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THE LEGALITY OF MUSLIM BAN UNDER PUBLIC INTERNATIONAL LAW

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Table of Contents

INTRODUCTION.....3

Background information on the problem.....	3
CHAPTER 1.....	5
The nature of obligations of states in relation to granting asylum and access to asylum procedures under relevant treaties.....	5
Customary International Law in Relations of Granting Asylum.....	10
The compatibility of so called “Muslim Ban” with corresponding international obligations of the United States of America.....	13
CHAPTER 2	
Non-refoulment principle in the light of interrelation of Refugee law and Human rights treaty norms.....	17
Customary nature of Non-refoulement Principle.....	19
The compatibility of so called “Muslim Ban” with corresponding international obligations of the United States of America.....	21
CONCLUSION.....	25
BIBLIOGRAPHY	26

Introduction

The world and international community are facing an unparalleled displacement crisis. Everyone, however, agrees that the problem continues to be both multidimensional and global.¹ The refugee situation has become a classic example of the interdependence of the international community.

Armed conflicts and other situations of violence have led to forced displacement across borders. Refugees seek safety in other countries when they face a threat of persecution and their own country is unwilling or unable to protect them. When experiencing or fearing serious violations of their fundamental rights, they have no choice but to leave their homes, their families and communities in order to survive². Conflicts are often fought for ethnic, political or religious reasons and they have formed the development of international refugee law in the early and mid-twentieth century.³ But who are the refugees? According to Article 1 of the Convention Relating to the Status of Refugees⁴, the term "refugee" shall apply to any person who: owing to 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.

There were 21.3 million of refugees worldwide at the end of 2015 but only 107, 100 were resettled that year.⁵ Their situation is often so intolerable that they cross national borders to seek safety in nearby countries, and thus become internationally recognized as "refugees". They are recognized precisely because it is too dangerous for them to return home, and they need asylum elsewhere. These are people for whom denial of asylum has potentially deadly consequences.⁶ However, they have rights which should be respected prior to, during, and after the process of seeking asylum. At the core of the international asylum and refugee protection regime is the right of people whose lives and liberty are at risk to seek safety and security in another state⁷.

¹ See Fact Sheet No 20, Human Rights and Refugees, available at: <http://www.ohchr.org/Documents/Publications/FactSheet20en.pdf>

² A. Edward, Human Rights, Refugees, and the right "To Enjoy Asylum", <<https://academic.oup.com/ijrl/article/17/2/293/1548262/Human-Rights-Refugees-and-The-Right-To-Enjoy>>

³ See Legal and Protection Policy Research Series, The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence, Division of International Protection, September 2012, <<http://www.refworld.org/pdfid/50474f062.pdf>>

⁴ See Convention Relating to the Status of Refugees, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugee and Stateless Persons Convened under General Assembly resolution 429(5) of 14 December, 1950 Entry into force: 22 April 1954, in accordance with article 43, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>

⁵ See UNHCR Global Trends Forced Displacement in 2015, <<http://www.unhcr.org/576408cd7.pdf>>

⁶ See The UN Refugee Agency, UNHCR Viewpoint, "Refugee" or "migrant"- Which is right? <<http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html>>

⁷ See UNHCR, Refugee Protection and International Migration, <<http://www.unhcr.org/4a24ef0ca2.pdf>>

The term “refugee” unfortunately carries a stigma today. While the international community has generally responded swiftly to refugee crises over the past half century, in recent years, some worrying trends have begun to emerge⁸. Attitudes in many countries have hardened towards refugees and asylum seekers. Facing the changed nature of conflict and the effects of globalization, many states have tried to redefine and limit their responsibilities towards refugees.⁹ Recent years there have been many instances in which asylum seekers have been rejected at borders or forcibly removed to countries where their safety cannot be assured.¹⁰ Countries that once generously opened their doors to refugees have been tempted to shut those doors for fear of assuming open-ended responsibilities, of abetting uncontrolled migration and people-smuggling, or of jeopardizing national security.

However, states and international community bear collective responsibility to protect the refugees. One specific and particularly important issue of refugee protection is related to the prohibition of returning them, directly or indirectly, to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. This principle is present in both international refugee law and international human rights law. The principle is called non-refoulement and is laid in Article 33 of the Convention Relating to the Status of Refugees¹¹.

States have consistently reaffirmed their commitment to refugee protection. However, there remain a number of gaps, mostly arising from long-standing problems such as violations of the principle of non-refoulement; lack of admission and access to asylum procedures; detention practices that violate international standards; lack of registration and documentation; and shortcomings in refugee status determination procedures¹². One of those recent examples is the US new policy, which has become the spot of the tension discussion and criticism throughout the world.

The master paper will address the issue of legality of so called “Muslim ban” under public international law. While this issue has a myriad of problems, our research does not imply broad thematic perspective – we will just limit the scope of study to the question whether the USA new Executive order violates international refugee law in relations of access to territory, seeking asylum and non-refoulement obligations.

⁸ See Refugee Protection: A Guideline to International Refugee Law <http://www.ipu.org/pdf/publications/refugee_en.pdf>

⁹ See “Solutions for Refugee Problems in Today’s World” - Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at the Commemoration of the 20th Anniversary of the Cartagena Declaration on Refugees, Mexico City, 15 November 2004

¹⁰ See UNHCR, The UN Refugee Agency, Safeguarding Asylum, <<http://www.unhcr.org/4444afc70.pdf>>

¹¹ See The Refugee Convention, 1951, THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY BY DR PAUL WEIS, <http://www.unhcr.org/4ca34be29.pdf>

¹² Supra note 8

CHAPTER I

1.1 The nature of obligations of states in relation to granting asylum and access to asylum procedures under relevant treaties

Throughout the 20th century, the international community gathered a series of guidelines, laws and treaties to ensure proper treatment of refugees and protect their human rights¹³.

The process began under the League of Nations in 1921¹⁴. In July 1951, a diplomatic conference in Geneva adopted the Convention relating to the Status of Refugees ('1951 Convention'), which was later amended by the 1967 Protocol¹⁵. These documents clearly spell out who is a refugee and the kind of legal protection, other assistance and social rights a refugee is entitled to receive. It also defines a refugee's obligations to host countries and specifies certain categories of people, such as war criminals, who do not qualify for refugee status.¹⁶ Initially, the 1951 Convention was more or less limited to protecting European refugees in the aftermath of World War II, but the 1967 Protocol expanded its scope as the problem of displacement spread around the world. These two documents, which enjoy near universal ratification, define "a refugee" as a person owing to 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.

