A RIGHT TO FAMILY?

FAMILY REUNIFICATION FOR REFUGEES IN UNITED STATES IMMIGRATION LAW

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ABSTRACT

This paper will evaluate the immigration laws in the United States relating to family reunifications for U.S. resettled refugees, answering the question of whether those laws are compliant with international human rights law. The legal obligations contained within the International Covenant on Civil and Political Rights (ICCPR) will receive the greatest focus throughout the paper's analysis, as the Covenant makes express mention of the rights of family and has been both signed and ratified by the United States.

Over the duration of the last five years or so, considerable changes have been made to the admission policies for refugees seeking resettlement in the United States. National Security has once again moved to the forefront of the political agenda, and refugee families seeking to reunite with separated loved ones are paying the cost. In October of 2008, the United States suspended one of the two arms of the family reunification programs, commonly referred to as the P-3 Program, for security reasons. As a consequence of this, the already limited pool of individuals eligible for reunification was only further downsized. In mid-2011, the admissions program saw the implementation of additional security checks, which has amounted to significant processing delays for refugees seeking to be reunited with their relative in the United States, These matters are blurring the lines of compliance regarding the United States' obligations to respect, protect and fulfil the rights of the refugee family at international law and warrant serious scrutiny. Ultimately, it will be revealed that reunifications of refugee families are reliant upon a U.S. immigration system that is too often unjust, inefficient, ineffective, and in need of urgent reform.

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ACKNOWLEDGEMENTS

This thesis concludes with a remark from the English poet, John Donne, "No man is an island, entire of itself. Every man is a piece of the continent; a part of the main." As I embarked on my studies this year, this thought surfaced in my mind time and time again. Indeed, we are all part of something greater, something to which we are responsible, something upon which we rely, and something to which we owe sincere gratitude.

My gratitude runs deep. Firstly, thank you to the entire academic staff at University of Helsinki for your support, encouragement and insights. A special thanks to my supervisors, Dr. Magda Kmak and Dr. Jan Klabbers, for your guidance in the research process and for creating such a warm and welcoming academic environment. Alice Neffe, Damarys Vigil, Ukri Soirila and Luca Bonadiman, you are four of the brightest, most fun, and creative people I have ever worked alongside. Thank you for assuming the role of my Helsinki family and ensuring that no day went without at least one good belly laugh. Ukri, your comments regarding my thesis were unsurprisingly insightful and from a true place of wisdom. I am so grateful for your assistance.

My motivation for pursuing a topic on family reunifications for refugees only came about after developing an interest in the field while working within the immigration department at Agency for New Americans, a refugee resettlement agency in Boise, Idaho. Each day I was inspired by the stories of our clients and equally frustrated when their attempts to reunite with loved ones were unjustly denied. This is the place from which my passion in the subject extends – from

those that have been wrongly affected by the United States immigration laws and for those that were denied the opportunity to enjoy in one of humanities greatest social creations, family. I hope that this paper, in the very smallest of ways, gives homage and perhaps a voice to your plight.

Terri Macdonald, I cannot thank you enough for your guidance during my time at the agency and for teaching me all that there was to know about family reunifications. You ignited an interest in me that has lasted, and will continue to last, years beyond my tenure at the agency. I am so fortunate our paths crossed. Also a special thanks to rest of the ANA/IRC family, including immigration attorney and academic professor, Ernie Hoidal, Yasmin Aguilar, Rabiou Manzo and the entire Bruce family for welcoming me into the team with open arms.

Before I read about the importance of family in the General Comments, Guiding Principles and academic texts - I knew it to be true from the original source, my own family. You guys are the single greatest thing that has ever happened to me. No one believes in me more, makes me laugh harder, reminds me to pull it into line better and anchors me in the world like you do. Each and every person should be afforded the opportunity to enjoy the support that you all give. You are my ultimate source of inspiration. Mummers, Papa Bern, Gma, Adam, Kellie Bean, Mac and Lucy Goose - you are my main; my continent. I am reliant upon, responsible to and so very grateful for your love.

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LIST OF ABBREVIATIONS

AOR: Affidavit of Relationship

BIA: United States Board of Immigration Appeals

CRC: Convention on the Rights of the Child

DHHS: United States Department of Health and Human Services

DHS: United States Department of Homeland Security

DOS: United States Department of State

HRC: United Nations Human Rights Committee

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

INA: Immigration and Nationality Act of 1952 (INA)

I-730: Form I-730, Refugee/Asylee Relative Petition

ORR: United States Office for Refugee Resettlement

PRM: Bureau of Population, Refugees & Migration

P-3: Priority 3 Program

USCIS: United States Citizenship and Immigration Services

USRAP: United States Refugee Admissions Program

UNHCR: United Nations High Commissioner for Refugees

I. INTRODUCTION

In commemoration of World Refugee Day 2012, Secretary of State, Hillary Clinton, recently remarked of the United States' strong commitment to the protection and assistance of the millions of individuals seeking safety and refuge from persecution each year.[1] As part of this commitment, the U.S. Refugee Admissions Program (**USRAP**)[2] offers permanent resettlement in the United States to approximately 50,000 to 80,000 refugees per annum.[3] Typically, the individuals which receive access to the USRAP have been referred to the program through United Nations High Commissioner for Refugees (**UNHCR**) and consist of those persons considered most vulnerable and unable to achieve repatriation or local integration into their asylum countries.[4]

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[1] Clinton, Press Statement, 20 June 2012.

[2] The USRAP is an interagency effort facilitating the resettlement for refugees in the United States. The program is comprised of the following organizations and agencies: Bureau of Population, Refugees and Migration (**PRM**), United Nations High Commissioner for Refugees (**UNHCR**), International Organization for Migration (**IOM**), Resettlement Support Centers (**RSC**), Department of Homeland Security (**DHS**)/U.S. Citizenship and Immigration Services (**USCIS**), Department of Health and Human Services (**DHHS**)/ Office of Refugee Resettlement (**ORR**), and Non-Governmental Organizations Resettlement Agencies (**NGOs**). See DOS, 'Refugee Admissions', available at http://www.state.gov/j/prm/ra/index.htm; USCIS, ':The United States Refugee Admission Program (**USRAP**) Consultation and Worldwide Processing Priorities', available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=385d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextoid=796b0eb389683210VgnVCM100000082ca60aRCRD.

[3] Each fiscal year the President, in consultation with Congress, establishes the number of refugees eligible for admission into the United States through the USRAP. The presidential determination typically sets 80,000 as the maximum numbers of refugees that may be admitted through the program, although the figures vacillate each year. See: USCIS, 2011, p.3.

4 DOS, DHS & DHHS, 2012 [hereinafter referred to as '***Report to Congress'***],pp. ii, 6; Section 207(a)(3) , Immigration and Nationality A ct of 1952 (**INA**) states USRAP shall allocate admission for individuals "of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation."

With the collaboration of international organisations, local NGO's and various departments of government, the program makes relocation to the United States for select refugees possible. As part of this process, considerable efforts and funds have been directed towards facilitating integration and inclusion of the resettled refugee into their new country.[5] Upon admission to the United States the refugee is offered an array of resettlement services, including employment assistance, language lessons, social security benefits, health benefits, housing, medical and immigration services.[6] In this regard, the program should be praised for its extensive and comprehensive efforts to provide 'durable solutions'[7] to thousands of refugees each year.

However, for many resettled refugees, a solution to their plight which is 'durable' necessarily requires one basic and fundamental element: the support of family.[8] In the face of dislocation from one's country, culture, language, and familiarity, the family more times than not plays a crucial role in the restoration of the refugee's individual dignity and sense of connection to the world.[9] In these instances, protection, assistance and integration, at their core, depend upon the emotional and material support that flows from family.[10] For the refugee that has been separated from his/her relatives prior to or in the process of resettlement, family reunification with those individuals is vital.[11] Absent of such an opportunity, the refugee is unable to enjoy one of the most fundamental rights offered at international human rights law, the right to family.

