

The United States is a signatory state of the 1967 Protocol Relating to the Status of Refugees<sup>1</sup>, which brings with it the obligations of the 1951 Convention, the tenets of which are integrated into the Refugee Act of 1980 (that came into force in 1984). The Preamble of the 1951 Convention on the status of refugees recognizes the need for the international community to address the needs of refugees as a whole,<sup>2</sup> however the Convention does not state that nations that are party have any duty to take a certain number or quota of refugees. The strongest suggestion that states must take on refugees appears in Article 26, according to which a nation has an obligation to allow refugees the freedom of movement to choose their place of residence:

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.<sup>3</sup>

This appears to mean that states must accept refugees who wish to live within their borders; but this is not necessarily the case. First, a nation could easily claim that they are falling with the lines of Article 26 by allowing refugees to pass through their nation, but not settle there, as we are currently seeing in Italy amongst Syrians who are eventually filing claims in, for example, Germany. In regards to the United States, it could be argued that just because the United States does not allow a refugee to choose to live within its borders does not mean that it prevented the refugee from choosing where to live, it simply made the choice to live in the United States unavailable. That does not mean that a refugee is not able to choose to live somewhere else. Furthermore, Article 26 only refers to a specific set of refugees that are ‘lawfully’ within territory. This means that a refugee that is deemed to be within a U.S. unlawfully could also be denied the right to simply pass through the U.S. This is especially concerning because refugees are often leaving dangerous situations and may not have the luxury of filing out the correct forms or researching the proper processes to enter a new territory. Although the United States’ geographic location makes it unlikely that many Syrian refugees will be able to enter the country without encountering immigration officers, this is still an important barrier to Syrian refugees.

This Convention was purposefully written<sup>4</sup> in such a way that nations, including the United States, have no real obligation to accept refugees into their borders. Furthermore, although the UNHCR has set of a resettlement program to facilitate refugees in need of a new home, participation in the program is not mandatory. While most countries the United Nations are party to the refugee convention, few participate in the resettlement program. The United States has been one of the biggest participants in the program for years, which may lead to a

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<sup>1</sup> UN Resolution 2198 (XXI) adopted by the United Nations General Assembly <http://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>

<sup>2</sup> Although the United States was not party to the 1951 Convention, the 1967 Protocol takes on Articles 2-34 of the Convention.

<sup>3</sup> 1951 Convention Relating to Status of Refugees, Article 26.

<sup>4</sup> “The Evolution of the International Refugee Protection Regime” 5 Wash U. J. L. & Pol’y 129 (2001) (Awareness of a responsibility to protect and find solutions for Refugees dates back to the appointment of the first League of Nations High Commissioner for Russian refugees in 1921. Although the League of Nations was eventually replaced by the United Nations the concern for refugees continued and several institutions were created to respond to refugee issues. This eventually led to the creation of the UNHCR in 1951. Although the UNHCR started with a good baseline it was necessary to expand the mandate and thus the work that led to the 1967 Protocol begun. The most important change created by the 1967 Protocol was that it let go of the geographical and time limitation. Thus the 1967 Protocol was not created on a whim, it was the result of almost half a century of thought about the needs of refugees. It is unlikely that the words of the Protocol were crafted in a careless manner).

good argument.<sup>5</sup> Article 3 states that nations must not be discriminatory in with respect to the refugees that they accept. It could be argued that since the U.S. has been an enthusiastic supporter of the resettlement program for years, failing to take in refugees, including Syrian refugees, in numbers that at least equal past years suggests a discriminatory purpose, particularly if this is done against a backdrop of election campaigning that supported acting in a fashion that aims to discriminate against Muslim refugees and migrants. This would suggest that the U.S. has a responsibility to at least maintain the number of refugees and an outright refusal not to taken in Syrian refugees would be a violation of the Protocol. Although this does not guarantee that many Syrian refugees acceptance into the U.S. it does suggest that U.S. has an obligation to accept some Syrian refugees.

The U.S. at least has a political obligation to accept Syrian refugees. Refusing Syrian refugees would be a violation of the purpose of the 1951 Convention. Although the Convention does not state that nations must accept refugees, the preamble suggests that the point of the document is that the international community has decided to take on the issue of refugees as a whole. Refusing to allow Syrian refugees to enter the United States would mean that other nations would be unduly burdened with taking on Syrian Refugees. The whole point of the Convention was to ensure that the international community could share the burden and ensure that the fundamental rights of human beings would be protected. If the U.S. refuses to take in Syrian Refugees, it disrespects the international community as a whole. This argument could be countered by pointing out other nations that have also chosen not to take in refugees. However, the U.S. has been in a place of leadership for decades and suggesting that it follow the lead of other nations that are not honoring the meaning of the Convention would probably be an unpopular statement.

International agreements such as this are difficult to manage because they can sometimes clash with a sovereign nation's ability to make individual choices. Although agreements like this may be more difficult to enforce, refusing to respect their meaning suggests that the U.S. cannot be trusted to honor their international agreements that could have important repercussions. Furthermore, the overwhelming proof of the horrors that Syrians face calls upon the U.S. to accept Syrian refugees out of a simple respect for human life. Legally the U.S. may have no obligation, but the U.S. should still endeavor to respect the meaning behind the 1951 Convention.