The phrase "*well-founded fear of being persecuted*" is the key phrase of the definition¹⁷. While fear is a subjective emotion, for purposes of refugee status determination, it must be well founded; that is, it must have an objective basis. There are varying degrees to which each of these two elements may be important in any individual case.¹⁸ In cases where there is a failure to express subjective fear, objectively the circumstances may well justify recognition, in that anyone in such circumstances would run such an obvious risk that the absence of fear would be immaterial. Conversely, there may be instances where objective circumstances in themselves do

¹³ See UNHCR, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, <http://www.unhcr.org/4ec262df9.pdf>

¹⁴ See On the History of the International Protection of Refugees, by Gilbert Jaeger, https://www.icrc.org/eng/assets/files/other/727_738_jaeger.pdf

¹⁵ See Convention Relating to The Status of Refugees, <http://legal.un.org/avl/ha/prsr/prsr.html>

¹⁶ Ibid

¹⁷ See HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees Reissued Geneva, DECEMBER 2011, available at <http://www.unhcr.org/3d58e13b4.pdf>

¹⁸ Ibid

not appear to be compelling, but taking into account the individual's own background, belief system and activities, the circumstances may indeed be considered as substantiating a well founded fear for that individual, although the same objective circumstances might not be so considered for another. It is essential that decisions on refugee status, and particularly the well-founded fear aspect, be taken only after having studied all the relevant circumstances of the case, and having weighed them appropriately.¹⁹

Persecution, for the purposes of refugee status determination, is nowhere defined in international law²⁰. The fact that the Convention does not legally define persecution is a strong indication that, on the basis of the experience of the past, the drafters intended that all future types of persecution should be encompassed by the term. The on-going development of international human rights law subsequent to the adoption of the 1951 Convention has helped to advance the understanding, that persecution comprises human rights abuses or other serious harm, often but not always with a systematic or repetitive element.²¹

Race, for the purpose of refugee status determination, in its widest sense includes all kinds of ethnic groups that are referred to as "races" in common usage²². Discrimination on racial grounds will frequently amount to persecution in the sense of the 1951 Convention. What refers to the *religion*, the Universal Declaration of Human Rights²³ and the International Covenant on Civil and Political Rights²⁴ declare the right to freedom of thought, conscience and religion. This right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.

The nationality ground has at times given rise to some confusion, because the same word can be used both to denote a person's ethnicity or ethnic origin, and a person's citizenship or the legal bond between an individual and a State²⁵. It is worth recalling that stateless persons can also be 1951 Convention refugees on the same grounds as others, or may become refugees, for example, where their very lack of citizenship attracts upon them severe discrimination amounting to persecution. In the eligibility practice of States, though, the most frequent meaning of nationality is that denoting ethnicity or ethnic origin. In the present context, where ethnic-based conflict is common, this ground has considerable significance.

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² Ibid

²³ See Universal Declaration of Human Rights, available at <http://www.un.org/en/universal-declaration-human-rights/>

²⁴ See International Covenant on Civil and Political Rights, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

²⁵ Supra note 17

Membership of a particular social group is perhaps the ground with least clarity²⁶. Varying interpretations have been given to the phrase in different jurisdictions. One interpretation emphasizes the perception of the persecutor and/or others within the relevant society, focusing on some characteristic attribute, activity, belief, interest or goal. Another approach in widespread use holds that characteristics that identify such groups are those which are either innate or historical and therefore cannot be changed, or those which, though it is possible to change them, ought not be required to be changed because they are so closely linked to the identity of a person and/or are an expression of fundamental human rights.

Political opinion presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods²⁷. Persecution “for reasons of political opinion” implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. An applicant claiming fear of persecution because of political opinion need not show that the authorities of his country of origin knew of his opinions before he left the country.²⁸

These are the main elements that should be considered in the process of granting asylum. However, some worrying trends have begun to emerge because of changed nature of conflicts and effects of globalization²⁹. Many states have tried to limit their responsibilities towards refugees. Debates are being continued about which states and how they should provide refugee protection. Nevertheless, they have taken on a new dimension, as states are trying to explore proposals how to improve refugee protection and to control refugee movement.³⁰ Part of the difficulties encountered by refugees lies in the obvious gap between the existence of a right to asylum and the lack of a corresponding state duty to grant asylum. The 1951 Refugee Convention does not make any mention of a duty of any State to grant asylum.³¹ The provisions of international law, in element, are to the effect that States possess a “right” and not a “duty” to grant asylum. Several international attempts were made to formulate clear legal provisions in respect to territorial asylum, which, however, mostly failed to materialize.³² The existing universal treaties are, thus, incapable of guaranteeing the intended protection to refugees, though the principle has been included in various texts. It is generally argued that states have a right,

²⁶ Supra note 17

²⁷ Supra note 17

²⁸ Supra note 17

²⁹ See Refugee Protection: A Guideline to International Refugee Law
<http://www.ipu.org/pdf/publications/refugee_en.pdf>

³⁰ See Catherine Phuong Identifying States' Responsibilities towards Refugees and Asylum Seekers, available at <http://www.esil-sedi.eu/sites/default/files/Phuong.PDF>

³¹ Ibid

³² See Aswathy Madhukumar, Right to asylum and State sovereignty to decide: The Conflict on Refugee Crises, available at: < <http://journal.lawmantra.co.in/wp-content/uploads/2015/12/91.pdf>>

rather than a duty, to grant asylum, which follows from their sovereign right to control admission into their territory³³. Thus, the controversy whether the states are obliged to grant asylum or it is their right to grant asylum continues to be the spot of discussion. Indeed, it is uncontroversial that asylum is a right of states to grant *if they so wish* in the exercise of their sovereignty, without it being considered a hostile act towards other states, who have a correlative duty to respect it³⁴. Article 1(1) of the UN Declaration on Territorial Asylum words it in this way: ‘Asylum granted by the State, in the exercise of its sovereignty ... shall be respected by all other States’³⁵. The nature of asylum as a sovereign right of states is further safeguarded by article 1(3) of the Declaration, whereby it shall rest with the State granting asylum to evaluate the grounds for the grant of asylum³⁶. Accordingly, asylum as an expression of state sovereignty is under no limitation in international law, with the exception of extradition or other obligations acquired by treaty.