[5] Report to Congress, 2012, p. iv.
[6] DOS, 'Refugee Admissions', available at http://www.state.gov/j/prm/ra/index.htm.
[7] Report to Congress, 2012, p. iv.
[8] Jastram and Newland, 2003, p.564.
[9] Lunn, 2010, p.834.
[10] Abram, 1995, p. 399; Jastram and Newland, 2003, pp. 557, 562; UNHCR, 2008, p.3.
[11] Jastram and Newland, 2003, p.564.

This paper will critically evaluate the family reunification laws and policies for refugees in the United States, answering the question of whether those laws are compliant with international human rights law, specifically as they relate to the rights of the family set forth in the International Covenant on Civil and Political Rights (**ICCPR**).[12] The term 'family reunification' in this paper refers to the immigration processes which allows U.S. residing non-citizens, such as refugees, to apply for relatives to join them in the United States. The term 'family unity' will also be used from time to time throughout the paper and refers to the rights of the family to live together as an integral whole.[13] Ultimately, it will be argued that the domestic legal framework fails, in-part, to uphold the United States' international legal obligations to respect, protect and fulfil family unity for the U.S. resettled refugee. The specific procedural, conceptual and judicial short-fallings of the system will be discussed in detail, with recommendations for reform offered as a concluding point.

Both the international and the U.S. domestic legal framework recognize the family as a social unit worthy of state protection, and have made express provision to this effect in their respective laws.[14] At the international level, the

[12] As will be made clear in Chapter II, the ICCPR is the only human rights treaty that affords explicit protection to the family and is legally binding upon the United States.
[13] Hathaway, 2005, p.534.
[14] See Table 1 for a list of the provisions which afford protection to the family within the international human rights framework. The list does not include regional instruments, but it is noted that Article 17, American Convention on Human Rights (**ACHR**) and Article 15(1) of its Additional Protocol, Article 18, African Charter on Human and Peoples' Rights (**African Charter**) and Article 8(1), European Convention of Human Rights (**ECHR**) all contain provisions protecting the family as the natural and fundamental base of the society.

family is regarded as the 'natural fundamental group unit of society;'[15] and in the United States it is said to enjoy a 'preferred position'[16] in the law on equal footing as a constitutional right.[17] However, the nature and extent of this protection varies considerably in terms of the rights set forth in human rights treaties, on the one hand, and U.S. immigration laws relating to family reunifications for refugees on the other. In practice, the disjunction in the two protection schemes means that at international law a refugee has a right to found and live with their family,[18] but this right may be rendered meaningless or wholly inaccessible by U.S immigration laws, which do not always permit a U.S residing refugee to reunite with separated family members. The result of this protection gap carries with it some of the most deeply personal and significant consequences for the refugee and his/her family.

A fundamental point that is patterned throughout this paper is that refugees, unlike other categories of migrants, migrate involuntarily.[19] By definition, they fled their home country because of persecution or a well-founded fear of persecution, which, had they been forced to remain in that country, would have made their lives intolerable.[20] The circumstances prompting migration were

[15] International Instruments: Article 16(3), Universal Declaration of Human Rights (**UDHR**); Article 23(1), International Covenant on Civil and Political Rights (**ICCPR**) and Article 10(1), International Covenant on Economic Social and Cultural Rights (**ICESCR**). Regional Instruments: Article 17, ACHR, Article 18, African Chapter and Article 8(1), ECHR.
[16] *Moore v. Cleveland,* 431 US 494, 511 (1977).
[17] *Idem*.
[18] Article 23, ICCPR; Article 16 UDHR; UNHRC, 1990 [hereinafter referred to as ***'General Comment 19'***], paragraph 5.
[19] Martin, 2001, pp.6-7.
[20] Definition at International Law: Article 1 A (2), Convention Relating to the Status of Refugees (**the Refugee Convention**). See also UNHCR, 1992, paragraphs 37-86; Definition at U.S. Law: Section 101(a) (42) INA.

therefore not by choice; they were forced.[21] Likewise, the separation and dislocation of refugee families in that migration, either during the flight from persecution or in the resettlement process, were also typically forced.[22] When faced with dire situations of war, conflict and trauma, families adopt certain survival mechanisms, which may keep individual family members alive, but come at the cost of splitting families apart.[23] Survival strategies may include dividing families into smaller groups to cross an international boundary, sending a family member into hiding, absorbing either extended family members or non-relatives into the group unit and sending vulnerable family members overseas first to avoid being raped, attacked or abducted.[24] The refugee that comes to the United States under such conditions and without his/her family in tow as a result of those conditions has done so because he/she had no other reasonable options available to them. This is an important point, and one that should be compared to the situation of a voluntary migrant, who creates a new place of residence out of choice. In the latter instance, there is an argument to say that the migrant of free-will could have chosen to remain with his/her family in their country of origin.[25] The refugee did not have such liberties.

Due to the circumstances of their refugee plight, families have been forced apart and are wholly unable to return to the country of origin to enjoy family unity.[26] Reunification in the resettlement country is therefore the only way in which that

[21] Martin, 2001, pp.6-7.
[22] Hathaway, 2005, p. 552.
[23] Holland, 2011, p.1651.
[24] Jastram and Newland, 2003, p.562
[25] The jurisprudence flowing from the European Court of Human rights, for example, requires that a state obligation to reunite family members will only be triggered if there is an impossibility of reunification elsewhere. See, for example, *Gül vs. Switzerland*, 53/1995/559/645, paragraph 42.
[26] Jastram and Newland, 2003, p.556.

refugee family will be able to enjoy their right to family life as provided for at international law. In other words, "family reunification effectuates family unity."[27] This will be explained further below, but the principal point being that the right to family life at international law necessarily implies a state obligation to reunite resettled refugees with their family abroad through the various immigration channels. Absent of such an obligation, the fundamental right to privacy and family life becomes meaningless to the resettled refugee.[28]

Although this key principle has been confirmed by the United Nations Human Rights Committee (**HRC**), the United States has found methods to either limit or wholly avoid this obligations regarding family reunification. Firstly, the United States has given a very narrow meaning to the concept of 'family' in its immigration laws, so that refugees may only apply to extend beneficiary immigration status to a very select group of their relatives. Likewise, the U.S. has adopted a powerful judicial doctrine known as the doctrine of plenary power, which permits the judiciary to defer all matters regarding the constitutional legitimacy of immigration legislation to the hands of the political branches of government.[29] As a consequence of this doctrine, immigration laws are rendered 'extraconstitutional'[30] and largely immune from judicial review, despite the fact that they may very well be contrary to the United States' legal obligations under international human rights law.[31] Thirdly, when legislating in the area of immigration, the political branches of government too frequently prioritise

[27] Hawthorne, 2007, p. 823.
[28] Hawthorne, 2007, p. 823; Jastram and Newland, 2003, p.562.
[29] Koulish, 2010, p.31; Legomsky, 1994, p.929; See generally: Henkin, 1987; Kouroutakis, 2011; Saito, 2001.
[30] Henkin, 1987, p. 862.
[31] Banks, 2010, p.1233, 1241; Kouroutakis, 2011, p.13; Legomsky, 1994, p.929; See generally: Henkin, 1997; Saito, 2001.

national security concerns over human rights obligations when the two are seen to be in opposition of one another.[32] The increasing securitization of the USRAP, which will be discussed below, illustrates this point.[33] It will be seen how the most recently adopted security screening measures have significantly slowed the refugee admission process for refugees generally, which has generated considerable processing delays and barriers to refugees seeking family reunification.

