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OUT OF IRAQ: THE U.S. LEGAL REGIME GOVERNING IRAQI REFUGEE RESETTLEMENT

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I. Introduction

Since the U.S. invasion of Iraq in March 2003, an estimated 2 million Iraqis have fled to Syria, Jordan, Egypt, Turkey, and other neighboring countries, and another 2.7 million are “internally displaced,”¹ meaning uprooted from their homes, but still within Iraq. Many fled not during the invasion, but later, because of the sectarian violence that erupted across the country after the bombing of the Al-Askari mosque in Samarra in February 2006,² leading to the Middle East’s gravest humanitarian crisis since the Palestinian diaspora of 1948.

Syria hosts roughly 1.4 million Iraqi refugees,³ many of whom arrived before October 2007 when its virtually porous border with Iraq was closed.⁴ Jordan, which effectively closed its border in late 2006,⁵ is thought to host approximately 500,000 Iraqi refugees,⁶ a group that on average tends to

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¹ RHODA MARGESSON ET AL., CONGRESSIONAL RESEARCH SERVICE, IRAQI REFUGEES AND INTERNALLY DISPLACED PERSONS: A DEEPENING HUMANITARIAN CRISIS? 1 (2009), *available at* <http://fas.org/sgp/crs/mideast/RL33936.pdf>.

² See The Secretary-General, *Report of the Secretary-General pursuant to paragraph 30 of resolution 1546 (2004)*, ¶ 35, U.N. DOC. S/2006/945 (Dec. 5, 2006) (delivered to the Security Council), *available at* [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/652179520EE479E4C125727D003BAD39/\\$file/SG_Report_S_2006_945_EN.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/652179520EE479E4C125727D003BAD39/$file/SG_Report_S_2006_945_EN.pdf).

³ Sybella Wilkes, *UNHCR Gives Syria US\$2.06 Million to Boost Health Care Facilities and Skills*, UNHCR (May 1, 2008), <http://www.unhcr.org/46373adf4.html>.

⁴ See Thanassis Cambanis, *Syria Shuts Main Exit From War for Iraqis*, N.Y. TIMES, Oct. 21, 2007, at 18, *available at* <http://www.nytimes.com/2007/10/21/world/middleeast/21syria.html>.

⁵ See PATRICIA WEISS FAGEN, INST. FOR THE STUDY OF INT’L MIGRATION & CTR. FOR INT’L AND REG’L STUDIES, *IRAQI REFUGEES: SEEKING STABILITY IN SYRIA AND JORDAN* 9 (2007), *available at* <http://isim.georgetown.edu/Publications/PatPubs/Iraqi%20Refugees.pdf>.

be more affluent⁷ and well educated.⁸ Most Iraqi refugees live in cramped apartments in Damascus and Amman, rather than in refugee camps.⁹ Although they have access to health care and public schools for their children, few have the right to work and they must survive off of savings or black-market labor,¹⁰ making permanent absorption into these countries untenable.

While the hope is that most can eventually return to Iraq, for many, repatriation is simply impossible any time soon.¹¹ Those who worked with Americans, for example as interpreters, cooks, or building civil society in Iraq, are indelibly branded “traitors” for “collaborating with the invaders.”¹² Others, such as secular professionals and religious minorities like the Yezedi and Assyrian Christians, risk being killed by extremists that the Iraqi government tacitly supports or is unable to control.¹³ During the peak of sectarian fighting, many Iraqis’ homes were destroyed or occupied, causing previously mixed neighborhoods to become increasingly homogeneous.¹⁴ Conditions remain particularly harsh for internally-displaced Iraqis, with many lacking drinkable water, food, and shelter.¹⁵ For many of these Iraqis, moving to a third country is the only realistic solution.¹⁶

The three main paths for an Iraqi to immigrate to the United States are resettlement in the country as a refugee, asylum for those already within U.S. borders,¹⁷ and “special immigrant visas” for Iraqis who have worked for the U.S. government in Iraq.¹⁸ Fewer than 25,000 Iraqis have been

⁶ NOR. RESEARCH INST. FAFO, GOV’T OF JORDAN, & U.N. POPULATION FUND, IRAQIS IN JORDAN THEIR NUMBER AND CHARACTERISTICS 8 (2007), available at http://www.dos.gov.jo/dos_home_e/main/Iraqis%20in%20Jordan.pdf.

⁷ See *id.* at 12-14.

⁸ *Id.* at 20; see also FAGEN, *supra* note 5, at 8 (stating that Iraqis who do not invest in businesses in Jordan must “deposit close to US \$150,000 in a Jordanian bank, and must maintain a sufficient balance (about half) to earn interest” in order to get a residency permit).

⁹ See RHODA MARGESSON ET AL., CONG. RESEARCH SERV., IRAQI REFUGEES AND INTERNALLY DISPLACED PERSONS: A DEEPENING HUMANITARIAN CRISIS? 6 (2009), available at <http://fas.org/sgp/crs/mideast/RL33936.pdf>; Michael Gerson, *Another Test in Iraq: Our Aid to Refugees*, WASH. POST, Aug. 22, 2007, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/21/AR2007082101419.html>.

¹⁰ AMNESTY INT’L, IRAQ: RHETORIC AND REALITY: THE IRAQI REFUGEE CRISIS 3 (2008), available at <http://www.amnesty.org/en/library/info/MDE14/011/2008/en>.

