

NOT SO SAFE AND SOUND¹

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- *The U.S. Security Against Foreign Enemies (SAFE) Act is another reminder that the immigrant population in the U.S. is increasingly vulnerable*

ABSTRACT

Despite its historical role as a refuge for people from all over the world seeking protection and a new life, in recent years, the United States of America (U.S.) has started to roll back its human rights protections for asylum seekers. Jamil Dakwar describes how, in response to the Paris attacks and other events in Europe and the U.S., which raised alarm over the threat of terrorism, the U.S. Congress is considering legislation known as the SAFE Act that specifically targets Syrian and Iraqi refugees and excludes them from protection in the U.S. Dakwar notes how the growing Islamophobic hysteria that has characterised much of the U.S. presidential cycle is threatening to dismantle critical human rights protections and the domestic civil rights not only of foreign-born refugees seeking assistance in the U.S., but also of minority communities already living in the country. These restrictive and discriminatory immigration policies have also targeted asylum-seekers arriving in the U.S. from Central America with devastating consequences for families and young children. In explicitly denying protections for Syrian and Iraqi refugees fleeing appalling danger, this article explores how the SAFE Act violates several fundamental human rights laws and principles.

KEYWORDS

International human rights | Refugee protections | U.S. treaty obligations | Convention on the Elimination of All Forms of Racial Discrimination (ICERD) | Convention Relating to the Status of Refugees

The United States of America (U.S.) was founded as an immigrant country. In the last 200 years, millions of immigrants from every continent have settled in the U.S. With the exception of Indigenous Peoples or Native Americans, everyone living in the U.S. is either an immigrant or the descendent of voluntary or involuntary immigrants. Yet every new wave of immigrants has faced fear and hostility, especially during times of economic hardship, political turmoil, or war. For example during depressions in the 1840s and then later in the 1930s, mobs hostile to Irish Catholic immigrants burned down a convent in Boston² and rioted in the streets of Philadelphia.³ In 1882, Congress passed the restrictive Chinese Exclusion Act, one of the country's first immigration laws, and designed explicitly to keep out people of Chinese origin.⁴ During the "Red Scare" of the 1920s, thousands of foreign-born people suspected of political radicalism were arrested and brutalised. Many were deported without a hearing.⁵ In 1942, 120,000 Americans of Japanese descent had their homes and other properties confiscated, and were interned in camps without due process until the end of World War II.⁶ During the same period, many Jews fleeing Nazi Germany were excluded under regulations enacted in the 1920s.⁷ In the 1950s, a U.S. government program targeted Mexicans, exclusively, for deportation.⁸ In the wake of 9/11, the U.S. government has used immigration enforcement as a justification to target members of Muslim, Arab, and South Asian communities for investigation, interrogation, and sometimes deportation. Though this tactic has been used in various ways, the most notorious was the National Security Entry-Exit Registration System (NSEERS) which was dissolved in 2011 after proving to be a completely ineffective counter-terrorism tool.⁹

In the last two decades, U.S. immigration laws and policies have been widely criticised for failing to meet the most basic international human rights norms with regard to the treatment of migrants and refugees. Immigrants have again become scapegoats of generalised fear-mongering that is so prevalent in today's post-9/11 U.S. The government sharply limits the right of immigrants to challenge the bases for their detention in the courts, unfairly discriminates against them in prisons, detains them for longer periods, and provides them no right to counsel in expulsion cases. Millions of immigrants have been deported.

While U.S. immigration policies have seen some improvements under President Obama, his administration has left in place, and even worsened, some of the Bush administration's most flagrant violations of immigrants' rights.

Under the Obama administration, the U.S.-Mexico border has been rife with human rights violations. Perhaps most disturbing has been the human rights violations affecting young children and families that have sought refuge in the U.S. from violent home countries. International human rights law demands particular protections for migrant children, including an explicit rejection of detention as a legal mechanism. It also requires access to counsel and a hearing to evaluate asylum claims. However, at the U.S.-Mexico border, most individuals, including many who are seeking asylum, are detained and turned away with a deportation order, and never receive a genuine opportunity to present their claims to an immigration judge.¹⁰ Even those who do receive a hearing in an immigration court

typically have no attorney to represent them in some of the most legally complex cases in the U.S. This is a clear violation of human rights. Nevertheless, despite clear evidence that children who appear without counsel are overwhelmingly likely to be deported,¹¹ the U.S. government has refused to provide legal representation for even the most vulnerable migrants facing deportation to incredibly dangerous circumstances.

