

## The Iraqi Refugee Crisis: Whose Problem Is It?

### Existing Obligations Under International Law, Proposal to Create a New Protocol to the 1967 Refugee Convention, & U.S. Foreign Policy Recommendations to the Obama Administration

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## I. INTRODUCTION

“Operation Iraqi Freedom” has led to massive humanitarian devastation in the Middle East region. It is estimated that the conflict has led to the internal and external displacement of at least 4 million Iraqis.<sup>1</sup> Ultimately,

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<sup>1</sup> Exact data on the numbers of Iraqis who are displaced internally and externally are not available because of “poor security, a lack of access to some areas, and ongoing movement of possibly thousands of people per day.” RHODA MARGESSON, ANDORRO BRUNO & JEREMY M. SHARP, IRAQI REFUGEES AND INTERNALLY DISPLACED PERSONS: A DEEPENING HUMANITARIAN CRISIS? 1 n.2 (Cong. Research Serv., CRS Report for Congress Order Code RL33936, Feb. 13, 2009), available at <http://www.fas.org/sgp/crs/mideast/RL33936.pdf>. However, most sources, including U.S. government agency reports, rely on estimates provided by the U.N. High Commissioner for Refugees (“UNHCR”). See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, IRAQI REFUGEE ASSISTANCE: IMPROVEMENTS NEEDED IN MEASURING PROGRESS, ASSESSING NEEDS, TRACKING FUNDS, AND DEVELOPING AN INTERNATIONAL STRATEGIC PLAN 1 (2009), available at <http://www.gao.gov/new.items/d09120.pdf> (“The UN reports government estimates of up to 4.8 million Iraqis displaced within the last 5 years, with 2 million fleeing primarily to Syria and Jordan.”); U.S. Dep’t. of State, Iraqi Refugee Assistance and Resettlement, <http://www.state.gov/g/prm/c25771.htm> (last visited Nov. 20, 2009) (citing UNHCR estimates of over 2 million Iraqi refugees displaced outside of Iraq and 2.8 million Iraqi internally displaced persons). The International Red Crescent Organization, which does not provide data on the numbers of Iraqis displaced outside of Iraq, estimates that 2.17 million Iraqis were displaced within Iraq as of May 2008, 82 percent of whom were women and children. IRAQI RED CRESCENT ORG., THE INTERNALLY DISPLACED PEOPLE IN IRAQ: UPDATE 35 2 (2008), available at [http://www.iraqredcrescent.org/IDP\\_35\\_update\\_EN.pdf](http://www.iraqredcrescent.org/IDP_35_update_EN.pdf). The Migration Policy Institute estimates that there were roughly 4.5 million displaced Iraqis in January 2008, of which 2.2 million were refugees and 2.3 million were internally displaced persons. KELLY O’DONNELL & KATHLEEN NEWLAND, MIGRATION POLICY INST., THE IRAQI REFUGEE CRISIS: THE NEED FOR ACTION 1 (2008), available at [http://www.migrationpolicy.org/pubs/MPI-The\\_Iraqi\\_Refugee\\_Crisis\\_The\\_Need\\_for\\_Action\\_01\\_1808.pdf](http://www.migrationpolicy.org/pubs/MPI-The_Iraqi_Refugee_Crisis_The_Need_for_Action_01_1808.pdf). Latest UNHCR estimates place the number of Iraqis displaced at 4.5 million, with 2.6 million Iraqis displaced internally and 1.9 million Iraqi refugees displaced externally. UNHCR, Iraq: Country Operations Profile, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e486426#>

this Note finds that current international law is inadequate to meet the humanitarian crises that stem from military conflicts entered into in violation of international law, as the Iraqi refugee crisis demonstrates. Accordingly, this Note recommends an additional Protocol to the 1967 Refugee Convention and Protocol. Finally, this Note makes specific recommendations to the current U.S. Presidential Administration as it develops the U.S. response to the disaster.

Part II outlines the respective responses to the ongoing Iraqi refugee crisis from the international community, host countries, and the U.S. government during both the Bush and Obama Administrations. Part III takes up the question of what legal obligations host countries, the United States, and the international community possess in regard to the Iraqi refugee crisis under current international law, and proposes a new Protocol to the 1967 Refugee Convention and Protocol. The proposed Protocol would require states that create massive humanitarian disasters through their unlawful entry into war to provide for the financial costs of addressing the toll. Part IV concludes the Note with legal and policy recommendations to the international community and the Obama Administration.

## II. DEVELOPMENT & SCOPE OF THE IRAQI REFUGEE CRISIS

In March 2003, the U.S. military launched “Operation Iraqi Freedom,” in which it invaded Iraq and ultimately removed Saddam Hussein and the Baath Party from political power.<sup>2</sup> From March 2003 to November 2007, U.S. bombing and other military actions, as well as the Iraqi insurgency and sectarian violence, caused an estimated 4.4 million Iraqis to flee their homes.<sup>3</sup> This number represents over one-seventh of the entire population of Iraq.<sup>4</sup> The Iraqi refugee crisis should not be underestimated. It is the fastest-growing refugee crisis in the world.<sup>5</sup>

It is estimated that over 2 million of these refugees fled Iraq to neighboring Syria, Jordan, Egypt, and Lebanon; the rest are internally

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(last visited Nov. 20, 2009). The numbers of Iraqi refugees living in Syria and Jordan are in turn based on estimates by the Syrian and Jordanian governments. *Id.*

<sup>2</sup> See, e.g., Press Release, Office of Press Secretary, Fact Sheet: Operation Iraqi Freedom: Three Years Later (Mar. 18, 2006), available at <http://merln.ndu.edu/archivepdf/iraq/WH/20060318-1.pdf>.

<sup>3</sup> Bill Felick, Refugee Policy Dir. For Human Rights Watch, *The Human Cost of War: The Iraqi Refugee Crisis, Testimony Before the Congressional Human Rights Caucus* (Nov. 15, 2007), <http://hrw.org/english/docs/2007/11/15/iraq17340.htm> [hereinafter *Felick Testimony*].

<sup>4</sup> *World View: A Chance to Do Right by Iraq* (Chicago Public Radio broadcast Aug. 16, 2007), available at [http://www.chicagopublicradio.org/Program\\_wv.aspx?episode=12746](http://www.chicagopublicradio.org/Program_wv.aspx?episode=12746).

<sup>5</sup> WOMEN'S COMM'N FOR REFUGEE WOMEN & CHILDREN, IRAQI REFUGEE WOMEN AND YOUTH IN JORDAN: REPRODUCTIVE HEALTH FINDINGS, A SNAPSHOT FROM THE FIELD 3 (2007), available at [http://www.womenscommission.org/pdf/jo\\_rh.pdf](http://www.womenscommission.org/pdf/jo_rh.pdf) [hereinafter IRAQI REFUGEE WOMEN AND YOUTH IN JORDAN].

displaced within Iraq.<sup>6</sup> The U.N. High Commissioner for Refugees reported that by the end of 2007, the Middle East region was host to one-quarter of all refugees worldwide, the majority of whom were from Iraq.<sup>7</sup> Iraq is the second largest source of refugees, with Afghanistan being the largest.<sup>8</sup> Together, these two countries account for nearly half of all refugees worldwide.<sup>9</sup> The Iraqi refugee crisis disparately affects women and children, who comprise over 83 percent of all Iraqi refugees.<sup>10</sup>

A. *The Responses of Host Countries: Syria, Jordan, Egypt, & Lebanon*

While 90 percent of Iraqi refugees have settled in Syria and Jordan, both countries have since closed their borders to Iraqi refugees, citing their economic inability to continue bearing the costs of providing humanitarian assistance alone.<sup>11</sup> Within Iraq, ten of the eighteen Iraqi sub-state governorates have restricted the entry of internally displaced Iraqis.<sup>12</sup> The restriction results in the concentration of many displaced persons in the center of Iraq, the most dangerous region, where humanitarian assistance organizations cannot reach safely.<sup>13</sup> Authorities within the ten Iraqi

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<sup>6</sup> AMNESTY INT'L, IRAQ: RHETORIC AND REALITY: THE IRAQI REFUGEE CRISIS 8 (2008), available at <http://www.amnesty.org/en/library/info/MDE14/011/2008/en> [hereinafter IRAQ: RHETORIC AND REALITY].

<sup>7</sup> U.N. High Comm'r for Refugees [UNHCR], 2007 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons 7 (June 2008), available at <http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf> [hereinafter 2007 Global Trends].

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.*

<sup>10</sup> IRAQI REFUGEE WOMEN AND YOUTH IN JORDAN, *supra* note 5, at 3; WOMEN'S COMM'N FOR REFUGEE WOMEN & CHILDREN, WOMEN, CHILDREN AND YOUTH IN THE IRAQ CRISIS: A FACT SHEET 1 (2008), available at [http://www.rhrc.org/resources/Iraqi\\_women\\_girls\\_factsheetFINALJAn08.pdf](http://www.rhrc.org/resources/Iraqi_women_girls_factsheetFINALJAn08.pdf).

<sup>11</sup> *Felick Testimony*, *supra* note 3.

