of the treatment of refugee; there are clear laws and standards that guarantee the safe resettlement of such individuals. In the United States, these policies that hinder the safety of these refugees demonstrate a clear deviation from the expectations and the binds of both *de facto* and *de jure* international laws. With this gap existing between the domestic and international standards, there will inevitably be further conflict regarding the legality of U.S. policies, and the refugee population attempting to enter the United States will be at the forefront of facing the impacts thereof. To mitigate the differences and overcome these differences, recognition for how inconsistent these policies were, as well as determinations to create future policies that are not reflective of such patterns is necessary as the United States government and its administration moves forward.