



# **Under International Law, When Can States Deny Refugees Asylum on The Basis of National Security:**

An analysis of the 2017 U.S. ‘travel ban’ executive orders and the  
suspension of the Refugee Admissions Program

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# List of Abbreviations

<b>AU</b>	African Union
<b>CAT</b>	United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), 1984.
<b>DHS</b>	Department of Homeland Security
<b>DOS</b>	Department of State
<b>EO1</b>	Executive Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).
<b>EO2</b>	Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICJ</b>	International Court of Justice
<b>INA</b>	Immigration and Nationality Act, 1952.
<b>IOM</b>	International Organisation for Migration
<b>OAS</b>	Organization of American States
<b>OAU</b>	Organisation of African Unity
<b>TRO</b>	Temporary Restraining Order
<b>UDHR</b>	Universal Declaration of Human Rights, 1948.
<b>UN Convention</b>	UNHCR Convention Relating to the Status of Refugees, 1951.
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>USCIS</b>	United States Citizenship Immigration Services

# Chapter One

## I. Introduction

On 27 January 2017, President Donald J. Trump of the United States of America issued an Executive Order entitled, ‘Protecting the Nation from Foreign Terrorist Entry into the United States’.<sup>1</sup> On 6 March 2017, a second Executive Order of the same name was issued as a replacement to the first.<sup>2</sup> Both orders, to different degrees, have the effect of restricting the entry of nationals of certain primarily Muslim countries and suspending the United States Refugee Admissions Program for a period of 120 days. Protests erupted across the U.S. in response to what is commonly referred to as the ‘travel ban’ or ‘Muslim ban’.<sup>3</sup> Subsequently, on 24 September 2017, the President issued Proclamation 9645, entitled ‘Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats’.<sup>4</sup> Courts in the U.S. have considered the legality of the EOs following petitions seeking temporary restraining orders; however such cases have solely focused on the legality of the executive orders under domestic U.S. law.

Under international law, the U.S. has signed and ratified the Protocol Relating to the Status of Refugees,<sup>5</sup> which itself encompasses the definition of a refugee and a litany of refugee rights as derived from the UN Convention Relating to the Status of Refugees.<sup>6</sup> Thus, the U.S. is subject to specific obligations towards refugees under international law. This paper will examine when, under the UN Convention and Protocol, a national state may refuse to grant asylum to a refugee under the auspices of ‘national security’. This includes instances where refugees are stopped at the border of a state; where recognised refugee status is revoked on the grounds of ‘national security’; and finally, where legislation and policies are implemented to prevent refugees from even attempting to apply for asylum. Overall, this paper seeks to answer the question whether the ‘travel ban’ executive orders and the Proclamation were in violation

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<sup>1</sup> Executive Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). Hereafter ‘EO1’.

<sup>2</sup> Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017). Hereafter ‘EO2’.

<sup>3</sup> Andrew Buncombe ‘Donald Trump's Muslim ban inspires mass protests across the United States involving millions of Americans: Thousands of protesters in different cities have launched loud, vociferous protests’ *Independent* 30 January 2017, available at <http://www.independent.co.uk/news/world/americas/donald-trump-muslim-ban-protests-us-refugee-immigration-policy-syria-iran-iraq-demonstrations-a7553476.html>, accessed on 9 July 2017.

<sup>4</sup> Proclamation 9645 *Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats* (2017). Hereafter ‘the Proclamation’.

<sup>5</sup> Protocol Relating to the Status of Refugees, 1967. Hereafter ‘the Protocol’. Pursuant to Article I (1) of the Protocol, “[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees hereinafter defined.” *Ibid.*

<sup>6</sup> UNHCR Convention Relating to the Status of Refugees, 1951. Hereafter ‘UN Convention’.

of the United States' obligations under international law, and specifically under the UN Convention and Protocol.

Refugees are some of the most vulnerable people in society. According to the United Nations High Commissioner for Refugees (UNHCR), there are reportedly 22.5 million refugees worldwide, with 55% fleeing from South Sudan, Afghanistan and Syria.<sup>7</sup> Having fled their homes out of fear of persecution or war, many arrive at the borders of foreign countries seeking safety for themselves and their families. It is thus necessary for states to understand and comply with their obligations under international law regarding refugees and particularly, to not unnecessarily enact policies in direct conflict with such obligations. It is important that states do not abuse the exceptions made available to them under international law in order to employ policies that would cause both harm and suffering, and a violation of international human rights.

After the attacks on September 11, 2001, international terrorism was publically linked to refugees by the United Nations Security Council<sup>8</sup> – even though no refugees were involved in any of those attacks.<sup>9</sup> Thus, in considering refugee and immigration legislation, states have increasingly linked national security issues to that immigration and refugee law. Prior to the 9/11 attacks, academic writing generally focused on the extent of states' obligations to refugees under international law and the recognition of refugee rights. Post-9/11, there was an increase in academic writing examining the connection between national security, immigration and refugees. However, despite the existence of restrictions on the admission of refugees in the west, there appeared to be a more liberal progression in immigration and refugee policies towards a more humanitarian and open approach.

In September 2015, the European Union and United Kingdom appeared ready and willing to accept Syrian refugees across their borders. David Cameron, as Prime Minister, stated that the U.K. had a 'moral responsibility' towards refugees and that the U.K. sought to accept 20'000 refugees by 2020.<sup>10</sup> Following this, the German Vice-Chancellor, Sigmar Gabriel, stated that Germany could receive 500'000 asylum seekers each year in the following years.<sup>11</sup> However, after the Paris attacks on 13 November 2015, migration and refugee law

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<sup>7</sup> UNHCR 'Figures at a Glance' 19 June 2017, available at <http://www.unhcr.org/afr/figures-at-a-glance.html>, accessed on 9 July 2017.

<sup>8</sup> UN Security Council Resolution 1373 (28 September 2001) 3(f)-(g).

<sup>9</sup> Geoff Gilbert 'Terrorism and international refugee law' in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (2014) 470.

<sup>10</sup> 'UK to Accept 20,000 Refugees from Syria by 2020' *BBC* 7 September 2015, available at <http://www.bbc.com/news/uk-34171148>, accessed on 9 July 2017.

<sup>11</sup> 'Migrant crisis: Germany 'can take 500,000 asylum seekers a year' *BBC* 8 September 2015, available at <http://www.bbc.com/news/world-europe-34185353>, accessed on 9 July 2017.

once again came to the forefront of national security.<sup>12</sup> In the U.S., Donald Trump had begun his campaign for President, holding forth on aims of implementing radical policies regarding immigration and refugee law. His campaign and subsequent election, as well the campaigns of right-wing parties in Europe, sparked new academic literature examining the relationship between national security, immigration and refugees. The legal fight regarding Trump's EOs is currently ongoing. Thus, this paper aims to be at the forefront of legal analysis of the United States' policies regarding refugees and immigration.

## II. Literature Review

This paper will broadly consider four main topics to assess when states may reject refugees based on national security, and specifically, to examine President Trump's executive orders and the Proclamation under international law. In this chapter, first, this literature review will consider the principle of non-refoulement and how it has been interpreted and applied in a U.S. context. Secondly, it will consider the general overlap between immigration law and national security. Thirdly, it will look more specifically into writings on the relationship between U.S. immigration law, national security and counter-terrorism. Fourthly, this literature review will examine the extent to which national security has influenced U.S. refugee law and subsequently how refugee law relates to national security in a more general sense. Fifthly, this review will examine literature on U.S. immigration law written in light of the EOs and finally will consider some of the most prominent U.S. court cases that have resulted from the EOs.

This review will largely cover sources in a chronological order; however, some sources have been discussed earlier because of their relevance to a particular topic. It is important to note that literature written before the 9/11 attacks will not have taken into account the emotional and fearful outlook that arose post-9/11 – as well as the legislative responses. Literature written before President Trump's campaign would have been less likely to anticipate the renewed rise of extreme conservatism in the west and the drastic legislative changes that he has promulgated. Notably, while some earlier sources may have theorised on Trump's campaign claim that he would enact a 'Muslim ban', only literature written after he officially signed in the EOs will be able to provide any in depth analysis into the legality of the controversial EOs.

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<sup>12</sup> Anton Troianovski 'Paris Attacks May Unsettle EU's Debate on Migration' *Wall Street Journal* 14 November 2015, available at <https://www.wsj.com/articles/paris-attacks-may-unsettle-eus-debate-on-migration-1447510975>, accessed on 9 July 2017.

### (a) The Principle of Non-Refoulement in a U.S. Context

The principle of non-refoulement is considered to be the cornerstone of refugee law by the UNHCR<sup>13</sup> as well as by academics.<sup>14</sup> It is found in Article 33(1) of the 1951 UN Convention and 1967 Protocol, which states:

No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership or a particular social group or political opinion.

Article 33(2)<sup>15</sup> provides for the only exception to this principle, which states that:

The benefit of the present provision may not, however, be claimed by a refugee whom there are *reasonable grounds* for regarding as a danger to the security of the country in which he is, or who, having been *convicted* by a final judgment of a *particularly serious* crime, constitutes a danger to the community of that country [*own emphasis*].'

According to Fatima Khan and James Hathaway, the French term *refouler* was used in order to allow for an expansion of the interpretation of this section. The English words 'expel' and 'return' were argued to be too restrictive, as 'expel' implies that a refugee has already been admitted into the country, and 'return' may not always be applied to a refugee who has yet to enter a country's territory.<sup>16</sup> Thus, according to Khan and Hathaway<sup>17</sup> persons who have not yet entered the territory of a country may still benefit from the protection of the non-refoulement principle. Additionally, the principle of non-refoulement has been held by the UNHCR to apply to any person who meets the requirements of the refugee definition in the UN Convention – they do not need to be formally recognised as a refugee by any member state.<sup>18</sup>

The United States Supreme Court case of *Sale*<sup>19</sup> examined the United States' obligations regarding the principle of non-refoulement. The case concerned an executive order<sup>20</sup> of President George H. W. Bush which continued a previous executive order mandating the Coast Guard to interdict and repatriate Haitians fleeing to the U.S. on the high seas. However, this order removed the previous order's requirement that the Coast Guard perform a refugee screening process. The executive order was challenged under the claim that it violated

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<sup>13</sup> UNHCR 'Note on the principle of non-refoulement' (1997), available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=438c6d972&skip=0&query=note%20on%20the%20principle%20of%20non-refoulement>, accessed on 10 July 2017.

<sup>14</sup> James Hathaway *The Rights of Refugees under International Law* (2005) 279.

<sup>15</sup> Article 33(2) of the UN Convention.

<sup>16</sup> Fatima Khan and Tal Schreier (eds) *Refugee Law in South Africa* (2014) 4-5.

<sup>17</sup> Hathaway op cit note 14 at 316.

<sup>18</sup> UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) para 28.

<sup>19</sup> *Sale v Haitian Centers Council, Inc.*, 113 S.Ct. 2549 (1993).

<sup>20</sup> Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1993).

§243(h) of the Immigration and Nationality Act (INA)<sup>21</sup> in addition to Article 33 of the UN Protocol. The court held that the executive order was not in violation of either §243(h) of the INA nor Article 33 of the UN Protocol.

It is arguable that this decision was decided on an incorrect interpretation of international law and jurisdiction. The Supreme Court, reversing the decision of the appellate court, held that neither section 243(h) nor Article 33 applied to the actions of the Coast Guard on the high seas, as the Haitians were not in ‘United States territory’ and thus were not protected by either provision.<sup>22</sup> However, the court failed to consider the *Lotus* case<sup>23</sup> which held that an occurrence on board a vessel on the high seas must be regarded as if it occurred on the territory of the state whose flag the ship was flying. Thus, when the U.S. Coast Guard intercepted Haitians fleeing Haiti, by bringing the Haitians aboard their vessels in order to return them, such persons were within U.S. territory. Therefore, the U.S. was arguably in violation of both section 243(h) of the INA and Article 33 of the Protocol by failing to recognise that the Haitians returned were, under international law, on U.S. territory.

Hathaway and Cusack further analysed the United States’ uneasy relationship with international law, and particularly with regard to refugee and human rights law.<sup>24</sup> Specifically, the article examines the cases of *Stevin*<sup>25</sup> and *Cadenza-Fonseca*<sup>26</sup> in which the United States Supreme Court found that the only clear obligation on the U.S. under the UN Convention was that of non-refoulement. Additionally, this duty was only owed to refugees who were able to show a *probability* of persecution – a much higher threshold than the ‘reasonable possibility’ of persecution found in the UN Convention. [*own emphasis*]<sup>27</sup>

Hathaway and Cusick critique the U.S. courts’ failure to interpret international refugee law with consideration to foreign and international law.<sup>28</sup> This article highlights the early disconnect between the United States’ interpretation of refugee law in comparison to the international regime – a standard of conduct that was followed in subsequent U.S. cases.<sup>29</sup> It thus provides a useful lens with which to view current U.S. cases regarding international

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<sup>21</sup> Immigration and Nationality Act, 1952.

‘The Attorney General is authorized to withhold deportation or return of any alien to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.’

<sup>22</sup> *Sale* supra note 19 at 2550.

<sup>23</sup> *The Lotus Case* (France v Turkey) 1927 PCIJ Reports Series A, No.10.

<sup>24</sup> James C Hathaway and Anne K Cusick ‘Refugee Rights Are Not Negotiable’ (2000) 14(2) *Georgetown Immigration Law Journal* 481.

<sup>25</sup> *INS v. Stevic*, 467 U.S. 407 (1984).

<sup>26</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>27</sup> Hathaway and Cusick op cit note 24 at 485-6.

<sup>28</sup> *Ibid* at 484.

<sup>29</sup> *Ibid* at 515.

refugee law. However, this article is limited, as it does not examine the national security exemptions to Article 1F<sup>30</sup> or Article 33(2) of the UN Convention in any depth – and certainly not in light of the much more security-conscious west that existed after the 9/11 attacks.

### **(b) Overlap between Immigration Law and National Security**

The attacks of September 11, 2001 provoked academic research into the causes and consequences of terrorism and how such acts relate to the international legal order. Specifically relevant to this paper is how the fight against terrorism and concern for national security were subsequently intimately linked to immigration and refugee law. Peter van Krieken provides a detailed overview of the policies of the UN, International Organisation for Migration (IOM) and the European Union.<sup>31</sup> He also considers the limitations on rejecting refugees on national security grounds under the UN Convention.

This work is useful in that it provides for and assesses the immigration and counter-terror policy recommendations and reactions made by the IOM and UNHCR in the wake of the 9/11 attacks – such as for improved information and identification systems.<sup>32</sup> It shows how immigration controls and enforcement were strengthened, and considers the effect on international refugee protection.<sup>33</sup> However, it is largely important in highlighting that, even in the immediate months following the 9/11 attacks, it was recognised that “immigration controls can only be a ‘needle in the haystack’ measure to counter terrorism. While tightening the asylum process has, in countries like the U.S., led to a reduction in the number of unfounded claims, there may be no linkage here with the deterrence of terrorism.”<sup>34</sup>

### **(c) Relationship between U.S. Immigration Law, National Security & Terrorism**

Donald Kerwin specifically examines the effect of the 9/11 attacks on U.S. policy, considering the efficacy of such developments and their impact on refugee rights.<sup>35</sup> In particular, he examines how stricter immigration and refugee law and enforcement may violate refugee rights under domestic U.S. legislation, such as the right to due process and issues with blanket detention.<sup>36</sup> However, it fails to assess specific violations of refugee rights under international law; thus it is useful purely for an examination of the policy developments in domestic U.S. legislation following the 9/11 attacks.

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<sup>30</sup> Article 1F of the UN Convention; full text found on page 32.

<sup>31</sup> P.J. van Krieken *Terrorism and the International Legal Order* (2002) 435-58.

<sup>32</sup> *Ibid* at 442.

<sup>33</sup> *Ibid* at 447-54.

<sup>34</sup> *Ibid* at 447.

<sup>35</sup> Donald Kerwin ‘The Use and Misuse of “National Security” Rationale in Crafting U.S. Refugee and Immigration Policies’ (2005) 17 *International Journal of Refugee Law* 749.

<sup>36</sup> *Ibid* at 756-7.

A more recent article, by Arthur Rizer, also looks into the effects of fear on national security and immigration law.<sup>37</sup> This article is also primarily focused on U.S. immigration law and policy; however it is able to take into account newer developments, including the Trump presidential campaign. It shows how the fear, that resulted immigration law developing into a focus in counter-terrorism, has continued to prevail in recent years – and is still driving changes and restrictions in immigration and refugee policy.<sup>38</sup> However, while this article is able to account for more recent developments in U.S. law and policy, it does not consider refugee rights or potential violations of international law.

Similarly, David Cole deals with the constitutional issues in U.S. federal law regarding policies which punish those guilty by association, including exclusion clauses to refugee status.<sup>39</sup> Specifically, he examines how such policies violate the First and Fifth Amendments of the United States Constitution;<sup>40</sup> however, like Kerwin and Rizer he does not explicitly analyse whether such policies are consistent with international law or to what extent they may be in violation of the UN Protocol. This article is exclusively relevant to the overlap between national security and immigration in a U.S. context.

An author who does consider the effects of the stepping up of national security on U.S. immigration policy in light of international refugee law is Jordan Fischer.<sup>41</sup> Specifically, he examines how the U.S policy of barring asylum seekers from refugee status where they have provided ‘material support’ to terrorist organisations/terrorist activities goes beyond the scope of the exclusion clause in Article 33(2) of the UN Convention.<sup>42</sup> In particular, he considers and interprets the meaning of the words contained in Article 33(2), such as the requirement of ‘reasonable grounds’. Further, he highlights the flaws in the Patriot Act<sup>43</sup> and REAL ID Act<sup>44</sup> in how they fail to require intentional *mens rea* in assigning guilt. Thus, refugees who provided aid unknowingly to a terrorist organisation, with the intent of spreading peace or promoting education, would be barred. Additionally, it does not account for the defence of duress.<sup>45</sup> This

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<sup>37</sup> Arthur L. Rizer III ‘The Ever-Changing Bogeyman: How Fear Has Driven Immigration Law and Policy’ (2016) 77 *Louisiana Law Review* 243.

<sup>38</sup> *Ibid* at 245-6.

<sup>39</sup> David Cole ‘Terror Financing, Guilt by Association and the Paradigm of Prevention in the “War on Terror”’ in Andrea Bianchi and Alexis Keller (eds) *Counterterrorism: Democracy’s Challenge* (2008).

<sup>40</sup> *Ibid* at 241-6.

<sup>41</sup> Jordan Fischer ‘The United States and the Material-Support Bar for Refugees: A Tenuous Balance Between National Security and Basic Human Rights’ (2012) 5 *Drexel Law Review* 237.

<sup>42</sup> *Ibid* at 258-9.

<sup>43</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.

<sup>44</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005.

<sup>45</sup> Fischer *op cite* note 41 at 256-7.

article thus provides a recent and in-depth analysis of U.S. policy regarding its international obligations; however, it has a primary focus on the ‘material-support bar’ and does not consider a refugee or travel ban such as the one(s) enacted by President Trump. Nevertheless, it is important to understand how U.S. refugee and immigration policy has been interpreted in the context of its international law obligations.