<sup>12</sup> Elizabeth Ferris, Senior Fellow for Foreign Policy at the Brookings Inst., Iraqi Internal Displacement and Int'l Law, Panel Discussion at the 9th Annual Conference on Pub. Serv. and the Law, Univ. of Virginia School of Law (Feb. 9, 2008), available at [http://www.brookings.edu/speeches/2008/0209\\_iraq\\_ferris.aspx](http://www.brookings.edu/speeches/2008/0209_iraq_ferris.aspx). It is estimated that 80 percent of the internally displaced persons ("IDPs") in Iraq fled from Baghdad, and that 80 percent of all IDPs are women and children, whose male family members, likely to have been the family's breadwinners, were casualties of Operation Iraqi Freedom. *Id.* Because the majority of Iraqi IDPs reside in urban areas, they are less visible to the media, living in conditions of high unemployment, highly restricted access to food and water, poor or nonexistent sanitation, transportation difficulties, and other extreme hardships. *Id.* This Note primarily focuses on refugees residing outside of Iraq rather than Iraqi IDPs, whose situation is governed by different international legal principles. According to international legal norms and the Guiding Principles on Internal Displacement, responsibility for the provision of humanitarian aid to Iraqi IDPs is primarily that of the Iraqi national government, though some international legal scholars make the argument that the United States also possesses an obligation to provide humanitarian aid as an occupying power. *Id.*

<sup>13</sup> *Id.*

governorates explain their restriction of intra-Iraq migration by citing scarce local social services and infrastructure, as well as security concerns.<sup>14</sup>

While the sheer numbers of Iraqis displaced by Operation Iraqi Freedom demonstrate the breadth of the crisis, conditions facing those refugees further highlight the seriousness of the problem. Conditions for refugees are a continuing issue of concern for human rights organizations. The overwhelming majority of Iraqi refugees in Syria and Jordan live in impoverished camps, where medical treatment for sick and elderly refugees is often difficult to access.<sup>15</sup> In Syria, where an estimated 1.5 million Iraqi refugees reside, domestic law does not permit Iraqis to work.<sup>16</sup> This leaves most refugees desperately impoverished.<sup>17</sup> Humanitarian assistance comes from UNHCR, the World Food Programme (“WFP”), the U.N. Children’s Fund (“UNICEF”), the U.N. Population Fund (“UNFPA”), and the World Health Organization (“WHO”).<sup>18</sup> However, due to a lack of financial support from the international community, many basic needs, such as food, medical treatment, and education, go unmet.<sup>19</sup> As a result of the rampant conditions of poverty, some Iraqi refugees living in Syria have turned to sex work and child labor.<sup>20</sup> Rates of sexual assault and domestic abuse have also increased.<sup>21</sup>

Conditions are even worse for the estimated 500,000 Iraqi refugees in Jordan, where UNHCR is currently able to provide food assistance to only 9190 people and financial assistance to 7708 families.<sup>22</sup> This low number is due to a lack of resources rather than a lack of need.<sup>23</sup> As in any refugee crisis, the majority of the people displaced are women and children whose husbands and fathers were either killed in Iraq or remained there.<sup>24</sup> In Jordan, where the government does not recognize the legal status of most refugees and does not permit them to work, many women and girls are forced

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<sup>14</sup> *Felick Testimony*, *supra* note 3.

<sup>15</sup> Kevin Walsh, *Victims of a Growing Crisis: A Call for Reform of the United States Immigration Law and Policy Pertaining to Refugees of the Iraq War*, 53 VILL. L. REV. 421, 424 (2008).

<sup>16</sup> PATRICIA WEISS FAGEN, GEORGETOWN UNIV. INST. FOR THE STUDY OF INT’L MIGRATION, IRAQI REFUGEES: SEEKING STABILITY IN SYRIA AND JORDAN 15 (2007), available at <http://isim.georgetown.edu/Publications/PatPubs/Iraqi%20Refugees.pdf>.

<sup>17</sup> IRAQ: RHETORIC AND REALITY, *supra* note 6, at 11.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 11–14.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 12–15.

<sup>22</sup> IRAQ: RHETORIC AND REALITY, *supra* note 6, at 18–19.

<sup>23</sup> *Id.*

<sup>24</sup> IRAQI REFUGEE WOMEN AND YOUTH IN JORDAN, *supra* note 5, at 3.

into sex work to support themselves.<sup>25</sup> In addition, refugees lack access to basic health care.<sup>26</sup> Iraqi children are permitted to attend public school in Jordan, but many do not because they lack required documentation or they work illegally during the school day to provide for themselves and their families.<sup>27</sup>

Non-governmental organization (“NGO”) fieldworkers report that incidents of rape are high for many women Iraqi refugees, and medical care is not available to address the physical and psychological trauma resulting from their experiences in Iraq.<sup>28</sup> Women in Jordanian refugee camps lack access to reproductive health care when it comes to prevention of and responses to gender-based violence, safe delivery services, family planning, or treatment of sexually transmitted diseases including HIV/AIDS.<sup>29</sup>

In Lebanon, where an estimated 50,000 Iraqi refugees have fled, the government continues to carry out its policy of detaining Iraqi refugees unless they can obtain a sponsor and fees in excess of \$1600.<sup>30</sup> In order to secure their release, the UNHCR sponsored Iraqi refugees in arbitrary detention in Lebanon, paid their fees, and worked with the Lebanese government to allow for their regularization and ability to work legally in the country within three months of release.<sup>31</sup> In order to do so, the UNHCR had to divert precious and scarce financial resources from more basic humanitarian aid.<sup>32</sup> More than three-fourths of all Iraqi children in Lebanon do not attend school due to high tuition and their need to work illegally to earn money.<sup>33</sup>

While a relatively small number of Iraqi refugees have settled in Egypt, the Egyptian government provides them with little to no support. It is estimated that 150,000 Iraqi refugees reside in Egypt.<sup>34</sup> Egypt does not permit Iraqis to work and fails to provide Iraqi children with access to public schools.<sup>35</sup> Rising food prices in Egypt have made already difficult conditions

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> IRAQ: RHETORIC AND REALITY, *supra* note 6, at 20.

<sup>28</sup> IRAQI REFUGEE WOMEN AND YOUTH IN JORDAN, *supra* note 5, at 3.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 21.

<sup>31</sup> *Id.*

<sup>32</sup> IRAQ: RHETORIC AND REALITY, *supra* note 6, at 23.

<sup>33</sup> *Id.*

<sup>34</sup> *Iraqi Refugees in Egypt*, BBC NEWS, Sept. 18, 2008, [http://news.bbc.co.uk/2/hi/middle\\_east/7616876.stm](http://news.bbc.co.uk/2/hi/middle_east/7616876.stm) [hereinafter *Iraqi Refugees in Egypt*].

<sup>35</sup> IRAQ: RHETORIC AND REALITY, *supra* note 6, at 23.

desperate.<sup>36</sup> Iraqis also have trouble accessing medical care in Egypt.<sup>37</sup> Finally, many Iraqi refugees in Egypt are unaware that resettlement assistance is available through UNHCR.<sup>38</sup> As a result, only 11,000 Iraqi refugees have registered with UNHCR to date, and thus, the vast majority of Iraqi refugees there are struggling to live without any humanitarian assistance.<sup>39</sup>

*B. The U.S. Response Thus Far: Looking at the Actions of Both the Bush & Obama Presidential Administrations*

In February 2007, the U.S. Department of State announced the creation of the Iraq Refugee and Internally Displaced Persons Task Force (“Task Force”).<sup>40</sup> The purpose of the Task Force was to assist the capabilities of other national governments, the United Nations, and non-governmental organizations in providing assistance to internally displaced Iraqis as well as Iraqi refugees.<sup>41</sup> The Task Force coordinated U.S. efforts with these entities, providing funding of UNHCR’s humanitarian assistance efforts.<sup>42</sup> The U.S. Task Force pledged \$18 million in funding for the UNHCR in its efforts to provide humanitarian assistance to Iraqi refugees.<sup>43</sup> As part of the Task Force’s goals, the United States also announced a plan to accept 7000 of the eligible refugees into the country for resettlement during the year 2007.<sup>44</sup> This number represented only a fraction of the 480,000 Iraqis fleeing the country in the year 2006 alone,<sup>45</sup> but nonetheless represented an increase over the mere 466 Iraqis who resettled in the United States between 2003 and 2007.<sup>46</sup>

Only weeks after its announcement regarding plans to resettle 7000 refugees in 2007, the United States adjusted the number of Iraqi refugees it

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<sup>36</sup> *Iraqi Refugees in Egypt*, *supra* note 34.

<sup>37</sup> IRAQ: RHETORIC AND REALITY, *supra* note 6, at 23.

<sup>38</sup> *Iraqi Refugees in Egypt*, *supra* note 34.

<sup>39</sup> *Id.*

<sup>40</sup> Randall Fenlon, *Developments in the International Arena: Creation of a New Iraq Refugee Task Force*, 21 GEO. IMMIGR. L.J. 333, 334 (2007).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 335.

<sup>44</sup> *Id.* at 334.

<sup>45</sup> U.N. High Comm’r for Refugees [UNHCR], *UNHCR Return Advisory and Position on International Protection Needs of Iraqis Outside Iraq* 2 n.5 (2006), available at <http://www.unhcr.org/refworld/pdfid/46371aa72.pdf>.

<sup>46</sup> Fenlon, *supra* note 40, at 334–35.

hoped to resettle to only 2000 people.<sup>47</sup> The U.S. Department of State reduced its goal when it became apparent that refugee processing procedures would make the more ambitious number impossible to achieve, given that only 1135 Iraqi refugees had been resettled by September 2007.<sup>48</sup> One of the greatest sources of delay was—and continues to be—that Iraqi refugees had to pass more stringent security-related barriers than refugees from most other nations.<sup>49</sup> In 2008, the U.S. Department of State again increased its resettlement goals, and in September of that year, it announced that it had resettled over 12,000 Iraqis in the United States since the start of the conflict.<sup>50</sup> The U.S. Department of State under the Bush Administration declared that heightened security requirements would remain in place for Iraqi refugees seeking resettlement in the United States, which in most cases has caused the United Nations to cease even referring individuals to the country.<sup>51</sup> To address the failure of the U.S. Department of State to meet Iraqi refugee resettlement goals, as well as to provide appropriations to assist host countries in the provision of humanitarian assistance to Iraqi refugees, Representative Alcee Hastings introduced H.R. 6496 on July 15, 2008.<sup>52</sup> Despite the desperate need for such a bill, H.R. 6496 did not make it out of committee by the end of the 2008 session.<sup>53</sup> Finally in 2008, during its last year in office, the Bush Administration increased its overall funding for humanitarian assistance to international organizations and NGOs for Iraqis

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<sup>47</sup> H.R. 3674, 110th Cong. §§ 7–8 (2007); Walsh, *supra* note 15, at 437.

<sup>48</sup> Nicole Gaouette, *U.S. Defends the Way It Deals with Iraqi Refugees*, L.A. TIMES, Sept. 22, 2007, at A7, available at <http://articles.latimes.com/2007/sep/22/world/fg-refugees22>.

<sup>49</sup> Matthew Lee, *U.S. Admissions of Iraqi Refugees Lagging*, USA TODAY, Jan. 3, 2008, available at [http://www.usatoday.com/news/washington/2008-01-02-2983556592\\_x.htm](http://www.usatoday.com/news/washington/2008-01-02-2983556592_x.htm). Criticized security requirements include: (1) ineligibility of refugees who fled first to Syria or Jordan for asylum once they arrive in the United States; (2) high burdens of proof for the asylum applicant to show individualized persecution; (3) failing to process refugees' applications in a timely manner; (4) disqualification for providing material support to terrorist organizations where material support is broadly defined, including, for example, monetary ransom payments for the release of a loved one and with no exception for material support given under duress; and (5) high burden of documentation for Iraqi translators working for the U.S. military. Walsh, *supra* note 15, at 435–44.