In summary, this paper will demonstrate the United States' international legal obligation to effectuate family unity for resettled refugees through their immigration and reunification laws. As will be made clear, the United States is not wholly compliant with those obligations and ground their reasoning for non-compliance in justifications of security, sovereignty and unsubstantiated claims regarding the narrow definition afforded to 'family.' These points will be discussed respectively throughout the paper, which will follow in five further parts. Chapter II will begin by explaining the broader concepts of sovereignty, human rights and a State's right to regulate migration, thereby placing the remainder of the paper's analysis into context. Following that, Chapter III will delve into the specific rights of families as contained within the international human rights framework, and the U.S.' obligations regarding refugee family reunifications that flow from that framework. As the ICCPR is the only legally binding treaty which makes express provision for the protection of the family, it will receive the greatest focus. The Convention on the Rights of the Child (**CRC**), however, which has been signed but not ratified by the United States, will also receive a brief mention, as there are strong moral and policy grounds for its

[32] Harris, 2003, p.150; Holland, 2011, 1670; Saito, 2001, p.1164
[33] Martin, 2005, p.301; Waibsnaider, 2006, pp.411, 422.

ratification. Chapter IV will delve into the domestic legal framework regarding family reunifications for refugees, discussing the way that the state protection of 'family' has translated into federal immigration laws. Chapter V will consolidate the considerations of the previous chapters, comparing the international framework to the domestic framework and evaluating where the United States has fallen short in regards to its obligations to ensure family reunification for refugees. Chapter VI will provide insights as to how the United States could, and should, reform their immigration policies so as to bring them into compliance with international law and human rights standards. Concluding remarks will be offered in Chapter VII.

II. SOVEREIGNTY, MIGRATION & HUMAN RIGHTS

A. Overview

Prior to delving into the specific rights of family at international law, one must firstly understand the broader concepts regarding the overlap between state sovereignty, human rights and migration. This will be the focus of this Chapter.

When matters of human rights merge into the realm of migration, the principle of State sovereignty surfaces, and, as will be explained, a push-pull relationship between the three elements is frequently triggered. It will be seen how international human rights law requires the United States to extend the rights of families as specifically discussed in the following Chapter to all individuals within its territory and subject to its jurisdiction, citizens and non-citizens alike.[34] However, at the same time, international law also allows a state to regulate migration within its territory as an extension of their sovereignty. [35] Although in theory the two principles should co-exist in harmony, such that human rights guide immigration policies, this is not always the reality in practice. Rather, when migrants' rights are seen to be misaligned with broader national self-interests, the United States has proven to rely upon their sovereign power to regulate migration as a means of suspending or limiting those rights.[36] The issue of family

[34] UNHRC, 1986 [hereinafter *'**General Comment No. 15'***], paragraph 1; UNHRC, 2004 [hereinafter ***'General Comment No. 31'***], paragraph 10.
[35] Aleinikoff, 2003, p. 3; J. Vedsted-Hansen, 1999, p. 273; Article 2(7), Charter of the United Nations:"Nothing in charter shall authorize the nations to intervene in matters which are essentially within the domestic jurisdiction…"
[36] *Chae Chan Ping v. United States*, 130 U.S 581, 609 (1889): "...the power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a

reunifications illustrates this point well: the individual refugee may have a right to family life at international law, but if that right can only be fulfilled through family reunification - a process of immigration- the United States have been shown to ground their reasoning for limiting that right as a continuation of their power to regulate migration.[37]

An analysis of this phenomenon will be developed in two parts. The first part will discuss the relationship between sovereignty, human rights and migration, contextualizing the discussion in the following Chapters. The second part of this Chapter will provide a brief outline of the historical roots of the U.S. immigration legal system, revealing specifically how the United States has insulated their immigration laws from constitutional and international human rights treaty obligations in the name of sovereignty. The doctrine of plenary power will be discussed, making it clear how the judiciary has allowed the political branches of the United States government to deny migrants equal protection of rights regarding family. Although the legitimacy of the doctrine will be analyzed further in Chapter V, its explanation here will provide a useful backdrop to the mechanisms the United States uses to avoid their broader human rights obligations.

B. The Relationship Between Sovereignty, Migration and Human Rights

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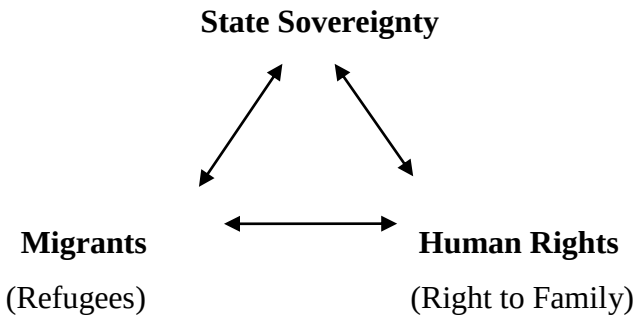
part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."

[37] *Fiallo v. Bell*, 430 US 787 (1977); Anderfuhren-Wayne, 1996, p.354; Hawthorne, 2007, p.811.

To demonstrate the conceptual relationship between international migration, human rights and state sovereignty, consider the following illustration:



The sovereign state is placed at the top of the triangle as it is in both a position of power over the migrant and also equally accountable to them by virtue of the human rights regime. The 'power' over the migrant flows from the principle at international law which grants States the right to regulate the movement of persons across their territory.[38] Included in this power is the authority to regulate the entry of migrants, the conditions upon which their migration is predicated, and the removal of unauthorized migrants.[39] Likewise, sovereignty affords States the right to determine that certain migrants threaten the peace, security and integrity of that State, and to enact laws to prevent against such a threat.[40] This power, however, places the migrant in a particularly vulnerable situation, as it exposes them to potential state exploitation and marginalization on the basis of their status

[38] Aleinikoff, 2003, p. 3; J. Vedsted-Hansen, 1999, p. 273; Article 2(7), Charter of the United Nations: "Nothing in charter shall authorize the nations to intervene in matters which are essentially within the domestic jurisdiction…".
[39] *Idem*.
[40] *Idem.*

as non-nationals.[41] The 'accountability' element of the in-principle relationship therefore obliges states to respect the fundamental human rights of those migrants.[42] In this sense, human rights seek to redress the imbalance that surfaces between individual vulnerability of the migrant on the one hand and the power of the state on the other.[43] The regime ensures that all persons are entitled to fundamental rights, simply by virtue of their essential human qualities, and not on the basis of immigration status or otherwise.[44] In this regard, legally binding human rights standards function, at least in theory, to limit the sovereign power of the State when its domestic immigration policies would affect the enjoyment and recognition of the fundamental rights.[45] Thus, the push-pull relationship between the three elements surfaces, and it becomes clear that human rights, through the protection of migrant's rights, challenge sovereignty and *vice versa*

C. Sovereignty and the Doctrine of Plenary Power

In the Chapters below, a detailed analysis regarding the current state of U.S. immigration/reunification laws will follow. However, prior to such a discussion, one must firstly understand a judicial doctrine which goes to the heart of U.S. immigration laws and has afforded the executive and legislative branches of the U.S. government absolute and complete power in their authority to regulate

[41] International Organization of Migration, 'Human Rights and Migration: Working Together for Safe, Dignified and Secure Migration', November 2009, available at http://www.iom.int/jahia/Jahia/policy-research/international-dialogue-migration/council-sessions/human-rights-and-migration-2009, p.1.
[42] General Comment No. 15, paragraph 1.
[43] Aleinikoff, 2003, pp. 5-6; OHCHR, 2007, p. 7
[44] General Comment No. 15, paragraph 1. Aleinikoff, 2003, pp. 5-6; OHCHR, 2007, p. 7.
[45] Vedsted-Hansen, 1999, p. 274; OHCHR, 'Landmark Statement on Protecting the Human Rights of Irregular Migrants', available at www.ohchr.org/EN/NewsEvents/Pages/MigrantsInIrregularSituation.

migration.[46] Although it is no radical concept that a State is afforded the power to control immigration within their territory, the doctrine of plenary power goes beyond this principle, providing that those immigration controls are not, with only one limited exception,[47] subject to constitutional limitations regarding due process, life, liberty and property.[48] In other words, Congress in the United States has the power to determine all matters regarding immigration, even if those decisions amount to the denial of basic constitutional and human rights protection for immigrants.[49]

The genesis of the doctrine dates back to the late 19th Century in the land mark immigration case before the U.S. Supreme Court, *Chae Chan Ping v. United States* (***the Chinese Exclusion Case***).[50] In 1868, the United States entered into a treaty known as the Burlingame Treaty with China, whereby it was agreed to allow Chinese Nationals free immigration to the United States. Two years later, Congress enacted the Scott Act, which effectively precluded the entry of all Chinese labourers into the U.S. The applicant, Chae Chan Ping, was a Chinese national that established residence in the United States under the operation of the Burlingame Treaty. He left temporarily to visit his family in China, and during his period outside of the United States, the Scott Act came into force. When Chae attempted to re-enter the United States, he was denied entry.