Reconsidering the issue of non-refoulement, Jacob Oakes provides a recent analysis of U.S. immigration policy in terms of international refugee law.<sup>46</sup> He considers the practice of U.S. immigration law in light of Article 33 of the UN Convention – but also regarding the inclusion of the principle of non-refoulement within the UN Convention against Torture<sup>47</sup> and the Organization of American States (OAS).<sup>48</sup> He also examines the discrepancies between the provisions found in the INA with regard to determining refugee status in comparison to international law.<sup>49</sup> This source is particularly important as it provides a detailed analysis of U.S. law’s congruency – or lack thereof – with the international refugee law regime. However, it does not delve specifically into the national security exceptions and, while it does briefly mention some of Trump’s presidential campaign statements, it does not comment on the ramifications of a refugee or travel ban under international law.<sup>50</sup>

#### **(d) Influence of National Security on U.S. Refugee law, and its Relationship with the International Refugee Regime**

With regard to the interaction between refugee law and national security in a more general sense, Geoff Gilbert considers first, how the threat of terrorism may form part of the persecution requirement in obtaining refugee status, and secondly, how states may legally exclude refugees from refugee status on the basis of terrorism.<sup>51</sup> Specifically, he argues that while states may have a right and an obligation to combat terrorism, “[s]tates are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect.”<sup>52</sup>

Gilbert, unlike the previous authors discussed, does analyse Article 1F of the UN Convention in depth, and examines how terrorism would fit within this provision. This is

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<sup>46</sup> Jacob Oakes ‘U.S. Immigration Policy: Enforcement & Deportation Trump Fair Hearings – Systematic Violations of International *Non-Refoulement* Obligations Regarding Refugees’ (2016) 41 *North Carolina Journal of International Law* 833.

<sup>47</sup> United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), 1984.

<sup>48</sup> Charter of the Organization of American States, 1967.

<sup>49</sup> Oakes op cit note 46 at 846-9.

<sup>50</sup> Ibid at 838 n19, 886.

<sup>51</sup> Gilbert op cit note 9 at 470.

<sup>52</sup> *Saadi v Italy*, App No 37201/06, (2009) 49 EHRR 30.

particularly relevant to President Trump's EOs, as these orders suspended the refugee programme with the intention of protecting the national security of the U.S. – specifically from terrorist threats.<sup>53</sup> Like Fischer, he considers the practice of 'guilt-by-association' and the potential defence of duress; however, Gilbert examines such practices under Article 1F, and also from a global perspective – not purely an American one. Gilbert also considers Article 33 of the UN Convention, and its relationship to national security and terrorism; however he does not go into much detail other than to consider on what occasions one would apply Article 33 rather than Article 1F.

Elspeth Guild, also in the Handbook on International Law and Terrorism, considers the relationship between terrorism and migration law.<sup>54</sup> It is necessary to consider both the chapter on refugee law and on migration law, as refugees fall within the greater category of migrants. Additionally, in many cases a refugee may be misclassified as a migrant, and thus it is also important to consider the protections available to migrants under international law such as the CAT and the Second Optional Protocol to the ICCPR.<sup>55</sup> Pertinent to the consideration of President Trump's EOs is Guild's argument against racial and religious profiling in order to determine if persons are more likely to be involved in terrorist activities, specifically where citizenship of a certain country is used as a proxy in order to religiously or racially profile.<sup>56</sup> However, while migration law as a whole does encompass much of refugee law, this paper aims to focus more specifically on the effects of the national security exceptions and the EOs on refugees – and thus Guild's chapter is relevant to a limited extent.

In a very recent article, Elizabeth Leiserson examines how many states have created policies that 'avoid' issues of non-refoulement by not technically *returning* refugees, but making it almost impossible for them to apply or access asylum processes [*own emphasis*].<sup>57</sup> Such policies are referred to as *non-entrée* policies, a term coined by Hathaway. Leiserson considers and explains how *non-entrée* policies can violate the principle of non-refoulement and thus states' obligations under international refugee law.<sup>58</sup> In particular, she examines whether states are able to defend their *non-entrée* policies under the national security exception in Article 33(2) of the UN Convention. Through a case study on the policies and treaties of the

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<sup>53</sup> EO1 and 2 op cit note 1 and 2.

<sup>54</sup> Elspeth Guild 'Terrorism and migration law' in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (2014) 486.

<sup>55</sup> CAT op cit note 47 and Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (International Covenant on Civil and Political Rights), 1989.

<sup>56</sup> Guild op cit note 54 at 499-500.

<sup>57</sup> Elizabeth Leiserson 'Securing the Borders Against Syrian Refugees: When Non-Admission Means Return' (2017) 42 *The Yale Journal of International Law* 185.

<sup>58</sup> *Ibid* at 193-5.

European Union, she argues that “[c]ountries that have signed the Refugee Convention should not be permitted to invoke broad national security arguments to avoid their responsibilities to admit and care for refugees.”<sup>59</sup> Overall, Lieserson’s article is relevant in that it takes a closer look at whether the subtler exclusionary policies of many western states violate international refugee law – and particularly, her case study on the European Union will hold many parallels to this paper’s consideration of the U.S. ‘travel ban’.

#### **(e) U.S. Immigration Law and the ‘Travel-Ban’ Executive Orders**

Shoba Sivaprasad Wadhia considers the U.S. immigration policies proposed under the Trump presidency, and the legality of his then-proposed ‘Muslim ban’.<sup>60</sup> However, her article does not consider the executive orders themselves. Nevertheless, she conducts an analysis as to the feasibility, legality and moral considerations of a ‘Muslim/travel ban’. This analysis takes into account the United States’ obligations under domestic law and the U.S. Constitution, but does not consider international law other than in a few brief references.<sup>61</sup> Notably, she discusses new changes in immigration legislation, noting that Congress has failed to take action on an immigration reform bill in the last two decades.<sup>62</sup>

Although immigration and refugee law in the U.S. is a federal issue, as will be discussed in the next section of this paper, Wadhia notes that 31 U.S. states have declared that they will reject Syrian refugees. Thus, she subsequently examines the legality of individual state action with regard to refugee law and policy. Finally, she draws on parallels between the proposals and responding legislation that was enacted in the wake of the 9/11 attacks, and those put forward by President Trump.<sup>63</sup> Therefore, this article is useful in that it considers the effect and legality of Trump’s proposed Muslim ban, specifically regarding refugees. However, the exclusive analysis of U.S. law limits its relevance to this paper.

The most recent article to be discussed in this literature review is by Jennifer M. Chacón.<sup>64</sup> She considers the history of immigration law in the U.S. up to and including the travel ban executive orders, in addition to other executive orders and memoranda from the Department of Homeland Security.<sup>65</sup> She examines the restrictive immigration policies already present under the Obama presidency, and how Trump’s Administration has only gone further

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<sup>59</sup> Ibid at 208.

<sup>60</sup> Shoba Sivaprasad Wadhia ‘Is Immigration Law National Security Law?’ (2017) 66 *Emory Law Journal* 669.

<sup>61</sup> Ibid at 678-82

<sup>62</sup> Ibid at 682.

<sup>63</sup> Ibid at 690-5.

<sup>64</sup> Jennifer M. Chacón ‘Immigration and the Bully Pulpit’ (2017) 130(7) *Harvard Law Review Forum* 243.

<sup>65</sup> Ibid at 245.

– and specifically, on the basis of weak and distorted evidence.<sup>66</sup> Critically, she analyses President Trump’s authority to enact the ban and its legality under the INA, taking into account the judgment in the case of *Washington v Trump*.<sup>67</sup> However, as with much of the literature reviewed, Chacón does not examine the development of immigration law nor the EOs under international law.

#### **(f) U.S. Case Law on the ‘Travel-Ban’ Executive Orders**

The first ‘travel ban’ executive order provoked multiple lawsuits in courts across the United States.<sup>68</sup> Most pertinent are those of *Washington v Trump*, *Hawaii v Trump*<sup>69</sup> and its subsequent appeal.<sup>70</sup> These cases examine the legality of the travel ban EOs – but only to the limited extent necessary in order to grant a temporary restraining order and preliminary injunction. This requires only that the plaintiffs establish that they have a strong likelihood of success on the merits of their claim.<sup>71</sup> All the cases found the plaintiffs to have standing, that the President’s executive orders were reviewable by the judiciary and that the claims were ripe.<sup>72</sup> Both *Washington v Trump* and *Hawaii v Trump* granted the temporary restraining orders requested and subsequent preliminary injunctions; and the court on appeal court upheld the injunction order, but to a lesser extent.

The case of *Washington v Trump* – regarding the first EO – specifically focused on legal issues regarding due process and religious discrimination with consideration for the balance between the hardships suffered by the plaintiffs, and the public interest.<sup>73</sup> In contrast, in the case of *Hawaii v Trump* (March), the court considered the second EO – as the second order revoked the first. Regarding the merits of the claim, the court examined whether the EO2 violated the Establishment Clause of the First Amendment – due to the EO2’s potential implied discriminatory purpose.<sup>74</sup> Thus, the court scrutinised EO2’s primary purpose in light of its historical background, EO1 and President Trump’s campaign statements and tweets.<sup>75</sup> Notably,

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<sup>66</sup> Ibid at 254-7.

<sup>67</sup> *Washington v Trump*, (W.D. Wash. 2017).

<sup>68</sup> For example: *Mohammed v. United States*, (C.D. Cal. Jan. 31, 2017); *City & Cty. of San Francisco v. Trump*, (N.D. Cal. Jan. 31, 2017); *Louhghalam v. Trump*, Civil Action (D. Mass. Jan. 29, 2017); *Int’l Refugee Assistance Project v. Trump*, (D. Md. filed Feb. 7, 2017); *Darweesh v. Trump*, 17 Civ. 480 (AMD), (E.D.N.Y. Jan. 28, 2017); *Aziz v. Trump*, (E.D. Va. Feb. 13, 2017); *Washington v. Trump*, (W.D. Wash. Feb. 3, 2017), emergency stay denied, (9th Cir. 2017). Note: this list is not exhaustive.

<sup>69</sup> *Hawaii v. Trump*, (D. Haw. Mar. 15, 2017). Hereafter, ‘*Hawaii v. Trump*’ (March)’.

<sup>70</sup> *Hawaii v. Trump*, No. 17-15589 (9th Cir. 2017). Hereafter, ‘*Hawaii v. Trump*’ (June)’.

<sup>71</sup> Supra note 69 at 2.

<sup>72</sup> “A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all’ in *Texas v United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

<sup>73</sup> Supra note 67 at 19-28.

<sup>74</sup> Supra note 69 at 28.

<sup>75</sup> Ibid at 33-9.

the court found that “the EO’s focus on nationality, could have the paradoxical effect of ‘bar[ring] entry to a Syrian national who had lived in Switzerland for decades, but not a Swiss national who had immigrated to Syria during its civil war’, revealing a ‘gross mismatch between the [Executive] Order’s ostensible purpose and its implementation and effects.’”<sup>76</sup>

The most recent case, at the time of this literature review, is that of the U.S. Court of Appeals for the Ninth Circuit in *Hawaii v Trump*.<sup>77</sup> The appellate court held both that the President exceeded the scope of his authority by not meeting the precondition of a “sufficient finding that the entry of these classes of people would be ‘detrimental to the interests of the United States’” – resulting in EO2 being inconsistent with the INA’s prohibition on nationality-based discrimination; and that he failed to follow the correct INA procedure in modifying the annual cap on refugees.<sup>78</sup> The court specifically addressed the suspension of the U.S. refugee resettlement program under §1182(f) of the INA, finding the justifications given in EO2 to be insufficient to support an assertion that the travel and admission of refugees would be detrimental to the interests of the U.S.<sup>79</sup> Additionally, the court found that the provisions of the INA allowed the President of the U.S. to *increase* the number of refugees after the start of the year, once he had consulted with Congress; however there was no mechanism in place for him to *decrease* the number of refugees [*own emphasis*].<sup>80</sup>

Nevertheless, though the court provides an in-depth legal analysis of the executive orders in light of the current U.S. political and legal climate, the court is not bound to consider international law when deciding its cases.<sup>81</sup> Thus, though it is important for this paper to consider the legality of the EOs under U.S. law, its relevance will be limited when examining the legality of the EOs under international law. Additionally, much of the case law on the EOs focuses on the effects of the travel ban regarding migrants generally and not refugees.

In brief, the mass of literature so far largely covers non-refoulement of refugees under international law, the national security exceptions under international law and the relationship between U.S. immigration law and national security. However, there are very few papers which individually cover all of these topics together. This paper aims to do just that. It aims to provide an outline of the international refugee law regime, and subsequently an examination of U.S. immigration and refugee law and policy. It aims to analyse the ‘travel ban’ executive orders to

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<sup>76</sup> Ibid 37.

<sup>77</sup> Supra note 70.

<sup>78</sup> Ibid at 2-3.

<sup>79</sup> Ibid at 46.

<sup>80</sup> Ibid at 58.

<sup>81</sup> This will be further discussed in Chapter 4 of this paper.

see whether they are in violation of the United States' obligations under international law – something which has not been discussed in the preceding literature. Overall, this paper will show that, “[n]ational security is not a ‘talismanic incantation’ that, once invoked, can support any and all exercise of executive power under §1182(f).”<sup>82</sup>

### III. Methodology

The methodology of this paper is that of a desktop-based study. The main sources referred to are international law, United Nations sources, U.S. domestic law, case law, academic journals, books and online sources. This paper will specifically focus on the U.S. as, as a major power in the world today, its policies and practices have global effect. The consequences of the ‘travel-ban’ and EOs will be felt by thousands; and may later affect the policies of other nations regarding their immigration and refugee laws.

It is also necessary to examine whether immigration and refugee law is a state or federal issue within the U.S., specifically regarding the application of EO2 and the ability of a court of a state of the U.S. to impose a nationwide injunction. Following the case of *Hawaii v Trump* (June),<sup>83</sup> confirming what was stated by the court in *Washington v Trump*,<sup>84</sup> it was held that immigration laws should be enforced vigorously and uniformly,<sup>85</sup> meaning that decisions regarding immigration law should be applied nationwide whenever possible. The courts in both cases further stated that an immigration policy that was ‘fragmented’ and differed from state to state would be in violation of the constitutional and statutory requirement that immigration law and policy be uniform.<sup>86</sup> Therefore, this paper will be assessing when a state can reject refugees or revoke refugee status, and specifically the U.S. ‘travel-ban’ EOs, at a federal level rather than at an individual state level.

### IV. Structure

As a whole, this paper will cover first, international refugee law; secondly, the national security exceptions to refugee status and the admission of refugees; thirdly, current U.S. immigration and refugee law and finally, the ‘travel-ban’ executive orders in light of the United States’ international obligations. Chapter one introduced the paper, provided a review of the literature to date and the methodology of this paper. Following, in chapter two, this paper will provide

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<sup>82</sup> Supra note 70 at 43.

<sup>83</sup> Ibid at 73-4.

<sup>84</sup> Supra note 67 at 24.

<sup>85</sup> *Texas v United States*, 809 F.3d 134, 187-88 (5th Cir. 2015).

<sup>86</sup> Ibid.

an overview of the international refugee law regime, examining the definition of a refugee under the relevant international treaties and academic opinions. It will consider the extent to which nation states are bound by their obligations under certain treaties and whether some obligations have reached the status of customary international law.

Chapter three will outline the national security exceptions to refugee status under international law – in particular with regard to Article 33(2) and Article 1F of the UN Convention.<sup>87</sup> Article 33(2) provides for national security exceptions to the principle of non-refoulement, whereas Article 1F provides for general exceptions to the recognition of refugee status. This chapter will also consider the concept of *non-entrée* and how this relates to the principle of non-refoulement in Article 33. Chapter four will outline the United States' domestic immigration and refugee law regime – and in particular under the INA and Refugees Act of 1980.<sup>88</sup> It will also examine relevant case law, and the extent to which the U.S. courts have considered international law when making their judgments – specifically with the intention of assessing the relationship between U.S. domestic law and international law.

Chapter five will perform an analysis of President Trump's 'travel-ban' EOs. It will consider the content of the orders, their objectives and implementation. It will look at the U.S. court cases in response to the EOs and uncover parallels between how the orders violate domestic law and potentially violate international law. Finally, this paper will assess whether the EOs violate the United States' international law obligations – holding that a blanket ban on refugees and the bulk of persons from certain states does not fall within the scope of the national security exceptions provided in international law. In conclusion, this paper will hold, in chapter six, that the 'travel-ban' executive orders violate the United States' obligations under international law.

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<sup>87</sup> UN Convention op cit note 6.

<sup>88</sup> United States Refugee Act, 1980 (Public Law 96-212). Hereafter '1980 Refugee Act'. Interestingly, this Act was brought into force in order to bring United States law into compliance with its international law obligations.

# Chapter Two

## I. Definition of a Refugee

There is no single universal definition of a refugee. Refugees have existed long before they were specifically named and made subject to legislation. Broadly they could be described as ‘a person fleeing life-threatening conditions’;<sup>89</sup> however, in the legal and political sphere, the definition of a refugee is more limited. It is also important to note the difference between a refugee and someone called a ‘migrant’. A migrant is a person who travels from one state to another for a wide variety of reasons or purposes; a refugee is a person who migrates out of necessity. What is required to necessitate one to migrate, however, is the subject of much legislation and debate.

### (a) International Law

International refugee law can arguably be said to have begun in 1921, with the ‘Nansen passport’, which was a travel document intended to assist in the migration of Russian refugees.<sup>90</sup> In 1948, the Universal Declaration for Human Rights<sup>91</sup> was adopted by the United Nations, following World War II. The 1951 UN Convention soon followed – and was developed from Article 14 of the UDHR. Article 14(1) provides that: ‘Everyone has the right to *seek* and to *enjoy* in other countries asylum from persecution [*own emphasis*].’<sup>92</sup> This provision provides for the right to seek asylum and to enjoy asylum; however it does not provide for the right to be *granted* asylum [*own emphasis*]. Thus, there is no obligation on a state to grant a person asylum. As a result, there is a tension between a state’s right to sovereignty and the rights of a refugee.<sup>93</sup> Article 1(2) of the UN Convention states:

- A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:
  - (2) As a result of events occurring before 1 January 1951 and 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>94</sup>

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<sup>89</sup> Andrew E. Shacknove ‘Who Is a Refugee?’ (1985) 95(2) *Ethics* 274 at 274.

<sup>90</sup> Stephen H. Legomsky & Christina M. Rodríguez *Immigration and Refugee Law and Policy* 6 ed (1992) 902.

<sup>91</sup> Universal Declaration of Human Rights, 1948. Hereafter, ‘UDHR’.

<sup>92</sup> *Ibid.*

<sup>93</sup> Legomsky & Rodríguez op cit note 90 at 898.

<sup>94</sup> UN Convention op cit note 6.

In 1967, the Protocol Relating to the Status of Refugees<sup>95</sup> entered into force. This protocol removed both the geographic and temporal restrictions that required a refugee to be fleeing events that occurred ‘in Europe’ and ‘before 1 January 1951’. However, not all states that signed and ratified the UN Convention subsequently signed and ratified the 1967 Protocol. Thus, these states are not required to recognise people as refugees if they are fleeing from events that occurred after this date. The United States has signed and ratified the protocol, which encompasses the 1951 UN Convention.

The definition in the UN Convention requires that a person have a ‘well-founded fear of being persecuted’. Mechanisms have been developed in order to determine whether a person’s fear is well founded, such as through an examination of the conditions in the home country, that can be both subjectively and objectively obtained.<sup>96</sup> The UN Convention requires that such an assessment take a forward-looking appraisal of risk, as there is no mention of past persecution; however, past persecution may arguably serve as evidence as to the likelihood of future persecution.<sup>97</sup> Additionally, the person must be fleeing from *persecution* and not just ordinary harm [*own emphasis*]. There are listed grounds of persecution, as well as limitations on who the agents of persecution should be. A person is also required to be outside his or her country of nationality. This limitation is linked to states’ unwillingness to overstep on to another state’s sovereignty by assisting those who are still within their country of nationality.<sup>98</sup> Refugees must also show that they are unwilling or unable to obtain protection from their own state or that their state is unwilling/unable to protect them.<sup>99</sup>

While the definition of a refugee is subject to much debate, this paper will not delve into the full depth of the definition as its main purpose is to examine when a state may reject refugees on the basis of national security.<sup>100</sup> Thus, this paper will work on the assumption that states are rejecting those who fall within the refugee definition. Importantly, however, it should be noted that one may be classed as a refugee without having been recognised as a refugee by any state – provided one meets the requirements in the UN Convention.<sup>101</sup> Notably, Article 31 of the UN Convention provides that states shall not penalise refugees for illegal entry or presence in their territory.<sup>102</sup> It requires refugees to make an asylum application without delay,

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<sup>95</sup> The Protocol *op cit* note 5.