<sup>50</sup> Online Video: Briefing on Developments in the Iraqi Refugee Admission and Assistance Programs (James B. Foley, U.S. Dep't of State Senior Coordinator for Iraqi Refugees and Lori Scialabba, Senior Advisor to the Sec'y of Homeland Sec. for Iraqi Refugees, Sept. 12, 2008), archived transcript now available at <http://merln.ndu.edu/archivepdf/iraq/State/109568.pdf> [hereinafter Foley, Briefing on Iraqi Assistance].

<sup>51</sup> Fenlon, *supra* note 40, at 334.

<sup>52</sup> Iraqi Refugee and Internally Displaced Persons Humanitarian Assistance, Resettlement, and Security Act of 2008, H.R. 6496, 110th Cong. (2008).

<sup>53</sup> *Id.*



from \$171.06 million in 2007 to \$318.2 million in 2008.<sup>54</sup> This additional funding, while marking a significant step in the right direction, fell short of the anticipated \$2 billion required to assist Iraqi refugees' host countries.<sup>55</sup>

During the 2008 U.S. presidential campaign, President Obama (then Candidate Obama) articulated a strategy to begin to address the Iraqi refugee crisis. The Obama-Biden team stated that "America has both a moral obligation and a responsibility" to address the Iraqi refugee crisis.<sup>56</sup> President Obama pledged to form an international working group to develop solutions to the crisis and to provide a minimum of \$2 billion in humanitarian assistance to Iraqi refugees living in the region.<sup>57</sup> On February 27, 2009, President Obama announced a three-part strategy for ending U.S. military operations in Iraq. As a part of the second prong of the strategy, "Sustained Diplomacy," the President stated a goal of increasing "support for the resettlement of Iraqi refugees."<sup>58</sup> President Obama's Proposed 2010 Budget aimed to expand U.S. aid to displaced Iraqis through the Department of State.<sup>59</sup> At the time of this writing, President Obama has requested \$51.7 billion for the Department of State for all State Department Programs.<sup>60</sup>

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<sup>54</sup> Press Release, U.S. Dep't of State Office of the Spokesperson, U.S. Surpasses Goal of Admitting 12,000 Iraqi Refugees in Fiscal Year 2008; Assistance Reaches New Heights (Sept. 12, 2008), available at <http://merln.ndu.edu/archivepdf/iraq/State/109544.pdf>.

<sup>55</sup> See, e.g., HUMAN RIGHTS FIRST, HOW TO CONFRONT THE IRAQI REFUGEE CRISIS: A BLUEPRINT FOR THE NEW ADMINISTRATION 5-7 (2008), <http://www.humanrightsfirst.org/pdf/081222-iraqi-refug-bluprnt.pdf>.

<sup>56</sup> Organizing for America, War in Iraq, Plan for Ending the War in Iraq, [http://www.barackobama.com/issues/iraq/index\\_campaign.php](http://www.barackobama.com/issues/iraq/index_campaign.php) (last visited Oct. 27, 2009) (follow "Foreign Policy" hyperlink; then follow "Ending the War in Iraq").

<sup>57</sup> *Id.*

<sup>58</sup> White House, Agenda-Iraq, <http://www.whitehouse.gov/agenda/iraq> (last visited Mar. 10, 2009). In January 2009, President Obama presented a fuller account of this position to a group of U.S. Marines at Camp Lejeune:

Diplomacy and assistance is also required to help the millions of displaced Iraqis. These men, women and children are a living consequence of this war and a challenge to stability in the region, and they must become a part of Iraq's reconciliation and recovery. America has a strategic interest—and a moral responsibility—to act. In the coming months, my administration will provide more assistance and take steps to increase international support for countries already hosting refugees; we'll cooperate with others to resettle Iraqis facing great personal risk; and we will work with the Iraqi government over time to resettle refugees and displaced Iraqis within Iraq—because there are few more powerful indicators of lasting peace than displaced citizens returning home.

Barack Obama, U.S. President, Responsibility Ending the War in Iraq: Remarks at Camp Lejeune, North Carolina (Feb. 27, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-of-President-Barack-Obama-Responsibly-Ending-the-War-in-Iraq](http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Responsibly-Ending-the-War-in-Iraq).

<sup>59</sup> OFFICE OF MGMT. & BUDGET, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE 88-89 (2009), available at <http://www.gpoaccess.gov/usbudget/fy10/pdf/fy10-newera.pdf>. The language of the budget request at once reaffirms the U.S. commitment to assisting Iraqi refugees

The FY 2010 Budget Request for the U.S. Department of State included \$1.48 billion for Migration and Refugee Assistance, which “will fund contributions to key international humanitarian organizations as well as to non-governmental organizations to address pressing humanitarian needs overseas and to resettle refugees in the United States.”<sup>61</sup> This amounts to less than the \$1.58 billion spent on Migration and Refugee Assistance in FY 2009. An additional \$50 million was requested specifically to provide continued humanitarian assistance to Iraqi IDPs as part of the State Department’s International Disaster Assistance request.<sup>62</sup> To put those numbers in perspective, the UNHCR reported that as of August 2009, it had received less than 70 percent of the amount requested for its efforts to assist Iraqi refugees.<sup>63</sup> While the United States has agreed to provide \$198 million to the UICHR for Iraqi refugees, the UICHR remains \$124 million short of its funding requirements.<sup>64</sup>

Secretary of State Clinton has not yet publically commented on the Iraqi refugee crisis in the Middle East. However, Clinton has answered questions relating to the U.S. resettlement of Iraqis who assisted the U.S. military during Operation Iraqi Freedom.<sup>65</sup> She stated that Iraqis who qualify for Special Immigrant Visas and Iraqi refugees in the United States, like all refugees, are entitled to immediate assistance in the United States and may access U.S. entitlement and social welfare programs.<sup>66</sup> Finally in November 2009, for the first time under the Obama Administration, the U.S. Department of State sent a representative to UNHCR headquarters in Damascus, Syria, to tour the region and encourage the international

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and seeks to disclaim a continuing obligation to them, proclaiming, “The Budget strengthens our assistance to Iraqis who have been displaced from their homes because of the war. The Budget also realigns our assistance efforts in Iraq to ensure that Iraqis can assume responsibility for their own political and economic future.” *Id.* at 89.

<sup>60</sup> *Id.* at 88.

<sup>61</sup> U.S. DEPT OF STATE, INT’L AFFAIRS FUNCTION, FISCAL YEAR 2010 BUDGET REQUEST 32 (2009), available at <http://www.state.gov/documents/organization/122513.pdf>.

<sup>62</sup> *Id.* at 15.

<sup>63</sup> UNHCR, Funding Overview for the Iraq Operation—2009: As at 7th August 2009, Aug. 7, 2009, <http://unhcr.org.iq/IndexPageFiles/FirstPageStatistic/20090801/2009-08-IRAQ%20FO-EXT.xls>.

<sup>64</sup> *Id.*

<sup>65</sup> Daily Press Briefing, Hillary Clinton, U.S. Sec’y of State, Resettlement Benefits for Iraqi Refugees (taken question) (Mar. 5, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/03/120067.htm>.

<sup>66</sup> *Id.*

community to answer UNHCR's financial plea to support its provision of humanitarian assistance to Iraqis.<sup>67</sup>

This Note concludes with legal and policy recommendations for the international community, the U.S. President, and Secretary of State as the Obama Administration moves forward in turning campaign statements into tangible assistance to Iraqis displaced by U.S. military action. As of the writing of this Note, even while U.S. troops withdraw from the region, the Obama Administration has yet to take effective action to remedy the crisis.<sup>68</sup> It seems, in fact, that no comprehensive plan to do anything about the crisis yet exists.<sup>69</sup>

### C. *The Response of the Broader International Community*

The international response to the Iraqi Refugee Crisis has been slow and inadequate, leaving millions without assistance. Compared to the international response to other refugee crises in recent years, the failure is even more apparent. For example, the devastation and displacement caused by the 2004 Tsunami—primarily affecting Indonesia, India, Sri Lanka, and Thailand—prompted quick and widespread humanitarian assistance. The United Nations Office for the Coordination of Humanitarian Affairs (“UNOCHA”) estimated that 1,509,528 people were displaced as a result of the Tsunami.<sup>70</sup> The World Bank estimated the humanitarian and infrastructure rebuilding needs at more than \$7 billion.<sup>71</sup> By early 2005, the vast majority of the costs of providing needed humanitarian aid had been met, with state-pledged funding to the United Nations reaching \$5.3 billion, private donations reaching between \$1 and \$2 billion, and the generation of \$0.7 billion through the U.N. Flash Appeal in Geneva in January 2005.<sup>72</sup> The World Bank took on the administration of funds for affected States who asked for such assistance, and the United Nations took on the distribution of assistance through coordination with affected nations.<sup>73</sup>

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<sup>67</sup> Julien Barnes-Dacey, *Iraqi Refugees Face Dwindling U.N. Funds, Creating Concerns of Unrest*, CHRISTIAN SCI. MONITOR, Nov. 19, 2009, available at <http://www.csmonitor.com/2009/1119/p06s08-wome.html>.

<sup>68</sup> See HUMAN RIGHTS FIRST, PROMISES TO THE PERSECUTED: THE REFUGEE CRISIS IN IRAQ ACT OF 2008 2–3 (2009), available at <http://www.humanrightsfirst.org/pdf/090428-RP-iraqi-progress.pdf>.

<sup>69</sup> Press Release, Refugees Int'l, Obama Admin. Must Not Forget Displaced Iraqis (Oct. 5, 2009), available at <http://www.refintl.org/press-room/press-release/obama-administration-must-not-forget-displaced-iraqis>.

<sup>70</sup> WORLD BANK, WORLD BANK RESPONSE TO THE TSUNAMI DISASTER 1 (2005), available at <http://siteresources.worldbank.org/COUNTRIES/Resources/tsunamireport-020205.doc>.

<sup>71</sup> *Id.* at i.