¹¹ U.S. GOV’T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL COMMITTEES, IRAQI REFUGEE ASSISTANCE: IMPROVEMENTS NEEDED IN MEASURING PROGRESS, ASSESSING NEEDS, TRACKING FUNDS, AND DEVELOPING AN INTERNATIONAL STRATEGIC PLAN, 4-5 (2009), available at <http://www.gao.gov/new.items/d09120.pdf> [hereinafter GAO REPORT].

¹² See generally George Packer, *Betrayed: The Iraqis who trusted America the most*, THE NEW YORKER, Mar. 26, 2007, available at http://www.newyorker.com/reporting/2007/03/26/070326fa_fact_packer?currentPage=all.

¹³ See UN ASSISTANCE MISSION FOR IRAQ, HUMAN RIGHTS REPORT 1 APRIL – 30 JUNE 2007, 7-9, 11 (2007), available at <http://www.uniraq.org/FileLib/misc/HR%20Report%20Apr%20Jun%202007%20EN.pdf>.

¹⁴ Tina Susman, *Sectarian ‘Cleansing’ in Baghdad*, LA TIMES, Aug. 12, 2007, <http://fairuse.100webcustomers.com/fairenough/latimesB40.html>; Louise Roug, *Sectarian Strife Reshaping Baghdad’s Neighborhoods*, LA TIMES, Oct. 1, 2005, <http://articles.latimes.com/2005/oct/01/world/fg-iraq1>.

¹⁵ INT’L ORG. FOR MIGRATION, EMERGENCY NEEDS ASSESSMENT, POST FEBRUARY 2006 DISPLACEMENT IN IRAQ 2 (2009), available at <http://www.iom-iraq.net/Library/IOM%20Iraq%20Displacement%20Assessments%20and%20Statistics%201%20Jan%202009.pdf>.

¹⁶ See generally UNHCR, RESETTLEMENT OF IRAQI REFUGEES (2007), available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=45f80f9d2&query=RESETTLEMENT%20OF%20IRAQI%20REFUGEE>.

¹⁷ See 8 U.S.C. § 1158 (2006).

¹⁸ See Pub. L. No. 109-163, § 1059, 119 Stat. 3136, 3147 (2006) (as amended by Pub. L. No. 110-36, 121 Stat. 227 (2007)); see also Pub. L. No. 110-181, §§ 1241-1249, 122 Stat. 3, 15 (2008) (as amended by Pub. L. No. 110-242, 122 Stat.

provided a safe haven in the United States since the U.S. invasion: 19,910 Iraqis have arrived as refugees,¹⁹ just over one thousand have been granted asylum,²⁰ and roughly another thousand have arrived on special immigrant visas.²¹ To its credit, the United States is finally reaching its resettlement targets.²² But many of these Iraqis have been in the pipeline for several years.²³ And the United States could be far more generous in the number of Iraqis it admits.

This article explains, analyzes and critiques the U.S. resettlement program for Iraqi refugees. We describe U.S. policy toward Iraqi refugees and how it has evolved, international conventions and U.S. laws providing protection for Iraqi refugees, and the U.S. refugee admissions process. We then analyze current U.S. law, asserting that, although existing legal mechanisms are largely sufficient to help vast numbers of Iraqi refugees, an understaffed bureaucracy, a lengthy and unnecessarily cumbersome application process, and our relations with Syria impede our ability to carry out the law effectively. We recommend a bureaucratic surge, vigorous diplomacy with Syria, and bold White House leadership to help the most vulnerable Iraqis quickly reach a safe haven in the United States.

II. U.S. Policy Toward Iraqi Refugees

The United States has historically set a high standard for generosity toward refugee populations, particularly toward those whose lives were torn apart by wars in which the United States participated. This commitment emerged slowly over the last century. In 1939, at the dawn of

1567 (2008)). Other immigration paths include petitions for alien relatives, *see* 8 U.S.C. §§ 1151(b), 1153(a) (2006), refugee/asylee relative petitions, *see* 8 U.S.C. §§ 1157(c)(2), 1158(b)(3) (2006), withholding of removal, *see* 8 U.S.C. § 1231(b)(3) (2006), and relief under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1468 U.N.T.S. 85, *see* 8 C.F.R. § 208.16(c) (2009).

¹⁹ U.S. CITIZENSHIP AND IMMIGRATION SERV., FACT SHEET: IRAQI REFUGEE PROCESSING (Feb. 11, 2009), http://www.uscis.gov/files/article/iraqi_refugee_fs_11feb09.pdf (numbers as of Feb. 4, 2009).

²⁰ U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION CTS. FY 2008 ASYLUM STATISTICS 4 (Mar. 2009), *available at* <http://www.usdoj.gov/eoir/efoia/FY08AsyStats.pdf>; U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION CTS. FY 2007 ASYLUM STATISTICS 4 (Apr. 2008), *available at* <http://www.usdoj.gov/eoir/efoia/FY07AsyStats.pdf>; U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION CTS. FY 2006 ASYLUM STATISTICS 4 (Apr. 2008), *available at* <http://www.usdoj.gov/eoir/efoia/FY06AsyStats.pdf>; U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION CTS. FY 2005 ASYLUM STATISTICS 4 (Apr. 2008), *available at* <http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf>; U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION CTS. FY 2004 ASYLUM STATISTICS 4 (Apr. 2008), *available at* <http://www.usdoj.gov/eoir/efoia/FY04AsyStats.pdf>; U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION CTS. FY 2003 ASYLUM STATISTICS 4 (Apr. 2008), *available at* <http://www.usdoj.gov/eoir/efoia/FY03AsyStats.pdf>.