Though candidate Obama ran on a platform of immigration reform, as president, he has earned the title of “Deporter-in-Chief” for deporting more migrants than any president, ever. He has proven himself a staunch ally to the Border Patrol – 35 per cent of its officers would not have jobs were it not for Obama’s rapid expansion of this out-of-control police force. And in the Obama administration’s quest to double-down on border enforcement, it has deported more than 2.4 million immigrants; unapologetically locked up asylum-seeking Central American women and children in dismal and privately -run detention centers as a “deterrent;” and began 2016 by announcing a nationwide roundup of undocumented immigrants, including raids. Once in border patrol custody, these individuals are almost guaranteed not to receive adequate representation.¹²

Responding to pressure and harsh criticism for his tough immigration enforcement policies and in the wake of U.S. Congress’ failure to pass immigration reform, President Obama took executive action that would have allowed nearly five million undocumented immigrants to “come out of the shadows” and work legally. Two executive orders, Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA), have sought to protect immigrants who have been living in the U.S. for five years and arrived before they were 16 years old, as well as parents of American citizens, from deportation – not to grant them citizenship, but just not to deport them. However, legal challenges brought by 25 states have resulted in a halt to DAPA, impacting millions of immigrant families and exposing them to the threat of deportation.¹³

The current political conversation, which has been dominated by anti-immigrant, xenophobic, and outright racist rhetoric and proposals – much of which has been fueled by rising Islamophobia, in particular – makes things worse for millions of immigrants. Anti-refugee laws, including quotas and denials of basic social services, as well as calls to ban Muslims from entering the country, have been debated in recent months as legitimate policy alongside mass deportations.

Despite those egregious violations, the U.S. does continue to provide some meaningful protection to refugees and asylum seekers. In 2013, the U.S. admitted 69,909 refugees and granted asylum to 25,199 individuals.¹⁴ The U.S. also substantially increased grants of immigration protection for victims of torture, trafficking, domestic violence, child abuse, abandonment, or neglect, and other qualifying crimes. However, following the Syrian refugee crisis, more than 4 million Syrians have fled conflict and violence in their home country, and 6.5 million have been displaced internally. During the consequent mass migration to Europe, the U.S. pledged to resettle only 10,000 refugees. As of April

2016, the U.S. has only admitted around 1,736 Syrians for resettlement.¹⁵ In comparison, Germany, much smaller than the U.S., has so far absorbed over 1 million refugees.

1 • The Introduction of the SAFE Act

Following the Paris attacks, which significantly increased the fear-mongering that has characterised the primaries to the U.S. presidential election, legislation was introduced to curtail refugee settlement programmes in the U.S., much of which discriminatorily singles out Syrian and Iraqi refugees. In November 2015, the U.S. House of Representatives passed the American Security Against Foreign Enemies Act (known as the SAFE Act).¹⁶

The bill would create a bureaucratic review process that would effectively shut down resettlement of refugees from Syria and Iraq. It mandates new certifications and undefined background investigations for all refugees who are nationals or residents of Iraq or Syria, and for many who are not. All refugees deemed to originate from Iraq or Syria – including anyone who has been in either country at any time in the last four and a half years – would only be admitted to the U.S. after the Director of the Federal Bureau of Investigation (FBI) certifies that the refugee has cleared an additional background investigation. This investigation would supplement what Attorney General Loretta Lynch testified to being the existing “significant and robust” security screening.¹⁷ Beyond this additional required screening, the legislation would mire the refugee process in further bureaucratic red tape by requiring that the Secretary of Homeland Security, Director of the FBI, and the Director of National Intelligence unanimously certify that a potential refugee – who has already gone through an extensive security screening – is not a threat to the U.S. There has been no need expressed by federal intelligence or law-enforcement agencies for such an unprecedented clearance process, which could take years to operationalise and would add no public safety benefits for the U.S. population. In short, the bill would bring the U.S. resettlement process of Syrian and Iraqi refugees to a grinding halt.

While the Senate has yet to approve this problematic law, it has already caused great damage to the reputation of the U.S. as a welcoming nation and safe haven for refugees. Several states, including Texas and Indiana, have sued the federal government and refugee resettlement agencies to prevent them from bringing Syrian refugees into these states (the ACLU represented the refugee resettlement organisations and has successfully defeated these efforts so far).¹⁸ Many argue that state hostility, along with the SAFE bill and other outrageous statements made by presidential candidate Donald Trump calling to bar Muslims from entering the country, clearly undermines U.S. leadership abroad, including in its fight against groups such as the so-called Islamic State. To his credit, President Obama and his administration spoke forcefully against the law and urged Congress not to go down this road of adding obstacles to settlement of refugees in the U.S.¹⁹