<sup>72</sup> *Id.* at 1–2.

<sup>73</sup> *Id.* at i.

Obviously, there are notable differences in the circumstances of the refugee crises caused by the 2004 Tsunami and the Iraq War today. While the displacement resulting from the 2004 Tsunami was caused by a natural disaster, the displacement of Iraqis was the result of military and political decisions. The decision to pledge humanitarian aid after a natural disaster is far less complicated than the decision to pledge humanitarian aid to victims of war. The former does not implicate international relations in the same way that the latter necessarily does. No one was to blame for the Tsunami; by contrast, the United States carries a special responsibility for the human fallout resulting from its unilateral and preemptive war in Iraq, a responsibility that it has acknowledged on some occasions.<sup>74</sup> Yet, for the displaced persons in both cases—1.5 million from the 2004 Tsunami and over 4 million from Operation Iraqi Freedom—the cause has no bearing on their need for humanitarian assistance.

### III. LEGAL DUTIES IMPLICATED BY THE IRAQI REFUGEE CRISIS

The two claims that this Note will examine are: first, whether Syria and Jordan, by closing their borders to Iraqi refugees, are violating customary international law; and second, whether the principle of non-refoulement has acquired the status of customary international law, and thus binds all parties. The issue of the United States' particular obligation to Iraqi refugees is within the latter question. NGOs that have addressed this problem have argued that the United States, because it did not obtain U.N. Security Council authorization for Operation Iraqi Freedom, has a particular and unique legal obligation to meet the humanitarian needs of Iraqi refugees by aiding their host countries.<sup>75</sup>

Where might such an obligation stem from? There are two potential sources. The first is U.N. General Assembly Resolution 60/147 of March 2006, entitled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law." The second is based on an argument of changing customs of international law in response to the unique Iraq War situation.

#### A. *Host Countries Possess a Duty of Non-Refoulement to Iraqi Refugees Under Customary International Law*

Host countries that turn away refugees flooding into their borders are doing so in violation of international law. Jordan and Syria have closed their borders to all but extremely exceptional cases of Iraqi refugees. While this

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<sup>74</sup> Foley, Briefing on Iraqi Assistance, *supra* note 50. The Secretary of State's Office under the Bush Administration stated, "We recognize our unique responsibilities toward displaced Iraqis, and we've acted on that recognition." *Id.* at 2.

<sup>75</sup> See, e.g., *Felick Testimony*, *supra* note 3; IRAQ: RHETORIC AND REALITY, *supra* note 6, at 45.

explicitly violates the principle of non-refoulement codified in the 1952 UNHCR Convention and 1967 Protocol Relating to the Status of Refugees (“Protocol”), both countries claim exemption because neither is a party to the agreements. However, because the principle of non-refoulement has acquired the status of customary international law, it is binding on host countries, whether or not they have signed the Refugee Convention and Protocol.

### 1. Customary International Law Binds All States

Customary international law refers to those consistent state practices that are not yet codified in treaties or are considered general, fundamental, and peremptory principles of law (in other words, they are not yet recognized as having acquired the status of *jus cogens*).<sup>76</sup> Despite the lack of codification, states nonetheless adhere to customary international law principles out of a sense of obligation as a matter of law (*opinio juris*),<sup>77</sup> or as a matter of political, economic, or social necessity (*opinio necessitatis*).<sup>78</sup> Customary law, unlike law made through treaties, is not usually an intentional lawmaking process; rather, it normally develops organically as states settle on shared practices in the international arena.<sup>79</sup> Customary international law is binding on all states, unlike treaties, which bind only states that are parties to the treaty and have ratified the agreements according to their own domestic procedures.<sup>80</sup> The International Court of Justice recognizes customary international law as binding in Article 38(1)(b),<sup>81</sup> which states, “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law.”<sup>82</sup> This text is also incorporated into the U.N. Charter in Article 92.<sup>83</sup> Positivist international legal scholars hold that individual states must consent to be bound by customary international law in order for it to have legal force in the period during which it is still developing through state practice.<sup>84</sup> Thus, persistent objection to a rule of customary international law, while it is developing, can

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<sup>76</sup> ANTONIO CASSESE, INTERNATIONAL LAW 157 (2d ed., Oxford Univ. Press 2005).

<sup>77</sup> *Id.*; see also North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3 ¶¶ 74–77 (Feb. 20), reprinted in JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 750 (2d ed., Aspen Pub. 2006).

<sup>78</sup> CASSESE, *supra* note 76, at 156.

<sup>79</sup> *Id.* at 156–57.

<sup>80</sup> *Id.* at 157.

<sup>81</sup> DUNOFF ET AL., *supra* note 77, at 74.

<sup>82</sup> ICJ, Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1031 (Jun. 26, 1945), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&PHPSESSID=5a2e090b2fb90da93422d1ee154f99c8> [hereinafter ICJ Statute].

<sup>83</sup> U.N. Charter art. 92.

<sup>84</sup> DUNOFF ET AL., *supra* note 77, at 78.

serve to exclude a given state from an obligation to comply with the rule.<sup>85</sup> However, failure to object persistently and during the rule's formation bars states from later claims that they are exempt.<sup>86</sup>

## 2. Non-Refoulement Has Become a Principle of Customary International Law

It is widely argued that the principle of non-refoulement is binding as a matter of customary international law.<sup>87</sup> As customary international law, the principle of non-refoulement would thus apply to all states whether or not they are signatories to the UNHCR Convention and Protocol. Regarding the refoulement policies of Syria and Jordan, the international community has called on the two countries to sign onto the UNHCR Convention and Protocol Relating to the Status of Refugees. Both countries have refused to become signatories.<sup>88</sup>

The UNHCR Convention and Protocol ensures a number of basic rights for refugees. These include the principle of non-refoulement.<sup>89</sup> The principle of non-refoulement prohibits countries from returning refugees to the nations they are fleeing in fear of persecution.<sup>90</sup> Other tenets of the UNHCR Convention and Protocol require that refugees receive the same rights of non-discrimination, access to work, access to schools, access to welfare programs, religious freedom, rights of association, access to courts, housing, and freedom of movement as afforded to nationals of the receiving state.<sup>91</sup>

## 3. Claims by Syria & Jordan That Both Have No Duty of Non-Refoulement Are Primarily Motivated by a Lack of Resources, Rather than Legal Principle

Despite calls for Syria and Jordan to join the UNHCR Convention and Protocol, the international community seems quite aware that the host countries' refoulement policies are a result of a lack of funding, rather than a

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> For a full accounting of the status of non-refoulement as a binding principle of customary international law, see *infra* Part III.A.1.

<sup>88</sup> Walsh, *supra* note 15, at 431.

<sup>89</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter U.N. Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, G.A. Res. 2198 (XXI), Chap. V, Art. 32–33 [hereinafter U.N. Refugee Protocol].

<sup>90</sup> Robert L. Newark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L.Q. 833, 833–34 (1993).

<sup>91</sup> U.N. Refugee Protocol, *supra* note 89, Chap. I–IV, art. 1–46.

lack of will.<sup>92</sup> Rationally, the countries would not wish to sign onto the UNHCR Convention and Protocol if it means committing themselves to a legal mandate for which they have inadequate funding assistance from the international community. Nonetheless, both nations arguably already have an obligation under customary international law not to return refugees to the country from which they are fleeing.

#### 4. Syria and Jordan Are Bound by the Principle of Non-Refoulement

While Syria and Jordan are not signatories to the UNHCR Convention and Protocol, and therefore are not subject to its broader provisions, many members of the international community claim that the principle of non-refoulement has become customary international law to which they are subject.<sup>93</sup> Additionally, both Syria and Jordan are signatories to the International Covenant on Civil and Political Rights (“ICCPR”), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), and Refugee Convention and Protocol, which prohibits refoulement.<sup>94</sup>

This Note takes the position that Syria and Jordan are bound by customary international law not to turn Iraqi refugees back at the border, regardless of being non-signatories to the Refugee Convention and Protocol. International customary law, as defined by consistent state practice and a strong *opinio juris*, binds all states, whether or not they are parties to the conventions incorporating and codifying the principle of non-refoulement.<sup>95</sup> Thus, Syria and Jordan, though not signatories of the UNHCR Convention and Protocol, are subject to customary international law. The following paragraphs flesh out the argument that the principle of non-refoulement is binding as a matter of customary international law.<sup>96</sup>

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<sup>92</sup> See, e.g., *Felick Testimony*, *supra* note 3 (telling the U.S. Congressional Human Rights Caucus that the reason Syria has closed its borders is that it can “no longer shoulder the responsibility alone”).

<sup>93</sup> IRAQ: RHETORIC AND REALITY, *supra* note 6, at 32.

<sup>94</sup> *Id.*

<sup>95</sup> Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law*, 20 INT’L J. REFUGEE L. 373, 384 (2008).

<sup>96</sup> Some scholars go further, arguing that the principle of non-refoulement has surpassed the level of customary international law and has become *jus cogens*, especially in cases where the refugee may face torture. See, e.g., Rene Bruin & Kees Wouters, *Terrorism and the Non-Derogability of Non-Refoulement*, 15 INT’L J. REFUGEE L. 5 (2003). *Jus cogens* refers to those general and fundamental principles of international law that preempt both conflicting norms and treaties as defined in Articles 53 and 64 of the Vienna Convention on the Law of Treaties. See, e.g., *id.* at 24.

Evidence of consistent state practice includes the Refugee Convention and the 1967 Protocol, which articulate the principle of non-refoulement,<sup>97</sup> and the CAT, which includes the non-refoulement provision in Article 3(1).<sup>98</sup> These instruments have been signed by a majority of states.<sup>99</sup>

The international community has construed Article 7 of the ICCPR to include an inherent right to non-refoulement.<sup>100</sup> In General Comment 20 to the ICCPR, the U.N. Human Rights Committee found that Article 7's non-refoulement principle represents customary international law and, thus, is not subject to reservations.<sup>101</sup> Thus, no state possesses the ability to exempt itself legally from the obligation not to refoule refugees at their borders. For this reason, states neighboring Iraq cannot legally refuse entry to Iraqis fleeing the continuing conflict in their country.