[46] Aleinikoff, Martin, Motomura, Fullerton, 2008, p. 205; Anderfuhren-Wayne, 1996, pp.353-354; Hawthorne, 2007, p.811; Koulish, 2010, p.31; Kouroutakis, 2011, pp.9-10; Legomsky, 1994, p.929; See generally: Henkin, 1987; Saito, 2001.
[47] As will be discussed, the exception appears to apply only in situations regarding due process protection and the deportation of non-citizens. See Legomsky, 1994, p.931.
[48] Henkin, 1987, p. 858.
[49] Henkin, 1987, p.859; Saito, 2001, p.1119.
[50] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

Council for Chae argued that the Scott Act, which was in violation of the Burlingame Treaty, was constitutionally invalid. The Court disagreed, finding that the Act was valid despite its contravention with the Burlingame Treaty,[51] and the reasoning behind the decision established a doctrine that would continue to survive over 100 years in the field of U.S. immigration law.[52] It was decided that as a key component of the United States sovereignty, the executive and legislative branches of the US government have absolute power to exclude non-citizens, as they see fit and free from any restrictions imposed by external sources.[53] Thus, if Congress perceives that the presence of certain foreigners are a threat to territorial peace and security, they have plenary power to prevent such a threat by way of immigration legislation, even if it can be said that such legislation contravenes international treaty obligations.[54]

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[51] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) in Aleinikoff, Martin, Motomura, Fullerton, 2008, p. 197.

[52] Anderfuhren-Wayne, 1996, p.370; Saito, 2001, p. 1159; Slocum, 2007, p.385.

[53] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) in Aleinikoff, Martin, Motomura, Fullerton, 2008, p.199: "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to is exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone." [Justice Field].

[54] This principle flowing from the doctrine of plenary power operated alongside a parallel doctrine that the case also established known as the 'last-in-time' doctrine. The scope of this paper does not permit a detailed discussion regarding the last-in-time doctrine, but the basic principle which surfaces from its application is that federal statutes and treaties are on equal footing, as both have been put into effect by the same sovereign; and the last expression of the sovereign will prevail. Thus, if Congress, in their sovereign power, decide to repeal or modify a treaty obligation, then that congressional act as the 'last-in-time' will succeed. In the *Chinese Exclusion Case*, the Scott Act prevailed over the Burlingame Treaty. See the remarks of Justice Field in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) in Aleinikoff, Martin, Motomura, Fullerton, 2008, pp.197-198: "If the treaty operates by its own force, and it relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control… The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction and

The doctrine continued through both World Wars and into the Cold War, operating to deny migrants basic due process rights in a time when immigrants were linked to the threat of Communism.[55] In *Harisiades v. Shaughnessy*[56] Justice Frankfurter summed up the opinion of the Court, and the essence of the doctrine:

> "...[w]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. Courts do enforce the requirements imposed by Congress upon officials in administering immigration laws...but the underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determinations may be deemed to offend American traditions and may, as has been the case, jeopardize peace."[57]

Later into the 1970's, at a time when the Supreme Court was enlarging constitutional protections in all other contexts, the Court obligingly followed the doctrine, insulating immigration laws from any such expansion of protection.[58] In

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an investment of that sovereignty to the same extent in that power which would impose such restriction." For a further analysis of the last-in-time doctrine, see: Banks, 2010; Henkin, 1987.

[55] Henkin, 1987, p.122; Koulish, 2010, p.34.See, for example, the Supreme Court decision of *Shaughnessy v. US Ex Rel. Mezei*, 345 U.S. 206 (1953). The Court upheld the Attorney General's decision to indefinitely detain a returning immigrant on Ellis Island without a hearing and on the basis of undisclosed evidence.

[56] *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

[57] *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) in Aleinikoff, Martin, Motomura, Fullerton, 2008, p. 707.

[58] Henkin, 1987, p.861.

the Supreme Court case of *Fiallo v. Bell*[59], the Court considered the application of the doctrine specifically in the context of family reunifications. Under the Immigration and Nationality Act (**INA**) in operation at the time, a non-citizen who qualified as the parent or child of a United States citizen or lawful permanent resident had special preference immigration status to join that relative in the United States. The Act defined "parent" and "child" in such a way that special preference status did not extend to: a.) an illegitimate child seeking preference by virtue of his relationship with his biological father; or b.) a biological father seeking preference by virtue of his relationship with his illegitimate child. The INA did, however, extend special preference to an illegitimate child seeking preference by virtue of his relationship to his biological mother and *vice versa*.[60]

The case was brought by three sets of unmarried biological fathers and their illegitimate children who sought, either as an alien father or alien child, special immigration preference by virtue of their relationship to a United States citizen or lawful permanent resident. Counsel for the Appellants argued that the relevant provisions of the INA were in violation of the First, Firth and Ninth Amendments of the US Constitution insofar as they: (a) discriminated against biological fathers and their illegitimate child, thus violating the Appellants equal protection rights; (b) violated the Appellants' rights to due process; and (c) "seriously burden[ed] and infringe[d] upon the rights of natural fathers and their children, born out of wedlock and not legitimated, to mutual association, to privacy, to establish a home, to raise natural children and to be raised by the natural father."[61]

[59] *Fiallo v. Bell*, 430 U.S. 787 (1977).
[60] *Fiallo v. Bell*, 430 U.S. 787 (1977) in Aleinikoff, Martin, Motomura, Fullerton, 2008, p. 314.
[61] *Idem*, p. 315.

In their decision rejecting the Applicants' claim, the majority confirmed the long-standing principle that the United States political branches of government, in exercising its sovereign power, have the right to expel or exclude non-citizens.[62] They went on to say that such matters are largely immune from judicial control.[63] In regards to constitutional complaints, Justice Powell remarked that the decision remains one "solely for the responsibility of the Congress and wholly outside the power of this Court to control."[64]

> "Since decisions in these matters may implicate our relations with foreign powers, they are not appropriate for judicial review and best left to the Legislative or Executive branches of government."[65]

The Court noted in obiter that the INA restricts special preference to other categories: married children over 21 years old, children adopted after 14 years old, and stepchildren who were over the age of 18 years old when the stepchild-parent relationship commenced. With respect to each of these categories, the Court said that the line could have been drawn differently, but ultimately this was a policy question, entrusted specifically to the political branches of government.[66]

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[62] *Idem*, p. 315:"This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute excersised by the Government's political departments largely immune from judicial control." [Justice Powell].

[63] *Idem*, p. 315: "...[i]t is important to underscore the limited scope of judicial inquiry into immigration legislation." [Justice Powell]

[64] *Idem*, p. 318.

[65] *Idem*, p. 316.

[66] *Idem*, p. 317.