Civil society organisations (CSOs) in the U.S. are outraged over the SAFE Act. The ACLU, together with other CSOs, sent a forceful appeal to congressional representatives, warning

that these anti-refugee laws “would ‘jeopardize the United States’ moral leadership in the world.”²⁰ In addition, the appeal notes that “Syrian refugees are fleeing exactly the kind of terror that unfolded on the streets of Paris. They have suffered violence just like this for almost five years.”²¹ Furthermore congressional representatives are reminded that:

*Department of Homeland Security officials interview each refugee to determine whether they meet the refugee definition and whether they are admissible to the United States. Refugees undergo a series of biometric and investigatory background checks, including collection and analysis of personal data, fingerprints, photographs, and other background information, all of which is checked against government databases.*²²

Aside from the legislation’s troubling and deleterious effect on U.S. immigration policy, protections for religious minorities, and its moral authority and standing in the world more generally, the American SAFE Act is inconsistent with U.S. treaty obligations to protect refugees and uphold human rights without discrimination. The following sections of this article will analyse the ways in which the American SAFE Act contradicts international law:

1 – The bill contravenes the letter and spirit of the Refugee Convention²³

In carving out an exception to its treaty obligations for a vulnerable community based on that community’s religious and ethnic identity and those individuals’ country of origin, this legislation flagrantly violates U.S. obligations under article 3 of the 1951 Refugee Convention which provides that “the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.” The U.S. is a State Party to the 1967 Protocol relating to the Status of Refugees, and is thereby bound to the Refugee Convention and its obligations relating to the Status of Refugees. In 1980, Congress enacted the Refugee Act with clear intent to bring the U.S. into conformity with its international refugee obligations, including the application of the Refugee Convention “to refugees without discrimination as to race, religion or country of origin.”²⁴ The legislative history of the Refugee Convention and Protocol highlights “the evolution of a consensus for the humanitarian, nondiscriminatory policy finally embodied in the Refugee Act.”²⁵ The negotiating history and the authoritative commentary on the Refugee Convention also make it very clear that discrimination perpetrated by Contracting States and against different groups of refugees is a direct violation of the Refugee Convention.

While governments have the role of designing their own resettlement programmes, these programmes must conform to international obligations. Thus, U.S. resettlement programmes must be nondiscriminatory and select refugees for resettlement only on the basis of their needs, regardless of nationality, ethnicity, religion, or other related characteristics. Furthermore, the U.N. High Commissioner for Refugees has acknowledged states’ legitimate concerns to maintain public security and combat terrorism, but has warned against “the erosion of long-standing refugee protection principles.”²⁶ These human rights protections cannot be

disposed of during times of perceived political emergency; to the contrary, they are all the more important in moments of alarm, as in the current situation, when governments are tempted to bow to the fears—however misplaced or imagined—of their constituents.

2 – The Act contravenes the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Article 5 of the ICERD, to which the U.S. is bound, requires States Parties to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.” Therefore, government policies that apply unequal legal standards to non-citizens based on their national origin clearly violate the ICERD.²⁷ Only legal provisions concerning issues of nationality, citizenship, or naturalisation are exempt from the effects of the Convention. However, under the SAFE Act, nationals or residents of Iraq or Syria will be treated differently from other asylum seekers and refugees in ways unrelated to nationality, citizenship, or naturalisation. This differential treatment between groups of non-citizens constitutes prohibited discrimination under Articles 1.1 and 1.3 of ICERD.²⁸

The Committee on the Elimination of Racial Discrimination has called upon states to “[e]nsure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin”²⁹ and has stated that laws on deportation and removal should “not discriminate, in purpose or effect, on the ground of race, colour, descent, or national or ethnic origin.”³⁰

The differential treatment imposed by the American SAFE Act on Iraqi and Syrian asylum seekers and refugees does just that. The Committee has already concluded that “xenophobia against non-nationals, particularly migrants, refugees, and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.”³¹ By excluding Iraqi and Syrian asylum seekers from critical human rights protections, the SAFE Act not only violates their rights to seek protection, but it contributes to discrimination and racism towards these individuals - including those who have been able to enter and seek protection in the U.S.