Further evidence of the prevailing state practice of non-refoulement includes U.N. General Assembly Resolution 37/95 of December 18, 1982, which treats non-refoulement as a fundamental principle of international law.<sup>102</sup> In addition, U.N. General Assembly Resolution 48/116 calls on all states to respect non-refoulement as a fundamental principle.<sup>103</sup> Finally, the International Institute of Humanitarian Law and the U.N. High Commissioner for Refugees issued the Sanremo Declaration in 2001, stating that "the principle of non-refoulement of refugees can now be deemed as an integral part of customary international law."<sup>104</sup> Again, such a designation preempts the ability of individual states to claim an exemption to the obligation of non-refoulement.

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<sup>97</sup> U.N. Refugee Convention, *supra* note 89; U.N. Refugee Protocol, *supra* note 89.

<sup>98</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 113, available at <http://www2.ohchr.org/english/law/cat.htm> [hereinafter Torture Convention].

<sup>99</sup> Gretchen Borchelt, *The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards*, 33 COLUM. HUM. RTS. L. REV. 473, 479–81 (2002); Human Rights Web, United Nations Agreements on Human Rights: Convention Against Torture, available at [http://www.hrweb.org/legal/un\\_docs.html#CAT](http://www.hrweb.org/legal/un_docs.html#CAT).

<sup>100</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 7, U.N. Doc. A/6316 (Dec. 16, 1966), available at <http://www2.ohchr.org/English/law/ccpr.htm>; Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in UNHCR, REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 92 (Erika Feller et al., eds., Cambridge Univ. Press 2003); U.N. HIGH COMMISSIONER FOR REFUGEES, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEES (HANDBOOK FOR PARLIAMENTARIANS) 14 (1991), available at <http://www.unhcr.org/3d4aba564.html>.

<sup>101</sup> *Id.* at 384–85.

<sup>102</sup> *Id.* at 385.

<sup>103</sup> *Id.* at 386.

<sup>104</sup> *Id.*



Evidence of a strong *opinio juris* against refoulement of refugees is overwhelming. As noted by the authors of the Sanremo Declaration, and as articulated in the *Nicaragua* case, a principle of customary international law is not invalidated simply because one or more states violate it, so long as the norm is generally recognized and the violators find it necessary to state an explanation for their violation.<sup>105</sup> Syria and Jordan, while claiming to be exempt from the principle of non-refoulement because neither is a signatory to the Refugee Convention, also felt it necessary to explain that they were only turning Iraqi refugees back at the border after years of accepting them because of a lack of financial ability.<sup>106</sup>

Further evidence of a strong *opinio juris* is the Summary Conclusion 2.2 of the Expert Roundtable organized by the U.N. High Commissioner for Refugees and the Lauterpacht Research Centre for International Law at the University of Cambridge in July 2001.<sup>107</sup> The U.N. Roundtable's main conclusion was that non-refoulement had become a principle of customary international law.<sup>108</sup> The conclusion of the U.N. Roundtable was based on the findings that, while refugee law is an area of international law that remains in flux, broad consensus and state practice formed the basis of the purpose of the 1951 Refugee Convention and its 1967 Protocol.<sup>109</sup> This purpose, to protect the rights of refugees, was further developed by the related fields of international human rights law and international humanitarian law.<sup>110</sup> The Expert Roundtable identified Article 33 of the Convention as the codification of the principle of non-refoulement. They found this principle to apply to all refugees regardless of whether the receiving country provided them with formal asylee status, until such time as their status is formally and fairly adjudicated in accordance with international law.<sup>111</sup> Significantly, the customary international legal principle of non-refoulement that Article 33 articulates applies to all state actions that would directly or indirectly cause the refugee to be returned to the country from which he flees for fear of persecution. This principle specifically encompasses interception, rejection at the border, and indirect refoulement.<sup>112</sup> The U.N.-commissioned Roundtable accordingly determined that states are obligated under customary

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<sup>105</sup> Duffy, *supra* note 95, at 387.

<sup>106</sup> See *supra* Part II.A.

<sup>107</sup> U.N. High Comm'r for Refugees and Lauterpacht Research Ctr. for Int'l Law, *Summary Conclusions: The Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 178–79 (Erika Fuller ed., 2003) [hereinafter UNHCR Summary Conclusions].

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> UNHCR Summary Conclusions, *supra* note 107.

international law to accept such refugees and address mass refugee influxes through creative measures if necessary, but under no circumstances could states derogate from the law.<sup>113</sup> Thus, as a tenet of basic human rights law, states cannot normally make claims of legitimate and legal exceptions to the principle of non-refoulement.<sup>114</sup> Any exceptions are to be interpreted “very restrictively, subject to due process safeguards, and as a measure of last resort,” and states may never refuse refugees who fear torture upon return.<sup>115</sup>

Thus, non-refoulement prohibits the actions that host countries in the Middle East have taken to close their borders to Iraqi refugees. In light of the status of the principle of non-refoulement as a matter of customary international law, Syria and Jordan must cease the practice of turning away Iraqi refugees at the border. However, these countries lack the resources to meet this international obligation to accept and care for such large numbers of refugees, and only closed their borders under the enormous economic stress felt by resident refugees and host countries’ citizens alike.<sup>116</sup> Thus, the international community should assist host countries—both in the provision of humanitarian aid, and in host countries’ efforts to comply with the principle of non-refoulement. As a practical matter, it is unlikely that host countries lacking the resources to meet their international obligations will do so without the assistance of the international community through the United Nations and/or bilateral financial assistance.

*B. The United States Should Take Primary Responsibility for the Iraqi Refugee Crisis, but Is It Legally Bound to Do So?*

The claim that the United States has not met a moral obligation to Iraqi refugees is fairly straightforward: the Bush Administration made a unilateral decision to enter into Operation Iraqi Freedom without U.N. Security Council authorization and has been the primary military force throughout the conflict in Iraq. However, the legal issue is a bit murkier. Human rights organizations and others have called for greater action on the part of the international community in responding to the Iraqi refugee crisis.<sup>117</sup> Many call, in particular, for greater U.S. assistance. In doing so, international

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> IRAQ: RHETORIC AND REALITY, *supra* note 6, at 11–14, 18–19; *see also supra*, Part II.A.

<sup>117</sup> *See, e.g.*, O’DONNELL & NEWLAND, *supra* note 1, at 14; IRAQ: RHETORIC AND REALITY, *supra* note 6, at 2; Roberta Cohen, *Iraq’s Displaced: Where to Turn?*, 24 AM. U. INT’L L. REV. 301, 327–28 (2008); Refugees Int’l, Iraq: Preventing the Point of No Return, <http://www.refugeesinternational.org/policy/field-report/iraq-preventing-point-no-return> (last visited Nov. 21, 2009); NGO Coordination Comm. for Iraq, IDPs and Refugees, <http://www.ncciraq.org/index.php/en/humanitarian-space> (last visited Nov. 21, 2009); Dahr Jamail, *The Iraqi Refugee Crisis*, NATION, Apr. 23, 2007, available at <http://www.thenation.com/doc/20070507/jamail>.

NGOs imply that the United States has a unique responsibility to address the crisis as a result of the unilateral nature of Operation Iraqi Freedom.<sup>118</sup>

While some NGOs have implied that the United States has a legal obligation to shoulder the burden of humanitarian assistance for the Iraqi refugee crisis, the argument for this duty has not yet been fully articulated. The U.S. Department of State has, at times, acknowledged a heightened responsibility to Iraqi refugees, but certainly has not presented this as a legal duty.<sup>119</sup> In any case, it has not met the responsibility it acknowledges—be it a legal, political, or only moral one—and has failed to sufficiently meet the humanitarian needs of Iraqi refugees.

In his address to the U.S. Congressional Human Rights Caucus in 2007, Bill Felick, Refugee Policy Director for Human Rights Watch, cited a lack of financial support from the international community, especially the United States, in the decisions of the Syrian and Jordanian governments to close their borders to refugees.<sup>120</sup>

The U.S. government needs to acknowledge that it has a particular responsibility toward Iraqi refugees because of its military intervention in Iraq. The usual formulas for international burden sharing do not apply because *other governments see the Iraq war as having been a largely unilateral undertaking* and have not (and will not) come forward with adequate contributions to meet the humanitarian emergency. Washington must shelve its self-imposed 30 percent limit on U.S. contributions to U.N. humanitarian appeals for these refugees.<sup>121</sup>

In 2008, Amnesty International went further in its appeal:

The international community, especially those states with particular responsibilities towards the crisis, such as the USA, UK and other participants in the US-led invasion, need

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<sup>118</sup> See Cohen, *supra* note 117, at 304.

<sup>119</sup> In fact, Lawrence E. Bartlette, representing the U.S. Department of State at a Georgetown University Panel Discussion on Iraq in 2007, denied that the United States had any unique obligation to resolve the Iraqi refugee crisis. See *id.* at 317. Then in 2008, then-U.S. Ambassador to the U.N., John Bolton, claimed that the refugee crisis was the result of Iraqi sectarian violence, rather than U.S. actions, and that, as a result, the U.S. bore no particular responsibility. *Id.* However, since that time, U.S. officials have acknowledged a special U.S. responsibility toward Iraqi refugees. As discussed *infra*, then-U.S. Ambassador to Iraq, James Foley, represented that the United States “recognize[s] our unique responsibilities toward displaced Iraqis.” Foley, Briefing on Iraqi Assistance, *supra* note 50. The Obama Administration has recognized the Iraqi refugee crisis as a U.S. obligation to seek to resolve, but has taken little action. See discussion, *supra*, Part II.B.

<sup>120</sup> Felick Testimony, *supra* note 3.