<sup>96</sup> UNHCR Handbook *op cit* note 18 para 38.

<sup>97</sup> Hathaway *The Law of Refugee Status* (1991) 50.

<sup>98</sup> Khan and Schreier *op cit* note 16 at 21.

<sup>99</sup> *Ibid* at 22-3; 55-7.

<sup>100</sup> For a detailed examination of the 1951 UN Convention definition, *see* James C. Hathaway and Michelle Foster *The Law of Refugee Status* (2014).

<sup>101</sup> UNHCR Handbook *op cit* note 18 para 28.

<sup>102</sup> Article 31 of the UN Convention.

to come directly from their country of origin, and to possess just cause in making their application.<sup>103</sup> Therefore, states have a duty to refrain from convicting refugees for breach of any immigration laws as they are protected by the UN Convention on arrival from any territory. However, states may institute proceedings.<sup>104</sup>

The Organisation of African Unity (OAU), which was subsequently replaced by the African Union (AU), drafted a refugee convention in 1969.<sup>105</sup> This convention's definition of a refugee, while based on that of the UN Convention, made some very important modifications. Most notable is that of Article 1(2), which states that:

2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>106</sup>

Thus, this definition provides refugee status to those fleeing any man-made disaster, whether or not they can be held to be fleeing persecution. This definition takes into account many of the problems and crises present in the third world, which were not accounted for in the UN Convention.

Primarily, this definition takes account of situations in which the government of a state has lost authority due to external aggression, foreign domination or occupation – and that people still deserve protection from the anticipated harm despite that harm being inflicted by a foreign power.<sup>107</sup> Secondly, this definition accounts for group disenfranchisement where persons flee due to broad events or phenomena instead of as a result of specific persecution on a listed ground. Thus, this definition encompasses those fleeing a significant disruption to the public order and does not require them to prove that they are fleeing persecution that is specifically linked to their personal status.<sup>108</sup> Additionally, the OAU definition provides protection to those fleeing a severe disruption to public order 'in either part or the whole' of the country.<sup>109</sup> This, too, is different from the assumption found in the UN Convention that a person should flee to a 'safe' part of their country of origin before fleeing to another country.

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<sup>103</sup> *R v Uxbridge Magistrates' Court ex parte Adimi* [2000] 3 W.L.R. 434; [2001] Q.B. 667; Imm AR 560.

<sup>104</sup> *Ibid.*

<sup>105</sup> Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969. Hereafter referred to as 'OAU Convention'.

<sup>106</sup> *Ibid.*

<sup>107</sup> Hathaway *op cit* note 97 at 17.

<sup>108</sup> *Ibid.*

<sup>109</sup> OAU Convention Article 1(2) *op cit* note 105.

However, such an assumption is illogical in that it may, in many cases, be easier and cheaper to travel to a neighbouring state than across one's own state. Additionally, one must consider that it may be impossible for a person to migrate to a 'safe' area of his or her own country, and even so, that the supposed safeness of such areas may be unreliable.<sup>110</sup>

The OAU Convention definition is relevant to this paper as it highlights some of the limitations of the UN Convention. Additionally, it is considered to be one of the most influential conceptual standards of refugee status and has provided a basis for many subsequent treaty definitions of refugees.<sup>111</sup> Thus, it is important that this paper take note of this definition when performing its analysis.

### **(b) Law of the United States**

Before the 1950s, the U.S. had no statute that generally regulated the admission of refugees. Some *ad hoc* legislation was passed by Congress in the 1950s and 60s; however this was specifically as a response to a certain crisis.<sup>112</sup> The Attorney General of the U.S. also had a power to parole a group of refugees into the U.S. under the INA §212(d)(5).<sup>113</sup> The parole power, however, was insufficient, as there were no distinct criteria for admission and no procedural recourse if parole was denied.<sup>114</sup> Additionally, to be paroled into the U.S. was not equivalent to being admitted; thus, a person who was 'paroled in' could be removed from the country at any time for any reason.<sup>115</sup>

In 1968, the U.S. acceded to the 1967 Protocol. Twelve years later, after finding their domestic legislation to be inadequate to handle the increasing number of refugees seeking admission, the Refugee Act of 1980<sup>116</sup> was enacted by Congress. The definition of a refugee can be found in §101(a)(42) of the INA,<sup>117</sup> and was modelled on Article 1 of UN Convention. It includes the requirements that refugees be outside of their country of origin; be unable or unwilling to return to that country; and be unable or unwilling to avail themselves to the protection of that country as a result of a well-founded fear of persecution on one of the listed grounds. These grounds are race, religion, nationality, membership in a particular social group or political opinion. This section also includes an exclusion from the definition of a refugee for

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<sup>110</sup> Hathaway op cit note 97 at 18.

<sup>111</sup> Ibid.

<sup>112</sup> Legomsky & Rodríguez op cit note 90 at 908.

<sup>113</sup> INA op cit note 21.

<sup>114</sup> Legomsky & Rodríguez op cit note 90 at 908.

<sup>115</sup> Ibid.

<sup>116</sup> 1980 Refugees Act op cit note 88.

<sup>117</sup> INA op cit note 21.

those ‘who ordered, incited, assisted, or otherwise participates in the persecution of any person on account of “one of the listed grounds”’.<sup>118</sup>

Additionally, the 1980 Refugee Act added §207(a) to the INA. This section requires that the President of the United States make an annual decision regarding how many refugees are to be admitted during the forthcoming fiscal year.<sup>119</sup> This Presidential determination must also specify how this number is to be allocated among refugees from various countries and geographic areas.<sup>120</sup> In addition, there is no limit on how high or low this number may be – and §207(b) provides the President with the authorisation to increase the number of refugees to be admitted, should an unexpected emergency situation arise.<sup>121</sup> However, acting as a check on this power, the President is required by §207(a)(1, 2, 3) and §207(b) to participate in ‘appropriate consultation’ with Congress before making any of the aforementioned determinations.<sup>122</sup>

Section 208 of the INA contains the main asylum provisions. It provides for the procedure of asylum applications, eligibility for asylum, the burden of proof, exceptions and the rights afforded to those granted asylum status.<sup>123</sup> Notably, the INA contains a one-year time limit, requiring asylum seekers to apply for asylum within one year of their arrival in the U.S.<sup>124</sup> This limit is not contained in the UN Convention, and is arguably harsh on arriving refugees, who may have a fear of law enforcement and an ignorance of the laws and their rights. Additionally, in §208(2)(A) the Article 1F exceptions and the Article 33(2) exceptions from the UN Convention are jointly mentioned as exceptions to refugee status in the U.S. This is unusual as Article 1F and Article 33(2) of the UN Convention are different in their effect on the status of refugees under international law, which will be explained in greater detail in Chapter three. Finally, in §212(d)(5)(B) Congress prevented the Attorney General from paroling refugees into the U.S. unless there were ‘compelling reasons in the public interest with respect to that particular alien’ in order to encourage the use of the procedures found in §208.<sup>125</sup>

The principle of non-refoulement, as mentioned in the Literature Review, can be found in §241(b)(3)(A) of the INA, which states:

- (A) In general. –Notwithstanding paragraphs (1) and (2), [the Secretary of Homeland Security] may not remove an alien to a country if the [Secretary] decides that the alien’s

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<sup>118</sup> §101(a)(42) of the INA op cit note 21.

<sup>119</sup> Legomsky & Rodríguez op cit note 90 at 910.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> §208 of the INA op cit note 21.

<sup>124</sup> §208(a)(2)(B) of the INA.

<sup>125</sup> Legomsky & Rodríguez op cit note 90 at 911.

life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.<sup>126</sup>

The principle of non-refoulement is renamed in U.S. law as 'withholding of removal'. In §241(b)(3)(B), discussed further in Chapter four, the INA again combines the exception provisions found in Article 1F and Article 33(2) of the UN Convention, narrowing refugees' access to this form of relief. Thus, U.S. domestic refugee law is already more restrictive than that of the international refugee law.

The U.S. domestic refugee legislation, like that of international law, has to perform a balancing act between national self-interest (state sovereignty) and humanitarian/human rights policies.<sup>127</sup> This paper is aimed at examining international refugee law, with a subsequent case study on the actions of the U.S. However, it will be examining the actions of the U.S. through the lens of international refugee law and not that of domestic U.S. legislation. Thus, while it is important to take note of how the UN Convention has been incorporated into the United States' domestic legislation, this legislation will not form the basis of this paper's analysis. In the following section, this paper will examine the extent to which the UN Convention is binding on nation states – and specifically, on the United States.

## II. Binding Nature of the UN Convention

The UN Convention is an international treaty and as such, a source of international law.<sup>128</sup> However, unlike national law, treaties are only binding on the basis of consent. Nevertheless, they are one of the only means by which a state may deliberately and consciously create binding international legal obligations for itself.<sup>129</sup> Treaties, such as the UN Convention, are able to create binding rights and obligations that are separate and distinct from any national law.<sup>130</sup> The Vienna Convention on the Law of Treaties<sup>131</sup> provides the foundational document for all international treaties. In order for a state to be bound by a treaty, the state must first give its consent<sup>132</sup> to be bound, and secondly, the treaty must have entered into force.<sup>133</sup> Consent takes place through 'signature' and 'ratification'. In most instances, only once a state has ratified a treaty is it bound by that treaty.<sup>134</sup> Article 24 of the Vienna Convention states that a treaty will

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<sup>126</sup> §241(b)(3)(A) of the INA op cit note 21.

<sup>127</sup> Legomsky & Rodríguez op cit note 90 at 898.

<sup>128</sup> Martin Dixon *Textbook on International Law* 7 ed (2013) 55.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid at 56.

<sup>131</sup> Vienna Convention on the Law of Treaties, 1969. Hereafter 'Vienna Convention'.

<sup>132</sup> Article 11 of the Vienna Convention.

<sup>133</sup> Dixon op cit note 128 at 66.

<sup>134</sup> Ibid.

enter into force “in such manner and upon such date as it may provide or as the negotiating states may agree.”<sup>135</sup> For example, the UN Convention was signed in July 1951; however, it only entered into force in April 1954.

Most importantly, Article 26 of the Vienna Convention states that “[e]very treaty in force is binding in good faith upon the parties to it and must be performed by them in good faith.”<sup>136</sup> This rule is in itself a part of customary international law. In addition, Article 27 of the Vienna Convention specifies that a state may not invoke the dictates of national law, as a reason to excuse its failure to perform a treaty obligation.<sup>137</sup> Thus, all states that are signatories to the UN Convention and Protocol, and who have subsequently ratified the UN Convention, are bound in international law by its provisions.<sup>138</sup>

The United States signed and ratified the protocol and is thus bound by the 1951 UN Convention. Therefore, the U.S. is obligated under international law to respect all the rights afforded to refugees under the convention.<sup>139</sup> However, the U.S. domestic law dictates the internal allocation of responsibility for the implementation of their international legal obligations.<sup>140</sup> Under domestic U.S. law, there is a distinction between international treaties and agreements which are, and are not, self-executing. Treaties that are self-executing and not self-executing both create binding international legal obligations; however, those which are self-executing also create binding national law without requiring any form of implementing legislation. The obligations flowing from treaties which are not self-executing are not automatically enforceable in domestic U.S. courts until implementing legislation has been enacted by Congress.<sup>141</sup> Once such legislation has been enacted, the legal obligations which follow are usually said to flow from the statute and not from the international treaty.<sup>142</sup>

According to the U.S. courts, the 1967 Protocol is non-self-executing.<sup>143</sup> In the case in point, *Matter of D-J*,<sup>144</sup> the Attorney General declared the protocol to be a non-self-executing treaty; however, while such a treaty would thus not be enforceable in a domestic U.S. court, he did not discuss why the U.S. would not be bound by its treaty obligations internationally.<sup>145</sup>

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<sup>135</sup> Vienna Convention op cit note 131.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Of course, where reservations have been made by a state regarding certain provisions, they would not be bound by those provisions.

<sup>139</sup> Legomsky & Rodríguez op cit note 90 at 921.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> *Matter of D-J* 23 I. & N. Dec. 572 (A.G. 2003).

<sup>144</sup> Ibid.

<sup>145</sup> Legomsky & Rodríguez op cit note 90 at 921.

While the non-refoulement obligation, found in Article 33 of the UN Convention, was implemented into U.S. law via the 1980 Refugee Act, it did not implement any of the other rights afforded to refugees.<sup>146</sup> Thus, it is arguable that the legislation in the U.S. is insufficient in meeting its obligations under the UN Convention.<sup>147</sup>

This paper will examine the obligations imposed on states under international law, and specifically in the U.S. Thus, it is important to note the extent to which the U.S. courts feel that they are bound and obligated to follow the UN Convention. However, even though the U.S. courts deem themselves not to be bound internally by their obligations under the UN Convention, they have yet to provide a reason as to why they would not be bound by their obligations under the UN Convention on the international plane.

### III. Customary International Law

Customary International Law is a source of international law that is based on the practices of states.<sup>148</sup> Thus, the international actions of states may eventually give rise to binding international law. It is a dynamic source of law which can be universal, regional or bilateral.<sup>149</sup> There are two main elements required for a practice to become customary international law. The first can be found in Article 38(1)(b) of the ICJ Statute,<sup>150</sup> which requires that there be a “general practice accepted by law.” The second element can be found in the *Asylum* case,<sup>151</sup> which, requires that (of the practice) there be “constant and uniform usage, accepted as law.” Thus, customary law can be derived from general, consistent and uniform state practice in combination with the belief by states that such practice is mandatory (*opinio juris*).<sup>152</sup> It is possible that treaties may change or replace aspects of customary international law; however, one should note that there are certain fundamental rules in customary law which cannot be changed by any treaty.<sup>153</sup>

The principle of non-refoulement is a rule of customary international law.<sup>154</sup> However, given the consensus on the reach of the mandate of the UNHCR and other refugee accords, Hathaway considers the possibility that there may be an expanded refugee concept in

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<sup>146</sup> Ibid at 922.

<sup>147</sup> Ibid.

<sup>148</sup> Dixon op cit note 128 at 32.

<sup>149</sup> Ibid.

<sup>150</sup> Statute of the International Court of Justice, 1946.

<sup>151</sup> *Asylum Case (Colombia v Peru)*, [1950] ICJ Rep 266 at 276-78.

<sup>152</sup> Dixon op cit note 128 at 54.

<sup>153</sup> Ibid. Such customary law is referred to as the ‘rules of *jus cogens*’.

<sup>154</sup> UNHCR Executive Commission Programme *Non Refoulement* Conclusion No. 6 (XXVIII).

customary international law.<sup>155</sup> Specifically, he refers to the arguments put forward by Guy Goodwin-Gil<sup>156</sup> regarding the principle of non-refoulement, holding that this principle may place an obligation on states not to return those who are outside the reach of the UN Convention refugee definition – and who will face harm and a lack of government protection.<sup>157</sup>

However, he also takes into account the arguments of Kay Hailbronner,<sup>158</sup> who argues that there is both insufficient uniform state practice and *opinio juris* to hold that refugees, who do not fall within the UN Convention definition, have such international rights.<sup>159</sup> He argues that most international practice is institutional practice by the UNHCR and thus cannot form binding obligations on states. Additionally, as will be discussed in this paper, many developed and developing states have rejected refugees *en masse*, and have formed countless mechanisms to deal with the numbers of refugees seeking asylum.<sup>160</sup> Nevertheless, Hailbronner does not take into account the global consensus of states seeking to determine a means to assess the claims of asylum seekers outside of the UN Convention definition, but who are within or at the borders of such states.<sup>161</sup>

Hathaway ultimately concluded that the principle of non-refoulement, regarding those outside of the refugee definition, had not become a part of customary international law. However, in more recent sources, it is clearly held that the principle of non-refoulement itself is a part of customary international law.<sup>162</sup>

Nevertheless, the existence of the principle of non-refoulement as a *jus cogens* norm will have significant implications on the interpretation of the Article 33(2) exceptions to the principle, particularly with regard to national security.<sup>163</sup> Specifically, the U.S. has previously relied on Article 33(2) to enact and prioritise anti-terrorism legislation above that of refugee rights and protections.<sup>164</sup> Alice Farmer argues that, while the principle of non-refoulement has achieved the status of customary international law through general acceptance, the exceptions

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<sup>155</sup> Hathaway op cit note 97 at 22.

<sup>156</sup> G. Goodwin-Gill 'Non-Refoulement and the New Asylum Seekers' (1986) 26(4) *Virginia Journal of International Law* 897.

<sup>157</sup> Ibid.

<sup>158</sup> K. Hailbronner 'Non-refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?' (1986) 26(4) *Virginia Journal of International Law* 857.

<sup>159</sup> Ibid.

<sup>160</sup> Hathaway op cit note 97 at 23.

<sup>161</sup> Ibid.

<sup>162</sup> Kate Jastram & Marilyn Achiron 'Refugee Protection: A Guide to International Refugee Law, IPU & UNHCR' (2001).

<sup>163</sup> Alice Farmer 'Non-refoulement and *Jus Cogens*: Limiting anti-terror measures that threaten refugee protection' (2008) 23(1) *Georgetown Immigration Law Journal* 1 at 3.

<sup>164</sup> Ibid.

to this principle have not.<sup>165</sup> In the following chapter this paper will consider when a state may exclude refugees on the basis of national security. Thus, it is necessary that it take into account the effect of the existence of refugee protection under international law as this will have an effect on the scope of such protections, in particular with regard to how they may be employed by the United States.

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<sup>165</sup> Ibid at 4.

# Chapter Three

## I. National Security Exceptions under the UN Convention

### (a) Defining ‘National Security’

Prior to analysing the provisions under international law which provide for the rejection of refugees on the basis of national security, it is necessary to define the term ‘national security’ – for “if we cannot define national security, we are less apt to uphold and defend it.”<sup>166</sup> In the context of immigration and refugee law, national security should not be interpreted in an overly broad fashion so as to encompass every possible aspect of a nation’s interest; however, it also cannot be overly limited, and thus fail to account for critical issues.<sup>167</sup>

The UN Convention was drafted soon after the conclusion of the World War II. Thus, nation states were concerned that war criminals not be protected under international refugee law and that such states could deny admission to criminals who could pose a danger to their national security and the public order.<sup>168</sup> The UNHCR, respecting state sovereignty, provided states with discretion as to whether to apply the exclusion clauses found in Article 1F. Nevertheless, in light of the potential gravity of the consequences of exclusion, the UNHCR Handbook requires that the exclusion clauses be interpreted restrictively.<sup>169</sup>

While there is no single, official, legal definition of national security<sup>170</sup>, it is nonetheless a well-defined term.<sup>171</sup> It has been defined as encompassing anything which poses a threat to a country’s sovereignty, territorial integrity, government, independence, constitution, external peace, armed forces, war potential or military installations.<sup>172</sup>

With regard to the UN Convention, it was initially proposed by the U.K. representative to the ad hoc committee that the convention include an article that would provide states with the ability to derogate from any provision – only as was necessary – in the interests of national security.<sup>173</sup> Alternatively, it was suggested that a state may apply any provisional measure to a refugee on account of their nationality until such measure was no longer necessary in terms of

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<sup>166</sup> James E. Baker *In the Common Defense: National Security Law for Perilous Times* (2007) 20.

<sup>167</sup> Rizer op cit note 37 at 247.

<sup>168</sup> UNHCR Handbook op cit note 18 at 24.

<sup>169</sup> Ibid.

<sup>170</sup> Rizer op cit note 37 at 248.