Article 33 of the Refugee Convention is the primary response of the international community to the need of refugees to enter and remain in an asylum state. The duty of non-refoulement is not, however, the same as a right to asylum from persecution, in at least two ways.³⁷ The first critical distinction between non-refoulement and a right of asylum follows directly from the purely consequential nature of the implied duty to admit refugees under Article 33.³⁸ Because the right of entry that flows from the duty of non-refoulement is entirely a function of the existence of a risk of being persecuted, it does not compel a state to allow a refugee to remain in its territory if and when that risk has ended. Thus, “refugee status is a temporary status for as long as the risk of persecution remains.” Second and most critically, the duty of non-refoulement only prohibits measures that cause refugees to “be pushed back into the arms of their persecutors”; it does not affirmatively establish a duty on the part of states to receive refugees.³⁹ State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted. But where there is a real risk that rejection will expose the refugee “in any manner whatsoever” to the risk of being persecuted for a Convention ground, Article 33 amounts to a de facto duty to admit the refugee, since admission

³³ Supra note 9

³⁴ See International Journal for Refugee Law, Asylum as a general Principle of International Law, <https://academic.oup.com/ijrl/article/27/1/3/2362480/Asylum-as-a-General-Principle-of-International-Law>

³⁵ See UNHCR, Note In International Protection Addendum 1: Draft Convention on Territorial Asylum (Submitted by the High Commissioner, Note on International Protection Addendum 1, <http://www.unhcr.org/excom/excomrep/3ae68c023/note-international-protection-addendum-1-draft-convention-territorial-asylum.html>

³⁶ See THE 1967 DECLARATION ON TERRITORIAL ASYLUM, available at http://legal.un.org/avl/pdf/ha/dta/dta_e.pdf

³⁷ See James C. Hathaway, The Rights of Refugees under International law, available at: <file:///C:/Users/asus/Downloads/Rights%20of%20refugees%20(1).pdf>

³⁸ Ibid

³⁹ Ibid

is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk.

However, a novel set of protections for refugees and asylum-seekers exists within the Inter-American human rights system, the scope of which has been developed considerably in recent years through the jurisprudence of its institutions.⁴⁰ The positive emphasis placed on the existence of procedural protections by the Inter-American system of human rights is reflected in the specific context of procedural standards for the treatment of aliens, especially in the context of removal or expulsion⁴¹. A core feature of the jurisprudence is the consistent view of the Commission that the right of resort to the courts and associated due process guarantees apply to claims for asylum. While the collective expulsion is prohibited by article 22(9), article 22(6) of American Convention on Human Rights⁴² requires that: An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law. This provision will be violated, where the decision to expel an alien does not respect the guarantees of due process and effective judicial counsel. The right to seek and be granted asylum established in article 22.7 of the American Convention, in conjunction with Articles 8 and 25 of the same Convention, ensures the right of asylum seekers to be heard by the authorities of the State of destination with due process of law.⁴³ The Commission has also interpreted the right to equality as a form of procedural protection for asylum seekers. This is a standalone right, which can be violated not only in the application of another substantive right, but also by unreasonable differentiation of persons belonging to the same category of class.

More recently, an obligation to grant asylum based on *non-refoulement* has been recognised by the Inter-American Court of Human Rights in the case of *Pacheco Tineo*⁴⁴. At the end of February, 2001, the Inter-American Commission on Human Rights referred a case to the Inter-American Court which raises, for the first time before the court, the issue of a state's obligation to give proper consideration to requests for asylum and not to return a person to a country where they would be at risk of ill-treatment—the principle of non-refoulement.

⁴⁰See David James Cantor, The Inter-American Human Rights System: A new model for integrating refugee and complementary protection, available at:

<<http://www.tandfonline.com/doi/full/10.1080/13642987.2013.825077?scroll=top&needAccess=true>>

⁴¹See UNHCR, Convention and Protocol Relating to the Status of Refugees, <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

⁴²See Regional Approaches to the Protection of Asylum Seekers, edited by Ademola Abass and Francesca Ipollito, <https://books.google.am/books?id=XfXsCwAAQBAJ&pg=PA284&lpg=PA284&dq=provisions+of+the+AC+HR+on+asylum&source=bl&ots=cmBbvjbLAO&sig=Eu6XuTUOUtp0Ky4sxJRMg2jGcC&hl=hy&sa=X>

⁴¹

⁴²

⁴³ See AMERICAN CONVENTION ON HUMAN RIGHTS, http://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf

⁴⁴ See INTER-AMERICAN COURT OF HUMAN RIGHTS CASE OF THE PACHECO TINEO FAMILY v. PLURINATIONAL STATE OF BOLIVIA Case, http://www.corteidh.or.cr/docs/casos/articulos/seriec_272_ing.pdf

The Court:

Analyzed the evolution of the right to seek and be granted asylum and of the principle of non-refoulement. When certain rights such as life or physical integrity of non-nationals are at risk, such persons must be protected against removal to the State where the risk exists, *as a specific modality of asylum under article 22.8 of American Convention on Human Rights*⁴⁵ This means that refugees and asylum seekers cannot be rejected at the border or expelled without adequate and individualized analysis of their requests.

Furthermore, Article 3 of the Refugee Convention makes clear that all Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.⁴⁶ The legislative and negotiating histories of the Refugee Convention make clear that discrimination by contracting states against different groups of refugees is a direct violation of the Convention. States are not allowed to refuse to grant an asylum based on the nationality, race and religion of asylum seekers.

Thus, it can be concluded that the states have a “duty” to grant asylum to refugees who are at the borders, without discrimination of race, religion and nationality. Refugees and asylum seekers cannot be rejected at the border or expelled without proper and individualized analysis of their claims. Moreover, states should provide and respect the guarantees of due process and effective judicial counsel.

1.2 Customary International Law in Relations of Granting Asylum

Refugee rights stem from international law and can be derived from the three formal sources of international law. These sources are listed in Article 38 in the Statute of the International Court of Justice (‘ Statute’): international conventions (treaties), customary international law and general principles of law⁴⁷. Article 38.1(b) of the ICJ Statute provides that customary international law consists as ‘evidence of a general practice accepted as law’⁴⁸.