<sup>121</sup> *Id.* (emphasis added).

to recognize their moral, political and legal responsibilities to respond to this crisis.<sup>122</sup>

For its part, representatives of the Bush Administration acknowledged the legitimacy of the moral and political, if not legal, claims made by the NGOs above, both in comments and in funding it provided to assist relief efforts. Responding to the UNHCR's 2008 Iraq appeal for an additional \$500 million dollars in fiscal year 2008, the U.S. Department of State surpassed its self-imposed 30 percent limit on contributions. James Foley, then-U.S. Ambassador to Iraq, commented on the increase in funding:

To date, we've funded—the U.S. has funded over 51 percent of UNHCR's 2008 Iraq appeal, which was for \$261 million. This far exceeds the traditional 25 percent benchmark and, as I said, we may yet reach a significantly higher percentage over the next 18 days of this UNHCR appeal. And I say this not to pat ourselves on the back. We recognize our unique responsibilities toward displaced Iraqis, and we've acted on that recognition.<sup>123</sup>

However, in the same announcement, Ambassador Foley also indicated that the Iraqi government itself bore the primary duty to assist and resettle Iraqi refugees and IDPs.<sup>124</sup> Ambassador Foley indicated that, while the United States would continue to work to bring security within Iraq so that refugees might return, the Iraqi government bore the responsibility to provide housing, work, and education to returning refugees.<sup>125</sup> Furthermore, Ambassador Foley spoke of the Iraqi government's obligation to provide direct aid to Iraqi refugees:

[T]he Iraqi Government's unwillingness thus far to significantly share the international burden of assisting the refugees would perhaps become more understandable if it were undertaking a serious and credible effort to prepare for large-scale returns. . . . But if we're talking about a government with increasingly robust resources that professes an unwillingness to help us and the Americans and the other international taxpayers to sustain their citizens who are caught out still in the region, then I think it would behoove them to put a little bit more in the way of planning, policies

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<sup>122</sup> IRAQ: RHETORIC AND REALITY, *supra* note 6, at 43.

<sup>123</sup> Foley, Briefing on Iraqi Assistance, *supra* note 50.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

and resources behind a credible and serious effort to promote sustainable large-scale returns.<sup>126</sup>

The United States recognizes the international legal principle of non-refoulement by incorporating binding international treaties within federal statutory law. Congress implemented the 1951 Refugee Convention in the Immigration and Nationality Act §§ 208 and 241(b)(3).<sup>127</sup> These laws provide for the granting of refugee status—imparting the right not to be refouled—to individuals who are present in the United States and seek protection because of a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group.<sup>128</sup> Furthermore, the Refugee Act of 1980 made non-refoulement provisions mandatory.<sup>129</sup> Notably, it also brought the United States into compliance with its obligations under the 1967 Protocol, to which it was a signatory.<sup>130</sup> Immigration and Customs Enforcement regulation 8 C.F.R. § 208.9 vests professional asylum officers with the authority to determine the legitimacy of asylum claims.<sup>131</sup> Critics assert that this process imposes too high a burden of production and proof on the part of Iraqi applicants for asylum, who often possess little documentation after fleeing from their homes.<sup>132</sup>

The United States also recognizes the principle of non-refoulement through the CAT. The CAT requires states to abide by the principle of non-refoulement when there are substantial grounds to believe the noncitizen would be tortured if returned to his or her home country.<sup>133</sup> The United States became party to the CAT in 1994 and adopted its non-refoulement requirements in 1999.<sup>134</sup> Congress adopted the CAT and implemented the principle of non-refoulement through the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”).<sup>135</sup> Under Immigration and Customs

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<sup>126</sup> *Id.*

<sup>127</sup> THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 948 (6th ed., Thomson/West 2008).

<sup>128</sup> *Id.* at 845.

<sup>129</sup> *Id.* at 848.

<sup>130</sup> *Id.* at 849.

<sup>131</sup> *Id.* at 850.

<sup>132</sup> See, e.g., Jennifer Rikoski & Jonathan Finer, *Out of Iraq: The U.S. Legal Regime Governing Refugee Resettlement*, 34 RUTGERS L. REC. 46, 56–57 (2009); Walsh, *supra* note 15, at 434; Meital Waibsnider, Note, *How National Self-Interest and Foreign Policy Continue to Influence the U.S. Refugee Admissions Program*, 75 FORDHAM L. REV. 391, 418 (2006); Ferris, *supra* note 12; António Guterres, U.N. High Comm’r for Refugees, Statement at the 10th Annual Midwest Light of Human Rights Awards, Heartland Alliance’s Nat’l Immigrant Justice Ctr. (June 19, 2009), available at <http://www.unhcr.org/4a7ae1659.html>.

<sup>133</sup> ALEINIKOFF ET AL., *supra* note 127, at 947.

<sup>134</sup> *Id.* at 847.

<sup>135</sup> Pub. L. 105–277, 112 Stat. 2681 (1998); ALEINIKOFF ET AL., *supra* note 127, at 949.

Enforcement provisions, found in 8 C.F.R. §§ 208.16–18 and 208.30–31, the Director of the Department of Homeland Security vests U.S. immigration judges with the authority to grant withholding of removal status to immigrants seeking non-refoulement under the CAT.<sup>136</sup>

As outlined above, the 1951 Refugee Convention, the 1967 Protocol, and the 1984 CAT are treaties that bind the United States under international law and have been incorporated or ratified into U.S. domestic law. The Immigration and Nationality Act is important to understanding the United States' international obligations to abide by the principle of non-refoulement because it contains domestic statutes implementing the treaty obligations. These statutes demonstrate the incorporation of the relevant international treaties codifying the principle of non-refoulement into U.S. law and thus bind the United States to abide by the principle.

1. An Additional Protocol to the Refugee Convention is Needed, Given the Circumstances Leading to the Iraqi Refugee Crisis

This Note argues that the United States has a heightened obligation to assist host countries in their provision of aid to Iraqi refugees as a matter of public policy, international relations, national security, and humanitarian responsibilities. While the argument that the United States has a special moral obligation to provide assistance to Iraqi refugees and their host countries is compelling, the argument for a legal obligation is ultimately less persuasive. As explained in the following paragraphs, this is largely due to a lack of precedent for holding nations who enter war unilaterally to be primarily obligated to provide humanitarian aid to address a resulting refugee crisis. In this regard, current international law is inadequate to address the needs of a changed world in the face of U.S. unilateralism.

a) *Existing International Law Is Inadequate to Hold the United States as Bearing Primary Legal Responsibility for the Iraqi Refugee Crisis*

There are two principle arguments for *legally* holding the United States primarily responsible for addressing the Iraqi Refugee Crisis under current international law. The first is that the United States must provide aid under the Refugee Convention. The second argument in favor of holding the United States to a greater obligation is that the United States, by entering into war in violation of international law, has committed a gross violation of humanitarian law, for which reparations may be sought by refugees. These two arguments will be considered in turn.

The first argument is that the United States must provide aid under the Refugee Convention. The Preamble of the 1951 Convention states that “the grant of asylum may place unduly heavy burdens on certain countries, and

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<sup>136</sup> ALEINIKOFF ET AL., *supra* note 127, at 949.

that a satisfactory solution of the problem with an international scope and nature cannot therefore be achieved without international co-operation.”<sup>137</sup> Thus, under the 1967 Protocol to the Refugee Convention, the United States agreed, as a member of the international community, to cooperate with other states in assisting host countries in the administration of aid to refugees.<sup>138</sup>

However, according to this argument, the obligation of the United States to Iraqi refugees is no greater than any other member of the international community. It does not speak to a heightened legal responsibility attributable to the United States’ unique role in creating the Iraqi refugee crisis by its unilateral, preemptive, and unauthorized entry into war. Because it has funded over 51 percent of UNHCR’s 2008 Iraq appeal, which totaled \$261 million, the United States has arguably met its obligation as a member of the international community under the Refugee Convention and Protocol. The Secretary of State’s Office has stated that “[w]e recognize our unique responsibilities toward displaced Iraqis, and we’ve acted on that recognition.”<sup>139</sup> As discussed in the next section, this Note proposes that the international community work together to create a new Protocol to the 1967 Refugee Convention that will address the current deficiencies.

There is an attractive second argument for a U.S. legal obligation to the Iraqi refugees. Elna Sondergaard, a professor of public international law at the American University in Cairo, has argued that Iraqi refugees are entitled to reparations for harm suffered as a result of the United States’ violation of international law in its unauthorized entry into war, which constitutes a gross violation of humanitarian law.<sup>140</sup> Articles I.1(b) and VII.11(b) of U.N. General Resolution 60/147 state that violators of international humanitarian law emanating from customary international law have an obligation to provide “adequate, effective, and prompt reparation for harm suffered.”<sup>141</sup>

General Resolution 60/147 has been used to argue for a right to reparations from the United States for indigenous peoples of the Americas in

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<sup>137</sup> Eleanor E. Downes, Book Review, *Fulfilling the Promise?: When Humanitarian Obligations and Foreign Policy Goals Conflict in the United States*, 27 B.C. THIRD WORLD L.J. 477, 494–95 (2007) (reviewing María Cristina García, *Seeking Refuge: Central American Migration To Mexico, the United States, and Canada* (2006)).

<sup>138</sup> *Id.*

<sup>139</sup> Foley, Briefing on Iraqi Assistance, *supra* note 50.

<sup>140</sup> Serene Assir, *Right to a Remedy: What Rights Do Iraqi Refugees in Egypt Have Under International Law?*, AL-AHRAM WKLY., Apr. 16, 2008, available at <http://weekly.ahram.org.eg/2008/892/sc31.htm>.

<sup>141</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, arts. I, VII, U.N. Doc. A/RES/60/147 (Mar. 21, 2006), available at <http://www.unhcr.org/refworld/docid/4721cb942.html>.

the context of compensation claims,<sup>142</sup> of Bosnian Muslims and Croats in the International Criminal Tribunal for the Former Yugoslavia, against the Republic of Serbia for the treatment of Bosnian Muslims and Bosnian Croats in Serbian detention camps,<sup>143</sup> and for victims of human rights abuses suffered at the hands of the Peruvian government,<sup>144</sup> among others. In enacting Resolution 60/147, the General Assembly made clear that the Basic Principles of 60/147, rather than creating new norms of international law, “do not entail new international or domestic legal obligations, but identify mechanisms, modalities, procedures and methods for implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.”<sup>145</sup> Resolution 60/147 establishes legal procedures for individuals to claim the right to reparations, but the right itself goes back to antiquity.<sup>146</sup>

There are a number of problems with nesting the basis of legal and financial responsibility in U.N. General Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Primary among these problems is that the legal process of making claims for reparations would require the harm to have been suffered already, as well as proven in a judicial proceeding. The lack of a timely redress under 60/147 makes relying on it for over 4 million Iraqi refugees who are currently in crisis particularly problematic, and necessitates the additional Protocol to the Refugee Convention this Note advocates in the following section. That said, 60/147 provides a necessary supplemental mechanism for victims of serious violations of human rights law in both refugee crises and other contexts.

The second problem with using a reparations approach to address the Iraqi refugee crisis is that, while 60/147 provides remedies for victims of serious violations of international human rights law and humanitarian law, it does not provide mechanisms for humanitarian assistance to innocent

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<sup>142</sup> Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 79–88 (2008).