²¹ *See* Ambassador James B. Foley, Senior Coordinator for Iraqi Refugee Issues, Briefing on Developments in the Iraqi Refugee Admissions and Assistance Programs at the U.S. Department of State (Sept. 12, 2008), *available at* <http://merln.ndu.edu/archivepdf/iraq/State/109568.pdf> [hereinafter Foley Briefing].

²² In September 2008, the United States announced it admitted 13,823 Iraqi refugees in fiscal year 2008, exceeding its target of 12,000. *See* Press Release, U.S. Dep't of State, *U.S. Government Reaches Record for Iraqi Refugee Admissions and Humanitarian Assistance in Fiscal Year 2008* (Oct. 2, 2008), *available at* http://iraq.usembassy.gov/pr_dos_10022008.html.

²³ HUMAN RIGHTS FIRST, PROMISES TO THE PERSECUTED: THE REFUGEE CRISIS IN IRAQ ACT OF 2008 3, 8 (2009), *available at* <http://www.humanrightsfirst.org/pdf/090428-RP-iraqi-progress.pdf> [hereinafter PROMISES TO THE PERSECUTED].

World War II, Eleanor Roosevelt became an ardent advocate of admitting European refugees.²⁴ She supported a child refugee bill that would have admitted 20,000 Jewish children fleeing Germany as the war escalated, though it was struck down in Congress²⁵ after her husband failed to back it.²⁶ Near the end of the war, members of the Roosevelt Administration pressed for an organized Allied effort on behalf of the millions of refugees from the war. It too failed.²⁷

A more welcoming policy was adopted after the Vietnam War, due in large part to President Gerald Ford's commitment. In 1975, President Ford created the Interagency Task Force for Indochina Refugees, recognizing the ethical and strategic necessity of helping Indochinese refugees as Saigon fell.²⁸ His personal attention to the crisis ensured the swift admission – in less than eight months – of 134,000 Vietnamese, many of whom were direct targets of Communist North Vietnamese retribution because of their support for Americans.²⁹ Since 1975, more than 900,000 Vietnamese refugees have been resettled to the United States.³⁰

Ford's example was repeated following the Balkan Wars of the 1990s. The United States resettled 143,000 Bosnian refugees between 1993 and 2003.³¹ In addition, the United States proved its ability to quickly evacuate and secure those who are most threatened, resettling more than 14,000 Kosovar refugees in one year through a special supplemental program.³²

After the first Gulf War, in an initiative dubbed Operation Pacific Haven, the American military – in a matter of only a few months – airlifted 6,600 Iraqi Kurds and Arabs from Turkey to Anderson Air Force Base in Guam.³³ Because of the high priority and attention of the humanitarian mission, the care, screening, and resettlement of Iraqis to the United States took only one or two months in most cases.³⁴

It was not until nearly four years after the start of the Iraq war that the United States government began to examine the Iraqi refugee problem.³⁵ The official position of President George W. Bush's Administration seemed to be that there was no humanitarian crisis; and, even if

²⁴ See MAURINE HOFFMAN BEASLEY ET AL., THE ELEANOR ROOSEVELT ENCYCLOPEDIA 432 (2001).

²⁵ *Id.*

²⁶ PATRICK J. MANEY, THE ROOSEVELT PRESENCE: THE LIFE AND LEGACY OF FDR 117 (1998).

²⁷ See U.S. Holocaust Mem'l Museum, *United States Policy Toward Jewish Refugees, 1941-1952*, Holocaust Encyclopedia, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007094> (last visited June 22, 2009) (discussing the post-war refugee crises); U.S. Holocaust Mem'l Museum, *Refugees*, Holocaust Encyclopedia, <http://www.ushmm.org/wlc/article.php?ModuleId=10005139> (last visited June 22, 2009).

²⁸ Edwin B. Silverman, *Indochina Legacy: The Refugee Act of 1980*, 10 PUBLIUS 27, 30 (1980).

²⁹ See Debbie Elliott, *A Lesson in History: Resettling Refugees of Vietnam*, N.P.R., Jan. 14, 2007, <http://www.npr.org/templates/story/story.php?storyId=6855407>.

³⁰ U.S. DEP'T. OF STATE, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, FACT SHEET: REFUGEE ADMISSIONS PROGRAM FOR EUROPE AND CENTRAL ASIA (Feb. 14, 2008), <http://164.109.48.103/g/prm/refadm/rls/fs/2008/100945.htm>.

³¹ *Id.*

³² U.S. DEP'T. OF STATE ET AL., U.S. REFUGEE ADMISSIONS FOR FISCAL YEAR 2000 18 (Oct. 1999), *available at* http://www.state.gov/www/global/prm/fy2000_budget.pdf.

³³ Press Release, U.S. Dep't. of Defense, Operation Pacific Haven Wraps Up Humanitarian Efforts (Apr. 15, 1997), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=1218>.