<sup>171</sup> Division of International Protection of the United National High Commissioner for Refugees ‘Commentary on the Refugee Convention 1951’ (2007) 28.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

national security.<sup>174</sup> The committee agreed that such an article should be included, but opted for one that was more along the lines of the second option. However, the provision was made to be more restrictive; for example, ‘a refugee’ was changed to ‘a particular person’, and so, provisional measures could only be applied to individual persons and could not be applied generally to groups of refugees.<sup>175</sup> It is also relevant to note that an asylum seeker or migrant could be considered a threat to national security even where they had not committed any specific crime.<sup>176</sup>

National security, within the context of the U.S., is defined in the INA as the national defence, economic interests, or foreign relations of the U.S.<sup>177</sup> However, how national security has been interpreted has been accomplished in various ways under the different presidencies. Under President Barack Obama, national security included the security of U.S. allies and partners.<sup>178</sup> Under President George W. Bush, national security was more focused on protection of the territorial homeland of the U.S. and the American people, with particular concern for the United States’ global military interests and the economy.<sup>179</sup> President Bill Clinton followed a much broader definition of national security, which could potentially even encompass present day climate change due to references to the protection of “quality of life”.<sup>180</sup>

Thus, with regard to refugee law, national security can be argued to concern instances where the admittance of a refugee(s) would threaten the safety, national interests, defence, infrastructure, peace and people of a country, in addition to many of the factors already stated. While there are many considerations that fall under the term of ‘national security’, this term should be interpreted restrictively as shall be discussed below.

## **(b) Article 1F**

### **(i) Overview**

Article 1F of the 1951 UN Convention contains what is commonly referred to as the ‘exclusion clauses’. These provisions are intended to exclude those who would fall within the refugee definition from the benefits of protection under the UN Convention.<sup>181</sup> Article 1F states:

- F.** The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

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<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid at 120.

<sup>177</sup> 8 U.S.C. § 1189(d)(2).

<sup>178</sup> Rizer op cit note 37 at 248.

<sup>179</sup> President George W. Bush ‘National Security Presidential Directive-1’ (2001) *Organization of the National Security Council System* 0211 at 2.

<sup>180</sup> Baker op cit note 166 at 18.

<sup>181</sup> UNHCR *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003) 3.

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The purpose of this article was to exclude those who, despite qualifying as a refugee, were deemed undeserving of the benefits afforded with refugee status. Such persons are undeserving because there are ‘serious reasons for considering’ that they have committed crimes against peace, war crimes, crimes against humanity, a serious non-political crime outside of the country of refuge, or are guilty of another act that is contrary to the principles and purposes of the UN.<sup>182</sup> Additionally, this section is aimed at preventing such persons from using the protections of international refugee law in order to avoid accountability for their actions.<sup>183</sup> The exclusion clauses provided for in Article 1F are exhaustive and cannot be amended or modified; however, they are subject to interpretation. Nevertheless, the UNHCR has stated that, with consideration to the severity of the consequences of exclusion, the provisions of Article 1F should be interpreted restrictively in light of the humanitarian purpose and character of the UN Convention.<sup>184</sup>

Looking specifically at the provisions contained in Article 1F, only section (b) is limited in terms of temporal and geographic scope. It requires that the non-political crime must have been committed before the individual seeks admission, and the crime committed outside of the country of refuge. Thus, by implication, Article 1F(a) and (c) are not restricted by when or where the acts listed were committed. Therefore, refugee status may even be revoked in instances where a recognised refugee engages in such acts after their admission into the country of refuge.<sup>185</sup> One should note that ‘admission’ in the context of the exclusion clauses merely means physical presence in the country of refuge.<sup>186</sup>

Refugee status can be cancelled under the principles of administrative law where, for instance, it has been discovered that the basis on which the decision was made was absent in the first place. This could be where, had all the facts been known and considered, the asylum seeker would not have met the definition of a refugee or where one of the exclusion clauses would have applied. However, it is important to note that cancellation in such a case would

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<sup>182</sup> UNHCR *UNHCR Statement on Article 1F of the 1951 Convention* (2009) 6.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid* at 7.

<sup>185</sup> UNHCR *op cit* note 181 at 5-6.

<sup>186</sup> *Ibid* at 16.

only apply to facts that were present at the time of the determination; subsequent conduct should not be considered.<sup>187</sup> Cancellation of refugee status should also be differentiated from withdrawal of protection under Articles 32 and 33 of the UN Convention. Cancellation applies where refugee status was awarded erroneously – where Article 32 and 33 withdraw protection from properly recognised refugees.<sup>188</sup>

Refugees are expected to follow the laws and regulations of the country in which they seek refuge under Article 2 of the UN Convention. Thus, should they commit crimes in the country of refuge, they would be liable for domestic criminal prosecution. In specific circumstances, as will be discussed below, a refugee may be expelled or removed from a country; however, such action does not deprive the individual of status as a refugee. Nevertheless, should a refugee engage in conduct that would fall within Article 1F(a) or (c), it is likely that the exclusion clauses would be triggered, and refugee status may subsequently be revoked.<sup>189</sup>

Importantly, it should be noted that the determination as to whether the exclusion clauses apply falls within the competence of the state in which the claimant seeks refuge. However, when a state finds that an exclusion clause applies, that state is not obliged to expel the individual and may choose to exercise its criminal jurisdiction over that person. The state may also have obligations under extradition treaties with regard to the individual, but most importantly, that person would no longer fall within the scope of the UNHCR.<sup>190</sup>

### *(ii) Specifics of the Exclusion Clauses*

Article 1F(a) specifically concerns the exclusion of individuals of whom there are serious reasons for considering have committed “a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.”<sup>191</sup> The most widely accepted definitions of these crimes can be found in the statutes of the International Criminal Court (ICC), specifically in Articles 7 and 8 of the Rome Statute.<sup>192</sup> However, one can only find a definition of a crime against peace in the London Charter,<sup>193</sup> in which such a crime arises from the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances,

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<sup>187</sup> Ibid at 6.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid at 7.

<sup>190</sup> Ibid at 8.

<sup>191</sup> Article 1F(a) of the UN Convention.

<sup>192</sup> Rome Statute of the International Criminal Court, 1998. Hereafter referred to as the ‘Rome Statute’. Specifically, Article 7 (Crimes Against Humanity) and Article 8 (War Crimes).

<sup>193</sup> Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 1945. Hereafter, ‘London Charter’.

or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”<sup>194</sup> Elements of this definition were subsequently incorporated into the principles and purposes of the UN Charter.<sup>195</sup> Such crimes are generally considered to be those of the most heinous nature, and as such, one would expect that other international instruments, such as the CAT and Genocide Convention, will be relevant in the interpretation of this exclusion clause.<sup>196</sup>

Article 1F(b) concerns serious non-political crimes committed outside of the country of refuge prior to seeking admission. Under this exclusion clause, the gravity of the crime in question should be assessed against international standards and not only against the domestic legislation. Additionally, the seriousness of the crime should be assessed with concern to the nature of the act, the harm inflicted, the type of procedure used in prosecution, the nature of the penalty as well as consideration for how other jurisdictions assess the seriousness of such a crime.<sup>197</sup> Serious crimes would include murder, arson, rape and armed robbery, and could also encompass any crime in which a deadly weapon was used, or one which caused significant injury.<sup>198</sup>

The requirement that the crime be non-political probably stems from the perceived justifiability of crimes committed for a political cause against an oppressive regime, in addition to instances where the domestic law of a country criminalises certain political acts. A state, when assessing whether a crime is non-political, should consider the motives behind the act and whether the predominant motivation was one of personal gain (or another).<sup>199</sup> Additionally, in circumstances where one is unable to establish a clear link between the crime and an alleged political motive or where the criminal act was vastly disproportionate from the alleged political objective, then a non-political motive may be considered predominant.<sup>200</sup> Thus, a state should take into account the context, method, proportionality and motivation behind a crime in order to evaluate whether it is of a political or non-political nature. Finally, a potentially justifiable political crime should be congruent with human rights and fundamental freedoms.<sup>201</sup>

Article 1F(c) excludes those who are “guilty of acts contrary to the purposes and principles of the United Nations,”<sup>202</sup> which can be found in Articles 1 and 2 of the UN Charter.

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<sup>194</sup> Article 6(a) of the London Charter.

<sup>195</sup> Charter of the United Nations, 1945.

<sup>196</sup> UNHCR *op cit* note 181 at 9.

<sup>197</sup> *Ibid* at 14.

<sup>198</sup> *Ibid*.

<sup>199</sup> *Ibid*.

<sup>200</sup> *Ibid* at 15.

<sup>201</sup> *Ibid* at 16.

<sup>202</sup> Article 1F(c) of the UN Convention.

However, these articles only provide broad, general terms which do not specify the types of crimes which would result in exclusion under Article 1F(c).<sup>203</sup> It is likely that this section was purposefully drafted to be broad so as to encompass future conduct that could not be conceived at the time of drafting. Nevertheless, it is recommended that Article 1F(b) be read narrowly in order to avoid misuse by states.<sup>204</sup>

The UNHCR has also stated that this section only includes crimes which *fundamentally* violate the principles and purposes of the United Nations, setting a high threshold for the gravity of the relevant conduct [*own emphasis*]. In particular, a state should take into consideration how the act was organised, the objectives in the long term, its international impact, as well as potential future implications for peace and security internationally.<sup>205</sup> Thus, it is likely that Article 1F(c) will only apply to politically or militarily high-ranking persons. This is because such persons would be in a high enough position of power in a country or similar state entity that would render them capable of violating these provisions.<sup>206</sup>

Nevertheless, as will be discussed subsequently, there are arguments that persons who commit acts of terrorism should fall within the scope of Article 1F(c), as such acts are capable of threatening international peace and security and are considered to be contrary to the principles and purposes of the United Nations. However, it is recommended by academics and organisations such as the UNHCR, that states should not focus on the label of ‘terrorist’ when considering the exclusion clauses, but rather on the specific terrorist ‘acts’ committed by the individual in question.<sup>207</sup> Such acts should then be assessed in terms of their gravity, whether they had an international impact and whether the act had implications regarding international peace and security. Notably, individual responsibility is a major factor to be considered in such instances.<sup>208</sup>

### ***(iii) National Security and Terrorism***

There is no specific mention of national security in Article 1F; thus, this provision cannot at face value be used to exclude an asylum seeker on the basis of national security. Nevertheless, it is likely that individuals who have committed the acts mentioned in Article 1F would be considered a threat to a nation’s security. Currently, national security concerns are often tied to issues of terrorism, specifically regarding refugee and immigration law. The exclusion

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<sup>203</sup> UNHCR op cit note 181 at 17.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid at 18.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid at 19.

<sup>208</sup> Ibid.

clauses make no specific mention of terrorism, and thus it is necessary to consider how terrorism (as a threat to national security) would fit in with Article 1F.

Regarding Article 1F(a), it is unlikely that a terrorist act would fall into the category of a crime against peace (or a crime of aggression), as such a crime would generally involve an *ad bellum* violation by a state official, instead of one concerning the methods and means of the violence.<sup>209</sup> However, should a terrorist act be committed during an armed conflict it could fall within the definition of a war crime, and thus, such a person could be excluded under Article 1F(a). Additionally, terrorism could also constitute a crime against humanity, provided that it is a widespread and systematic attack on a civilian population, and the perpetrator has the requisite knowledge component.<sup>210</sup> Nevertheless, as mentioned previously, the exclusion clauses require individual responsibility; thus, there must be serious reasons for considering that the asylum seeker has committed the terrorist act in question or made a substantial contribution towards it.<sup>211</sup>

Terrorist acts, while they may claim to be for political motivations, are usually entirely disproportionate to the ends sought. Thus, an individual who has committed a terrorist act would more readily be excluded under Article 1F(b).<sup>212</sup> Regarding when such an act could be considered political, the House of Lords in *T v Secretary of State for the Home Department* held that: “Homicide, assassination and murder, is one of the most heinous crimes. It can only be justified where no other method exists of protecting the final rights of humanity.”<sup>213</sup> Therefore, where there are serious reasons for considering that an individual, who otherwise meets the definition of a refugee under the UN Convention, has committed a terrorist act (or acts) outside of the country of refuge prior to seeking admission, would be excludable under Article 1F(b). However, it would be necessary to carefully assess whether the specific acts concerned reach the gravity requirement and the requisite level of seriousness in order to fall under Article 1F(b).<sup>214</sup>

Nevertheless, there is also jurisprudence indicating that persons who commit terrorist acts may also be excludable under Article 1F(c) as a result of being “guilty of acts contrary to the purposes and principles of the United Nations.”<sup>215</sup> When considering the *travaux préparatoires* of the UN Convention, one is able to recognise a connection between Article

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<sup>209</sup> Gilbert op cit note 9 at 478.

<sup>210</sup> Ibid.

<sup>211</sup> UNHCR op cit note 181 at 30.

<sup>212</sup> Gilbert op cit note 9 at 478.

<sup>213</sup> [1996] UKHL 8, [1996] WLR 766.

<sup>214</sup> UNHCR op cit note 181 at 31.

<sup>215</sup> Article 1F(c) of the UN Convention.

1F(c) and Article 14(2) of the UDHR.<sup>216</sup> Article 14(2) stipulates the right to seek asylum from persecution ‘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’.<sup>217</sup> Consequently, an individual who has violated fundamental human rights, such as through a terrorist act, should not be afforded protection under the UN Convention. In addition, as the UN Security Council has stated that it considers terrorism to be against the purposes and principles of the UN, and a threat to international peace and security,<sup>218</sup> it would seem reasonable to include terrorism within the scope of Article 1F(c).<sup>219</sup>

Nonetheless, as previously stated, the application of Article 1F(c) would generally be to those in a position of power – thus perhaps only to the leaders of terrorist organisations.<sup>220</sup> Despite this, Article 1F(c) has been applied to individuals of a lower level who have engaged in terrorist activities.<sup>221</sup> Consequently, one would seek to avoid too close an association between terrorism and asylum seekers, in order to prevent states from using the label of ‘terrorism’ in order to suppress the legitimate political activities of their opponents.<sup>222</sup> Thus, Article 1F(c) should be interpreted and defined narrowly in order to protect the institution of international refugee law.<sup>223</sup> Therefore, as previously stated, terrorist acts should only render an individual excludable under Article 1F(c) where such acts have threatened international peace and security.<sup>224</sup>

In order to assess the individual responsibility of the asylum seeker regarding terrorist activities or where the applicant is a member of a terrorist organisation, certain factors should be considered. The case of *JS (Sri Lanka)*<sup>225</sup> from the U.K. provided a list of seven such factors. First, a state should consider the nature and importance of the alleged terrorist organisation, and specifically, the section of the organisation to which the applicant was connected. Secondly, a state should consider whether and by whom the organisation was prohibited or deemed a terrorist organisation. Thirdly, it should be noted how the applicant was recruited and fourthly, how long the asylum seeker remained in the organisation and whether they had any opportunities to leave.

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<sup>216</sup> UDHR op cit note 91.

<sup>217</sup> Gilbert op cit note 9 at 480.

<sup>218</sup> UN Security Council Resolution 1377 (12 November 2001).

<sup>219</sup> Ibid.

<sup>220</sup> UNHCR op cit note 181 at 32.

<sup>221</sup> Such as in the case of *Georg K v Ministry of the Interior* [1969] 71 ILR 284 (Austrian Administrative Court).

<sup>222</sup> UNHCR op cit note 181 at 32.

<sup>223</sup> Gilbert op cit note 9 at 481.

<sup>224</sup> Ibid at 481-2.

<sup>225</sup> *JS (Sri Lanka) v Secretary of State for the Home Department* [2010] UKSC 15, [2010] WLR 79, [30].

Fifthly, a state should consider what the position, standing or rank the asylum seeker had in the organisation, as well as their level of influence. Sixthly, a state should investigate and enquire into the applicant's knowledge of the activities and crimes of the organisation – an examination of the *mens rea* component. Seventhly, and finally, the personal role and level of involvement of the asylum seeker in the organisation should be considered. In particular, a state should take note of the contributions made by the individual in the commission of any international crimes.<sup>226</sup> Therefore, for the exclusion clauses under Article 1F to apply, a state would need to be able to make a connection between the asylum seeker and a terrorist crime, with specific reference to evidentiary facts.<sup>227</sup>

It is also important to consider the defences available to an individual whom the state is trying to exclude under Article 1F. Following the provisions of the Rome Statute,<sup>228</sup> and in particular Articles 31-33, an asylum seeker may employ the defence of duress, mental disease or defect, self-defence, mistake of fact, involuntary intoxication, or certain mistakes of law.<sup>229</sup> In very rare instances, the defence of superior orders may also be accepted.<sup>230</sup> In general, the burden of proof in asylum cases is shared between the asylum seeker and the state; however, where a state seeks to exclude an individual under Article 1F, the burden shifts to the state to justify the exclusion.<sup>231</sup> This aligns with the legal principle that the person or state making a claim should bear the burden to prove that claim. Nevertheless, where an individual has been indicted by an international criminal tribunal or court, a rebuttable presumption of excludability would be created against the applicant. Presence on a terrorist suspect list or membership in a terrorist organisation, however, does not generally result such a presumption.<sup>232</sup>

If a state wanted to exclude a refugee for reasons of national security, it could not do so under Article 1F unless such person had already committed one of the required acts. An alleged terrorist may be considered a threat to national security; however, unless they have committed one of the acts that fall within Article 1F, they cannot be excluded under this provision. Article 1F is not an anti-terrorism provision. Simply bearing the label of 'terrorist' due to placement on a 'terrorism watch-list', or being a member of a terrorist organisation, cannot and should not automatically lead to exclusion under these clauses.<sup>233</sup> However, such

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<sup>226</sup> Ibid. See also, the Court of Appeal decision: *R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)* [2009] EWCA Civ 364, [2010] 2 WLR 17.

<sup>227</sup> Gilbert op cit note 9 at 483.

<sup>228</sup> Rome Statute op cit note 192.

<sup>229</sup> UNHCR op cit note 181 at 25-6.

<sup>230</sup> Gilbert op cit note 9 at 482.

<sup>231</sup> UNHCR op cit note 181 at 38.

<sup>232</sup> Ibid.

<sup>233</sup> UNHCR op cit note 182 at 8.

labelling or membership may lead to an investigation into the applicability of the exclusion clauses.<sup>234</sup>

The requirement of ‘serious reasons’ sets the standard of proof at a higher threshold than a ‘reasonable suspicion’ and indeed, higher than a ‘balance of probabilities’; however, the criminal standard of ‘beyond a reasonable doubt’ would be too great a burden. It is not necessary that the asylum seeker should be or have been formally charged or convicted.<sup>235</sup> Thus, the standard of proof should lie somewhere between a balance of probabilities and beyond a reasonable doubt in order to protect the integrity of the international refugee regime and to ensure that *bona fide* refugees are not unjustifiably excluded.<sup>236</sup>

National security is explicitly mentioned in Article 33(2) as an exception to the principle of non-refoulement. However, one cannot take the national security exception from Article 33 and impute it into Article 1F as these provisions are distinct and were enacted for separate purposes. Article 1F forms a part of the definition of a refugee, and thus an applicant who falls within these exclusion clauses does not obtain refugee status. Article 33(2) does not provide a basis for exclusion from refugee protection.<sup>237</sup> Whereas Article 1F aims to prevent the international refugee regime from awarding refugee status to those who are undeserving of protection, Article 33(2) aims to protect the security of refugee-receiving states. Article 33(2) is thus concerned with the *treatment* of recognised refugees and not with the *recognition* of refugees [*own emphasis*]. It only withdraws the protection against refoulement for a recognised refugee where such person has been deemed a danger to national security in the host state.<sup>238</sup> Thus, if a state were to exclude an asylum seeker on the basis of national security under the provisions of Article 1F, such an act would run against the object and purpose of Article 1F as well as the conceptual framework of the UN Convention.<sup>239</sup>

Therefore, it is conceivable that there could be a situation in which a state is confronted with an asylum seeker whom it perceives is a threat to national security, but who has not committed any acts that would result in their exclusion under Article 1F. In such circumstances, provided the applicant meets the definition of a refugee, a state may not exclude the refugee for national security reasons under Article 1F. However, it is possible that the state may be able

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<sup>234</sup> Ibid.