⁴⁵ See American Convention on Human Rights “PACT OF SAN JOSE, COSTA RICA” (B-32) http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

⁴⁶ Supra note 41

⁴⁷ See Statute of the International Court of Justice, http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf

⁴⁸ See especially the case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgement) [1986] ICJ Rep 14., where the ICJ confirmed that customary international law consists of two elements, the objective one ‘general practice’ and the subjective one ‘accepted as law’, also known as opinio juris

In the North Sea Continental Shelf Case, the International Court of Justice ('ICJ') discussed the criteria for how a new customary rule can emerge⁴⁹. For a customary rule to emerge the court held that it needed: (1) widespread and representative participation in the convention, including States whose interests were specially affected (i.e. generality); and (2) virtually uniform practice (i.e. consistent and uniform usage) undertaken in a manner that demonstrates (3) a general recognition of the rule of law or legal obligation (i.e. *opinio juris*). Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention.⁵⁰ In order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.⁵¹ The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.⁵²

Even though there are countries that are not Contracting States to the Geneva Convention, they still have obligations towards refugees⁵³. The lack of ratification of the Convention does not mean that States do not incur protection obligations. Uniform practice (including that of states that are not parties to the Convention), along with widespread ratification of the Convention should be sufficient to claim that there is a customary rule requiring states to grant access to proceedings to persons who reach their border.

Here it is worth to analyze the practice of Lebanon and Jordan, which are not parties to the Convention Relating to the Status of Refugees, but have been accepting most of refugees per capita in the world recently.

⁴⁹ See North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgement) [1969] ICJ Rep 3., <http://www.icj-cij.org/docket/files/51/5535.pdf>

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid

⁵³ See UNHCR, Convention and Protocol Relating to the Status of Refugees, <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

Jordan has topped a list of 10 (Iran, Ethiopia, Kenya, Uganda, Democratic Republic of Congo, Chad, Pakistan) countries that host more than half of the world's refugees, according to an Amnesty International (AI) report⁵⁴. Jordan, which has taken in over 2.7 million people, was named as the top refugee-hosting country, followed by Turkey with over 2.5 million refugees, and Lebanon which hosts over 1.5 million people. According to UNHCR, Jordan is the second largest host of refugees per capita in the world following Pakistan⁵⁵. In 1998, Jordan and the UNHCR signed a memorandum of understanding (MOU) to allow the UNHCR to act within its mandate to provide international protection to persons falling within its mandate⁵⁶. This MOU has become the legal framework under which refugees are treated and processed in Jordan. The MOU states that Jordan accepts the definition of "refugee" as it is defined in 1951 Convention. Jordan also agrees that asylum seekers and refugees should receive treatment according to internationally accepted standards.

Lebanon also is not a party to the Convention relating to the Status of Refugees of 1951 or its 1967 Protocol, but it has a large number of refugees. According to the UN High Commissioner for Refugees (UNHCR) report the number of Syrian refugees alone to be 1,835,840 in 2015⁵⁷. As a result of the "absence of a national refugee law," a Memorandum of Understanding (MOU) was signed between the UNHCR and the Government of Lebanon in September 2003. This provides a mechanism for the "issuing of temporary residence permits to asylum seekers." According to the MOU, the UNHCR adjudicates claims for asylum and the government issues a temporary residence permit, normally for three months but possibly extended to six to nine months. This allows UNHCR to find a durable solution for the refugee in question. In terms of benefits offered to refugees, the Lebanese government allows refugees to enroll in Lebanese universities and have access to primary health care after registering with the UNHCR⁵⁸.

Based on the above, it can be claimed that at the very least the key substantial provisions of the Convention have attained the status of customary international law. Finding that such law exists does not, however, necessarily mean that refuge is available to an expanded group of persons. International law is not always so kind. Instead, it means that protection is available for more persons, but also that protection is limited by additional rules. In the field of refugee law, there is usual balance between state freedom of action and state limitation on action, with states demanding increasingly liberal moral standards from themselves, but showing increasing

⁵⁴ See The Jordan Times, Jordan Tops list of refugee-host countries- Amnesty, <http://jordantimes.com/news/local/jordan-tops-list-refugee-host-countries-%E2%80%94-amnesty>

⁵⁵ Ibid

⁵⁶ See Refugee Law and Policy in selected Countries, March 2016, available at: <https://www.loc.gov/law/help/refugee-law/refugee-law-and-policy.pdf>

⁵⁷ Ibid

⁵⁸ See Legal Status of Refugees: Egypt, Jordan, Lebanon and Iraq, available at: <https://www.loc.gov/law/help/refugees/legal-status-refugees.php>

reluctance to live by those standards. However, customary international law shows once again, that regardless of the fact that the state is a contracting party of the Convention or not, the fact that refugees are entitled with a right to seek and be granted asylum, is a clear proof of states obligation to protect those rights by granting them asylum. Hence, it is submitted that all states should protect the fundamental human rights of refugees under customary international law.

1.3 The compatibility of so called “Muslim Ban” with corresponding international obligations of the United States of America

On January 27, 2017, the US President issued Executive Order 13769, “Protecting the Nation from Foreign Terrorist Entry into the United States” (the “Executive Order”)⁵⁹. Citing the terrorist attacks of September 11, 2001, and stating that “numerous foreign-born individuals have been convicted or implicated in terrorism related crimes” since then, the Executive Order declares that “the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles⁶⁰.” It asserts, that deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The Executive Order made several changes to the policies and procedures by which non-citizens may enter the United States⁶¹. Three are at issue here. First, section 3(c) of the Executive Order suspended for 90 days the entry of aliens from seven countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen. Second, section 5(a) of the Executive Order suspended for 120 days the United States Refugee Admissions Program. Third, section 5(c) of the Executive Order suspended indefinitely the entry of all Syrian refugees.

⁵⁹ See Business Insider, Politics, <http://www.businessinsider.com/trump-executive-orders-memorandum-proclamations-presidential-action-guide-2017-1/#executive-order-january-27-immigration-ban-11>

⁶⁰ See Executive Order: Protecting The Nation from Foreign Terrorist Entry Into The United States, <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>

⁶¹ See United States Court of Appeals for the Ninth Circuit, <http://edition.cnn.com/2017/02/09/politics/travel-ban-9th-circuit-ruling-full-text/>

Federal lawsuits were filed in New York, Massachusetts, Virginia and Washington on behalf of travelers who were detained in airports in the United States⁶². After the judicially challenged rollout of President Donald Trump's initial executive order on refugees and immigration from Muslim-majority countries, the White House has put forth a revised version.