³⁴ *Id.*

³⁵ In January 2006, the National Defense Authorization Act for Fiscal Year 2006 authorized a mere 50 special immigrant visas per year for Iraqi and Afghan translators who had worked at least one year for the U.S. military. Pub. L. No. 109-163, § 1059(c)(1), 119 Stat. 3136, 3444 (2006).

there were, it was the Iraqis' fault.³⁶ Unsurprisingly, by early 2007, only nineteen Iraqi refugees had been resettled in the United States since the start of the war.³⁷ Congress was equally absent during the early years of the war, giving scant attention to the refugee crisis until Senate Judiciary Committee hearings in January 2007.³⁸ Throughout 2007, bipartisan support slowly grew to address Iraq's humanitarian catastrophe, with Congress passing legislation in June 2007 that slightly increased the number of special immigrant visas available to Iraqis and Afghans who interpreted or translated for the U.S. military or Department of State³⁹ and proposing landmark legislation to overhaul our Iraqi refugee policy.⁴⁰ However, despite repeated assurances from Administration officials – including Paula Dobriansky, Undersecretary of State for Democracy and Global Affairs – that 7,000 Iraqi refugees would be resettled in America by September 2007, only 1,608 were admitted in fiscal year 2007.⁴¹ Scrutiny of our lackluster Iraqi refugee program by Congress, the press, and advocacy organizations became all the more intense after two scathing cables were leaked to *The Washington Post* in which Ryan Crocker, U.S. Ambassador to Iraq, lambasted the lengthy delays in resettling Iraqi refugees.⁴² As pressure mounted to shake the bureaucracy out of its complacency, the White House appointed two “refugee czars” in September 2007, Lori Scialabba and Ambassador James Foley, to oversee Iraqi refugee policy at the Department of Homeland Security and the Department of State, respectively.⁴³

In January 2008, the National Defense Authorization Act for Fiscal Year 2008 became law, and with it the Refugee Crisis in Iraq Act of 2007, which significantly expanded refugee resettlement programs for Iraqis and provided an additional 25,000 special immigrant visas over five years (the “Kennedy Bill”).⁴⁴ Until the passage of the Kennedy Bill, an Iraqi seeking refugee resettlement was required to flee Iraq to a neighboring country and register with the local Office of the United

³⁶ John Bolton, U.S. Ambassador to the United Nations under President George W. Bush, told *The New York Times*, “The refugees have nothing to do with our overthrow of Saddam. Our obligation was to give them new institutions and provide security. We have fulfilled that obligation. I don’t think we have an obligation to compensate for the hardships of war.” Nir Rosen, *The Exodus*, N.Y. TIMES, May 13, 2007, § 6, at 74. Similarly, Ellen Sauerbrey, Assistant Secretary of State for Population, Refugees and Migration, and the President’s point person on Iraqi refugee issues, stated, “[t]he problem is one caused by [Saddam Hussein’s] repressive regime. We take the responsibility of being a compassionate nation seriously.” *Id.* at 78.

³⁷ See UNHCR, *Cumulative UNHCR Iraqi Submissions versus Arrivals to the United States (including non-UNHCR)* tbl., <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=491958c92> (last visited June 7, 2009).

³⁸ *The Plight of Iraqi Refugees: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:33563.pdf (webcast available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=2470>).

³⁹ Pub. L. No. 110-36, 121 Stat. 227 (2007) (increasing from 50 to 500 the number of special immigrant visas available in fiscal years 2007 and 2008).

⁴⁰ See *infra* text accompanying note 44.

⁴¹ Human Rights First, *2007 Iraqi Refugee Admissions: An Overview*, http://www.humanrightsfirst.org/asylum/lifeline/pages.asp?country=iq&id=19&misc1=overview_admissions (last visited June 22, 2009).

⁴² Spencer S. Hsu and Robin Wright, *Crocker Blasts Refugee Process, Iraqis Could Wait 2 Years for Entry*, *Ambassador Says*, WASH. POST, Sept. 17, 2007, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/16/AR2007091601698.html>.

⁴³ Reuters, *U.S. Sets Officials for Iraq Refugees*, N.Y. TIMES, Sept. 20, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=9D01E7DD123AF933A1575AC0A9619C8B63>.

⁴⁴ Pub. L. No. 110-181, §§ 1241-1249 (2008).

Nations High Commissioner on Refugees (“UNHCR”).⁴⁵ A tiny portion are referred to a third country for resettlement,⁴⁶ namely, those who UNHCR determines need a “durable solution” based on eleven vulnerability criteria and a lengthy case review.⁴⁷ The potential resettlement country then evaluates whether the individual meets its own legal standards for resettlement.⁴⁸

As described in greater detail in Section III below, the Kennedy Bill changed the landscape in two significant ways. First, it allowed Iraqis with certain U.S. affiliations to bypass UNHCR and apply directly to the United States government for refugee resettlement. By mid-2007, the overwhelming majority were still required to navigate the byzantine UNHCR system in the hope of being one of the lucky few referred for resettlement.⁴⁹ Second, Iraqis with U.S. ties were no longer required to flee the country – they could apply from within Iraq.⁵⁰ In May 2008, the United States government finally began in-country processing of Iraqi refugee applications, opening an office in the Green Zone to interview eligible Iraqis for refugee resettlement, and the first wave of refugees from Iraq arrived in the United States in November.⁵¹

Other countries have acted with varying degrees of generosity toward Iraqi refugees. The shining example at one time was Sweden, a country that was not a part of the coalition fighting in Iraq, but that has nonetheless seen an influx of more than 49,000 Iraqis.⁵² Sweden has admitted more Iraqi refugees than any other country since the war began in 2003 and now holds claim to Europe’s largest Iraqi community with about 100,000 residents.⁵³ In recent months, however, citing the economic burden Iraqis have imposed on a country with a robust welfare system, the Swedish government has begun rejecting a higher percentage of asylum claims from Iraqis, many of whom arrived in the country illegally.⁵⁴ Many of those rejected were deported to Iraq, raising the ire of

⁴⁵ See George Packer, *A Little Good News for Iraqi Refugees*, THE NEW YORKER, May 30, 2008, <http://www.newyorker.com/online/blogs/georgepacker/2008/05/a-little-good-n.html>; Press Release, Senator Edward Kennedy, Passage of Iraqi Refugee Bill (Sept. 28, 2007), available at http://kenedy.senate.gov/newsroom/press_release.cfm?id=A31726F9-4EC2-42CC-A50D-0E844B53A14B.