Although the doctrine operated in more or less its full form through to the end of the 20th Century,[67] its potency appeared to be somewhat diluted by the Supreme Court in *Zadvydas v. Davis*[68] in a decision regarding the constitutional rights of permanent residents facing indefinite detention. The Court held that the doctrine's power, "...is subject to important constitutional limitations."[69] However, Saito[70] and other leading immigration academics are not so convinced, remarking that *The Chinese Exclusion Case* was still cited with approval thereby leaving the door open for the future application of the plenary power.[71] Likewise, Legomsky[72] notes that the limitation is confined to situations regarding procedural due process rights in deportation cases.[73] Outside of these specific circumstances, the doctrine continues to operate in full form. Legomsky concludes:

> "For the most part, the Supreme Court has not applied to immigration cases the constitutional norms familiar in other areas of public law. That special judicial deference, known in immigration circles as the plenary power doctrine, has never been adequately explained on grounds of either policy or precedent."[74]

The effect of this doctrine is that it allows judicial deference to the political branches of government when faced with constitutional or treaty-based challenges

[67] Koulish, 2010, p.35. See for example, *Jean v. Nelson*, 472 U.S. 846, 968 (1985): The 11th Circuit held that non-citizens who have not been admitted continue to "have no constitutional rights with regard to their applications, and must be content to accept whatever statutory rights and privileges they are granted by Congress."
[68] *Zadvydas v. Davis*, 533 U.S. 678. See Koulish, 2010, p.35.
[69] *Zadvydas v. Davis*, 533 U.S. 678 in in Aleinikoff, Martin, Motomura, Fullerton, 2008, p.1106,
[70] Saito, 2001.
[71] *Idem*, pp. 1162-1163.
[72] Legomsky, 1994.
[73] *Idem*, p.931.
[74] *Idem*, p.937.

to U.S. immigration law. [75] The doctrine does not mean that the Courts will not review the constitutionality of *oth*er forms of legislation, as was the case in *Plyer v. Doe*[76] in which the Supreme Court found that laws denying undocumented school children access to education were in violation of the equal protection clauses of the Fourteenth Amendment. It does mean, however, that when those laws fall within the realm of immigration, the Courts will not review the constitutionality of that law, as Congress has been imbued with plenary power to determine the level, if any, of constitutional protection that that should be afforded in their immigration laws. As will be seen, this becomes hugely significant in the context of family reunifications, which rely entirely on immigration laws; if those laws do not accord with basic constitutional and fundamental protection, such as equal protection, privacy and family rights - then there is little or no scope for judicial review.[77] In other words, the doctrine of plenary power permits U.S. immigration laws to exist in a sphere of virtual indestructibility. This of course may seem somewhat perverse, but it is nevertheless the application of the doctrine's legacy.

If the judiciary refuses to monitor the legitimacy of U.S. immigration law in regards to the application of fundamental rights for non-citizens, one then wonders where the scope for review and accountability rests. The matter will remain an open question to be revisited in the final Chapters of this paper. In the interim, the doctrine of plenary power should be kept in mind throughout the remainder of the paper's analysis regarding both the U.S international legal

[75] Banks, 2010, p.1233, 1241.
[76] *Plyer v. Doe*, 457 U.S. 202 (1982).
[77] Hawthorne, 2007, p.831.

requirements towards families and the way in which those protections have manifested at the domestic level.

III. THE RIGHT TO FAMILY AT INTERNATIONAL LAW

A. Overview: The Family as the Most Natural and Fundamental Group Unit of Society

International law provides explicit protection of the family, proclaiming it to be "the natural and fundamental group unit of society...entitled to protection by society and the state."[78] Additionally, protection of the family is embedded within the human rights law framework in so far as it relates to the right to marry and found a family,[79] the rights of the child, both as they implicitly and explicitly relate to the family,[80] and a prohibition on the State from arbitrary or unlawful interference with the privacy, family and home of an individual.[81]

The comprehensive inclusion of family protective provisions into the international law stands as a reminder of the link between family unity and the inherent dignity of the individual.[82] The Preamble of the Universal Declaration of Human Rights (**UDHR**), declares fundamental rights, such as the rights of the family, to be "the foundation of freedom, justice and peace in the world." [83] To violate the integrity of the family is to therefore risk violating individual dignity and the pillars of a stable society.

[78] Article 16(3), UDHR; Article 23(1), ICCPR. Note also, Article 10(1), ICESCR, which has been signed but not ratified by the United States, provides: "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society…"
[79] Article 16(1), UDHR; Article 23(2), ICCPR.
[80] Article 25, UDHR; Article 24, ICCPR; Article 10(1) and Article 10(3), ICESCR.
[81] Article 12, UDHR; Article 17, ICCPR.
[82] Demleitner, 2003, p.294.
[83] Preamble of the UDHR:"*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family in the foundation of freedom, justice and peace in the world."

This Chapter will delve into the scope of protection awarded to the family at international human rights law, with the analysis following in two further parts. The first part will identify and explain the framework regarding the protection of family life in human rights treaties.[84] As the primary aim of the paper is to analyse whether US immigration laws regarding family reunifications are compliant with international law, those obligations which are legally binding upon the United States by way of treaty ratification will receive the greatest focus in this Chapter. The CRC, which has been signed but not yet ratified and offers substantial protection of the family, including an express obligation for reunification, will be discussed in the second part of this Chapter as its ratification is a key recommendation offered in Chapter VI.

B. US Legal Obligations regarding the Rights of the Family at International Law

As demonstrated in Table 1, the relevant legally binding obligations for the United States at international law regarding family are contained within Articles 17, 23 and 24 of the ICCPR.[85] Whilst the family protective provisions within the

[84] An exhaustive list of those international instruments and respective Articles which afford such protection, and are specifically relevant to family reunifications for refugees in the United States, have been included for reference at Table 1. It is noted that the Table does not include regional instrument, American Convention on Human Rights – the "Pact of San Jose" (22 November 1969), which was signed but not ratified by the United States (non-binding). Articles 11, 17 and 19 of the Convention largely mirror the protection offered under the ICCPR, which is legally binding for the United States and will be discussed at length in this paper.

[85] Article 16 of the UDHR, which largely mirrors Article 23 of the ICCPR, has been said by some scholars to form international customary law. If this argument is accepted, then Article 16 can also be said to be legally binding upon the United States. See Oraa Oraa, 2009, p.233. However, as the Article is absorbed under Article 23 of the ICCPR, this paper will not discuss its status at international customary law but rather its application under its codified provision, Article 23 of the ICCPR.

International Covenant on Economic, Social and Cultural Rights (**IESCR**) and the CRC may be persuasive, the United States has signed but not yet ratified these treaties. Absent of any such ratification, the U.S. is legally obliged only to refrain from acts that would defeat or undermine the objectives or purposes of the CRC and IESCR.[86] Articles 12 and 25 of the UDHR are similar in this vein, persuasive but not binding, as they are generally not considered to form customary international law.[87] Finally, it is noted that the Convention Relating to the Status of Refugees, of which the United States is a party, makes no mention of protection for the refugee family.[88]

a. Article 17, ICCPR

Article 17 of the ICCPR protects against, *inter alia*, the arbitrary or unlawful interference with one's privacy, family or home. The HRC in *Coeriel and Aurik v The Netherlands*[89] remarked that the provision, "refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone."[90] Family, as explicitly mentioned in Article 17, includes such a relationship, and may therefore be considered to be an

[86] Martin, Schnably, Slye, Wilson, Falk, Simon, & Koren, 1997, p.28.
[87] Oraa Oraa, 2009, P.233.
[88] Note that Article 44(1) & (2) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, in force 1 July 2003, A/RES/45/158, makes express mention of a right to reunification for certain migrants, but the Convention has neither been signed nor ratified by the United States, and does not apply to "refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned" (Article 3(d)).
[89] *Coeriel and Aurik v The Netherlands*, Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991 (1994).
[90] *Idem*, paragraph 10.2.

expression of an individual's identity.[91] Whilst the overlap between family and individual identity may be universally agreed, there is no such universal agreement regarding the exact definition of the term 'family' within the ICCPR.[92] The HRC, and other UN bodies, such as UNHCR, have offered guidance on the parameters of the term, but 'family' does not, as such, carry with it a specific definition at international law.[93] This point is central to the family reunification debate as it has caused divergent views as to whether US immigration laws are in fact compliant with international law, a discussion which will be revisited further at Chapter V.