Soon, after the first Executive order, on March 6, 2017, US President Donald Trump signed a new executive order that bans immigration from six Muslim-majority countries, dropping Iraq from January's previous order, and reinstates a temporary blanket ban on all refugees⁶³.

The order calls Iraq a "special case" because of the "close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq⁶⁴."

According to his executive order, all refugee arrivals will be stopped for a period of 120 days⁶⁵. Unlike in the previous text, Syrian refugees are not singled out for a permanent ban on entry. Furthermore, citizens from six countries have been prevented from entering the United States from March 16, unless they have previously been granted a visa. A federal judge in Hawaii issued a nationwide order blocking President Trump's ban on travel from parts of the Muslim world⁶⁶. Hawaii State had argued that the ban would harm tourism and the ability to recruit foreign students and workers, while in Maryland the plaintiffs argued it discriminated against Muslims and illegally reduced to number of refugees being accepted for resettlement in the US. A federal judge in Maryland ruled against Mr. Trump overnight, with a separate order forbidding the core provision of the travel ban from going into effect⁶⁷.

One of the main issues at stake in the growing legal battle over the order is whether the order qualifies as unconstitutional discrimination against Muslims. Despite a thin veneer of religious neutrality, the order does in fact target Muslims. On its face, the order does not discriminate on the basis of religion⁶⁸. The text does not even mention Muslims or any other religious group by

⁶² See abcNews, A timeline of Trump's immigration executive order and legal challenges, <http://abcnews.go.com/Politics/timeline-president-trumps-immigration-executive-order-legal-challenges/story?id=45332741>

⁶³ See BBC News, Trump signs new travel ban directive, <http://www.bbc.com/news/world-us-canada-39183153>

⁶⁴ See The Executive Order Protecting The Nation From Foreign Terrorist Entry into The United States, March 06, 2017, available at: <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>

⁶⁵ Ibid

⁶⁶ See NBC NEWS, Trump's Second Travel Ban Blocked by Hawaii Judge Derrick Watson, available at: <http://www.nbcnews.com/news/us-news/federal-judge-hawaii-blocks-trump-s-revised-travel-order-n734141>

⁶⁷ Ibid

⁶⁸ See The Washington Post, Why Trumps Executive Order is Unconstitutional, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/05/why-trumps-refugee-order-is-unconstitutional-discrimination-on-the-basis-of-religion/?utm_term=.0f63182ad98f

name. There is a popular counterargument to all constitutional challenges to the executive order. Because the new policy does not target all Muslim-majority countries, it cannot be considered an act of discrimination against Muslims⁶⁹. Legally, this is a weak argument. To see how absurd logic it is, consider this: If the president signs an executive order that discriminates against *some* African-Americans, it doesn't matter that it doesn't discriminate against *all* African-Americans—it's still illegal. The principle of non-discrimination and equal protection of the law is embodied in Article 3 of the Refugee Convention, and other international human rights treaties⁷⁰. The executive order also contravenes with the International Covenant on Civil and Political Rights (in)⁷¹, another treaty to which the US is a state party. Article 26 of the ICCPR requires equal treatment before the law of all persons, without discrimination on any ground, including race, religion, or national or social origin.⁷² Article 4 of the ICCPR notes that even in a "time of public emergency which threatens the life of the nation", states cannot take any action to stray from their obligations that involve discrimination "solely on the ground of race, color, sex, language, religion or social origin".⁷³ The order is clearly discriminatory, requiring separate and unfair treatment of entire groups of people based on their national origin, Muslims in particular.

The UN experts wrote that the immigration policy “risks people being returned, without proper individual assessments and asylum procedures, to places in which they risk being subjected to torture and other cruel, inhuman or degrading treatment, in direct contravention of international humanitarian and human rights laws which uphold the principle of non-refoulement⁷⁴.” Trump's order appears to violate several obligations, which should have been followed by the USA. The United Nations Refugee Convention requires that the US provide protection and asylum to those facing persecution. By shutting the door to refugee admissions, whether temporarily or indefinitely, Trump's order flagrantly violates that core obligation. Article 3 of the Refugee Convention makes clear that all signatory states "apply the provisions ... to refugees without discrimination as to race, religion or country of origin". In 1980, Congress enacted the Refugee Act to bring the US into conformity with these obligations after ratifying the 1967 Protocol

⁶⁹ See How Trump's Executive Order on Immigration Violates Religious Freedom Laws, <https://www.justsecurity.org/37061/trumps-executive-order-immigration-violates-religious-freedom-laws/>

⁷⁰ See Convention Relating to the Status of Refugee, Art.3. This principle is contained in other international human rights instruments as well. See, e.g., American Convention on Human Rights, Art. 24; International Covenant on Economic, Social and Cultural Rights, Art. 2(2); Convention on the Rights of the Child, Art. 2

⁷¹ See International Covenant on Civil and Political Rights, available at: International Covenant on Civil and Political Rights

⁷² Ibid

⁷³ Ibid

⁷⁴ See Washington Post, UN Experts say Trump Immigration Order Violates US Human Rights Obligations, https://www.washingtonpost.com/news/post-nation/wp/2017/02/01/u-n-experts-say-trump-immigration-order-violates-u-s-human-rights-obligations/?utm_term=.494b26790325

Relating to the Status of Refugees⁷⁵. While governments are responsible for designing their own refugee resettlement programs, these programs must conform to international obligations. They must select refugees for resettlement only on the basis of their needs, regardless of nationality, ethnicity, religion, or other related characteristics. While the Convention allows exclusion of certain persons from refugee protection - for example, if they committed war crimes - this exclusion is determined on a case-by-case basis and certainly does not allow any sort of blanket ban against a group of people or nationality.

The Trump executive order not only denies individuals an opportunity for individualized review, but it has also resulted in the detention, denial of counsel, and removal of individuals with prior authorization to enter the US.