⁴⁶ Less than one percent of refugees registered worldwide with UNHCR are resettled in third countries. See GAO REPORT, *supra* note 11, at 10.

⁴⁷ The primary countries accepting UNHCR Iraqi refugee referrals are the United States, Australia, Canada, Sweden, and New Zealand. UNHCR, *Resettlement Referrals for Iraqi Refugees Top 20,000 This Year*, Dec. 12, 2007, <http://www.unhcr.org/475fea9a4.html>.

⁴⁸ Interview with Sybella Wilkes, Regional Public Information Officer, UNHCR, in Damascus, Syria (Mar. 18, 2008).

⁴⁹ The United States allowed a small number of Iraqis to apply directly to the U.S. Refugee Admissions Program in Amman and Cairo if they had worked for the U.S. Embassy in Iraq or had immediate family members in the United States. Interview with Phillip Eanes, Dep. Manager for the Overseas Processing Entity, Int’l Org. for Migration, in Amman, Jordan (Mar. 17, 2008). See also U.S. DEP’T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2009 REPORT TO THE CONGRESS 50 (2008), available at <http://www.state.gov/documents/organization/113507.pdf> [hereinafter FY 2009 REFUGEE ADMISSIONS REPORT].

⁵⁰ Pub. L. No. 110-181, § 1242(a) (2008).

⁵¹ A small group of Iraqis who worked at the U.S. Embassy in Baghdad arrived earlier, in May of 2008, as part of a pilot program for “Locally Employed Staff”. See FY 2009 REFUGEE ADMISSIONS REPORT, *supra* note 49, at 50.

⁵² Mariah Blake, *In E.U., Hope Dims for Iraqi Refugees*, CHRISTIAN SCI. MONITOR, Apr. 24, 2008, at A1, available at <http://www.csmonitor.com/2008/0424/p01s05-woeu.html>.

⁵³ Louise Nordstrom, *Strained By Influx of Asylum-Seekers, Sweden Closes Doors to Iraqis*, ASSOCIATED PRESS, Mar. 31, 2008.

⁵⁴ *Id.*

refugee advocates who had once praised Sweden's charity.⁵⁵ Other European countries have taken in far smaller numbers of Iraqis. The European Union pledged in November to resettle up to 10,000 Iraqis – with Germany leading the way with 2,500 – though the commitment was non-binding and it provided no timetable for doing so.⁵⁶

III. Legal Protections for Iraqi Refugees

Although the term “refugee” is often used loosely to describe a person who flees to another country to escape danger, it has a precise definition under both international and U.S. law. The modern definition emerged in conjunction with the creation of UNHCR. The United Nations General Assembly established UNHCR in 1950 to coordinate international protection of World War II refugees and to work with nations to “facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”⁵⁷ The United Nations’ 1967 Protocol Relating to the Status of Refugees (the “1967 Protocol”), which incorporates Articles 2 through 42 of the 1951 Convention Relating to the Status of Refugees (the “1951 Convention”),⁵⁸ provides the primary basis for refugee protection under international law (prohibiting “*refoulement*” or “expulsion” to “the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”).⁵⁹ The 1967 Protocol applies to a person who

owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁶⁰

⁵⁵ Jerome Socolovsky, *Sweden Begins Sending Iraqi Refugees Home*, NATIONAL PUBLIC RADIO, Mar. 25, 2008, <http://www.npr.org/templates/story/story.php?storyId=89022332>.

⁵⁶ *E.U. Ready to Accept 10,000 Iraqis*, BBC NEWS, Nov. 28, 2008, <http://news.bbc.co.uk/2/hi/europe/7754097.stm>. See Stephanie Nebehay, *U.N. Asks Europe to Copy Germany and Take Iraq Refugees*, REUTERS U.K., Mar. 20, 2009, <http://uk.reuters.com/article/worldNews/idUKTRE52J3OQ20090320> (stating that Germany has resettled 122 so far).

⁵⁷ Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), Annex, ¶ 1, U.N. Doc. A/1775 (Dec. 14, 1950).

⁵⁸ Protocol Relating to the Status of Refugees art. 1(1), Oct. 4, 1967, 606 U.N.T.S. 267, available at http://www.unhcr.ch/html/menu3/b/o_p_ref.htm; see G.A. Res. 429(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Dec. 14, 1950).

⁵⁹ G.A. Res. 2198(XXI), U.N. GAOR, ¶ 1 (Dec. 16, 1966) (incorporating Article 33 of the 1951 Convention); UNHCR, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 32, available at <http://www.unhcr.org/cgi-bin/txis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b66c2aa10> [hereinafter CONVENTION AND PROTOCOL].

⁶⁰ G.A. Res. 2198(XXI), U.N. GAOR, ¶ 1 (Dec. 16, 1966) (incorporating and revising Article I, Paragraph A(2) of the 1951 Convention); CONVENTION AND PROTOCOL, *supra* note 59, at 16.