Despite no formal definition as to whom will fall within the meaning and protection of 'family' at international law, General Comment 16[94] provides that, "for the purposes of article 17 this term should be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned."[95] Thus, states have discretion to determine the scope of the 'family' with respect to fulfilling their obligations under Article 17, so long as the meaning given to the term accords with the way in which 'family' is conceived and understood in the society of that state.[96]

[91] Joseph, Schultz & Castan, 2005, pp. 476-477; See also *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (1997), paragraph 10.3.
[92] Burchill, 2004, p.7; Demleitner, 2003, pg.273; UNHCR, 2001, p. 4.
[93] Demleitner, 2003, pg.273; UNHCR, 2001, p. 4.
[94] UNHRC, 2004 [hereinafter '***General Comment No. 16***']
[95] General Comment No. 16, paragraph 5.
[96] Burchill, 2004, p.7.

The HRC's decision in *Francis Hopu and Tepoaitu Bessert v. France* (***Hopu and Bessert v France***)[97] sheds light on additional relevant considerations to be taken into account when determining the scope of the term family. The two applicants, both ethnic Polynesians and Tahiti nationals, contested the construction of a hotel complex over the burial grounds of their ancestors in Tahiti, which represented an important part of their heritage, family history and culture. It was alleged that such a development would destroy the sacred burial site and violate their privacy and family life as protected under Articles 17(1) and 23(1) of the ICCPR.[98] In finding in favour of the applicants, the majority of the Committee stressed that a State should afford due consideration to cultural traditions when defining the term:

> "The Committee observes that the objectives of the Covenant require that the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question. *It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation* [emphasis added]. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life."[99]

It is worth mentioning just how broad the HRC were prepared to define 'family' in this case. Given the personal significance the Applicants had attached to the burial site, the HRC was willing to extend 'family' to even members no longer

[97] *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (1997).
[98] *Idem*, paragraphs 3.1-3.4.
[99] *Idem*, paragraph 10.3.

living. The far-reaching interpretation should be kept in mind during the later discussion regarding the way the United States, by contrast, has defined family.

Once the scope of family has been established, Article 17(1) prohibits the unlawful or arbitrary interference with that unit; Article 17(2) guarantees the right to receive protection of the law from such interferences. That is to say, the first paragraph of the Article carries a negative obligation by way of a prohibition, and the second paragraph, as noted by authors Joseph, Schultz and Castan,[100] includes a quasi-positive obligation on States to ensure that people are protected from such interferences.[101] The Article, when read as a whole, however, is generally considered to impose a negative obligation on States which requires non-interference with the family.[102]

The HRC has noted that an interference with the family under Article 17 will only be considered 'unlawful' if such acts do not "comply with the provisions, aims and objectives of the Covenant."[103] Further, for an interference to fall outside the meaning of arbitrary, it must be, "reasonable in the particular circumstances."[104] This requirement of reasonableness was expanded upon in *Toonen v. Australia*[105] when the Committee stated that reasonableness implies that, "any interference with privacy must be *proportional to the end sought* [emphasis added] and be *necessary in the circumstances* [emphasis added] of any given case."[106] Nowak[107]

[100] Joseph, Schultz & Castan, 2005.
[101] *Idem*, p. 586.
[102] Burchill, 2004, p.205.
[103] General Comment No.16, paragraph 3. See also Burchill, 2004, p.205.
[104] General Comment No. 16, paragraph 4.
[105] *Toonen v. Australia, Communication No*. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).
[106] *Idem*, paragraph 8.3.
[107] Nowak, 2005.

and Hathaway[108] both also note that arbitrary interferences will include an element of "capriciousness."[109] Thus, even if an act is authorized by law, if the application of that law is so rigid that it becomes unreasonable, unnecessary or capricious, and it can also be said that the law operates in such a way to defeat the aims and objectives of the protection offered in Article 17, then an arbitrary interference will be established.[110]

In relation to family unity specifically, the HRC have shown to undertake highly fact-specific inquiries with regard to their analysis of the individual circumstances of each case.[111] In *Bakhityari v. Australia* ***(Bakhityari's Case)***[112] for example, the Applicant refugee family alleged that a deportation order amounted to a violation of their family unity. The husband had initially arrived into the country from Afghanistan, via Pakistan, as an asylum seeker independent of his family. His wife and children followed to Australia soon thereafter, also seeking protection, but were detained for close to three years. Australia denied the wife and children a protection visa, disputing that she and the children were Afghan nationals and issued an order for their removal. The family alleged a violation of, amongst other Articles, Articles 17, 23(1) and 24(1) of the ICCPR, arguing that the deportation order which required the Applicant mother and her five children to return to Afghanistan, where the husband could not safely return, would unreasonably split the family apart and violate their right to live together as a family.[113] The HRC

[108] Hathaway, 2005.
[109] Hathaway, 2005, p.550; Nowak, 2005, p. 291.
[110] Hathaway, 2005, p.550; Joseph, Schultz & Castan, 2005, p. 480; Nowak, 2005, p. 291.
[111] Hathaway, 2005, p.550; *Bakhtiyari v. Australia*. Communication No 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002 (2003).
[112] *Bakhtiyari v. Australia*. Communication No 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002 (2003).
[113] *Idem*, paragraphs 3.3-3.5.

found in favour of the refugee family, finding that an arbitrary interference with the unity of the family had in fact occurred at the hands of the State:

> "Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs Bakhtiyari and her children would face if returned to Pakistan without Mr Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs Bakhtiyari and her children...would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant." [114]

The case is significant in the context of rights for refugee families in that it firstly shows that for immigration laws to be reasonable when dealing with matters of family unity, they must look to the whole of the situation.[115] In other words, the HRC found it appropriate to look at the trauma and difficulties the family had endured prior to the deportation order and the trauma that could be reasonably said to occur to the family as a consequence of that deportation. Thus, there is an argument to say that, by analogy to the decision in *Bakiyari's Case,* family reunification laws for refugees should also have due regard to the significant trials and tribulations that the family has already undergone in the lead up to a family reunification petition, and the physical and psychological damage that will reasonably result from further separation. Moreover, the case illustrates the

[114] *Idem,* paragraph 9.6.
[115] Hathaway, 2005, p.550.

important point that the refugee does not have the opportunity to conduct their family life in their country of origin, hence the reason they fled in the first place. Likewise, and as mentioned by the HRC, it was also considered unreasonable to subject the family to create a new life together in Pakistan, the country of asylum.[116] This point will be revisited in the next part regarding Article 23 and family reunifications specifically.

Hathaway[117] notes that although Article 17 may be a useful tool for disputing State acts which disrupt the unity of families, such as the deportation proceedings of *Bakiyari's Case,* Article 23 of the ICCPR, when viewed in light of General Comment 19,[118] may be more useful in the context of family reunifications, as discussed below.[119]

b. Article 23 (1) and (2), ICCPR

Article 23, paragraphs 1 and 2, protect the family, as the natural and fundamental group unit of society and the rights of individuals of marriageable age to marry and found a family. As mentioned, Article 17 protects family unity by way of a negative obligation, or, in other words, a prohibition from interference by states, whereas Article 23 imports a positive obligation on states to ensure family unity.[120] Importantly, General Comment 19 clarifies the purview of this positive obligation:

[116] *Bakhtiyari v. Australia*. Communication No 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002 (2003), paragraphs 3.3-3.5.
[117] Hathaway, 2005.
[118] UNHRC, 1990.
[119] Hathaway, 2005, p.551.
[120] Burchill, 2004, p.205; Joseph, Schultz & Castan, 2005, p.586.

> "[t]he right to found a family implies, in principle, *the possibility to procreate and live together*...[T]he possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, *in cooperation with other States, to ensure the unity or reunification of families*, particularly when their members are separated for *political, economic or similar reasons* [emphasis added]."[121]

This statement is highly significant in the context of refugee family reunifications. The HRC is making it clear that affirmative measures to reunite families may be required for a State to fulfil their obligations under Article 23, particularly in situations where a family has been separated for political, economic or other reasons. The Committee is identifying that there will be situations in which a family has been forced apart, for political reasons or otherwise, and it may be the case that family unity simply cannot be realized elsewhere as a result of that forced migration and separation. In these situations the legal obligation upon States to reunite families will be triggered.[122] Although it is not technically

[121] General Comment 19, paragraph 5.