<sup>235</sup> Hathaway op cit note 97 at 150.

<sup>236</sup> UNHCR op cit note 181 at 38-9.

<sup>237</sup> UNHCR op cit note 182 at 8.

<sup>238</sup> Ibid.

<sup>239</sup> UNHCR ‘UNHCR Comment on Article 14(4)-(6)’ *Annotated Comments on the EC Council Directive 2004/83/EC of 29.04.2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004)* (2005) 30.

to remove the refugee from their territory under the exception to non-refoulement as found in Article 33(2), as shall be considered in the next section.

**(c) Article 33(2)**

The principle of non-refoulement is contained in Article 33 of the UN Convention.<sup>240</sup> This provision aims at preventing states from returning individuals to a country in which they may suffer persecution. Article 33(2) provides the only exceptions to this principle under the UN Convention. As discussed above, the principle of non-refoulement has been held to have reached the level of customary international law and thus, the exceptions to it should be considered increasingly narrowly.<sup>241</sup> Additionally, as previously stated, Article 33(2) is not a ground for terminating or excluding an asylum seeker from refugee status.

Specifically, Article 33(1) prohibits states (or entities falling within a state's responsibility)<sup>242</sup> from returning or expelling refugees in any manner whatsoever. Thus, no matter the means or procedure a state follows in order to return a refugee, be it expulsion, extradition, rejection, return, deportation etc., it will not prevent them from violating the principle of non-refoulement.<sup>243</sup> Additionally, refugees may not be returned to the 'frontiers of *territories* where their life or freedom would be threatened'. As such, the principle of non-refoulement applies not only to the state of origin of the refugee, but to *any* state in which their life or freedom would be threatened [*own emphasis*].<sup>244</sup> Further, rejection at the frontier could constitute refoulement. Where a state is unwilling to grant asylum to an individual, it may not take a course of action that would result in such an individual being returned to a territory where they may face persecution. The state must take another course of action such as removing the asylum seeker to a safe third country or perhaps to provide temporary protection.<sup>245</sup>

The duty of non-refoulement is owed to a refugee from the moment they enter a country; thus, it applies to all asylum seekers, even before a status determination is made. The definition of a refugee in Article 1A(2) of the UN Convention does not require a refugee to have been *formally recognised* as having a well-founded fear of persecution [*own emphasis*].<sup>246</sup>

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<sup>240</sup> For the text of this section, see Literature Review at page 8.

<sup>241</sup> Farmer op cit note 163.

<sup>242</sup> Sir Elihu Lauterpacht and Daniel Bethlehem 'The scope and content of the principle of *non-refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 109.

<sup>243</sup> Ibid at 112.

<sup>244</sup> Ibid at 122.

<sup>245</sup> Ibid at 113.

<sup>246</sup> Ibid at 116. This is also confirmed in the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (2011) 9.

The principle of non-refoulement and its exceptions will apply to such persons as they are to be considered *prima facie* refugees. As such, a state cannot return them to their state of origin or to any other country where their life or freedom will be in danger. This would include states in which the individual would have a well-founded fear of persecution, a risk of torture or other cruel, inhuman or degrading treatment, or any other threat to their life, liberty or physical integrity.<sup>247</sup> In addition, the application of Article 33(1) will require an examination of the individual circumstances in each case, even in instances of mass influx.<sup>248</sup>

With regard to Article 33(2), it should first be noted that this section contains a higher threshold requirement than found in Article 1F. Additionally, Article 33(2) relies on a state's consideration of a future threat from the individual rather than basing their determination on previously committed acts.<sup>249</sup> Thus, should the past acts of a refugee be insufficient to justify the application of the exclusion clauses under Article 1F, it would also be unlikely that such person would meet the higher threshold of the Article 33(2) exception.<sup>250</sup> Article 33(2) contains an exception regarding a refugee who has been 'convicted by a final judgment of a particularly serious crime, [and] constitutes a danger to the community'. Thus, merely being accused of a crime, or the suspicion of having committed a crime, or even being prosecuted for a crime would not be sufficient under this section.<sup>251</sup> Only where a refugee has been convicted by a final judgment – i.e. a judgment from which there is no possibility of appeal – will this exception apply. The exception requires that the conviction be for a particularly serious crime; thus, as previously discussed, only certain major crimes will warrant the use of this part of the exception clause.<sup>252</sup>

This exception is also forward looking, thus subsequent to a conviction by final judgment of a serious crime, an assessment of the danger to the community (of the country of refuge) would still need to be made.<sup>253</sup> The term 'danger' should be interpreted to constitute a particularly serious danger in light of the circumstances surrounding the conviction, length of time since the conviction and other relevant facts.<sup>254</sup> Such a crime may have been committed before or subsequent to admission as a refugee; however, as the exclusion clause in Article

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<sup>247</sup> Ibid at 125.

<sup>248</sup> Ibid at 118-20.

<sup>249</sup> Ibid at 129.

<sup>250</sup> Ibid.

<sup>251</sup> Khan and Schreier op cit note 16 at 16.

<sup>252</sup> Ibid.

<sup>253</sup> Lauterpacht and Bethlehem op cit note 242 at 138.

<sup>254</sup> Ibid at 139.

1F(b) should apply to situations where such crimes were committed prior to admission, it is likely that Article 33(2) is aimed at convictions for particularly serious crimes that were committed *after* admission as a refugee [*own emphasis*].<sup>255</sup>

The exception to the principle of non-refoulement under Article 33(2) also specifically allows states to return refugees – even to countries where they may face persecution, where there are reasonable grounds for regarding the refugee as a danger to national security. Past conduct may be relevant in assessing the future risk that an individual may pose to national security; however, the primary focus should be on prospective threats to national security.<sup>256</sup> The national security exception in Article 33(2) is also specific to the country of refuge. Thus, while states are not limited under the UN Convention to take action within their own territory or jurisdiction to secure national security interests of other states, such actions may not include refoulement.<sup>257</sup>

Unlike the exception of having been convicted of a serious crime, the national security exception only requires that there be ‘reasonable grounds’ for considering that the individual is a danger to national security.<sup>258</sup> Article 33(2) does not specifically identify any of the kinds of acts which would potentially trigger this exception, nor what is necessary to prove that an individual is a danger to national security. However, the term ‘reasonable’ implies that states may not act arbitrarily and should base their conclusions on evidentiary facts.<sup>259</sup> The ‘danger’ posed should also be weighed against the serious consequences faced by the refugee on refoulement, indicating that this section requires that the danger be very serious, especially since the threshold of danger in this section is higher than that in Article 1F.<sup>260</sup> Examples of such acts were espoused by Grahl-Madsen as including, “espionage, sabotage of military installations and terrorist activities.”<sup>261</sup>

Once again, a state should always consider the individual circumstances of a refugee when making an assessment – especially one which would result in a loss of protection. This requirement also ties in with the obligation on states to ensure that there is an actual connection between the individual concerned and the threat to national security.<sup>262</sup> Additionally, the principle of proportionality must apply. Thus, states should take account of the seriousness of

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<sup>255</sup> Ibid at 130.

<sup>256</sup> Ibid at 135.

<sup>257</sup> Ibid.

<sup>258</sup> Van Krieken op cit note 31 at 439.

<sup>259</sup> Lauterpacht and Bethlehem op cit note 242 at 135.

<sup>260</sup> Ibid at 136.

<sup>261</sup> Alte Grahl-Madsen *Commentary on the Refugee Convention 1951* (1997) 235-6.

<sup>262</sup> Lauterpacht and Bethlehem op cit note 242 at 137.

the threat to national security, the likelihood and imminence of such a threat and whether such a threat would be alleviated or eliminated if the relevant individual was removed, the risk to the individual should they be ‘*refouled*’ and whether there is an alternative course of action which does not include refoulement.<sup>263</sup>

Therefore, Article 33(2) provides states with a means to return refugees in instances where they pose a threat to national security. However, as in Article 1F, states may only return refugees and asylum seekers under limited circumstances. This section contains a specific reference to national security, where Article 1F did not; however as the threshold is higher, it would only be in rare and extreme circumstances that the Article 33(2) exceptions would apply. Additionally, there has been a trend against the use of the Article 33(2) exceptions, and there have even been arguments made that the exceptions should be entirely disregarded.<sup>264</sup>

*(i) Non-refoulement as a ‘Jus Cogens’ norm*

As discussed previously, the principle of non-refoulement has become a part of customary international law, arguably attaining the status of *jus cogens*. Alice Farmer argues that with this status the exceptions to the principle, which have not obtained customary law status, are limited.<sup>265</sup> She argues that the exceptions should be interpreted and employed only in an extremely restricted manner in order to protect and preserve the *jus cogens* character of non-refoulement. The exceptions to the norm, while setting a high threshold, are fairly broad. Thus, were a state to interpret them generously, the exceptions could undermine the principle of non-refoulement as a *jus cogens* norm. In particular, while Article 1F should not be construed as an anti-terror provision, Article 33(2) specifically refers to national security, and may form the basis of anti-terror legislation.<sup>266</sup>

As a *jus cogens* norm, the principle of non-refoulement should function in an absolute and unconditional manner; however, the exceptions take away from this by creating conditions. Additionally, *jus cogens* norms form part of the international public order, superseding treaty law; thus, the exceptions in Article 33(2) create a conflict between the UN Convention and the international public order.<sup>267</sup> Thus the prevalence and scope of these exceptions should be considered. Taken from a human rights context, Erika de Wet states that: “As these rights by their very nature are directed at the protection of individuals within the territory of state parties, as opposed to regulating the relationship between states, one is forced to rethink the scope of

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<sup>263</sup> Ibid at 137-8.

<sup>264</sup> Ibid at 130-1.

<sup>265</sup> Farmer op cit note 163 at 28.

<sup>266</sup> Ibid.

<sup>267</sup> Ibid at 29.

application of the concept of *jus cogens*.<sup>268</sup> Thus, *jus cogens* norms in a human rights context are necessary to protect individuals' fundamental rights.

The international community would perceive the breach of an international norm as a wrong, from which there should have been no derogation. However, despite the fact that one could technically argue that the exceptions to non-refoulement are not derogations, there is a correlation in the argument against the exceptions in such a context.<sup>269</sup> Notably, such an argument would also align with Article 42 of the UN Convention which prohibits states from electing to make a reservation to Article 33. Indeed, the concept of the principle of non-refoulement as *jus cogens* is powerful; it would prevent states from making individual or even regional objections to it. Should states be allowed to create broad anti-terror policies which undermine this norm, the purpose and power of *jus cogens* would be endangered.<sup>270</sup> Farmer agrees with Lauterpacht and Bethlehem that the UN Convention should not be read without Article 33(2) and that removing the exceptions would be plainly inappropriate. However, there is consensus that as the principle of non-refoulement increasingly trends towards a *jus cogens* norm, so should the exceptions be read in an increasingly limited manner.<sup>271</sup>

#### *(ii) Non-entrée*

In order to avoid violating the principle of non-refoulement, increasingly many states have created policies and practices in which refugees are not returned, as is constituted by the principle of non-refoulement, but are refused entry to countries. The term '*non-entrée*' originated in 1992; however, it is not formally defined.<sup>272</sup> *Non-entrée* strategies generally aim at preventing asylum seekers from being able to access asylum and refugee status processes. An example would be the 'interception' programmes which seek to prevent persons who are in the process of migrating from reaching the country in which they intend to apply for asylum.<sup>273</sup> Such policies often result in the intercepted persons being sent to a third state, which then may return such persons to their country of origin, even where to do so would constitute refoulement.<sup>274</sup> Other policies relevant to *non-entrée* include visa requirements, carrier sanctions, requirements that refugees apply for asylum in the first safe country they enter, as well as regulations concerning international zones.

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<sup>268</sup> Erika de Wet 'The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 97 at 99-100.

<sup>269</sup> Farmer op cit note 163 at 29.

<sup>270</sup> Ibid at 29-30.

<sup>271</sup> Ibid at 33 and Lauterpacht and Bethlehem op cit note 242 at 132-3.

<sup>272</sup> Leirserson op cit note 57 at 193.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid at 193-4.

Refugee programmes in the global north are largely focused on resettlement. Recognised refugees apply to the UNHCR for resettlement and if approved, they will be able to travel to the U.S. or Europe to be resettled. This is a vastly different scenario than that faced by the bulk of refugees, who will flee their country to seek refuge in another state and apply for refugee status once they are at the border or have entered the desired destination state.<sup>275</sup> The question posed by Leirserson is whether *non-entrée* policies violate the principle of non-refoulement.

After considering the humanitarian and collaborative intent of the UN Convention to provide refuge and protection for refugees,<sup>276</sup> she argues that such policies, especially where they apply indiscriminately to groups of refugees, cannot justifiably result in a broad-based refusal to provide access to asylum proceedings.<sup>277</sup> To do so would certainly be a failure to consider an individual's personal circumstances. Additionally, while states are not required to accept all refugees seeking admission, especially where an individual is perceived as a threat to national security, they cannot employ Article 33(2) to implement policies which intercept asylum seekers abroad under the guise of a blanket declaration that they are a security risk.<sup>278</sup>

As such, *non-entrée* policies do not necessarily violate the principle of non-refoulement, nor are they inherently illegal. However, certain policies have the potential of indirectly violating the principle of non-refoulement, which, as a *jus cogens* norm, would constitute an act against the international public order. Lauterpacht and Bethlehem also agree that a state's responsibility includes its conduct – as well as those who act under its auspices – outside of its own territory.<sup>279</sup> This was also confirmed in the *Lotus* case,<sup>280</sup> in which the court held that the U.S., by intercepting refugees in the high seas and taking them aboard U.S. boats assumed jurisdiction and returning them constituted a violation of the principle of non-refoulement. Notably, the South African Refugees Act holds rejection at the border to be synonymous with refoulement,<sup>281</sup> indicating that there are states which do recognise that *non-entrée* policies may result in refoulement. Thus, while some states may employ such *non-entrée* policies in order to prevent the admission of refugees where there are concerns for national security, they would nevertheless have a duty to ensure that such policies do not amount to a violation of the principle of non-refoulement.

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<sup>275</sup> Ibid at 194.

<sup>276</sup> Ibid at 191-7.

<sup>277</sup> Ibid at 206.

<sup>278</sup> Ibid.

<sup>279</sup> Lauterpacht and Bethlehem op cit note 242 at 110.

<sup>280</sup> Supra note 23.

<sup>281</sup> Khan and Schreier op cit note 16 at 7.

**(d) Article 32**

Article 32 of the UN Convention provides for the expulsion of an already lawfully present refugee. It states:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they deem necessary.<sup>282</sup>

Expulsion is distinguished from the principle of non-refoulement, as expulsion under Article 32 does not include return to the refugee's country of origin or to any territory where the refugee's life or freedom would be at risk.<sup>283</sup> As with Article 33, the concept of 'national security and public order' is to be interpreted restrictively. Only grave threats to national security can warrant the exclusion of a lawfully present refugee. Additionally, in contrast to Article 33, Article 32 contains an explicit requirement that a decision to expel be made 'in accordance with due process of law.' However, it is nevertheless arguable that such a requirement should be read into Article 33 of the UN Convention.<sup>284</sup> The section further details the specific procedures that are at minimum required in order for a state to expel a refugee.

The UNHCR recognises in its 'Note on Expulsion of Refugees' that there is a balancing act at play between the national security of a state and the serious consequences faced by a refugee on expulsion. Refugees, by definition, cannot return to their home country and do not necessarily have an alternate country in which they could return should they be expelled. Therefore, expulsion has particularly harsh consequences for refugees as they do not have the entitlement to remain in any other country on a permanent basis.<sup>285</sup> States are thus encouraged to take into account the personal circumstances of the refugee facing expulsion, and in particular the hardships that the refugee would face as a result of their status as a refugee. Therefore, consideration should be given to whether there are mitigating circumstances, or whether the refugee could be prosecuted under the state's normal penal procedures.<sup>286</sup>

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<sup>282</sup> Article 32 of the UN Convention.

<sup>283</sup> UNHCR 'Note on Expulsion of Refugees EC/SCP/3' 24 August 1977, available at <http://www.unhcr.org/en-us/excom/scip/3ae68cbf14/note-expulsion-refugees.html>, accessed on 9 October 2017.

<sup>284</sup> Lauterpacht and Bethlehem op cit note 242 at 134.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

Article 32 is also a relatively unenforceable provision as it would be difficult to find another state that is willing to accept the expelled refugee, which is also a state in which the refugee will not be at risk of persecution.<sup>287</sup> Expulsion orders may not be enforced unless there is another country willing to accept the refugee.<sup>288</sup> Thus, the UNHCR recognises that a state may detain a refugee awaiting expulsion for a longer period than an ordinary alien facing expulsion. However, it urges that detention not be prolonged unduly.<sup>289</sup>

Therefore, as in Article 33, while Article 32 does not result in the loss of refugee status, it does provide a state with a means to expel a refugee on the basis of national security. However, Article 32 does not absolve a state of its obligations under the principle of non-refoulement in Article 33. Nevertheless, should a state, after following the procedures required by Article 32, find that a refugee should be expelled on reasons of national security, it is likely that the national security exception in Article 33(2) will also be met, and thus a state may even return a refugee to a territory in which their life or freedom is threatened.<sup>290</sup> Notably, Article 32(3) requires states to delay expulsion in order to provide refugees with the opportunity to pursue their own options – thus providing a potential means to avoid the grave consequences awaiting them in their country of origin.<sup>291</sup> However, states are not obligated to delay expulsion where the refugee already possesses valid documentation for entry into another safe country where expulsion could be enforced.<sup>292</sup>

Thus, while Article 32 provides states with a means to expel lawfully present refugees on the basis of national security, it was intended to limit the right of states to expel refugees both procedurally and substantively.<sup>293</sup> Procedurally, an administrative agency may order expulsion; however it is required that the refugee have the right to appeal against such a decision to a more senior authority, which is better able to consider the full circumstances of the case, including the particular vulnerabilities of a refugee. Additionally, the due process requirement would necessitate the application of procedural fairness, reasonableness and the rule of law.<sup>294</sup> The only rights that may be constrained due to *compelling* national security concerns are the right of the refugee to representation, and to submit evidence and to an appeal [*own emphasis*].

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<sup>287</sup> Ibid

<sup>288</sup> UNHCR ‘The Refugee Convention, 1951: The *Travaux preparatoires* analysed with a Commentary by Dr. Paul Weis’ (1990) 233.

<sup>289</sup> Ibid.

<sup>290</sup> Hathaway op cit note 14 at 692.

<sup>291</sup> Ibid at 692-3.

<sup>292</sup> Ibid.

<sup>293</sup> Ibid at 694.

<sup>294</sup> Ibid.

With regard to the substantive limitations, if a state were to seek expulsion on the basis of national security, it would need to show that the refugee's actions or presence would, objectively and with a reasonable possibility, substantially threaten the national security interests of the host state.<sup>295</sup> This is a high threshold and therefore, while national security concerns may permit a state to expel a refugee, and limit the refugee's procedural rights, the state cannot expel a refugee on capricious or arbitrary national security concerns and certainly not without specific consideration for the refugee's individual circumstances and connection to the threat.