The 1967 Protocol also sets forth a refugee's rights in the host country, concerning religion, employment, housing, public education, public benefits, identity papers, travel documents, and other fundamental issues.⁶¹

In December 2006, UNHCR declared all Iraqis fleeing the country to be *prima facie* refugees,⁶² meaning those who register with UNHCR receive UNHCR protection from *refoulement* (deportation) or other punishment for illegally entering the neighboring country or staying there after their entry visa expired. While the 1951 Convention and the 1967 Protocol place expansive obligations on countries where refugees have fled, of Iraq's neighbors, only Turkey and Egypt are signatories to these international laws. Thus, Iraqis who escaped to Jordan, Syria, Lebanon and elsewhere in the Middle East are not automatically entitled by law to the benefits that refugee status would confer.⁶³

The United States is a signatory to both the 1951 Convention and the 1967 Protocol, but an individual does not become a refugee under U.S. law until a U.S. Refugee Admissions Program official determines that he or she meets the definition under the Immigration and Nationality Act and reaches a U.S. port of entry.⁶⁴ Each year, in consultation with Congress, the President determines the number of "refugees of special humanitarian concern" that the United States may admit.⁶⁵ For fiscal year 2009, the proposed ceiling is 80,000,⁶⁶ with 17,000 as the target allocated to Iraqi refugees.⁶⁷

The definition of a "refugee" under U.S. law parallels the 1967 Protocol,⁶⁸ but the President may also designate "any person within the country of such person's nationality" as a refugee.⁶⁹ The Kennedy Bill, which established in-country processing of Iraqi refugees, was signed by President George W. Bush, thus, triggering this provision of the Immigration and Nationality Act. Excluded from eligibility are those who persecuted others "on account of race, religion, nationality, membership in a particular social group, or political opinion."⁷⁰ Other grounds for inadmissibility

⁶¹ E.g., G.A. Res. 2198(XXI), U.N. GAOR, ¶ 1 (Dec. 16, 1966) (incorporating Articles 4, 17-23, 27, and 28 of the 1951 Convention); CONVENTION AND PROTOCOL, *supra* note 59, at 19, 24-27, 30.

⁶² See UNHCR, RETURN ADVISORY AND POSITION ON INTERNATIONAL PROTECTION NEEDS OF IRAQIS OUTSIDE IRAQ 3 (2006), *available at* <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=45a252d92> (UNHCR did not include Iraqis from the three northern governorates under the control of the Kurdish Regional Government). In April 2009, UNHCR revised its guidelines such that only Iraqis from the central governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Al-Din will be considered *prima facie* refugees. Iraqis from all other governorates must undergo individualized refugee status determinations. UNHCR, UNHCR ELIGIBILITY GUIDELINES FOR ASSESSING THE INTERNATIONAL PROTECTION NEEDS OF IRAQI ASYLUM-SEEKERS 18 (2009), *available at* http://www.uniraq.org/documents/UNHCR_Iraq_Guidelines%2024Apr09.pdf.

⁶³ See FY 2009 REFUGEE ADMISSIONS REPORT, *supra* note 49, at 47-48.

⁶⁴ 8 U.S.C. § 1157(c)(1) (2006).

⁶⁵ *Id.* § 1157(a)(3).

⁶⁶ FY 2009 REFUGEE ADMISSIONS REPORT, *supra* note 49, at 5, tbl. I.

⁶⁷ Foley Briefing, *supra* note 21.

⁶⁸ See 8 U.S.C. § 1101(a)(42)(A) (2006) ("Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.").

⁶⁹ *Id.* § 1101(a)(42)(B).

⁷⁰ *Id.*

include criminal convictions,⁷¹ national security,⁷² misrepresentation of a material fact,⁷³ the intent to practice polygamy,⁷⁴ and other statutory bars.

To have access to the U.S. Refugee Admissions Program, a refugee must fall into one of three priority categories established by the Department of State in consultation with the Department of Homeland Security.⁷⁵ The Kennedy Bill establishes Priority 2 categories for Iraqis of “special humanitarian concern” who may apply directly to the U.S. Refugee Admissions Program without a referral from UNHCR or another entity (“Direct Access”). Iraqis eligible for Direct Access include those who worked for the U.S. government in Iraq, a U.S.-based “media or nongovernmental organization,” or “an organization or entity closely associated with the United States mission in Iraq that has received United States Government funding through an official and documented contract, award, grant, or cooperative agreement.”⁷⁶ Also included are certain family members of those described above. Most notably, in addition to spouses and children, the Kennedy Bill includes parents and siblings, two categories of familial relationships that generally have fewer rights under U.S. immigration laws.⁷⁷ The law also authorizes the Secretary of State to designate as Priority 2 groups of Iraqis who have “close family members” in the United States and are “members of a religious or minority community” that the Secretary determines to be a “persecuted group.”⁷⁸ Finally, the Kennedy Bill authorizes the Secretary of State to “identify other Priority 2 groups of Iraqis, including vulnerable populations.”⁷⁹

IV. Mechanics of Iraqi Refugee Resettlement

To be considered for refugee resettlement under the U.S. Refugee Admissions Program, an Iraqi must either be referred by a U.S. Embassy, UNHCR, or a nongovernmental organization approved by the Department of State, be eligible for Direct Access, or have immediate family members in the United States who were granted asylum or refugee status.⁸⁰ Direct Access is currently only available in Amman, Cairo, and Baghdad,⁸¹ and any Iraqi within Iraq interested in resettlement in the United States must be eligible for Priority 2 processing.