Refugees are deprived from procedural safeguards—like advance notice, a hearing before a neutral decision-maker and a chance to tell their side of the story—before the government takes away their liberty. Procedural due process forbids the government from depriving an individual of life, liberty or property without due process of law. The US government is obligated to hear the asylum claims of noncitizens who arrive at US borders and ports of entry. The Immigration and Nationality Act provides, "Any alien who is physically present in the US or who arrives in the US . . . irrespective of such alien's status, may apply for asylum . . ." They must be afforded an opportunity to apply for asylum or other forms of humanitarian protection and be promptly received and processed by US authorities⁷⁶.

The Trump administration's new policy has been violated and continues to violate international refugee law and override all international instruments that prohibit these kind of violations. US casts doubt on its democratic image that has been formed throughout decades and so called welcome approach toward refugees has become an opposite pole of its former policy.

⁷⁵ See International Dimension of U.S Refugee Law by Joan Fitzpatrick, available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1154&context=bjil>

⁷⁶ See US Migration since 1965, < <http://www.history.com/topics/us-immigration-since-1965>>

CHAPTER II

2.1 Non-refoulement principle in the light of interrelation of Refugee law and Human rights treaty norms

The principle of *non-refoulement* is the cornerstone of asylum and of international refugee law⁷⁷. Non-refoulement is a principle of international law that precludes states from returning a person to a place where he or she might be tortured or face persecution. The principle is inter alia stipulated in Article 33 of the 1951 Refugee Convention⁷⁸. In essence, *non-refoulement* provides that a government should not eject a refugee from its state-territory or borders and ‘*refouler*’ that person to a place (country of origin or otherwise) where his or her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Convention Relating to the Status of Refugees has been ratified by almost 150 states and remains one of the most widely accepted treaties in refugee law⁷⁹. Article 42(1) of the Refugee Convention confirms that the provision relating to *non-refoulement*, contained in Article 33, is non-derogable, which means states cannot make reservations to this article⁸⁰. 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. James C. Hathaway identifies two main tests that are applicable in assessing whether the asylum seeker or refugee is a danger to the national security of the asylum state⁸¹. The first test requires a high level of proof for the determination that the person is a danger to the security of the asylum state, in that there must be ‘reasonable grounds’ for this conclusion. The asylum state must demonstrate that the refugee's continued presence in the state constitutes a threat to the security of the state. Secondly, the refugee may be excluded if, ‘having been convicted by a final judgment of a particularly serious crime’, he or she constitutes a danger to the community in the asylum-state. Concerns about threats to the safety and security of an

⁷⁷ See UNHCR Note on the Principle of Non-Refoulement, <http://www.refworld.org/docid/438c6d972>.

⁷⁸ Supra note 3

⁷⁹ See UNHCR, States Parties to The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>

⁸⁰ Supra note 3

⁸¹ See Cornell International Law Journal, Framing Refugee Protection in the New World Disorder by James C. Hathaway Colin J. Harvey, <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1488&context=cilj>

asylum state should be factored into the protection decision, instead, through an exception to the duty of states not to expose a refugee to the risk of return to persecution, the duty of non-refoulement⁸². Article 33(2) of the Convention authorizes a government to refuse to protect a refugee whose presence threatens its most basic interests⁸³. A receiving state may even return a dangerous refugee to face the risk of persecution in his or her state of origin, but only if the risk to national security or communal safety is established on the basis of a more demanding standard of proof.

The principle of non-refoulement has arguably reached a status of *jus cogens* (i.e. a fundamental rule of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted)⁸⁴. Thus (as a part of *customary and treaty law*), all countries are legally bound by the prohibition of returning refugees in any manner whatsoever to countries or territories where their lives or freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion, which is the cornerstone of international protection. Beyond the 1951 Convention, non-refoulement protects fundamental rights in numerous international human rights treaties. At that, exceptions to the norm are found only in the Conventions. The Convention Against Torture (CAT) contains an absolute prohibition on refoulement in torture cases, subject to no exceptions⁸⁵. Likewise, the International Covenant on Civil and Political Rights (ICCPR)⁸⁶ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁸⁷ protect individuals from refoulement in cases of torture or cruel, inhuman or degrading treatment without exception. In effect, non-refoulement in these contexts provides absolute protection for fundamental rights. Non-refoulement in the refugee context provides far less complete protection for norms that are equally fundamental, such as the right to life.

⁸² "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Id. art. 33(1), 189 U.N.T.S. at 176.

⁸³ 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

⁸⁴ See The Jus Cogens Nature of Non-Refoulement by Jean Allain, https://www.researchgate.net/publication/31412200_The_jus_cogens_Nature_of_non-refoulement

⁸⁵ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, art. 3, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force 26 June 1987)

⁸⁶ See International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

⁸⁷ See European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf

The purpose of the principle of non-refoulement is, among others, to serve the protection of refugees. Following from the right to seek and enjoy in other countries asylum from persecution, as set forth in Article 14 of the **Universal Declaration of Human Rights**, this principle of non-refoulement reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person⁸⁸. These and other rights are threatened when a refugee is returned to persecution or danger.

Now is the time for a progressive development of a global approach to the refugee problem, an approach which takes due cognizance of the basic human rights of refugees and interests of the asylum countries and the international community, and secures the cooperation of all parties in seeking a solution to the problem.⁸⁹

Given the close link between refugees and human rights, international human rights standards are powerful ammunitions for enhancing and complementing the existing refugee protection regime and giving it proper orientation and direction.⁹⁰

2.2 Customary nature of Non-refoulement Principle

For all persons, regardless of their legal status, the principle of non-refoulement is a core component of the prohibition of torture and cruel, inhuman or degrading treatment or punishment enshrined in Article 7 of the ICCPR, Article 3 of the UN Convention against Torture and Article 3 of the ECHR as interpreted by the European Court of Human Rights.⁹¹ Such provisions do not allow for any derogation, exception or limitation. UNHCR is of the view that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under international human rights law, constitutes a rule of customary international law⁹². In this wider field of application,

⁸⁸ See Universal Declaration of Human Rights , <http://www.un.org/en/universal-declaration-human-rights/>

⁸⁹ See Bagish Chandra Nirmal, Refugees and Human Rights, available at: <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/6.html>

⁹⁰ Ibid

⁹¹ See Scope of the principle of non-refoulement in contemporary border management: evolving areas of law, available at: < file:///C:/Users/asus/Downloads/fra-2016-scope-non-refoulement_en.pdf >

⁹² See: UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR

non-refoulement now extends to prohibit the return of *anyone* to a situation in which he or she runs the risk of torture, cruel or degrading treatment or the risk of a violation of the right to life. Regional and international human rights treaties⁹³ as well as a number of other international instruments⁹⁴ contain prohibitions of refoulement. The principle of non-refoulement not only prohibits the removal, expulsion or extradition to a country where a person may be at risk of persecution or other serious harm (direct refoulement) but also to countries where individuals would be exposed to a serious risk of onward removal to such a country (indirect refoulement).⁹⁵ Under the 1951 Refugee Convention, non-refoulement not only refers to returns or expulsions of people who are already within a host state's territory, but also encompasses rejection at the borders.