**(e) Article 9**

Article 9 of the UN Convention concerns the provisional measures that a state may take with regard to asylum seekers in times of war or other exceptional circumstances. Specifically, Article 9 states:

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that the person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.<sup>296</sup>

This provision applies only in very limited and exceptional circumstances and it specifically concerns persons who have yet to be formally recognised as refugees. It also places a high threshold on states as to when they may take provisional measures, requiring that such measures be *essential* to national security [*own emphasis*]. Provisional measures may include the suspension of rights under the UN Convention, and may include detention while awaiting determination of refugee status.<sup>297</sup> The limit on essential measures implies that the measures taken must be logically connected to averting the national security threat.<sup>298</sup>

Hathaway argues that provisional measures may be taken against a subset or even all asylum seekers collectively in a state, but only under the most extreme national security concerns.<sup>299</sup> However, this seems to be inconsistent with the wording of the provision, which requires that the measures pertain to a particular person – implying that a State cannot impose provisional measures in a general fashion on a group of asylum seekers, but should have consideration for the individual circumstances of each person. Nevertheless, such measures are limited in application as they must be provisional and not continued on an ongoing basis. Where an asylum seeker is determined to be a refugee, the provisional measures must cease to

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<sup>295</sup> Ibid at 695.

<sup>296</sup> Article 9 of the UN Convention.

<sup>297</sup> Hathaway op cit note 14 at 266.

<sup>298</sup> Ibid at 267.

<sup>299</sup> Ibid.

be employed against them,<sup>300</sup> and where an individual is subsequently considered a threat to national security, the provisions of Article 32 and 33 would apply.

Therefore, Article 9 provides states with the means, in exceptional circumstances, to impose certain measures which can limit asylum seeker's rights under the UN Convention pending a status determination. However, this provision does not provide states with the power to reject or return refugees on the basis of national security, and thus, it is not pertinent to this paper.

## II. Other National Security Exceptions

As previously stated, there has been a trend in international law against exceptions to the principle of non-refoulement.<sup>301</sup> In particular, the exception of 'national security' is not included in many other treaties or regional agreements. In particular, the Convention against Torture<sup>302</sup> contains a clause reflecting the principle of non-refoulement in Article 3. However, Article 3 contains no exceptions.<sup>303</sup> Nonetheless, the CAT only restricts refoulement in the limited circumstance of where the refugee would be in danger of being subjected to torture. Nevertheless, this provision acts as an additional safeguard to refugees of whom a state seeks to return under Article 33(2) for reasons of national security. Should that refugee, while falling within the national security exception of Article 33(2), be at risk of torture in their state of origin, a state bound by the CAT could not return that individual. Additionally, regional documents have also been found to further limit or completely remove exceptions when including the principle of non-refoulement.<sup>304</sup> Neither the OAU Convention nor the Cartagena Declaration<sup>305</sup> contain any exceptions to the principle.<sup>306</sup> There are also no exceptions explicitly stated to non-refoulement in the American Convention on Human Rights,<sup>307</sup> but this Convention does permit derogation under certain circumstances.<sup>308</sup>

There are some regional agreements which do permit 'national security' exceptions; however, relatively narrow language is used. For example, the Declaration on Territorial

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<sup>300</sup> Ibid at 268.

<sup>301</sup> Lauterpacht and Bethlehem op cit note 242 at 130-2.

<sup>302</sup> CAT op cit note 47.

<sup>303</sup> Legomsky & Rodríguez op cit note 90 at 1133.

<sup>304</sup> Farmer op cit note 163 at 11-12.

<sup>305</sup> Section III, para 5 of the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984.

<sup>306</sup> Farmer op cit note 163 at 12.

<sup>307</sup> Article 22(8) of the American Convention on Human Rights, 1969.

<sup>308</sup> Farmer op cit note 163 at 12.

Asylum<sup>309</sup> states that “exception may be made to the forgoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons,” and the Asian-African Refugee Principles allow for exceptions only “for overriding reasons of national security or safeguarding populations.”<sup>310</sup> The threshold of ‘overriding reasons’ is arguably quite low and could compare to a ‘balancing of interests’.<sup>311</sup> Thus, while the CAT and some of the other regional agreements would place further limitations on a state seeking to return or reject a refugee on the basis of national security, states which are not party to the UN Convention, but which are party to the Declaration on Territorial Asylum or the Asian-African Refugee Principles, would be subject to a lesser burden.

Overall, this chapter has provided a detailed analysis of the provisions within the UN Convention that would allow a state to reject, return or expel a refugee on the basis of national security. It showed how the ground of national security tends to be limited in almost every provision in which it occurs. Additionally, this chapter discussed the emergence of the principle of non-refoulement as a *jus cogens* norm – and how this has affected and will affect the national security exceptions. It also considered the concept of *non-entrée* and how national security policies which act as a barrier to claims of asylum may violate the principle of non-refoulement, thus further curtailing the circumstances in which a state may employ such regulations. Additionally, this chapter examined provisions from other international documents and agreements which provide states with a means to reject or return refugees on the basis of national security, highlighting the trend towards an absolute or extremely limited principle of non-refoulement. The following chapter will consider the national security exceptions as interpreted and enforced by U.S. domestic law.

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<sup>309</sup> Article 3 of the Declaration on Territorial Asylum, 1967.

<sup>310</sup> Asian-African Legal Consultative Committee (AALCO) ‘1966 Asian-African Refugee Principles’ *Eight Session* 8 August 1966 at 335.

<sup>311</sup> Andreas Zimmermann, Jonas Dörschner and Felix Machts *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (2011) 1412.

# Chapter Four

## I. Interaction between U.S Law and International Law

This paper is primarily focused on the national security exceptions to refugee status/admission as found in international refugee law. However, subsequently, this paper will consider President Trump's refugee and immigration bans under international law. Thus, while the domestic refugee legislation of the U.S. is not pertinent to this analysis, it is nevertheless necessary in order to provide a background perspective into how the U.S. currently interprets and applies the UN Convention and other international instruments.

In the Republic of South Africa, the Constitution<sup>312</sup> obliges the judiciary to consider international law when interpreting the Bill of Rights.<sup>313</sup> There is no such duty found in the U.S. Constitution.<sup>314</sup> Nevertheless, Article VI of the U.S. Constitution states that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.<sup>315</sup>

Thus, treaties that have been signed and ratified by the U.S. form part of the supreme law of the land, and, where such treaties are self-executing, will create binding obligations on the President – in addition to prevailing over inconsistent state and federal law enacted prior to the treaty. Therefore, in some instances, the U.S. Supreme Court has occasionally accepted international law as a persuasive authority when determining the meaning of certain provisions in the U.S. Constitution.<sup>316</sup> Additionally, a U.S. District Court in New York held that courts have a duty to interpret statutes in line with treaty obligations, as “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”<sup>317</sup> However, a few years later, the same court acknowledged that “. . . Congress has the power to override international law if it so chooses, *Restatement* §402, cmt.I.”<sup>318</sup>

Nevertheless, in more recent times it has been noted that when the U.S. does agree to sign an international treaty, specifically one concerning human rights, it often seeks to impose

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<sup>312</sup> Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

<sup>313</sup> Rex D. Glensy ‘The Use of International Law in U.S. Constitutional Adjudication’ (2011) 25 *Emory International Law Review* 197 at 198.

<sup>314</sup> Constitution of the United States of America, 1789. Hereafter ‘U.S. Constitution’.

<sup>315</sup> Article IV of the U.S. Constitution.

<sup>316</sup> Glensy op cit note 313 at 198.

<sup>317</sup> *Unites States v. PLO*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1998) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

<sup>318</sup> *United States v. Bin Laden*, 92 F. Supp. 2d 189, 196 (S.D.N.Y. 2000).

the condition that it will only accept its international obligations provided that its domestic Constitution remains supreme.<sup>319</sup> This does not fall within the general consensus of what ratification substantively entails, which is to bring domestic law into alignment with international standards.<sup>320</sup> Additionally, the U.S. continually refuses to endorse the enforceability of the conditional human rights obligations that it accepts – relying on its own notion that international rights are mostly not ‘self-executing’. Thus, U.S. courts are not readily able to implement such international rights.<sup>321</sup> Finally, the U.S. also denies its own citizens the right to access the individual complaint mechanisms of the United Nations. This includes the mechanisms aimed at adjudicating issues regarding civil and political rights, as well as those of racial discrimination and freedom from torture.<sup>322</sup>

The U.S. acceded to the Protocol<sup>323</sup> in 1968, with only two minor reservations related to taxation and social security benefits. The U.S. did not attempt to impose any conditions concerning the Protocol’s compatibility with U.S. domestic law or their Constitution.<sup>324</sup> The Refugees Act of 1980 was intended to incorporate the Protocol into U.S. domestic law, and this was confirmed in the case of *INS v. Cardoza-Fonseca*, in which it was stated that:

If one thing is clear from the legislative history of the new definition of ‘refugee’, and indeed the entire 1980 Act, it is that one of Congress’s primary purposes was to bring U.S. refugee law into conformance with the 1967 United Nations Protocol relating to the Status of Refugees . . .<sup>325</sup>

Nevertheless, it is only in rare situations that American decision makers display any awareness of how any of the other Protocol member-states have implemented the Convention and Protocol.<sup>326</sup> For example, in the case of *Matter of Acosta*, the court stated that “[s]ince Congress intended the definition of a refugee in section 101(a)(42)(A) of the Act to conform to the Protocol, it is appropriate for us to consider various international interpretations of that agreement. However, these interpretations are *not binding upon us . . .*”<sup>327</sup> [*own emphasis*]

Notably, the U.S. fails to concede the essential underlying theory of the UN Convention that persons who meet the UN Convention’s refugee definition are refugees and holders of rights, even when a state has yet to provide formal recognition of their status.<sup>328</sup> Such persons

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<sup>319</sup> Hathaway and Cusick op cit note 24 at 481.

<sup>320</sup> Ibid.

<sup>321</sup> Ibid at 482.

<sup>322</sup> Ibid.

<sup>323</sup> Protocol op cit note 5.

<sup>324</sup> Ibid at 483.

<sup>325</sup> *INS v. Cardoza-Fonseca* supra note 26 at 436.

<sup>326</sup> Hathaway & Cusick op cit note 24 at 483.

<sup>327</sup> *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985) at 220.

<sup>328</sup> Hathaway & Cusick op cit note 24 at 484-5.

are entitled to the rights found in Articles 2-34 of the UN Convention, but they are not entitled to ‘asylum’ in any state party.<sup>329</sup> In the U.S. Supreme Court’s initial decisions after accession to the Protocol,<sup>330</sup> the court held that the only clear obligation that the U.S. owed was that of non-refoulement. Additionally, while the U.S. recognised in the *Cardoza-Fonseca* case that the standard of proof regarding the ‘well-founded fear of persecution’ element in an asylum case is 10%, it has held that a refugee or asylum seeker must show that there is a *probability* of persecution on return in order to be granted ‘withholding of removal’ (non-refoulement) under INA §241(b)(3) [*own emphasis*].<sup>331</sup>

## II. The Functioning of U.S. Refugee Law

As previously stated, the definition of ‘refugee’ under U.S. domestic law can be found in §101(a)(42) of the INA.<sup>332</sup> The U.S., however, largely follows a different procedure when it comes to accepting refugees. In fact, its approach is the opposite of what is required under the international refugee regime.<sup>333</sup> Under U.S. law, the focus of the refugee system is on the recognition and resettlement of persons overseas who have applied for refugee status. This process is governed by §207 of the INA.<sup>334</sup> The UN Convention and Protocol do not require that states recognise and provide rights to refugees who are outside of their territory; however, it does require that states acknowledge those who are within or at their borders. Thus, someone who meets the UN Convention’s definition of a refugee is entitled to the Convention’s rights at the border of a host state before that state has formally recognised them as a refugee.<sup>335</sup> For example, the state cannot *refoule* a refugee from their border unless it can be determined that such a person is not a refugee or that they are subject to one of the exceptions to Article 33(2).

The United States’ Office of Refugee Resettlement is overseen by the Department of Health and Human Services. Under the resettlement programme, a limited number of individuals are selected from refugee camps around the world for admission. This is often done in consultation with and on the recommendation of the UNHCR.<sup>336</sup> Thus, while such persons have already been recognised as refugees by the UNHCR, the U.S. will still perform its own

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<sup>329</sup> Ibid at 485.

<sup>330</sup> *Stevic* supra note 25 and *Cardoza-Fonseca* supra note 26.

<sup>331</sup> Legomsky & Rodríguez op cit note 90 at 1033.

<sup>332</sup> INA op cit note 21.

<sup>333</sup> Hathaway & Cusick op cit note 24 at 501.

<sup>334</sup> INA op cit note 21.

<sup>335</sup> Hathaway & Cusick op cit note 24 at 501.

<sup>336</sup> Michael J. Churgin ‘Is Religion Different? Is There a Thumb on the Scale in Refugee Convention Appellate Court Adjudication in the United States? Some Preliminary Thoughts’ (2016) 51(2) *Texas International Law Journal* 213 at 215.

assessment of the individual's status as a refugee before recognising them as a refugee. This process involves an intricate security check and multiple interviews.<sup>337</sup> The procedure and elements can be found in §208 of the INA.

The applicant needs to show a well-founded fear of persecution on account of one of the listed grounds.<sup>338</sup> This is assessed on an objective and subjective basis. Persecution is not defined in the INA or in other regulations; however, it can be determined through an examination of the case law and interpretations as put forward by the Department of Justice (DOJ) and the Department of Homeland Security (DHS).<sup>339</sup> Refugees must also be able to show that they are unwilling or unable to return to their country of origin. Additionally, the U.S. takes into consideration past persecution and the severity of past harm.<sup>340</sup> Thus, the U.S. expands the definition of a refugee to include those who have suffered persecution in the past, even where there has been a change in conditions and no future persecution is feared. However, there are additional barriers to relief when a claim is based solely on past persecution.<sup>341</sup>

#### **(a) U.S. Refugee Procedure and the National Security Exceptions**

The security and interview process can take up to 24 months before the applicant arrives in the U.S.<sup>342</sup> Further along in the process, the refugees will have to interact with the United States Citizenship Immigration Services (USCIS), which is a unit within the DHS. A refugee status determination assessment and interview will be performed by officers of USCIS.<sup>343</sup> Once a refugee has met the required elements, they will also need to show that they are not subject to any of the bars to admission, which include conduct similar to that found in Article 1F of the UN Convention. Specifically, §208(b)(2)(A) of the INA states:

(2) Exceptions. -

- (A) In general. - Paragraph (1) shall not apply to an alien if the Attorney General determines that -
- (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
  - (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
  - (iii) there are serious reasons for believing that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States;

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<sup>337</sup> Wadhia op cit note 60 at 672.

<sup>338</sup> Ibid.

<sup>339</sup> Ibid at 673.

<sup>340</sup> *Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989).

<sup>341</sup> Legomsky & Rodríguez op cit note 90 at 927.

<sup>342</sup> Wadhia op cit note 60 at 673.

<sup>343</sup> Ibid.

- (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;
- (v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 212(a)(3)(B)(i) or section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 212(a)(3)(B)(i), the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or
- (vi) the alien was firmly resettled in another country prior to arriving in the United States.<sup>344</sup>

Therefore, U.S. domestic legislation has incorporated the Article 1F exclusions. Section 208(b)(2)(A)(iii) is almost exactly similar to that of Article 1F(b), and §208(b)(2)(A)(i) could be argued to be in alignment with Article 1F(a) and (c). However, the U.S. has incorporated the Article 33(2) exceptions (to non-refoulement) in the UN Convention into their exceptions to asylum clause. In particular, the INA states that a particularly serious crime, as mentioned in §208(b)(2)(A)(ii), would be that of an ‘aggravated felony’.<sup>345</sup> Thus, refugees applying from overseas face an incredibly high legal standard in order to gain recognition of their status and to subsequently be admitted into the U.S. However, there is also another way in which an individual may seek refugee status in the U.S.

Accommodating the traditional practices of international refugee law, U.S. law provides that an individual may apply for protection (‘asylum status’) where they meet the domestic definition of a refugee, when they are already in the U.S. or when they are seeking admission at the border.<sup>346</sup> These applications can either be affirmative or defensive. An affirmative application is when a refugee applies for asylum at a USCIS Asylum Office or on arrival at a U.S. border.<sup>347</sup> A defensive application is when a refugee, who is already within the U.S., applies for asylum as a defence during removal proceedings. Additionally, the U.S. has created separate forms of relief in defensive applications: an application for asylum or an application for withholding of removal.<sup>348</sup> Defensive applications for asylum or withholding of removal are filed with the immigration judge.<sup>349</sup>

In an application for asylum, the individual would need to show that he/she meets the definition of a refugee under the INA and that he/she is not subject to any of the bars. Where an application for asylum is denied, the court will automatically consider an application for

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<sup>344</sup> Section 208 of the INA op cit note 21.

<sup>345</sup> Section 208(b)(2)(B)(i) of the INA op cit note 21.

<sup>346</sup> Oakes op cit note 46 at 846.

<sup>347</sup> Legomsky & Rodríguez op cit note 90 at 920.

<sup>348</sup> Ibid at 919.

<sup>349</sup> INA 8 CFR §208.2(b) (2014).

withholding of removal as an alternative.<sup>350</sup> Withholding of removal also has a higher burden, as the individual needs to show a probability (>50%) that they will face harm/persecution on return. There is also a bar on this form of relief if the person has been convicted of a particularly serious crime with a five-year sentence (regardless of the time actually served). Regrettably, the U.S. provides greater rights to those who are awarded asylum to those granted withholding of removal. Consequently, those granted asylum may later adjust their status to that of a permanent resident, and eventually gain citizenship, withholding of removal provides no such option.<sup>351</sup>

### **(b) The Principle of Non-Refoulement under U.S. Immigration and Refugee Law**

The principle of non-refoulement under Article 33 of the UN Convention applies to all refugees who meet the UN Convention definition. The U.S., however, applies it to those it has rejected for asylum, after finding that they do not meet the U.S. domestic definition of a refugee. Therefore, the U.S. utilises the principle to protect those individuals who are barred from asylum, but fall within the small window of those barred from asylum but still eligible for withholding of removal. This includes those who did not apply for asylum within one year of arrival in the U.S., as required by §208(a)(2)(B) of the INA, or who had failed in a previous application for asylum,<sup>352</sup> but would still be subject to persecution on return. Additionally, applications for asylum in the U.S. are discretionary;<sup>353</sup> thus, even where an individual meets the definition and does not fall within any of the exceptions, he/she may still be denied asylum.<sup>354</sup> In contrast, withholding of removal is mandatory where the requirements are met.<sup>355</sup>

That the U.S. holds an aggravated felony to automatically constitute a particularly serious crime is problematic, especially when considering the expansion of the definition of an aggravated felony.<sup>356</sup> For example, a crime such as ‘petty larceny’ could constitute an aggravated felony if the sentence is at least one year.<sup>357</sup> This seems to be out of touch with the UNHCR Handbook, which requires that the word ‘crime’ in Article 1F(b) should only denote a capital crime or ‘a very grave punishable act’.<sup>358</sup> Additionally, the UNHCR Handbook requires that the ‘nature of the offence’ be balanced against the ‘degree of persecution feared’

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<sup>350</sup> Legomsky & Rodríguez op cit note 90 at 920.

<sup>351</sup> INA 8 U.S.C. § 1231(b)(3) (2012).

<sup>352</sup> Refugees may only apply for asylum in the U.S. once under INA §208(a)(2)(C).

<sup>353</sup> Legomsky & Rodríguez op cit note 90 at 1055-9.

<sup>354</sup> Churgin op cit note 336 at 215.

<sup>355</sup> Ibid.

<sup>356</sup> Legomsky & Rodríguez op cit note 90 at 1053.

<sup>357</sup> Ibid at 617.