The International Organization for Migration (“IOM”), the “Overseas Processing Entity” for the U.S. Refugee Admissions Program in the Middle East, helps prepare an individual’s case for presentation to United States Citizenship and Immigration Services (“USCIS”) of the Department of Homeland Security (“DHS”). IOM collects extensive biographical information from applicants including education, employment, military service and police records, identification documents, and

⁷¹ *Id.* § 1182(a)(2).

⁷² *Id.* § 1182(a)(3).

⁷³ *Id.* § 1182(a)(6).

⁷⁴ *Id.* § 1182(a)(10).

⁷⁵ FY 2009 REFUGEE ADMISSIONS REPORT, *supra* note 49, at 6-13.

⁷⁶ Pub. L. No. 110-181, § 1243(a)(1)-(2) (2008).

⁷⁷ *Id.* § 1243(a)(3).

⁷⁸ *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a) (2006); Pub. L. No. 110-181 § 1243(a)(4) (2008).

⁷⁹ Pub. L. No. 110-181 § 1243(b) (2008).

⁸⁰ *See* FY 2009 REFUGEE ADMISSIONS REPORT, *supra* note 49, at 6-14.

⁸¹ *See* U.S. Dep’t of State, U.S. Refugee Resettlement Application Requirements for Iraqis with U.S. Affiliations, <http://iraq.usembassy.gov/root/pdfs/how-to-apply.pdf> (last visited June 22, 2009) [hereinafter Application Requirements].

significant detail about the persecution that an applicant may have suffered and why he or she fears future persecution in Iraq.⁸² USCIS officials interview each applicant and any family members who would accompany the applicant to the United States and determine whether the individual qualifies for refugee resettlement under U.S. law.⁸³ An applicant must also clear identity and security checks, pass a medical screening, and must not otherwise be barred from resettlement.⁸⁴ After USCIS approval, IOM helps the State Department and volunteer agencies in the United States coordinate the refugee's admission to the United States by arranging entry paperwork, travel, and cultural orientation.⁸⁵

V. Analysis and Recommendations

The Kennedy Bill was a crucial supplement to existing U.S. refugee law, addressing the two most significant legal obstacles to the U.S. Refugee Admissions Program – the requirements that an Iraqi must first flee Iraq to be eligible for refugee resettlement and then endure the overloaded, opaque, and bureaucratic UNHCR system in the hope of being referred for resettlement. In practice, however, several challenges remain.

First, Syria, which hosts the majority of Iraqi refugees living outside of Iraq, does not allow Direct Access, leaving Iraqis there, who are otherwise eligible for Priority 2, alone to navigate UNHCR. Syria has said it will not give any special preference to Iraqis who have aided the U.S.-led war in Iraq.⁸⁶ Yet, even if Syria will not permit Priority 2 processing for Iraqis who worked with Americans in Iraq, the United States ought to negotiate with Syria to allow Direct Access for other vulnerable groups such as those persecuted as “members of a religious or minority community,” with close family in America or other groups that the Secretary of State and the Syrian government together determine are “vulnerable populations.”⁸⁷ The Kennedy Bill gives this discretion to the Secretary of State, and it ought to be used to help Iraqis trapped in Syria.

Second, the heavy reliance on UNHCR referrals for Iraqis who do not fall into currently established Priority 2 criteria means that some Iraqis in particular need of resettlement must wait months or even years to be referred to the U.S. Refugee Admissions Program and many may never be referred at all to the United States or another resettlement country, given the limited number of spots available. The United States ought to train nongovernmental organizations working in Iraq and neighboring countries to identify especially vulnerable Iraqis and refer them to the United States for resettlement.⁸⁸ The Department of State also should consult with such organizations about adding Priority 2 groups, as they have significant insight into populations especially at risk.

⁸² See U.S. Dep't of State, Iraqi Refugee Assistance and Resettlement, <http://www.state.gov/g/prm/c25771.htm> (last visited June 7, 2009).

⁸³ *Id.*

⁸⁴ See *supra* text accompanying notes 70-74.

⁸⁵ See Office of Refugee & IDP Affairs, Embassy of the United States, Baghdad, Iraq, Frequently Asked Questions (FAQ) on Refugee Resettlement Benefits, http://iraq.usembassy.gov/faq_benefits.html (last visited June 26, 2009).

⁸⁶ Ambassador Imad Moustapha, Ambassador of Syria to the U.S., Remarks at the Villanova School of Law, Matthew J. Ryan Law and Public Policy Forum: The Iraqi Refugee Crisis: Law, Policy, and Practice (Apr. 4, 2008).

⁸⁷ See *supra* text accompanying notes 78-79.

⁸⁸ Note, however, that Syria allows very few international nongovernmental organizations to operate in Syria, particularly those that address human rights. See Sybella Wilkes, *UNHCR Signs Landmark Accord in Syria with International NGO*, UNHCR, May 8, 2008, <http://www.unhcr.org/48231be54.html>.