The lack of ratification of the Convention does not mean that States do not incur protection obligations. The normative evolution after the adoption of the Geneva Convention, practical necessities, and policy considerations combined to create additional safeguards for refugees.⁹⁶ Even though Lebanon, Jordan and other countries (Iran, Ethiopia, Kenya, Uganda, Democratic Republic of Congo, Chad, Turkey, Pakistan) are not Contracting States to the Geneva Convention, they still have obligations towards refugees.⁹⁷ The global rights group in its latest report on the refugee crisis found that the five African countries together with Jordan, Lebanon, Pakistan, Iran and Turkey were accommodating over 50% of global refugees.⁹⁸ States may be bound not only by international treaties, whether general or particular, establishing rules expressly recognized by them and to which they have given their formal assent, but also by international custom as evidence of a general practice accepted as law. This, together with the fact that the State parties to the Convention formally acknowledged non-refoulement as a principle 'whose applicability is embedded in customary international law' and its wide

1938/93, 2 BvR 1953/93, 2 BvR 1954/93

<http://www.refworld.org/publisher,UNHCR,POSITION,DEU,437b6db64,0.html>

⁹³ As part of the prohibition of torture: cf. Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7 of the 1966 International Covenant on Civil and Political Rights and its interpretation by the UN Human Rights Committee in its General Comment No. 20 (1992), Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 22(8) of the 1969 American Convention on Human Rights; or explicitly as in Article 19(2) of the 2000 Charter of Fundamental Rights of the European Union.

⁹⁴ See Article 3(1) of the 1967 Declaration on Territorial Asylum, adopted unanimously by the UNGA Resolution 2132 (XXII), Article II(3) of the 1969 Organization of Africa Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Section III(5) of the 1984 Cartagena Declaration and Article 3(2) of the 1957 European Convention on Extradition, Article 4(5) of the 1981 Inter-American Convention on Extradition.

⁹⁵ Ibid

⁹⁶ See The obligations of states towards refugees under international law: Some reflections on the situation in Lebanon, available at: < <https://www.nrc.no/globalassets/pdf/reports/obligations-of-state.pdf>>

⁹⁷ See AfricaNews, Ethiopia, Uganda, DRC, Kenya and Chad in top 10 refugee friendly nations-Amnesty, available at: <

<http://www.africanews.com/2016/10/04/ethiopia-uganda-drc-kenya-chad-in-top-10-refugee-friendly-nations-amnesty/>>

⁹⁸ Ibid

acceptance as a norm of fundamentally norm-creating character, has led many scholars and UNHCR to conclude that it forms part of customary international law today⁹⁹. As such, it is binding on all States, including those, which have not yet become party to the 1951 Convention and/or its 1967 Protocol. In this regard, UNHCR notes, inter alia, the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations¹⁰⁰. Moreover, exercising its supervisory function, UNHCR has closely followed the practice of Governments in relation to the application of the principle of non-refoulement, both by States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR's experience, States have overwhelmingly indicated that they accept the principle of non-refoulement as binding, as demonstrated, inter alia, in numerous instances where States have responded to UNHCR's representations by providing explanations or justifications of cases of actual or intended refoulement, thus implicitly confirming their acceptance of the principle¹⁰¹.

The emergence of an absolute prohibition under international and regional human rights law of torture, cruel, inhuman or degrading treatment, continuing progress towards the abolition of capital punishment and, in particular, the consolidation of the principle of non-refoulement into a norm of customary international law which is binding on all States have been particularly important in this regard.

2.3 The compatibility of so called “Muslim Ban” with corresponding international obligations of the United States of America

President Donald Trump's Executive Order, commonly referred to as the “Muslim Ban,” has generated significant discussion of its discriminatory and Islamophobic nature, but not enough about the plight of refugees. Too little attention has been paid to the way this executive action violates long-standing, core U.S. obligations to protect refugees and to ensure no one is sent to a country where he faces a real risk of torture or persecution. This is not only a matter of

⁹⁹ See Declaration of State Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of states Parties, Geneva, 12-13 December 2001, UN doc. HCR/MMSP/2001/09, 16 Jan. 2002. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, para 4, adopted on 18 Dec. 2001

¹⁰⁰ Supra note 26

¹⁰¹ See Non-Refoulement in the 1951 Convention, From: The Refugee in International Law (3rd Edition) Guy S. Goodwin-Gill, Jane McAdam, file:///C:/Users/asus/Downloads/OPIL_The_Refugee_in_International_Law_Part_2_Asylum_5_NonRefoulement_in_the_1951_Refugee_Convention%20(1).pdf

international law, of course, as the United States has incorporated its obligations directly into domestic law. Soon, after Mr. Trump signed the ban, a group of UN experts denounced the measure, calling particular attention to the plight of “people being returned, without proper individual assessments and asylum procedures, to places in which they risk being subjected to torture and other cruel, inhuman or degrading treatment, in direct contravention of international humanitarian and human rights laws which uphold the principle of *non-refoulement*.¹⁰²”. The Inter-American Commission on Human Rights, which monitors rights protections in the Western hemisphere, decried the Order’s abrogation of “the right to seek and receive asylum, the principle of *non-refoulement*, the prohibition on rejection at the border, and the prohibition on the collective expulsion of aliens¹⁰³.”

As discussed above, the rules against torture and *refoulement* are norms of the highest and most binding nature, and the prohibition on ill-treatment is non-derogable, meaning it cannot be limited under any circumstances, even in times of emergency¹⁰⁴. The 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) also includes a substantive *non-refoulement* protection and related procedural rights that bind the United States under the Protocol¹⁰⁵. As it is mentioned above, the Convention prohibits states from transferring individuals to countries where they face a serious risk of persecution. Moreover, determination of refugee status requires an individualized analysis with both an objective and subjective component, and entails due process guarantees to ensure that analysis can take place. What refers to Article 33(2) of the Refugee Convention, it excludes from the protection of Article 33(1) individuals about “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 judgement of a particularly serious crime, constitutes a danger to the community of that country.” These exclusion clauses must be construed narrowly, and must be made on an individualized basis—which the Executive Order does not. Even when this exclusion is applicable, individuals retain the protection against *refoulement* to other risks, including the risk of torture and cruel treatment under international human rights law, which contains no exceptions.