[122] Hathaway, 2005, pp. 551-552; Jastram and Newland, 2003, p.556, 558, 576; Joseph, Schultz & Castan, 2005, p.610. Due the scope of this paper it is not possible to make an extensive inquiry into the jurisprudence flowing from the European Court of Human Rights on the point of family reunifications, however, the principles regarding reunification parallel this point. The case law makes it clear that an obligation to reunite will only be triggered if there is an impossibility of living elsewhere. See *Gül vs. Switzerland*, 53/1995/559/645, paragraph 42: The Court found that a refusal to allow a 12 year old Turkish boy to join his parents in Switzerland did not amount to a violation of Article 8 of the European Convention of Human Rights. "In view of the length of time Mr. and Mrs. Gül have lived in Switzerland, it would admittedly not be easy for them to return to Turkey, but there are, strictly speaking, no obstacles preventing them from developing family life in Turkey." See also, *Abdulaziz, Cabales and Balkandali vs. United Kingdom*, 15/1983/71/107-109, paragraph 68: "the duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them."

appropriate to say that there is a blanket "right to family reunification" under the ICCPR,[123] Article 23 means that the right to found a family includes the right to live together, and if this right cannot be enjoyed by no other means than family reunification, then a State will be obliged to ensure reunification through their domestic immigration policies.[124]

As forced migration for refugees is, by definition, for 'political...or similar reasons', and the separation of refugee families is most often the flow on effect of such forced movement,[125] States cannot reasonably expect a refugee to return to their home countries to reunify with their family. Similarly, a refugee that resettles in the United States under USRAP has done so on the program's general proviso that neither repatriation nor local integration into an asylum country were viable options for the refugee. In other words, the USRAP resettled refugee does not have the possibility of carrying out his right to family life in either his country of origin or asylum country; thus, family life can *only* be conducted in the resettlement country, and accordingly the right to found a family necessarily implies an obligation of reunification in this situation.[126]

If the right to family unity can be said to extend to an obligation on States to effectuate family reunifications for refugees, then the question re-surfaces: what is meant by the term 'family'? Similar to Article 17, the Committee has confirmed

[123] Anderfuhren-Wayne, 1996, p. 349: "The right to [family] unity is often distinguished from the right to reunification, which extends protection more specifically to families which have been separated and wish to reunite. Few international human rights instruments specifically designate a right of family reunification or otherwise elaborate on how the right to be treated as a unit should be implemented in cases of separated families."
[124] Jastram and Newland, 2003, pp.556, 558, 579.
[125] UNHCR, 1983, p.1.
[126] Jastram and Newland, 2003, p.581.

that States may interpret the meaning of 'family', but only if the meaning given to the term accords to the way in which 'family' is understood in the society of that State.[127] Again, this is an important point in the context of family reunifications: a State Party must not enact immigration legislation which adopts such a restrictive definition of 'family' that the meaning adopted therein is narrower than the way 'family' is conceived in the society of that State Party.[128] The HRC has also noted that 'family' for the purposes of Article 23 means that an effective family life must exist between family members; the protection of Article 23 will therefore only be triggered if there are sufficient ties of a relationship, either through a prolonged family life, economic ties, a regular and an intense relationship or otherwise.[129]

In *Hopu and Bessert v France,*[130] discussed above, the HRC made it clear that a State must take cultural traditions into account when defining family. This requirement may be relevant to family reunifications as it could be argued that a State may not take liberties in disregarding functional family formations, if such formations are rooted in cultural and situation-specific traditions and go to the heart of a person's identity and private life.[131] Likewise, the HRC's decision in

[127] General Comment 19, paragraph 2.
[128] Joseph, Schultz & Castan, 2005, p.588.
[129] See *Balaguer Santacana v. Spain*, Communication No. 417/1990, U.N. Doc.CCPR/C/51/D/417/1990 (1994), paragraph 10.2: "The Committee begins by noting that the term "family" must be understood broadly; it reaffirms that the concept refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and child...Some minimal requirements for the existence of a family are however necessary, such as life together, economic ties, a regular and intense relationship, etc."
[130] *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (1997).
[131] *Idem,* paragraph 10.3.

Bakiyari's Case[132] supports this principle, making it clear that if immigration laws are arbitrarily applied without consideration for the potential and unreasonable application of those laws in specific situations, then this may amount to a violation of Articles 17 and 23.[133] In other words, when read together, the underlying principles flowing from the General Comments and these cases are that States have an obligation to reunite refugee families and in doing so are obliged to have due regard to the sensitivities arising from the refugee narrative and develop those reunification laws accordingly. Immigration policies which fall short of this standard will therefore appropriately be dealt with under Article 23, but any such alleged violation in this context could equally be said to amount to a violation of Article 17 as it is quite conceivable that a violation to family unity relating to family reunifications concerns a violation of both Articles.[134]

c. Article 24 (1), ICCPR

Article 24, paragraph 1, affords special protection to the child by virtue of his/her status as minor, recognising the role of the family, Society and State in the realization of such protection.[135] Similar to Article 23, Article 24 is considered to incorporate a positive obligation on States to provide the necessary protection of children.[136] General Comment 17[137] provides as follows in regards to the relationship between children's rights and the family:

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[132] *Bakhtiyari v. Australia*. Communication No 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002 (2003).
[133] *Idem*, paragraph 9.6.
[134] Burchill, 2004, p.205; Joseph, Schultz & Castan, 2005, p.586.
[135] Joseph, Schultz & Castan, 2005, 622; UNHRC, 1989 [hereinafter '***General Comment No.17***'], paragraph 6.
[136] Burchill, 2004, p.205.
[137] UNHRC, 1989.

> "Responsibility for guaranteeing children the necessary protection lies with the family, society and the State. Although the Covenant does not indicate how much responsibility is to be apportioned, it is primarily incumbent on the family, which is interpreted broadly to include all persons composing it in the society of the State party concerned, and particularly on the parents, to create conditions to promote the harmonious development of the child's personality and his enjoyment of the rights recognised in the Covenant."[138]

If the family is recognised as one the principal and most important sources of a child's development, then a State may therefore interfere with the rights of children *vis –a-vis* the family. In other words, there may be considerable overlap between Articles 17, 23 and 24 as a violation of family unity may trigger a violation to the rights of the child.[139] By way of example, immigration laws which arbitrarily limit the pool of adults with whom a child may reunite, in violation of Articles 17 and 23, may also interfere with the rights of the child if they prevent a child from receiving the care and protection of the family envisaged by Article 24.[140]

The case of *Hendrick Winata and So Lan Li v. Australia (**Winata and Lan Li v. Australia**)*[141] before the HRC illustrates this point. The case concerned a husband and wife who initially travelled to Australia as Indonesian nationals. The couple

[138] General Comment No.17, paragraph 6.
[139] Burchill, 2004, p. 205; Joseph, Schultz & Castan, 2005, 622.
[140] Thronson, 2010, p.393, 396, 399.
[141] *Hendrick Winata and So Lan Li v. Australia*, Communication No. 30/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

overstayed their visas and continued to reside in Australia for close to 15 years, in which time they gave birth to and raised a child together. Although the child gained Australian citizenship by virtue of the principle of *jus soli*, the parents faced eventual deportation for their unauthorized residence in the country. They petitioned against the removal order on the basis that deportation would violate the rights of the family under Articles 17 and 23 and the rights of their 13 year old child under Article 24(1).[142] The HRC largely agreed with the arguments advanced by the family, concluding that any such deportation would indeed violate family unity and the rights of the child as foreseen under Article 24(1). It was specifically noted that the child had spent his entire life in Australia and proven to be completely integrated within Australian society, developing strong social bonds and ties to the country which flow from such integration. If the child had been required to re-establish a life in Indonesia or remain in Australia, dislocated from family, it would, in the eyes of the HRC, amount to a violation of his rights as a child and the rights of the family as a group unit.[143] The case is significant in that it recognizes a prohibition from applying broad brush immigration laws if the specific circumstances flowing from the application of that law will amount to a characterization of arbitrariness and/or a violation of fundamental rights.[144]