<sup>358</sup> UNHCR op cit note 18 para 155.

when determining whether the crime precludes asylum.<sup>359</sup> However, the U.S. Board of Immigration Appeals (BIA) has explicitly rejected this approach under both the ‘serious non-political crime’ and ‘particularly serious crime’ exceptions. Instead, the BIA has held that the nature of the crime is the determining factor when assessing the level of seriousness.<sup>360</sup> This was confirmed by the U.S. Supreme Court, which found that the recommendations in the UNHCR Handbook were ‘useful’ but not ‘binding’.<sup>361</sup>

### **(c) U.S. Immigration and Refugee Law and the Convention against Torture**

In 1990, the U.S. Senate ratified the CAT, along with an extensive list of reservations, understandings and declarations.<sup>362</sup> Additionally, the CAT was declared to be not self-executing and consequently, the U.S. falls short on many of its obligations under the treaty.<sup>363</sup> Notably, the U.S. held that Article 3 of the CAT (regarding non-refoulement) required that a person can only not be returned where “it is more likely than not that he will be tortured.”<sup>364</sup> Thus, the U.S. increased the standard of proof required in order to obtain relief under the non-refoulement provision of the CAT.

Furthermore, the U.S. also placed exceptions on ‘withholding of removal’ under the CAT, excluding those who had been convicted of a particularly serious crime, who had committed acts of persecution, or who are a threat to national security.<sup>365</sup> Thus, the U.S. excludes people from protection under this section, whereas the CAT held this rule as absolute.<sup>366</sup> In order to bring the domestic legislation in line with their international obligations under the CAT, the Justice Department issued interim regulations that created a distinction between ‘withholding of removal’ and ‘deferral of removal’, which is a more limited remedy. There is no criminal bar to accessing the remedy of ‘deferral of removal’; however, when the danger of torture subsides, it is significantly easier to *refouler* a person granted ‘deferral’ than one who was granted ‘withholding’.<sup>367</sup>

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<sup>359</sup> Ibid at 156.

<sup>360</sup> Legomsky & Rodríguez op cit note 90 at 1054.

<sup>361</sup> *INS v. Aguirre*, 526 U.S. 415, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) at 1445-7.

<sup>362</sup> Legomsky & Rodríguez op cit note 90 at 1120.

<sup>363</sup> Ibid at 1122-3.

<sup>364</sup> United States Congress *Resolution of the United States Senate Ratifying the Convention against Torture* (1990).

<sup>365</sup> INA §241(b)(3)(B).

<sup>366</sup> Legomsky & Rodríguez op cit note 90 at 1131-2.

<sup>367</sup> Ibid at 1132.

#### (d) U.S. Policies of Non-Entrée

Finally, the U.S. has also engaged in *non-entrée* strategies.<sup>368</sup> Notably, the requirement that an application for asylum be filed within one year of arrival in the U.S.<sup>369</sup> is particularly limiting – despite the presence of a few exceptions.<sup>370</sup> There is no strict deadline in the UN Convention, and to impose one on asylum seekers who are often disorientated, traumatised and without significant resources is an incredible burden that has resulted in almost a third of applicants being excluded.<sup>371</sup>

The Expedited Removal procedures, established in 1996, are aimed at deterring fraudulent entries, reducing asylum applications, and to work speedily and cheaply through asylum applications.<sup>372</sup> These procedures have been found to be increasingly problematic, with the U.S. Commission on International Religious Freedom reporting that “one-sixth of migrants whom it observed at U.S. ports of entry who expressed a fear of return were (illegally) denied the opportunity to apply for political asylum.”<sup>373</sup> The Bush Administration also employed the Coast Guard to interdict and return Haitians travelling to the U.S. via boat – including asylum-seekers – citing national security concerns.<sup>374</sup> While a refugee may be returned on account of being a threat of national security, such a consideration needs to be weighed up in a formal procedure on an individual scale. It has also been held by counter-terror experts that the Haitian boat travellers were not viewed as a terrorist threat.<sup>375</sup>

Other *non-entrée* tactics include the detention of asylum-seekers, criminal persecutions for illegal entry (in violation of Article 31 of the UN Convention), denying employment authorisation, application fees, visa and carrier sanctions and the reinstatement of removal orders.<sup>376</sup> Therefore, in combination with the other inconsistencies with its obligations under international law, it is clear that the U.S. has inadequately implemented its obligations under international refugee law into their domestic legislation. There is a pattern of consistent avoidance of its international commitments and duties in addition to a failure to take account of international and foreign law when interpreting its implementing legislation. One may be tempted to accredit this to the fact that the U.S. is not party to the Vienna Convention;<sup>377</sup>

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<sup>368</sup> Ibid at 1071.

<sup>369</sup> INA §208(a)(2)(B).

<sup>370</sup> Legomsky & Rodríguez op cit note 90 at 1071; see also INA §208(a)(2)(D).

<sup>371</sup> Ibid at 1072.

<sup>372</sup> Ibid at 1079.

<sup>373</sup> United States Commission on International Religious Freedom *Report on Asylum Seekers in Expedited Removal, Volume II* (2005) 20-3.

<sup>374</sup> Kerwin op cit note 35 at 757-8.

<sup>375</sup> Ibid at 758.

<sup>376</sup> Legomsky & Rodríguez op cit note 90 at 1083-9.

<sup>377</sup> Vienna Convention op cit note 131.

however, U.S. courts have recognised the Convention as authoritative.<sup>378</sup> In conclusion, the U.S. has shown a preponderance to disregard international law and its commitments therein – a trend that has been furthered by President Trump’s immigration executive orders.

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<sup>378</sup> Legomsky & Rodríguez op cit note 90 at 1121.

# Chapter Five

## I. The Executive Orders, the Proclamation and U.S. Case Law

At the time of writing this paper, the refugee ban contained in the second executive order has expired.<sup>379</sup> However, it is nevertheless still relevant to consider its legality under international law from an academic perspective. Additionally, President Trump has issued a proclamation which imposes immigration bans indefinitely on many Muslim-majority countries.<sup>380</sup> While this paper is focused on refugee law, immigration is necessarily connected as many refugees will not reveal their wish to apply for asylum until they have reached their chosen country of refuge. Other asylum seekers may seek to flee persecution in their country of origin and, without an understanding of international refugee law, may seek immigration instead of asylum. Thus, a blanket immigration ban may deny and also deter legitimate refugees from seeking asylum contrary to the principles of international refugee law. In this paper, the most important acts of President Trump are those of EO1, EO2 and the Proclamation. The content of these acts changed in response to the various court opinions that emerged for and against the bans. Thus, before analysing the international legality of the orders, it is necessary to examine their content.

### (a) The First ‘Travel-Ban’ Executive Order

The first ‘travel-ban’ executive order was issued on 27 January 2017, and it contained several notable policy and procedural changes.<sup>381</sup> First, section 3(c) banned the entry of individuals from seven countries: Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen. Secondly, section 5(a) suspended the United States Refugee Admissions Program for a period of 120 days.<sup>382</sup> Additionally, section 5(b) required the Secretary of State to prioritise claims made by refugees whose religion was a minority religion in their country of origin. Thirdly, section 5(c) sought to indefinitely suspend the entry of all Syrian refugees.<sup>383</sup> The first EO also included exceptions made in sections 3(g) and 5(e), which could be made on a case-by-case basis by the Secretary of State.

In the case of *Washington v. Trump*, the court considered the legality and constitutionality of the challenged sections in EO1. This case was brought by the Government

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<sup>379</sup> The 90-Day ‘Travel-Ban’ provision expired on 24 September 2017 and the 120-day refugee-ban expired on 24 October 2017.

<sup>380</sup> The Proclamation op cit note 4.

<sup>381</sup> *Washington v. Trump* supra note 67 at 3.

<sup>382</sup> EO1 op cit note 1.

<sup>383</sup> *Washington v. Trump* supra note 67 at 4.

of the United States seeking a stay of the temporary restraining order (TRO) imposed by the Washington District Court against EO1. First, the court in this case found that EO1 violated the Fifth Amendment's Due Process Clause, which applies to 'all persons' within the U.S. regardless of the lawfulness of their presence.<sup>384</sup> In particular, the court held the due process rights of lawful permanent residents and of refugees were violated.<sup>385</sup> Secondly, the court considered whether EO1 was unlawful due to issues regarding religious discrimination, but it reserved judgment until a later date.<sup>386</sup> Thus, in order to prevent irreparable harm by allowing the reinstatement of EO1, the court denied the motion for a stay of the TRO pending appeal.<sup>387</sup>

### **(b) The Second 'Travel-Ban' Executive Order**

The second executive order was issued on 6 March 2017, and revoked EO1 on taking effect.<sup>388</sup> Thus, the appeal against the TRO on EO1 was dismissed. Similar to EO1, section 2 of EO2 sought to suspend the entry of nationals from six countries for a period of 90 days. These countries are: Iran, Libya, Somalia, Sudan, Syria and Yemen. Thus, EO2, unlike EO1, does not suspend the entry of Iraqi nationals as a result of the 'close cooperative relationship' between the U.S. and the Iraqi governments.<sup>389</sup>

Additionally, unlike EO1, EO2 specifically excludes from the ban lawful permanent residents; admitted or paroled foreign nationals; individuals with valid travel documents permitting entrance into the U.S., other than a visa; dual nationals travelling on a passport other than the one from the listed country; foreign-nationals travelling on a diplomatic or other specified visa; as well as those who have been granted asylum or refugees who have already been admitted into the U.S. or have been granted withholding of removal, advance parole, or protection under CAT.<sup>390</sup> There is also a case-by-case exception for those who were previously admitted for a long-term activity; those with significant contacts within the U.S.; those with significant business or professional obligations in the U.S; those with close family members who are lawfully within in the U.S.; for the entry of young children and infants; those employed by the U.S. government; for travel related to a designated international organisation as well as a few other exceptions.<sup>391</sup>

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<sup>384</sup> Ibid at 20-1.

<sup>385</sup> Ibid at 20.

<sup>386</sup> Ibid at 25-6.

<sup>387</sup> Ibid at 29.

<sup>388</sup> *Hawaii v. Trump* (March) supra note 69 at 2.

<sup>389</sup> Ibid at 5.

<sup>390</sup> Ibid.

<sup>391</sup> Ibid at 6-7.

Section 6 of the second executive order, like that of EO1, contained a provision suspending the U.S. Refugee Admissions Program for 120 days.<sup>392</sup> This ban on the entry of refugees also includes those who were formally scheduled to transit to the U.S. prior to the effective date of the EO. The second EO also provided for waivers on a case-by-case basis to admit refugees where their admission would provide a means for the U.S. to abide by its pre-existing international agreements or where the denial of admission would cause undue hardship.<sup>393</sup> Additionally, unlike EO1, EO2 no longer contains any reference to exceptions for ‘religious minorities’ nor does it contain the indefinite ban on Syrian refugees.<sup>394</sup>

In the case of *Hawaii v. Trump* (March) the court granted the motion for a TRO against EO2. The court found that the plaintiffs were likely to succeed on the merits of their claim under the Establishment Clause.<sup>395</sup> The Establishment Clause provides that one religion cannot be officially preferred over any other religious denomination.<sup>396</sup> The court analysed EO2 according to the test found in the *Lemon v. Kurtzman* case,<sup>397</sup> in which a government act should first, have a primary secular purpose; secondly, should not have a principal effect of inhibiting or advancing religion; and thirdly, should not promote any entanglement with religion.<sup>398</sup>

The court rejected the government’s argument that by only targeting six Muslim majority countries it was only targeting a fraction of the global Muslim population, so that the EO was therefore religiously neutral. Notably, the court held that “the notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed.”<sup>399</sup> The court also took into account circumstantial evidence, such as statements made by the President in reference to EO2. Additionally, the court found the pretext for the EO, national security, to be unsupported by evidence, commenting that nationality was a poor criterion for determining whether an individual was a threat to national security.<sup>400</sup>

In the appeal of the *Hawaii v. Trump* case to the 9<sup>th</sup> Circuit, the court shifted focus away from the content of EO2, and focused more on whether the President acted outside the authority delegated to him by Congress.<sup>401</sup> In this case, the court held that President Trump did not meet the precondition for the exercise of his authority in suspending the refugee programme and in

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<sup>392</sup> Ibid at 7.

<sup>393</sup> Ibid at 8.

<sup>394</sup> Ibid.

<sup>395</sup> Ibid at 29.

<sup>396</sup> *Larson v. Valente*, 456 U.S. 228, 244 (1982).

<sup>397</sup> 403 U.S. 602, 612-13 (1971).

<sup>398</sup> *Hawaii v. Trump* (March) supra note 69 at 29.

<sup>399</sup> Ibid at 30.

<sup>400</sup> Ibid at 37.

<sup>401</sup> *Hawaii v. Trump* (June) supra note 70 at 2.

the reduction of the cap on the admission of refugees into the U.S.<sup>402</sup> This precondition required him to make a sufficient finding that the entry of refugees *would* be ‘detrimental to the interests of the United States’ [*court’s emphasis*].<sup>403</sup> The court also held that EO2 violated the INA as it required the President to follow certain procedures when setting the annual cap on refugees and, additionally, it prohibited nationality-based discrimination.<sup>404</sup> Notably, the court stated that: “National security is not a ‘talismanic incantation’ that, once invoked, can support any and all exercise of executive power under §1182(f).”<sup>405</sup>

Nevertheless, in June 2017, the Supreme Court, while agreeing to consider the case in full in October 2017, ruled that the immigration bans and the suspension of the refugee programme could go into effect. It also provided that the ban and suspension of the refugee programme would not apply to those who were able to prove a ‘*bona fide*’ relationship with a person or entity in the U.S.<sup>406</sup> After the expiry of the suspension on immigration on 24 September 2017, the Supreme Court dismissed the appeal against the ban, as the case was no longer ‘live’. However, the suspension of the refugee programme remained in place until 24 October 2017. Additionally, the Supreme Court accepted the adjustment of the refugee cap to 45 000 – the lowest in modern U.S. history.<sup>407</sup>

### (c) Proclamation 9645

President Trump issued Proclamation 9645 on 24 September 2017. The Proclamation, unlike EO1 and EO2, *indefinitely* suspends the immigration of nationals from seven listed countries<sup>408</sup> and also imposes restrictions on the entry of certain Venezuelan government officials [*own emphasis*].<sup>409</sup> The Proclamation follows from a directive contained in EO2, which required the Secretary of Homeland Security to perform a global review of the cooperativeness of countries, with regard to information sharing, where their nationals are seeking entry into the U.S.<sup>410</sup> The same exceptions that applied in EO2 with regard to permanent residents, and others, as mentioned previously, were also included in the Proclamation.<sup>411</sup> Finally, the Proclamation

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<sup>402</sup> Ibid.

<sup>403</sup> 8 U.S.C. § 1182(f).

<sup>404</sup> *Hawaii v. Trump* (June) supra note 70 at 3.

<sup>405</sup> *Hawaii v. Trump* (June) supra note 70 at 43.

<sup>406</sup> Connder Finnegan ‘A timeline of Trump’s battle with the courts to keep his travel ban alive’ *ABC News* 19 October 2017, available at <http://abcnews.go.com/Politics/timeline-trumps-battle-courts-travel-ban-alive/story?id=50559798>, accessed on 10 January 2018. This article also defines which familial relations are considered to be ‘*bona fide*’.

<sup>407</sup> Ibid.

<sup>408</sup> The Proclamation does not include Iraq or Sudan, but does include Chad and North Korea.

<sup>409</sup> *Hawaii v. Trump*, No. 17-17168 (9<sup>th</sup> Cir. 2017). Hereafter, ‘*Hawaii v. Trump* (Dec)’.

<sup>410</sup> Ibid at 4.

<sup>411</sup> Ibid at 14.

makes no mention of the Refugee Admissions Program as, at that time, the suspension on the program was still in place.

On 17 October 2017, the day before the Proclamation was set to take effect, the District Court in Hawaii granted a TRO blocking the ban on the six Muslim-majority countries listed in the Proclamation.<sup>412</sup> However, on 24 October 2017, the Supreme Court of the United States vacated the court decision in the *Hawaii v. Trump* (June) case as moot, while expressing no view on the merits.<sup>413</sup> On 4 December 2017, the Supreme Court granted the request that the preliminary injunction (converted from the TRO) be stayed pending review of the injunction.<sup>414</sup>

Subsequently, the 9<sup>th</sup> Circuit Court of Appeals considered the legality of the immigration bans included in the Proclamation.<sup>415</sup> In this case, the court held that the Proclamation fell foul of the same deficiencies as that of EO2. Thus, the court found that the President exceeded the authority provided to him under the INA, in particular with regard to the indefinite nature of the ban<sup>416</sup> and concerning the way in which the Proclamation supplanted Congress's statutory scheme without its consent.<sup>417</sup> Again, the court held that the President failed to meet the preconditions contained in §1182(f). However, while the court ultimately held that the preliminary injunction might continue – it narrowed the scope to apply only to those with a credible '*bona fide*' relationship with a U.S. person or entity. Additionally, the court stayed the application of its own order pending review in the Supreme Court. Thus, the immigration bans contained in the Proclamation remain in effect until they are heard before the Supreme Court.<sup>418</sup>

#### **(d) New 'Enhanced Vetting' Procedures**

As previously mentioned, the immigration bans are relevant to refugees because potential refugees may be seeking admission into the U.S. via means other than the Refugee Admissions Program. Nevertheless, while the Proclamation makes no reference to the suspension of the refugee program, the DHS followed the instructions contained in section 6(a) of EO2 and developed additional procedures for the refugee screening and vetting process.<sup>419</sup> These procedures mainly focus on the refugee resettlement application process, the interviews and adjudication process and system checks. More specifically, the new procedures require more

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<sup>412</sup> The plaintiffs did not seek a TRO against the bans on nationals from North Korea or Venezuela.

<sup>413</sup> *Hawaii v. Trump* (Dec) supra note 409 at 6.

<sup>414</sup> *Ibid* at 7.

<sup>415</sup> *Ibid*.

<sup>416</sup> *Ibid* at 28-30.

<sup>417</sup> *Ibid* at 35.

<sup>418</sup> *Ibid* at 70.

<sup>419</sup> Rex W. Tillerson, Elaine Duke and Daniel Coats 'Memorandum to the President: Resuming the United States Refugee Admissions Program with enhanced vetting capabilities' 23 October 2017.

in-depth biographical data<sup>420</sup> from refugees in addition to increased training and improved processes aimed at detecting fraud.<sup>421</sup> The memorandum also announced that the citizens of 11 unnamed countries would be admitted only on a case-by-case basis pending a subsequent 90-day period in which the government intended to conduct an additional round of reviews.<sup>422</sup> Finally, the memo also states that the ‘follow-to-join’ programme, for close relatives of refugees already admitted to the U.S., will be paused indefinitely until the administration has conducted a further review.<sup>423</sup>

These ‘enhanced’ vetting measures, and particularly the focus on detecting fraud, may bring the U.S. in violation of their obligations under the UN Convention. Specifically, Article 31 of the UN Convention provides that member states should not impose any penalties on asylum seekers who entered or are unlawfully present in the host country.<sup>424</sup> Thus, where a refugee has entered the U.S. by means of fraud or fraudulent documents with the intention of applying for asylum this article would require the U.S. to refrain from convicting the asylum seeker.<sup>425</sup> Additionally, there is no mention of bad faith in the UN Convention; there are only those limitations as included in Article 33(2) and Article 1F, as discussed in Chapter three. States are also not permitted to make reservations which equate bad-faith claims to the exclusion clauses, as the exclusion clauses are restricted to individuals who have committed serious crimes.<sup>426</sup>

In addition, these sections may result in a violation of the non-refoulement principle via means of *non-entrée*, as they all but prevent nationals of 11 countries from succeeding in an application for asylum. The memorandum also provided that asylum applicants from other countries would be prioritised.<sup>427</sup> Thus, the new rules and procedures severely discourage and limit refugees’ ability to seek asylum in the U.S. In the subsequent section, this paper will consider whether the ‘travel-ban’ executive orders and the Proclamation are in conflict with the United States’ obligations under the UN Convention and Protocol.