<sup>143</sup> Nancy G. Abudu et al., *International Legal Developments in Review: 2007, Public International Law, Human Right*, 42 INT'L L. 755, 759 (2008).

<sup>144</sup> Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51, 55–56 (2007).

<sup>145</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violations of International Human Rights and Humanitarian Law, G.A. Res. 60/147, pmb., sec. IX, U.N. Doc. A/RES/60/147 (Mar. 21, 2006), available at <http://www.unhcr.org/refworld/docid/4721cb942.html>.

<sup>146</sup> Laplante, *supra* note 144, at 55–56.



victims of lawful war.<sup>147</sup> While the case that the United States violated international law in entering war—*jus ad bellum*—is fairly well established, the actions of the United States within the context of the war—*jus in bello*—has not met the same threshold of a gross violation of international law. Under international law, whether or not a state violates international law in going to war, it remains obligated to engage only in “just war.”<sup>148</sup> The principles articulated in 60/147 apply very clearly to war crimes and crimes against humanity, but their application to crimes *ad bellum* are less established.<sup>149</sup> These principles, at best, constitute an emerging system of international norms, rather than established and accepted international norms that are recognized as binding.<sup>150</sup> For these reasons, current international law regarding reparations is inadequate to address the needs of innocent civilians who are displaced as a result of war. To properly address these needs, an amendment of the 1967 Protocol is necessary.

b) *Proposed Additional Protocol to the 1967 Refugee Convention*

As outlined above, under current international law, the United States has likely met its legal obligations to address the Iraqi refugee crisis. Any individual right to seek reparations under U.N. General Resolution 60/147 fails to offer timely redress for harms suffered, to prevent further harm from occurring, and to address the problem on the massive scale that is required.

For this reason, the international community should work together to create an additional Protocol to the 1967 Refugee Convention to ensure that when countries enter war without proper authorization from the U.N. Security Council, they become legally responsible to provide humanitarian assistance to the persons they displace as a result of that war. However, the rogue state’s legal responsibility must be to the international community as a whole, rather than to displaced persons directly. It would be a counterproductive result for refugees who are displaced to receive inadequate assistance because they must rely on the same state that violated international law in its entry to war. Such countries, having already established their willingness to violate international law, would be more likely to continue in their violative behavior in meeting any obligations to the refugees after entry-into-war.

Second, not all states that violate international law by causing a refugee crisis will have the resources that the United States possesses. Less affluent countries may not have the financial ability to meet the needs of displaced

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<sup>147</sup> Jonathan Tracy, *Responsibility to Pay: Compensating Civilian Casualties of War*, 1 HUM. RTS. BRIEF 16, 16 (2007).

<sup>148</sup> *Id.* at 17.

<sup>149</sup> *Id.* at 16–17.

<sup>150</sup> *Id.*

persons. Therefore, rather than modify the existing 1967 Protocol in terms of the member states' individual obligations, the international community as a whole should remain primarily responsible for providing aid. Furthermore, the 1967 Protocol should be amended to supplement the existing obligation by requiring the rogue state to pay back the international community over time for the financial costs incurred in providing aid. Other states that have complied with international law, especially those who have criticized the non-complying state for its unilateral action, understandably may feel reluctant to provide aid for a crisis they believe to be the primary responsibility of a nation whose entry into war was unauthorized by the United Nations. An amendment to the 1967 Protocol would allow more immediate distribution of aid without states having to worry about appearing to condone the cause of the displacement itself (the unlawful entry into war). Such an amendment would also provide initial confidence that funds would be recouped eventually, as well as a much-needed financial disincentive for unauthorized entry into war in the first place.

Relying on U.N. General Resolution 60/147 to require the United States to provide sustained and effective assistance to Iraqi refugees is inadequate for a number of reasons. First, the legal process of making claims for reparations would require claimants to have already suffered the harm, rather than providing an incentive to the United States to seek to improve conditions on a widespread scale in Iraq so that IDPs and refugees would have the safety and security required for them to return home willingly. Second, 60/147 would require a lengthy and complicated judicial proceeding to which the United States would arguably not submit. An additional protocol to the Refugee Convention would be preferable to this possible remedy, because it would require immediate action on the part of the international community to provide swift humanitarian assistance to displaced persons. The protocol that this Note proposes would only provide that the international community could seek repayment from the state violator of international law *after* the community's provision of aid.

## 2. Notwithstanding Current International Law, the United States Must Address the Iraqi Refugee Crisis for Critical Non-Legal Reasons, Including Humanitarian Goals, National Security, and Diplomatic Relations

Legal claims aside, the United States has compelling humanitarian and foreign policy reasons for providing greater assistance to Iraqi refugees and their host countries. The United States, in entering Operation Iraqi Freedom without U.N. Security Council authorization,<sup>151</sup> violated international law.

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<sup>151</sup> This Note accepts as a premise that the United States entered into Operation Iraqi Freedom in violation of international law by applying the authorization it received for the first Gulf War to the second one. This amounts to entering the war without U.N. Security Council authorization, which is prohibited by the U.N. Charter. For examples of this argument, see, e.g., Richard Falk, *The Iraq War and the Future of International Law*, 98 AM. SOC'Y INT'L L. PROC.

Thus, it altered the duty normally shared by all member states to provide humanitarian assistance to refugees from an authorized conflict, and consequently, the United States should take on the burden—like the war itself—in nearly unilateral fashion.

As described in detail in this Note, Operation Iraqi Freedom caused millions of Iraqis to flee their homes in search of safety from the conflict and resulting sectarian violence. Now, Iraqi refugees in neighboring countries face conditions of grave humanitarian consequence, including lack of status, no right to work, inadequate or absent access to schools for children, conditions of serious malnutrition and starvation, insufficient access to safe drinking water, inadequate shelter, and extremely poor access to necessary medical care.<sup>152</sup> To do nothing, or too little, to prevent Iraqi IDPs and refugees from living and dying in these conditions after being the major force behind their upheaval is an untenable option, one that would condemn the United States' military actions in Iraq as the actions not of liberators, but of occupiers, profit-seekers, and gross violators of human rights. The United States should seek to do everything in its power to ensure Iraqis have a safe home to return to, and that their health, safety, and welfare is protected in the meantime.

Beyond humanitarian reasons, the United States must take serious and broad-sweeping steps to resolve the Iraqi refugee crisis in order to protect its own national security. The Iraqi refugee crisis poses a serious threat to the security of the entire Middle East, which in turn poses a significant obstacle to U.S. foreign policy goals in the region. Iraqi refugees in Syria and Jordan have the potential to destabilize those countries and engender long-term resentment and hostilities for generations. During a March 2009 Senate Committee on Foreign Relations, one expert imagined a future where the millions of disaffected Iraqi refugees become “the next Palestinians: a large population movement caused by political upheaval and war that has the potential to change the politics of the region for generations.”<sup>153</sup> Iraqi

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263, 263–66 (2004); J.M. Spectar, *Beyond the Rubicon: Presidential Leadership, International Law, and the Use of Force in the Long Hard Slog*, 22 CONN. J. INT'L L. 47, 103–14 (2006); Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?*, 34 CAL. W. INT'L L.J. 1, 12–14 (2003). However, some legal scholars argue that preemptive self-defense is justifiable under international legal norms. See, e.g., Matthew L. Sandgren, *War Redefined in the Wake of September 11: Were the Attacks Against Iraq Justified?*, 12 MICH. ST. J. INT'L L. 1, 5 (2003); John Yoo, *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 563, 564, 575 (2003).

<sup>152</sup> See discussion, *supra* Part II.A; The Return and Resettlement of Displaced Iraqis: Hearing Before the S. Comm. on Foreign Relations, 111th Cong. Sess. 1, 2 (2009) (Opening Statement of Robert P. Casey, Jr., U.S. Senator), available at <http://foreign.senate.gov/testimony/2009/CaseyStatement090331pp.pdf>.

<sup>153</sup> The Return and Resettlement of Displaced Iraqis: Hearing Before the S. Comm. on Foreign Relations, 111th Cong. Sess. 1, 1 (2009) (statement of Ellen Laipson, President & C.E.O., the Henry L. Stimson Ctr.), available at <http://foreign.senate.gov/testimony/2009/LaipsonTestimony090331pp.pdf>.

refugees and IDPs reasonably can be expected to develop deep-seated antagonism toward the United States if it disengages from Iraq, withdraws troops, and fails to address the widespread humanitarian fallout that resulted from the U.S. military invasion. Certainly, the longer Iraqis remain displaced due to failed security and peace in Iraq, the greater this potential becomes.

Finally, the United States must work to resolve the Iraqi refugee crisis if it is ever to regain the trust and goodwill of the international community. The international community largely conceives of the Iraqi refugee crisis as a problem created by the United States and sees resolution of the situation as the responsibility of the U.S. and Iraqi governments to resolve.<sup>154</sup> They perceive both the United States and Iraq, having access to large oil reserves, as possessing both the financial resources and the burden to resolve the crisis.<sup>155</sup> Many in the international community perceive the U.S. entry into war in Iraq as illegal. For example, in 2004, Kofi Annan described the war as “not in conformity with the U.N. charter from our point of view,” continuing that “from the charter point of view, it was illegal.”<sup>156</sup> Individual state governments, including important U.S. allies, such as France and Germany, opposed the unauthorized entry into war and believed war would only further destabilize the region.<sup>157</sup> Outside of Europe, many national political leaders openly condemned U.S. actions.<sup>158</sup> Even when states more formally aligned themselves with the U.S. government in the invasion of Iraq, many of those states’ populaces widely opposed the war and their government’s role in supporting the U.S.-led invasion. This was the case, for example, in Spain, the United Kingdom, and Italy.<sup>159</sup> Many countries, including Spain, withdrew the forces they initially committed to the invasion in light of widespread popular opposition at home.<sup>160</sup> In fact, popular opinion polling conducted in

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<sup>154</sup> Cohen, *supra* note 117, at 304.

<sup>155</sup> *Id.*

<sup>156</sup> *Iraq War Illegal, Says Annan*, BBC NEWS, Sept. 14, 2004, <http://news.bbc.co.uk/2/hi/3661134.stm>.

