"A Terrible Signal that International Law can be Flaunted without Consequence"

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It has been three days since President Trump has ordered border control authorities to bar citizens of seven Muslim-majority countries from entering the US, with hundreds of lawful residents or refugees with resettlement visa detained or even deported after arriving at US airports. Has the dust settled now enough to tell what this order ensues beyond intentionally making the life of hundreds of innocent Muslims miserable?

I don't think the dust has settled at all yet. The only point where we have some clarity is that green card holders who are nationals of the listed countries have to be allowed in. Apart from that everything remains up for grabs.In particular, there has been no modification of the order to make sure that refugees who have been granted visas to be resettled or who travel directly to the US to seek asylum are exempted.

This is a clear breach of international law, right?

If refugees are detained or turned away for reasons of religion or country of origin, that is a case of discrimination clearly prohibited by international refugee law, specifically Art. 3 of the Refugee Convention.Turnbacks may also be refoulement contrary to Art. 33.

Will the courts be able to sort this out anytime soon?

My guess is that the legal mess will go on for some period of time, partly because of the way the American judicial system is organized. So far, we have a District Court judge in New York who suspended parts of the order. Whether or not other courts will follow her lead is an open question.There is a lively dispute about the extent to which deference is owed to such decisions.And it could be a very long time before this case reaches the Supreme Court, which might of course choose not to hear it.

The German Chancellor Angela Merkel has lectured President Trump about the Geneva Convention. Do you think this sort of input has any traction with the current US government?

I don't think international law has much traction with President Trump.So if Chancellor Merkel's "lecture"has any value it would be at the political rather than the legal level. President Trump has issued another executive order calling for a moratorium for the US becoming a party to any new human rights treaties. That order is especially scathing about the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child, which he views as clear examples of over-reaching by international law.In line with his „America First" policy, he is opposed to any international human rights agreements that would circumscribe US freedom of action.That America pushed hard for international human rights law, motivated by a clear sense that such law supports its own values and security, is a point that has clearly escaped him.

What will be the long-term effect of this change of policy towards international law?

The President has the authority to negotiate or not negotiate international treaties. The Senate has to ratify them, but if if the President refuses to engage in negotiations that is his prerogative.

What can the world do aboutthe US breach of refugee law?

In theory any other state party to the Refugee Protocol can take the US to the International Court of Justice. The US has entered no reservation to that provision. But history shows that no government has ever done that. Will Chancellor Merkel or perhaps Canadian Prime Minister Trudeau – each of whom has spoken up for refugees in the current context – have the courage to make that referral?

So we should better trust in lawyers who take the government to domestic courts?

Under President Trump's order, the US refugee resettlement program – the largest of any country by far – has been suspended for 120 days, ForSyrians, the suspension is indefinite. US lawyers will likely invoke a law from the 1960s that prohibits discrimination in resettlement, and perhaps also argue due process or equal protection concerns.But because the resettlement program is entirely a domestic prerogative, Congress could in theory simply abolish the entire resettlement program.There is therefore a risk – perhaps small, but still real – that insisting on a truly non-discriminatory refugee resettlement program might simply push right-wing politicians to abolish resettlement or at least dramatically truncate it. Because there is no international legal duty to bring refugees in from abroad, there would be nothing anyone in the rest of the world could do about that.Indeed, only three countries in the world – the US, Canada, and Australia – now do 90 percent of the world's refugee resettlement. It would be difficult for states that do little if any resettlement to criticize the US for cutting back on its resettlement program.

So, this is a Catch-22 situation? Screwed if we do and screwed if we don't?

Yes. Isn't that awful? It is a really nasty situation. That may account for the soft language from the UNHCR which has only expressed its „worry" and suggested that refugees „should" receive equal treatment without discrimination – not one word about legal duties, and certainly no mention whatsoever of the potential for the Trump order to result in the refoulement of refugees.This is in my view a tragic failure of leadership by an agency with the explicit mandate to supervise implementation of refugee law.If neither the UN nor other states call the US action what it is – illegal discrimination and, at least for those refugees who manage to get to US jurisdiction, an action that can result in refoulement – then we will send a terrible signal that international refugee and human rights law can be flaunted without consequence.

Questions by Maximilian Steinbeis

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