3 – The SAFE Act contravenes the International Covenant on Civil and Political Rights (ICCPR or the Covenant)

The U.S. is required to respect and ensure the rights guaranteed under the ICCPR to everyone within its territory and subject to its jurisdiction. This means that the U.S. must respect and ensure the rights laid down in the Covenant to anyone within its power or effective control, even if the individual is not situated within the territory of the U.S. The U.N. Human Rights Committee (HRC) has interpreted this obligation as not limited to citizens of States Parties, but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who

may find themselves in the territory or subject to the jurisdiction of the State Party.³² In the context of expulsion addressed in Article 13, the Committee has stated that “discrimination may not be made between different categories of aliens.”³³

Moreover, under Article 2(1) of the ICCPR, governments are prohibited from denying the fundamental rights enshrined in the Covenant on the basis of national origin. Article 26 of the ICCPR further provides that: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The U.N. HRC has said that the term “discrimination” as used in the Covenant should be understood “to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”³⁴

Furthermore the Committee noted that the application of the principle of non-discrimination in Article 26 is not limited to those rights which are provided for in the ICCPR, and that “when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.”³⁵ The Committee has observed that not “every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”³⁶

What the SAFE Act proposes to do, however, is clearly discrimination as the separate and unfair treatment of an entire group of people, based on their national origin, denies these individuals of their fundamental rights under the Covenant. The Act has both the aim and effect of discrimination without justification.

4 – The SAFE Act contravenes the American Declaration of Rights and Duties of Man

The American Declaration guarantees, under Article II, the right to equality before the law. In a 1997 decision concerning the U.S. interdiction policy regarding Haitian refugees at high seas, the Inter-American Commission on Human Rights dismissed the U.S. government’s argument that the right to equality under Article II applies to equality only with respect to the application of the substantive rights articulated in the Declaration and stressed that:

[A] breach of Article II arises not only in the application of a substantive right but also in respect of any unreasonable differentiation in respect of the actual treatment of persons belonging

*to the same class or category. Thus, the finding that the Haitians have a substantive right to asylum under Article XXVII does not preclude a finding of a breach of Article II in respect of unreasonable differentiation in the treatment of Haitians and nationals of other countries seeking refuge in the United States.*³⁷

Here again, in denying Syrians and Iraqis protection and a chance to apply for asylum in the U.S. on the basis of their national origin, the SAFE Act explicitly violates the right to equality before the law.

5 – The SAFE Act contravenes guidance from the U.N. High Commissioner for Refugees

Following the terrorist attacks on 11 September 2001, the U.N. High Commissioner for Refugees presciently warned against scapegoating refugees and asylum seekers in the face of anxieties about international terrorism in his guidance on Addressing Security Concerns without Undermining Refugee Protection.³⁸ The High Commissioner's guidance stressed that "[a]ny discussion on security safeguards should start from the assumption that refugees are themselves escaping persecution and violence, including terrorist acts, and are not the perpetrators of such acts."³⁹

Furthermore, the High Commissioner' 2001 guidance called on Contracting Parties to combat racism and xenophobia against refugees, noting that

Equating asylum with a safe haven for terrorists is not only legally wrong and thus far unsupported by facts, but it serves to vilify refugees in the public mind and promotes the singling out of persons of particular races or religions for discrimination and hate-based harassment...

*Since 11 September, a number of immigrant and refugee communities have suffered attacks and harassment based on perceived ethnicity or religion, heightening social tensions. While there are some asylum-seekers and refugees who have been, or will be, associated with serious crime, this does not mean that the majority should be damned by association with the few.*⁴⁰

More recently, in response to the 2015 terrorist attacks in Paris, the High Commissioner expressed concern "about reactions by some States to end the programs being put in place, backtracking from commitments made to manage the refugee crisis (i.e. relocation), or proposing the erection of more barriers. We are deeply disturbed by language that demonizes refugees as a group. This is dangerous as it will contribute to xenophobia and fear. The security problems Europe faces are highly complex. Refugees should not be turned into scapegoats and must not become the secondary victims of these most tragic events."⁴¹

Similar dangers are emerging in the U.S., as exemplified by the SAFE Act and renewed calls by Donald Trump to ban Muslim immigrants in the wake of the mass shooting in Orlando, Florida by a U.S.-born Muslim man. These responses to a real or perceived national security threat present a serious threat to human rights protections not only of non-citizens seeking assistance in the U.S. but also of religious and ethnic minorities for whom the U.S. has always been home.

2 • Conclusion

The fate of the SAFE Act remains unknown, but the heightened anti-Muslim and anti-refugee rhetoric has made it clear that even well-established human rights protections for immigrants and minorities are threatened in the U.S. The upcoming U.S. presidential election has put the rights and treatment of vulnerable asylum seekers and minority communities in stark distress and the issues at stake – how we treat refugees and others seeking protection from violence – are unlikely to disappear soon. The Syrian refugee crisis and the humanitarian crisis in Central America will continue to confront the next presidential administration and the new Congress. The question for the U.S. government and population is how to respond. Will the fear-mongering and sensationalist political rhetoric that paints Muslims and all refugees as a threat be enshrined in law and allowed to dismantle essential international human rights laws and principles? Or can these human rights commitments remind the U.S. of its historical identity as a place of refuge, inclusion, and rebirth?

NOTES

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Received in June 2016.
Original in English.



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