Third, despite Ambassador Crocker's admonition in 2007 that it could take two years to resettle an Iraqi in the United States,⁸⁹ most cases outside of Amman continue to take more than a year. IOM tells Iraqis applying for Direct Access in Baghdad to expect to wait at least two years before their cases are adjudicated by the Department of Homeland Security.⁹⁰ Even after an Iraqi has been interviewed by a USCIS officer – the last stage of the resettlement process – he or she frequently waits months more for the security check to clear.⁹¹ Increasingly, Iraqis are receiving letters from USCIS saying that their cases are on hold pending “Further Processing,” with no additional detail.⁹²

There are numerous steps that the Department of State and USCIS could take to speed up the process.⁹³ Most importantly, they could dramatically increase the number of IOM and USCIS interviewers in Iraq and Syria. Within Iraq, they could also make “circuit rides” outside of the Green Zone. At a minimum, they would screen Iraqis working on U.S. military bases outside of Baghdad, and ideally they would also reach other vulnerable populations that cannot travel to Baghdad and do not have access to the Internet, scanners, or other technology required for them to apply to the U.S. Refugee Admissions Program.⁹⁴ Additionally, American lawyers ought to be allowed a formal role representing an individual applying for refugee resettlement. For asylum and special immigrant visa cases, an applicant may appoint a designated representative by filling out a basic form that allows the government to communicate with the lawyer about the case.⁹⁵ But a refugee applicant has no such right. Permitting lawyers to play a more formal role would reduce the burden on IOM and USCIS to gather documents and collect significant amounts of information from each applicant. Lawyers can also ensure the fairness of the process and be a resource to Iraqis trying to understand an often bewildering resettlement regime.

The United States has come a long way in acknowledging the Iraqi refugee crisis, passing laws that allow us to help significant numbers of people at risk, and establishing a functioning system to resettle Iraqis in the United States. Four months into fiscal year 2009, the United States

⁸⁹ See *supra* text accompanying note 42.

⁹⁰ E-mail from IOM official (name withheld) (Dec. 14, 2008) (on file with author); see also PROMISES TO THE PERSECUTED, *supra* note 23, at 8.

⁹¹ See PROMISES TO THE PERSECUTED, *supra* note 23, at 8; GAO REPORT, *supra* note 11, at 33.

⁹² See Letters from U.S. Citizenship and Immigration Services to author's Iraqi refugee clients (names withheld) (undated) (on file with author).

⁹³ Despite its noble intentions, a recent proposal to airlift up to 100,000 Iraqis with U.S. affiliations to Guam to process them for resettlement in the United States would likely add, rather than reduce, bureaucracy and poses significant policy questions beyond the costs of the airlift and operating the holding facilities in Guam (e.g., Who is evacuated? How do you ensure their safety, the American pilots' safety, and the safety of the family members left behind who may not be able to hide their U.S. ties? How does an airlifted Iraqi gather the required documents for entry into the United States such as identification cards, proof of employment, and police and military records? What happens to airlifted Iraqis who do not meet the legal requirements for admission as refugees into the United States? Would this divert attention away from those left behind in Iraq who need protection and trigger greater violence against Iraqi civilians as the United States draws down its troops?). See Natalie Ondiak & Brian Katulis, *Operation Safe Haven Iraq 2009*, CTR. FOR AM. PROGRESS (Jan. 2009), available at http://www.americanprogress.org/issues/2009/01/pdf/iraqi_refugees.pdf.

⁹⁴ See Application Requirements, *supra* note 81 (“If you wish to be considered for USRAP processing in Iraq, you must send the following information [and documents] to BaghdadInfoCenter@iom.int. All information must be contained in one email with the principal applicant's name in the subject line . . .”).

⁹⁵ U.S. Citizenship and Immigration Serv., Notice of Entry of Appearance as Attorney or Representative, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=44bd4154d7b3d010VgnVCM10000048f3d6a1RCRD> (last visited June 22, 2009).

admitted 4,479 Iraqi refugees and was on track to reach its target of 17,000 Iraqi refugees.⁹⁶ President Obama's recent speech in Cairo has fueled once unimaginable speculation in the international media of a "new beginning" for relations between the United States and the Islamic world.⁹⁷ A more generous approach to the Iraqi refugee crisis by the new Administration, coupled with its renewed commitment to diplomacy with states like Syria⁹⁸ and Iran,⁹⁹ could be a key component of this strategy.

Though the violence continues and Iraq is by no means safe, we recognize that many Iraqis may be able to return home over the next few years. But not all will. The United States must be prepared for the human consequences of the violence that may ensue as it withdraws its troops from Iraq. Iraq has an obligation to protect the Iraqi people and to assist the neighboring countries that are generously hosting its refugees. The United States, as the country that waged preemptive war in Iraq, shares those humanitarian responsibilities. America's efforts have largely focused on the most important prong – stabilizing Iraq and training Iraqi police and soldiers to protect their citizens. But the Iraqi people and Iraq's neighbors deserve a continued and robust commitment from the United States to do everything within our power to provide shelter to those whose lives have been uprooted by the war.

⁹⁶ See *supra* text accompanying note 22.

⁹⁷ See, e.g., Matthew Rusling, *Can Obama Mend Relations with the Muslim World?*, XINHUA NEWS AGENCY (China), June 6, 2009, http://news.xinhuanet.com/english/2009-06/06/content_11500358.htm.

⁹⁸ See Sarah Baxter, *Obama Woos Syria in Push for Peace*, TIMES (London), June 7, 2009, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6446305.ece.

⁹⁹ See Glenn Kessler, *Man Behind Iran Policy Faces Big Task*, WASH. POST, June 10, 2009, at A5, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/09/AR2009060903131.html>.