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<sup>420</sup> For example, refugees are reportedly now required to provide 10 years of biographical data, instead of the previous requirement of five years. See Yeganeh Torbati ‘Even though the refugee ban is over, admissions to the US are plummeting’ *Reuters* 9 December 2017, available at <https://www.reuters.com/article/us-trump-effect-refugees/trump-lifts-refugee-ban-but-admissions-still-plummet-data-shows-idUSKBNIE21CR>, accessed on 10 January 2018.

<sup>421</sup> Tillerson ‘Addendum to Section 6(a) Memorandum’ op cit note 419 at 2-3.

<sup>422</sup> Betsy Fisher ‘Trump’s New Refugee Vetting Rules Will All but Stop the Resettlement Process’ *ACLU* 26 October 2017, available at <https://www.aclu.org/blog/immigrants-rights/trumps-new-refugee-vetting-rules-will-all-stop-resettlement-process>, accessed on 10 January 2018.

<sup>423</sup> *Ibid.*

<sup>424</sup> Article 31 op cit note 102.

<sup>425</sup> Kahn & Schreier op cit note 16 at 25-6.

<sup>426</sup> *Ibid* at 31.

<sup>427</sup> Torbati op cit note 420.

## II. International Law

### (a) Article 9

Article 9 allows member states to take provisional measures against asylum-seekers that are essential to national security in times of war, or other grave and exceptional circumstance. While the U.S. may assert that they are engaged in a ‘war on terror’, such a war is not formalised, but ideological. Terrorism, too, is essentially a tactic – not an entity with which one could traditionally be at war. Nevertheless, the ‘war on terror’ has been recognised internationally – and thus it is possible that the U.S. could claim that EO1, EO2 and the Proclamation are provisional measures that fall within Article 9. However, this section explicitly states that such measures may be taken and continued in the case of ‘a particular person’. Thus, such measures should be taken on a case-by-case basis. The first executive order, EO2 and the Proclamation all include measures that apply to all nationals from numerous countries, and at times, suspending the admission of all refugees into the country.

Additionally, drawing from the domestic case of *Hawaii v. Trump* (Dec), Article 9 only permits states to take measures provisionally i.e. a measure that is temporary or subject to change.<sup>428</sup> The Proclamation bans immigration from seven listed countries indefinitely. Thus, while it is possible that the U.S. may claim to be acting in a time of war or other grave and exceptional circumstance, the measures taken are neither with regard to an individual person nor are they provisional. Therefore, none of the ‘travel-ban’ orders nor the Proclamation can be justified under Article 9 of the UN Convention.

### (b) Article 1F

Article 1F of the UN Convention provides for the exclusion clauses, which aim to avoid granting refugee status to those who are considered to be undeserving. Following the explanation of Article 1F previously in Chapter three, one is able to understand how terrorist acts may fall within the ambit of the exclusion clauses. How terrorism relates to the UN Convention is important in this section, as EO1, EO2 and the Proclamation explicitly state that their purpose aimed at protecting the public safety of U.S. citizens from terrorist activities.<sup>429</sup> Thus, the justification provided for the orders and policies advocated in EO1, EO2 and the Proclamation is arguably the national security of the U.S. In particular, the object is to protect

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<sup>428</sup> Oxford Living Dictionaries ‘provisionally’, available at <https://en.oxforddictionaries.com/definition/provisionally>, accessed on 11 January 2018.

<sup>429</sup> Section 1 of EO1 op cit note 1; Section 1 of EO2 op cit note 2; and section 1 of the Proclamation op cit note 4.

the nation from acts of terrorism by restricting the entry of individuals who intend to commit such acts. As stated previously, national security is not specifically mentioned in Article 1F, and thus to exclude refugees solely on the basis of ‘national security’ would run against the object and purpose of Article 1F as well as the conceptual framework of the UN Convention.<sup>430</sup>

Article 1F is not an anti-terrorism provision; however it can be used to exclude terrorist actors. Thus, initially it may seem that the executive orders and Proclamation may be justifiable under Article 1F. However, there are limitations. First, it requires that there be ‘serious reasons’ for holding that someone falls within one of the exclusion clauses. This burden, as stated previously, is somewhere between a ‘balance of probabilities’ and ‘beyond a reasonable doubt’.<sup>431</sup> In this case, while there has been a review by the Department of State and the Department of Homeland Security,<sup>432</sup> this review was found to be insufficient by the court in the *Hawaii v Trump* (Dec) case to warrant a blanket ban on the entry of individuals from certain nations.<sup>433</sup> Thus, it is likely that the reasons provided for the ban would not meet the required burden of proof under Article 1F.

Secondly, Article 1F requires that persons be excluded only where they have either ‘committed’ one of the acts listed in subsection (a) or (b), or have been found guilty with regard to subsection (c). The EOs and the Proclamation, however, contain no such requirements and ban all nationals of certain countries on the basis of findings that these countries present ‘heightened concerns about terrorism’<sup>434</sup> or that they do not have adequate identity-management and information-sharing capabilities.<sup>435</sup> Additionally, subsection (c) is only relevant to high-ranking persons, and thus could not be used as part of a broad nationality-based ban. Thirdly, the U.S. already has strict inadmissibility bars for applicants for immigration and asylum seekers who have materially supported designated foreign terrorist organisations.<sup>436</sup> The overbroad ambit of the term ‘material support’ in the INA arguably already puts the U.S. at risk of violating its obligations under the UN Convention and Protocol.<sup>437</sup> In particular, the U.S. places a large focus on the label of ‘terrorist’ rather than on the acts themselves.<sup>438</sup> The EOs and the Proclamation therefore take U.S. refugee policy way

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<sup>430</sup> UNHCR op cit note 239 at 30.

<sup>431</sup> UNHCR op cit note 181 at 38-9.

<sup>432</sup> Memorandum op cit note 419.

<sup>433</sup> *Hawaii v Trump* (Dec) supra note 409 at 47-50.

<sup>434</sup> Section 1(b)(i) of EO2 op cit note 2.

<sup>435</sup> Section 1(g) of the Proclamation op cit note 4.

<sup>436</sup> Foreign Terrorist Organizations (FTOs) as defined in §219 of the INA.

<sup>437</sup> Fischer op cit note 41 at 258-9.

<sup>438</sup> UNHCR op cit note 182 at 8.

beyond the scope of the exclusion clauses – denying refugees the ability to even seek asylum in the U.S. even if they have no connection at all to terrorism.

Finally, Article 1F requires that those excluded be considered on an individualised basis. This can be determined from the language of the section, which refers to ‘any person’, in addition to recommendations by the UNHCR.<sup>439</sup> Regarding the EOs and the Proclamation, these only contain provisions for determining whether nationals from the excluded states *may* be admitted on a case-by-case basis – the inverse of what is required in the UN Convention [*own emphasis*]. Ultimately, as both of the EOs and the Proclamation prevent potential refugees and all nationals from certain countries from seeking asylum, they cannot be justified under Article 1F of the UN Convention.

**(c) Article 33(2)**

Article 33(1) of the UN Convention provides for the principle of non-refoulement, and Article 33(2) contains the only exceptions thereto. This section prevents a state from returning a refugee to a territory in which his/her life or freedom would be threatened on account of one of the listed grounds. However, this protection does not apply to a person of whom there are reasonable grounds for considering that they are a danger to the security of the country, have been convicted of a particularly serious crime or who constitutes a danger to the community of the country of refuge.<sup>440</sup> This provision would specifically apply in the case of refugees who travelled to the U.S. with the intent of making an affirmative asylum application on arrival.

While travelling to the U.S. without already having been granted asylum or some sort of immigration visa would be exceptionally difficult, but not impossible. Such persons would, under EO1, EO2 and the Proclamation, be denied asylum as a consequence of their nationality, unless they could meet the high burden required to be admitted on a case-by-case basis. In such instance, the U.S. would be in violation of its obligations under the UN Convention if the asylum seeker was refouled. Nevertheless, Article 33(2) does provide for some exceptions.

While the executive orders and the Proclamation claim to be acting for the security of the country and to protect the community of the U.S., the Article 33(2) exception requires that there be ‘reasonable grounds’ for finding that the individual applicant is such a threat. In this case, and as stated previously in this chapter, the executive orders and the proclamation have been found by U.S. domestic courts to not be based on sufficient evidence stating that, ‘the Proclamation – like EO-2 – fails to ‘provide a rationale explaining why permitting entry of

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<sup>439</sup> UNHCR op cit note 181 at 19.

<sup>440</sup> Article 33(2) op cit note 15.

nationals from the six designated countries under current protocols would be detrimental to the interest of the United States'.<sup>441</sup> Additionally, the immigration ban and new refugee restrictions apply in a blanket manner on the basis of nationality, whereas Article 33(2) only permits the exclusion of a refugee on a case-by-case basis.

Thus, it is unlikely that the reasonable grounds standard in Article 33(2) would be met by the EOs or by the Proclamation. Therefore, the Article 33(2) exceptions cannot be used to justify the orders or the Proclamation, and as such, should any refugees have been refouled under these orders, the U.S. would be in violation of its obligations under the UN Convention and Protocol.

**(i) *Non-entrée***

As the U.S. Refugee Admissions Program mainly takes applications from refugees who have been recognised by the UNHCR and considers such applications while the refugee remains in another country, the issue of non-refoulement is more complicated. Such persons, if rejected, are not strictly 'returned' to a territory in which their life or freedom is threatened; they are simply denied asylum in the U.S. These applications may be made from a 'safe' third country, the applicant's country of origin or another country in which the applicant may be at risk of persecution. For example, a gay man may flee persecution in Iran for Turkey, and apply for refugee status in the U.S. from Turkey. However, that same man may still face persecution on the basis of his sexuality in Turkey, and thus it is possible that, in this case, Turkey may not be considered a 'safe' third country.<sup>442</sup>

The Executive Orders and the Proclamation could arguably be considered to be *non-entrée* strategies, as, in effect, they prevent asylum seekers from being able to access asylum and the refugee status processes. While the U.S. is not required to accept all refugees seeking admission, *non-entrée* strategies are also not illegal, Article 33(2) cannot be used to implement policies which would divert asylum seekers abroad under the guise of a blanket declaration that they are a security risk.<sup>443</sup> Using Article 33(2) in this way could have the potential of indirectly violating the principle of non-refoulement, which, as a *jus cogens* norm, would result in the U.S. committing an act against the international public order.

**(d) Article 3**

Article 3 of the UN Convention is a non-discrimination clause. It states that:

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<sup>441</sup> *Hawaii v Trump* (Dec) supra note 409 at 47.

<sup>442</sup> Torbati op cit note 420.

<sup>443</sup> Ibid.

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

The first executive order explicitly provided preference to refugees from religious minorities – a clear instance of discrimination against the majority religions of the listed countries. Additionally, EO1 sought to suspend the admission of refugees from Syria indefinitely, which is a clear act of discrimination on the basis of country of origin. Therefore, EO1 was in clear violation of Article 3 of the UN Convention and Protocol.

Whilst EO2 does not contain a provision that provides preference to refugees who are members of a religious minority, it does still limit immigration on the basis of nationality. As previously stated, such a limitation could have a severe impact on asylum seekers. Additionally, both EO2 and the Proclamation contained statements which provided that, “[n]othing in this order [proclamation] shall be construed to limit the ability of an individual to seek asylum, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.” However, the court in *Hawaii v Trump* (June) considered a similar argument by the U.S. Government and held that it would be unsustainable for the President to circumvent the non-discrimination provisions of the INA by granting visas to nationals of the six listed countries, but then denying them entry.<sup>444</sup>

Following the same reasoning, the U.S. government cannot argue that individuals are open to seek asylum when it has also stated that the Refugee Admissions Program has been suspended and that persons of certain nationalities may not be admitted for immigration. Additionally, the new rules and restrictions in the refugee process – in particular against the 11 unnamed countries – effectively close off the asylum-seeking process. This paper does not intend to suggest that the U.S. must automatically grant entry to all refugees or immigrants; however, it notes that refugee applicants cannot be subjected to discrimination on the basis of race, religion or country of origin throughout the refugee process – be it at the time of application or on arrival at a port of entry.<sup>445</sup> Thus, the EO2 and the Proclamation are in violation of Article 3 of the UN Convention and Protocol.

### **(e) Convention against Torture**

As there are no exceptions to Article 3 of the CAT, the U.S. would be in violation of its obligations under the CAT should it have returned any person to a territory in which they were likely to be subject to torture. As the immigration bans and refugee suspension did not provide

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<sup>444</sup> *Hawaii v Trump* (June) supra note 70 at 51.

<sup>445</sup> *Ibid* at 52.

for the return of those who had already been granted withholding of removal or deferral of removal under the CAT, it is unlikely that the U.S. violated the CAT by means of the EOs or the Proclamation. However, while the *non-entrée* principle has yet to be applied in the instance of the CAT, it should be noted that it is possible that the orders and proclamation may have indirectly resulted in individuals being unable to seek refuge from torture.

Overall, this chapter has examined the contents of the recent U.S. policies concerning the ‘Travel-ban’ and refugee suspension. Additionally, it has considered the U.S. court cases in response to the EOs and the Proclamation and determined how the EOs and Proclamation conflicted with domestic U.S. law. Finally, this chapter analysed the EOs and the Proclamation under international refugee law, finding that none of the national security exceptions provide a justification, nor would they permit, such policies. Thus, in the next chapter, this paper will form its conclusion, taking note of the implications of this paper, in addition to its limitations, but overall, highlighting the academic contribution made by such an analysis.

# Chapter Six

## I. Conclusion

This paper aimed to examine when, under the UN Convention and Protocol, a state may refuse to grant asylum to a refugee under the auspices of ‘national security’. This includes instances where refugees are stopped at the border of a state, where recognised refugee status is revoked and finally, where legislation and policies are implemented to prevent refugees from even attempting to apply for asylum. Overall, this paper sought to answer the question as to whether the ‘travel ban’ executive orders and the Proclamation were in violation of the United States’ obligations under international law, and specifically under the UN Convention and Protocol.

Refugee and immigration legislation has been increasingly linked to issues of national security. Prior to the attacks of 9/11, academic writing generally focused on the extent of states’ obligations to refugees under international law and the recognition of refugee rights. Post-9/11, there was an increase in academic writing examining the connection between national security, immigration and refugees. However, despite the existence of restrictions on the admission of refugees in the west, there appeared to be a more liberal progression in immigration and refugee policies towards a more humanitarian and open approach. In response to the recent rise in anti-refugee and anti-immigration sentiment,<sup>446</sup> this paper has focused on the overlap between national security and international refugee law, and the recent restrictive U.S. immigration and refugee policies.

Initially, this paper explored the international refugee regime, including that found in regional agreements, and how international refugee law has been incorporated into U.S. domestic legislation. With particular regard to the UN Convention, this paper detailed the exceptional provisions found in Article 9, Article 1F, Article 32 and Article 33, which provide ‘contracting states’ with the means to reject or exclude asylum seekers. It also examined how these provisions have been applied in other agreements – such as the CAT. Overall, under international law, it is necessary that refugees be rejected only in the most extreme circumstances and thus, all the exception clauses are to be interpreted restrictively and applied on an individualised basis.

Subsequently, this paper has provided an overview of domestic U.S. refugee law and its interaction with international law. It has shown that the refugee law regime in the U.S. is more restrictive than that found under international law. Further, this paper has examined the

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<sup>446</sup> Troianovski op cit note 12.

‘travel-ban’ executive orders and the U.S. cases that followed in Washington, Hawaii and in the Supreme Court. These cases highlighted the differing perspectives on the legality of the EOs under U.S. law with consideration to both constitutional and statutory issues. While some of the cases found it necessary to consider the discriminatory nature of the EOs, others focused only on whether the President had the authority to enact the immigration and refugee suspensions.

This paper also highlighted the issuing of the Proclamation which sought to continue the immigration bans found in the EOs, and subsequently discussed the court cases that had been brought against the Proclamation. It noted that while the Proclamation makes no mention of the suspension of the Refugee Admissions Programme, the suspension of nationals of certain countries will more than likely result in the exclusion of refugees and asylum-seekers. Thus, this paper also examined the U.S. case law triggered by the Proclamation, finding that the Proclamation fell foul of the same U.S. statutory and constitutional issues as the EOs that came before it. Nevertheless, the provisions of the Proclamation have been allowed to continue pending review by the Supreme Court, thus, the findings of this paper remain current.

Finally, this paper performed an assessment of the EOs and the Proclamation under international refugee law. It has held that the EOs and the Proclamation violate international refugee law and cannot be justified under any of the ‘national security’ exceptions. The EOs and the Proclamation are overbroad and all-encompassing; they do not follow international law, which requires refugee exclusions to be exceptional. While international law does provide states with the means to act out of necessity in the interests of national security with regard to refugees, this must be done on a case-by-case basis with an examination of individualised circumstances. Nationality-based bans do not conform to the tenets of international law, in particular they contravene the non-discrimination provision found in Article 3 of the UN Convention and Protocol. In conclusion, therefore, this paper holds that the ‘travel-ban’ executive orders and the Proclamation put the U.S. in violation of its obligations under international law.

The research conducted, and the subsequent findings of this paper are limited as the issues surveyed are currently developing. Therefore, there is very little academic literature and analysis on the EOs and the Proclamation. Indeed, even the literature and source material which does consider the legality of the EOs, only examines the orders from an American law perspective. Additionally, the application of this paper’s findings is also limited, as the EOs have both either been withdrawn or lapsed and been replaced by the Proclamation. While international law does contain mechanisms for state responsibility, the U.S. is an incredibly

powerful nation with a penchant for ignoring international opinions. Thus, despite this paper's holding that the U.S. is in violation of its international obligations under the UN Convention and Protocol, there is very little that can be done practically to hold the U.S. to account.

Nevertheless, there is much that can be gained from this paper. It brings together all of the possibilities available for a state to reject and expel refugees on the basis of national security under international law. The issue of immigration and, in particular, of the influx of refugees into the U.S. and Europe, is a contentious topic in current politics.<sup>447</sup> Therefore, as the migration of refugees is increasingly linked to national security, this paper is able to highlight many of the overlaps between these two areas in international law. In essence, this paper has sought to provide some insight into international refugee law, in which the 'talismanic incantation of national security'<sup>448</sup> is currently being exploited at the expense of the world's vulnerable refugee population.

Importantly, this paper has provided an academic analysis of the EOs and the Proclamation from an international law perspective, where much of the previous literature and cases focused primarily on U.S. domestic law. Additionally, it has brought together the literature on the Article 1F exception clauses, Article 33(2) and the concept of *non-entrée* and shows how such clauses can and, in this case, cannot be applied in practice. The legal fight for and against President Trump's EOs is ongoing. Thus, this paper aims to be at the forefront of legal analysis of the United States' policies regarding refugees and immigration.

It is essential to recognise that refugees are one of the most vulnerable groups in the world. With 22.5 million refugees worldwide,<sup>449</sup> it is necessary for states to understand and comply with their obligations under international law regarding refugees and particularly, to not unnecessarily enact policies in direct conflict with such obligations. It is important that states do not abuse the exceptions made available to them under international law in order to employ policies that would cause harm and suffering as well as a violation of international human rights. When states take advantage of the few exceptions provided in a framework created to *protect* refugees, in order to abandon their fellow human beings, everyone is worse off [*own emphasis*]. It is hoped that this paper has created an understanding of the limitations of the national security exceptions under international law and has shown how discriminatory orders and proclamations cannot be legally justified. It intends to encourage a recognition of

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<sup>447</sup> Ibid.

<sup>448</sup> *Hawaii v. Trump* (June) supra note 70 at 43.

<sup>449</sup> UNHCR 'Figures at a Glance' 19 June 2017, available at <http://www.unhcr.org/afr/figures-at-a-glance.html>, accessed on 9 July 2017.

the plight of refugees globally, and to provoke states to uphold their obligations under international law as “no one leaves home unless home is the mouth of a shark.”<sup>450</sup>

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<sup>450</sup> Warsan Shire *Teaching My Mother How to Give Birth* (2011) 36.

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