Risks of *Non-refoulement* resulting from the Executive Order

The Executive Order violates the United States’ international *non-refoulement* obligations.

¹⁰² See The Independent, Donald Trump refugee ban: UN condemns President’s ban on asylum and entry from Muslim-majority countries, <http://www.independent.co.uk/news/world/americas/donald-trump-refugee-ban-executive-order-muslim-majority-countries-syrians-un-united-nations-a7550576.html>

¹⁰³ See Convening an Emergency Hearing on U.S. Executive Order “Protecting the Nation from Foreign Terrorist Entry into the United States” at March 2017 Period of Sessions, http://www.ijrcenter.org/wp-content/uploads/2017/02/IACHR_Muslim-Ban-coalition-letter-Feb.-6-2017.pdf

¹⁰⁴ Supra note 18

¹⁰⁵ Supra note 3

Anyone who is within U.S. custody or on U.S. territory (i.e. anyone detained at a U.S. airport) is plainly protected by the procedural rules related to *non-refoulement*¹⁰⁶. Every individual arriving in the United States must be given a fair opportunity to make a claim that he or she is at risk of torture or persecution. Reports suggest that Customs and Border Protection is not advising individuals of their right to claim asylum, much less conducting credible fear interviews¹⁰⁷. If this is the case, the United States is in breach of its *non-refoulement* obligations when it expels such individuals. Moreover, many of those entering the United States who have been granted refugee status have already made out *refoulement* claims in the course of their application for visas.

The situation confronting those attempting to board airplanes to come to the United States is more complex. Airlines routinely screen passengers before allowing them to board flights to the United States to ensure they have valid visas or travel documents permitting them to enter. Reports indicate that following the Executive Order, airlines have turned many away on the basis that their visas are no longer valid¹⁰⁸. While airline personnel are not U.S. agents, and passengers are not in the custody or on the territory of the United States, these individuals should still be allowed to travel to the United States if their visas are facially valid. Because the Executive Order has both been stayed by a number of federal courts and is patently of highly questionable legality, pre-screening by airlines is no longer a pro-forma exercise, but could amount to knowing assistance in human rights violations. The violations relating to *non-refoulement* are plain: when they fail to conduct credible fear screenings, U.S. agents violate procedural guarantees, and when they turn away refugees who face persecution if returned, they violate the substantive norm.

Since September 11, 2001, states that host refugees have been imposing stricter anti-terrorism measures¹⁰⁹. Many of those policies come at the expense of refugee protection. The United States, for instance, relies heavily on the language in Article 33(2) of CRSR to exclude from protection individuals suspected of having links to terrorism¹¹⁰.

¹⁰⁶ See Trump's Executive order: Refugees detained at US airports, BBC News, <http://www.bbc.com/news/world-us-canada-38783512>

¹⁰⁷ See Protest at JFK Airport over Trump's refugee ban, <http://www.aljazeera.com/news/2017/01/protest-jfk-airport-trump-refugee-ban-170128193014041.html>

¹⁰⁸ See Travelers stranded and protests swell over Trump Order, by Peter Baker, https://www.nytimes.com/2017/01/29/us/politics/white-house-official-in-reversal-says-green-card-holders-wont-be-barred.html?_r=0

¹⁰⁹ See NON-REFOULEMENT AND JUS COGENS: LIMITING ANTI-TERROR MEASURES THAT THREATEN REFUGEE PROTECTION, https://www.hrw.org/sites/default/files/related_material/Non-Refoulement%20and%20Jus%20Cogens%20Limiting%20Anti-Terror%20Measures%20That%20Threaten%20Refugee%20Protection_0.pdf

¹¹⁰ Supra note 3

Given the current concerns over terrorism worldwide, there is great potential for other states to follow the U.S. lead and weaken refugee protection by enacting broad policies based on the Article 33(2) exceptions. Yet this would be at odds with current state obligations under international law.

Conclusion

Within the ambit of this paper, we discussed how the USA new Executive order violates international refugee law in relations of access to territory, seeking asylum and non-refoulement obligations. We discussed customary nature of granting asylum and non-refoulement obligations, which means that even there are countries that are not Contracting States to the Geneva Convention, they still have obligations towards refugees. Moreover, the Executive order violates several treaty norms. As it is discussed above, Article 26 of the ICCPR, requires equal treatment before the law of all persons, without discrimination on any ground, including race, religion, or national or social origin. The order is clearly discriminatory, requiring separate and unfair treatment of entire groups of people based on their national origin, Muslims in particular. The paper also referred to the Convention Against Torture (CAT), ECHR and ICCPR, which contain an absolute prohibition on refoulement in torture cases, subject to no exception. The US new Immigration policy risks people being returned, without proper individual assessments and asylum procedures, to places in which they risk being subjected to torture and other cruel, inhuman or degrading treatment. The Executive order not only denies individuals an opportunity for individualized review, but it has also resulted in the detention, denial of counsel, and removal of individuals with prior authorization to enter the US. Refugees are deprived from procedural safeguards—like advance notice, a hearing before a neutral decision-maker and a chance to tell their side of the story—before the government takes away their liberty. Procedural due process forbids the government from depriving an individual of life, liberty or property without due process of law. The US government is obligated to hear the asylum claims of noncitizens who arrive at US borders and ports of entry.

By shutting the door to refugee admissions, whether temporarily or indefinitely, Trump's order flagrantly violates those core obligations. States increasingly want to avoid the particularized obligations that arise when refugees arrive at their territory. The arrival of refugees does not expose them to the risk of unilateral and undifferentiated legal responsibility. The goal of refugee protection as conceived in international law, is instead to ensure the availability of solid and rights-regarding protection to refugees until and unless it is safe for them to return.

For the best way to prevent a future refugee crisis is to avoid sending back millions of men, women and children to scarce resources and ruins. States should maintain their commitment to the protection of refugees and encourage tolerance towards diversity.

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