It is debatable whether states have the right to choose to take in Syrian refugees. Although the federal government's power is fairly restrained, there are a still a number of ways that the federal government could restrict states. First the 10<sup>th</sup> Amendment of the Constitution states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."<sup>6</sup> Article 1 Section 8 of the Constitution lists these enumerated powers such as; lay taxes, regulate commerce among the states, establish a uniform rule of naturalization, declare war and make law necessary and proper to execute the forgoing powers.<sup>7</sup> Although this may seem like a narrow set of powers that do not affect a state's right to accept to refugees it could have an important effect. First, the federal government could claim that it falls under the commerce clause. Although, the issue of accepting refugees may not have an obvious connection to interstate commerce there may be an argument to be made. Past Supreme Court decisions have suggested that in order for the federal

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<sup>5</sup> <http://www.unhcr.org/en-us/resettlement-in-the-united-states.html>

<sup>6</sup> U.S. Constitution, 10<sup>th</sup> Amendment.

<sup>7</sup> U.S. Constitution, Article 1 Section 8.

government to regulate something under the commerce clause it must be substantially related to interstate commerce.<sup>8</sup> In the past the Supreme Court has held that the federal government cannot regulate gender-motivated violence, health care or guns near school zones using the commerce clause.<sup>9</sup> However the court has upheld using the commerce clause to prevent discrimination.<sup>10</sup> It could be argued that accepting refugees falls under the interstate commerce because refugees could have a substantial effect. Refugees that enter states could cross state borders and have effects on other states. The entrance of a large number of refugees may also have a big economic impact one state and affect the flow of commerce in another state. This could be used to argue that the federal government should control whether refugees can enter states. It could also be argued that controlling the entrance of refugees is connected to the federal government’s enumerated power to establish a uniform rule of naturalization. The federal government could claim that they have created the uniform rule not to accept refugees and that states cannot defy this. Furthermore, it could be argued that accepting refugees affects the common welfare and general defense of the country, the protection of which was delegated to the federal government under Article 1 Section 8 of the Constitution.<sup>11</sup> Therefore, if the federal government makes the decision to accept no refugees in order to protect the common welfare of the country, states do not have the power usurp the power of the federal government by choosing to accept refugees. However, the general welfare clause is actually connected to the federal government’s power to tax. States could argue that the federal government is free to tax and spend for the common welfare, but not create laws that restrict the actions of states. States could also argue that if they choose to accept refugees through the federal government and the UNHCR’s processes that carefully vets the refugees that are accepted they do not pose a threat to national security. Furthermore, it would be difficult to argue that the methods of screening are inadequate because the U.S. has previously allowed refugees that come through their system to enter the U.S. and there has been no direct evidence that those that have come through the careful vetting process have posed any harm. Finally, states could appeal to the conservative beliefs in order to support their right to accept refugees. The current presidential administration seems to favor less federal regulation and involvement with the states, so states could argue that this goes along with that philosophy.

Currently it is impossible for Syrian refugees to claim status as refugee in the United States. Under U.S. law refugees are: people located outside the U.S., that are of special humanitarian concern to the U.S., that demonstrate that they are persecuted for certain reasons, who are not firmly resettled in another country and are admissible to the United States.<sup>12</sup> Since a

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<sup>8</sup> *United States v. Lopez*, 514 U.S. 549 (note that in *U.S. v. Morrison* the Court explained that the substantial effect cannot be based on a cumulative impact).

<sup>9</sup> *United States v. Lopez* 514 U.S. 549; *United States v. Morrison* 529 U.S. 598; *NFIB v. Sebelius* 567 U.S. \_\_\_

<sup>10</sup> *Heart of Atlanta Hotel v. United States* 379 U.S. 241.

<sup>11</sup> U.S. Constitution, Article 1 Section 8.

<sup>12</sup> Immigration and nationality Act Section 101(a)(42); 1951 Convention Relating to Status of Refugees, Article 1 (“A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it..)

Toni Otokunrin, "States' Obligations Towards Syrian Refugees", AmeriQuests 12.2 (2017)

new executive order has stated immigrants from Syria and five other countries will not be allowed in the U.S., Syrian refugees will not be able to enter the United States. There are a few mitigating factors that could be used. Syrian refugees could refer back to Article 3 of the Convention and cite this as blatant discrimination.<sup>13</sup> However, this is unlikely to work. The executive order only bans Muslim refugees for 90 days so it could be claimed that since it is, for now, not a permanent ban it is not discriminatory. Furthermore, the Executive order also banned all refugees for 120 days so it could be claimed that since all refugees are banned there is no discrimination against Syrian refugees.

The obstacles that Syrian refugees currently face make applying for refugee status in the U.S. impossible. The current presidential administration has clearly set out to ignore the needs of refugees and dishonor the agreements that the U.S. has previously made. However, with lawsuits that challenge the executive order in place and many disagreeing with the ban hopefully the ban will be short lived.

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<sup>13</sup> 1951 Convention Relating to Status of Refugees, Article 3