<sup>157</sup> Andrew Roche, *Most World Leaders Condemn U.S. Attack; Britain, Kuwait, and Others Rally to War*, WASH. POST, Mar. 20, 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn/A57593-2003Mar19?language=printer>; *Chirac Blasts U.S.-Led Invasion of Iraq*, FOXNEWS.COM, Jan. 5, 2007, <http://www.foxnews.com/story/0,2933,241838,00.html?sPage=fnc/world/Europe;U.S.PlansforWaronIraqSufferBlowfromEuropeanStates>, AGENCE FR. PRESS, Feb. 9, 2003, available at <http://www.commondreams.org/headlines03/0209-10.htm>.

<sup>158</sup> Roche, *supra* note 157 (citing examples of Russia, Malaysia, Indonesia, Pakistan, and Iran).

<sup>159</sup> *Spain’s Prime Minister Orders Iraq Troops Home*, BBC NEWS, Apr. 18, 2004, <http://news.bbc.co.uk/2/hi/3637523.stm>; *U.K. Combat Operations End in Iraq*, BBC NEWS, Apr. 30, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/8026136.stm](http://news.bbc.co.uk/2/hi/uk_news/8026136.stm); *Italy to Begin Iraq Troop Withdrawal*, ABC NEWS ONLINE, Jan. 20, 2006, <http://www.abc.net.au/news/newsitems/200601/s1551358.htm>.

<sup>160</sup> Miriam Sapiro, *Preempting Prevention: Lessons Learned*, 37 N.Y.U. J. Int’l L. & Pol. 357, 358 (2005).

2003 revealed that the majority of the European, Russian, and Middle Eastern populaces opposed launching a military strike in Iraq without U.N. Security Council authorization.<sup>161</sup> A slightly smaller majority opposed the Iraq War even if Security Council authorization had been obtained.<sup>162</sup>

The United States has a long way to go toward repairing its relationships with foreign governments and international bodies, rebuilding trust in U.S. respect for law, and improving U.S. standing in the world. The election of U.S. President Barack Obama provided a positive signal to the world that the United States would once again work with the international community, rather than unilaterally, in the furtherance of peace and international stability. However, international enthusiasm for the Obama Administration is likely to falter in the face of inaction or incompetence in dealing with the problem of Iraq and the tragedy of the Iraqi refugee crisis. For the United States to effectively navigate the global challenges it will face in the next few years, among them threats to national security and the ongoing financial crisis, it will need to foster anew the trust and partnership of the international community. This task will be impossible if the United States does not take action to confront the human rights abuses and violations of international law that occurred during the Bush Administration's eight years in office. Chief among these is the duty to prevent further illness, suffering, and death of the more than 4 million Iraqis displaced by the U.S.-led invasion.

As demonstrated, the United States implemented the international law of non-refoulement in the Immigration and Nationality Act.<sup>163</sup> In addition, statements made by the U.S. Department of State demonstrated its recognition of, at minimum, a humanitarian duty to aid Iraqi refugees.<sup>164</sup> However, such a humanitarian argument only posits that a duty may emerge out of the Iraqi refugee crisis, but has not yet taken hold. In other words, the obligation of the United States to aid host countries financially—in order to facilitate their non-refoulement of refugees—is ultimately a good foreign policy for national security, foreign relations, and humanitarian reasons, rather than a legal duty. The absence of a clear legal duty arises from the lack of precedent for situations like Operation Iraqi Freedom and the resulting Iraqi refugee crisis. In the meantime, the international community

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<sup>161</sup> William Horsley, *Polls Find Europeans Oppose Iraq War*, BBC NEWS, Feb. 11, 2003, <http://news.bbc.co.uk/2/hi/europe/2747175.stm>. For a graphical view of polling results, see *id.* tbl., available at [http://news.bbc.co.uk/2/shared/spl/hi/middle\\_east/03/iraq\\_euro\\_war\\_views/html/](http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/iraq_euro_war_views/html/) (finding over 65 percent opposition to war in Iraq without U.N. Security Council authorization in the United Kingdom, Portugal, Ireland, Spain, Belgium, Finland, Denmark, Italy, the Netherlands, Luxembourg, Sweden, Austria, Greece, France, and Germany).

<sup>162</sup> *Id.* tbl.

<sup>163</sup> See ALEINIKOFF ET AL., *supra* note 127.

<sup>164</sup> See, e.g., Foley, Briefing on Iraqi Assistance, *supra* note 50.

should work toward amending the 1967 Protocol to hold states accountable for causing the displacement of persons by illegally entering war. One means to accomplish this goal is to require the transgressor state to repay the costs of humanitarian assistance to the international community.

#### IV. CONCLUSION: LEGAL & POLICY RECOMMENDATIONS TO HOST COUNTRIES, THE INTERNATIONAL COMMUNITY, & THE UNITED STATES

The Iraqi refugee crisis demonstrates the inadequacy of current international law to address the needs of millions of Iraqi men, women, and children who fled their homes in fear for their lives and safety. After years of maintaining open borders, Syria and Jordan recently began to turn Iraqi refugees away,<sup>165</sup> violating the customary international legal principle against refoulement. However, both Syria and Jordan are widely understood to have rejected refugees only because of impossible financial circumstances and inadequate support from the international community. While Syria and Jordan must cease the practice of refoulement of Iraqi refugees in order to comply with international law, the expectation that they will continue to accept refugees at any cost amounts to a financially unsupported mandate from the international community. Thus, the international community must increase financial support and use diplomacy to reopen borders for Iraqis fleeing persecution. In particular, the United States must increase its funding and diplomatic efforts to provide for the humanitarian assistance of Iraqi refugees in host countries.

Current international law has proven inadequate to compel the states that are responsible for creating massive and devastating refugee crises—here, the United States—to shoulder the burden of providing humanitarian aid in response to those crises. The United States currently is meeting its legal obligations to contribute to international community efforts to address the needs of Iraqi refugees. However, these legal obligations are inadequate, in real dollars and cents, when compared with the financial needs of Iraqi refugees and their host countries. The United States has acknowledged its non-legal, moral obligation to provide heightened aid commensurate with its “unique responsibility.”

Recent scholarship has called for a “third pillar” to the Just War doctrine, so that, in addition to codified norms for *jus ad bellum* (just cause to go to war) and *jus in bello* (just means of war), norms be codified for *jus post bellum* (justice after war) to deal effectively with the humanitarian fallout of war.<sup>166</sup> Members of the international community should work together,

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<sup>165</sup> Bassem Mroue, *Syria Bars Iraq Refugees, Crisis Worsens*, ASSOCIATED PRESS, Feb. 12, 2007, <http://www.refugees.org/uploadedFiles/Investigate/Newsroom/Headlines/syria.bars.iraqi.refugee.crisis.worsens.pdf>.

<sup>166</sup> Benjamin R. Banta, *Just War Theory and the 2003 Iraq War Forced Displacement*, 21 J. REFUGEE STUD. 261, 263 (2008).

especially with the United States, to codify new international legal standards and procedures. These new standards should address the humanitarian fallout of war while holding the state(s) responsible for creating the crisis to a heightened financial obligation.

Due to its unique responsibility in causing the Iraqi refugee crisis, the United States should increase aid and diplomatic efforts to facilitate host-countries reopening their borders to Iraqi refugees and provide humanitarian care for them during their displacement. U.S. policymakers should embrace bilateral assistance to host countries. During the Presidential campaign, then-Candidate Obama promised to provide \$2 billion in bilateral assistance to countries hosting Iraqi refugees. The State Department should use much of these funds and diplomatic efforts with host countries to ensure regional compliance with the international legal principle of non-refoulement, particularly by Syria and Jordan. This bilateral assistance and diplomacy would adequately provide for the short-term needs of Iraqi refugees living in the Middle East according to estimates by human rights organizations.<sup>167</sup> In addition, the United States would send the message to the broader international community that the new Administration is prepared to recognize and comply with international law, and take responsibility for the fallout resulting from the prior Administration's international legal violations.

What is more, the United States needs to develop methods to reliably track the numbers and needs of displaced Iraqis within and outside of the country, coordinate with UNHCR to develop programs to assist displaced Iraqis, and develop strategies to monitor funding to ensure it reaches Iraqis in need. The Government Accountability Office recently released a report based on meetings with UNHCR officials, international organizations, NGOs, and fieldwork conducted in Jordan and Syria.<sup>168</sup> The report found that the U.S. Department of State had yet to develop either a comprehensive international strategy to resolve the Iraqi refugee crisis or performance measures to achieve U.S. goals for meeting the needs of displaced Iraqis and facilitating their return home.<sup>169</sup> It is critical that the State Department and Obama Administration develop a comprehensive plan for the Iraqi refugee crisis, identify goals, set a specific timeline, and provide the necessary funding to achieve those goals. The United States is alone in its particular

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<sup>167</sup> See, e.g., HUMAN RIGHTS FIRST, HOW TO CONFRONT THE IRAQI REFUGEE CRISIS: A BLUEPRINT FOR THE NEW ADMINISTRATION 6–7 (2008), available at [www.humanrightsfirst.org/pdf/081222-iraqi-refug-bluprnt.pdf](http://www.humanrightsfirst.org/pdf/081222-iraqi-refug-bluprnt.pdf).

<sup>168</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. GAO-09-120, IRAQI REFUGEE ASSISTANCE: IMPROVEMENTS NEEDED IN MEASURING PROGRESS, ASSESSING NEEDS, TRACKING FUNDS, AND DEVELOPING AN INTERNATIONAL STRATEGIC PLAN 1–2 (2009), available at <http://www.gao.gov/new.items/d09120.pdf>.

<sup>169</sup> *Id.* at 40–45.

obligation and ability to resolve the crisis, in concert with the Iraqi government, host state governments, and the international community.

Ultimately, to address the root of the Iraqi refugee crisis, the Obama Administration must facilitate the ability and desire of displaced Iraqis, both within and outside of Iraq, to return home. Here lies the most difficult task. Such a result requires the restoration of security and political stability in the country. President Obama has put forth a plan to end military operations in Iraq by the end of 2010. However, it will be impossible to claim any real success until the more than 4 million Iraqis displaced by Operation Iraqi Freedom voluntarily resettle elsewhere or freely choose to return to Iraq. This will likely require at least four things: the cessation of all military operations, training of Iraqi police forces to ensure continuing security, ongoing U.S. diplomatic engagement, and bilateral financial assistance for many years to come.