As a final point in regards to Article 24(1), the Article must be read in light of Article 26 of the ICCPR, which affords all persons equality before the law and is naturally meant to extend to children. Both State legislation and practice should therefore ensure that children are afforded equal protection, free of discrimination on grounds of race, colour, sex, language, religion, national or social origin,

[142] *Idem*, paragraphs 3.1-3.6.
[143] *Idem*, paragraphs 7.1-7.3.
[144] Joseph, Schultz & Castan, 2005, 603.

property or birth. This is an important point in the context of immigration law, as States have a duty to ensure that children are not marginalized in their regulation of migration. It is not enough to afford protection merely to adults/parents in immigration policies and expect that such policies on their own will have the follow-on effect of protecting children.[145]

d. Obligation to Provide Equal Protection of Rights under the ICCPR

As mentioned in the previous Chapter, the international human rights framework operates through the entitlement of rights on the basis of an individual's humanness, not by virtue of a person's citizenship.[146] The ICCPR therefore requires that State Parties extend the above mentioned rights to all individuals within their territory and subject to their jurisdiction, citizens and non-citizens alike.[147] The HRC has made it clear in their General Comment No. 15 that the only time in which a State will be permitted to distinguish in its provision of ICCPR rights on the basis of citizenship is when the Covenant expressly provides for such a distinction, such as in the case of Article 25 (participation in government and right to vote), for example.[148] Articles 17, 23 (1) & (2) and 24 of the ICCPR do not include any such express limitation and must therefore be afforded equally to those within the territory, regardless of citizenship.[149] Accordingly, it is not sufficient for the United States to deny or limit a refugee's right to be reunited with their family as they see fit merely because the right

[145] See generally: Thronson, 2010.
[146] It is not possible to discuss the non-discrimination framework of the ICCPR extensively in this paper, however it is noted that equality of treatment and prohibition of discrimination can be found, relevantly, at Articles 2(1), 3, 4(1), 20,23, 24, and 26 of the ICCPR. See Davidson, 2004, pp,161-181.
[147] General Comment No. 15, paragraph 1; General Comment No.31, paragraph 10.
[148] General Comment No. 15, paragraph 2.
[149] General Comment No. 15 paragraph 6; General Comment No.31, paragraph 10.

merges into the area of migration or because they do not perceive migrants as being equal rights-holders as citizens.[150] This is an important point and reaffirms the HRC's reasoning for expressly requiring that a State afford the same definition to 'family' in its immigration processes as is understood in the society of that State. The underlying idea is that the human rights regime is seeking to ensure that migrants have access to the fundamental rights of the family on equal footing as that of non-migrants.

However, despite the intent of the human rights framework, the Committee has noted that in practice States frequently do not adhere to their obligations to afford equal protection to migrants:

> "...[t]he Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant."[151]

Perhaps this is largely due to the fact that when States do not perceive the obligation to afford migrants full protection of rights to be aligned with their national self-interests, such as economic and national security, they frequently rely, albeit wrongly, on sovereignty arguments, such as their right to regulate migration, to deny or limit the rights of migrants.[152] In other words, the refugee may claim to have a right to be reunited with his/her family, but the United States argues that this right merges into their domain, namely immigration, and their right to regulate immigration trumps the refugee's right to family unity. This is not the way in which ICCPR rights are intended to operate, but it is nevertheless

[150] OHCHR, 2007, p.1.
[151] General Comment 15, paragraph 2.
[152] OHCHR, 2007, p.1; Warner, 1999, p.253.

reflective of the situation in practice. The next part of this Chapter will discuss the U.S. legal framework regarding refugee reunifications which will demonstrate the ways that the United States have avoided their international human rights obligations.

C. Non-Binding Obligations: Protection of the Family under the CRC

As mentioned, the United States, as a signatory of the CRC, is obliged to refrain from acts which would defeat the object or purpose of the treaty.[153] This paper will not conclude that the United States, by virtue of their reunification policies, have violated the CRC in this vein; however, it will be argued in the Chapter VI that there are strong policy and moral grounds for the CRC's ratification. Accordingly, it is relevant to analyse here below the protection that the CRC affords to families seeking reunification *vis-a-vis* the interests of the child.

The protection afforded to both the family and child in the CRC is extensive and represents a dramatic advancement in the explicit rights afforded to the 'family.'[154] It must be remembered that the CRC post-dates the ICCPR and ICESCR by over 20 years, which is most evident in the progressive meaning that has been given to family in the text. The Preamble, for example, refers to the "family environment" as an "atmosphere of happiness, love and understanding,"[155] the implication being that the family is not simply defined by elements of biology.[156] The Committee on the Rights of the Child in their General

[153] Martin, Schnably, Slye, Wilson, Falk, Simon, Koren, 1997, p.28.
[154] King, 2009, p.541.
[155] CRC Preamble: "Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding..."
[156] King, 2009, p.541.

Comment 7[157] reaffirm this hypothesis, finding that the word "family" in the Preamble refers to:

> "...a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children's rights and best interests."'[158]

Likewise, extended family members and other guardians are incorporated into the text of the Convention at Articles 3(2) and 5, which anticipate that the protection and care necessary for a child's well-being, may very well flow from an extensive network of 'family' members, including individuals responsible for a child according to certain customs, legal guardians and extended family members.[159] In contrast to Articles 17, 23 & 24 of the ICCPR, protection for the non-nuclear family is expressly envisaged in the CRC.

Article 10(1) refers to family reunification, requiring State Parities to deal with such applications in a "positive, humane, expeditious manner" that "entail no adverse consequences for the applicants and for the members of their family."[160] Although the Article does not provide an express "right" to family reunification, it is more evolved than most international instruments in that family reunification receives explicit and stand-alone protection and does not need to be read into the Article as required under the ICCPR and ICESCR.[161] The policy and moral

[157] CRC, 2005.
[158] CRC, 2005[hereinafter referred to as ***'General Comment No. 7'***], paragraph 15.
[159] Article 3(2), Article 5 CRC; See also King, 2009, p.542.
[160] Article 10(1), CRC.
[161] Jastram and Newland, 2003, p.578; OHCHR, 2005, p.4.

arguments for ratifying a treaty which extends protection of this nature to the family and child will be discussed in greater depth in Chapter VI.

IV. FAMILY REUNIFICATION FOR REFUGEES IN THE U.S

A. Overview

As demonstrated in the above Chapter, Article 23 of the ICCPR imposes a positive obligation on the United States to ensure the protection of the family, which includes reunification for families, particularly if separation was for political or similar reasons. Laws which unlawfully or arbitrarily infringe upon the rights of the family may amount to a violation of Articles 17, 23 and also Article 24(1), if the rights of the child have been affected *vis a vis* the family.[162] This Chapter will now delve into the ways in which the rights secured within the international human rights law framework translate into the domestic laws and policies of the United States, specifically in the situation of family reunifications for refugees.

The Chapter will be divided into two further parts. The first part will explain the protection afforded to the family in U.S. law generally and the manifestation of this protection in U.S. immigration law relating to family reunifications. The second part will discuss specifically how a refugee may access that protection via the various legal channels so as to extend beneficiary immigration status to family members overseas with which he/she seeks to reunite. It will be demonstrated that a refugee legally residing in the United States previously had two different applications available to him/her to bring family members over to the United States, namely the I-730 and the P-3 Program, the primary difference between the two being that the P-3 was more generous in the scope of persons that could

[162] Burchill, 2004, p.205; Joseph, Schultz & Castan, 2005, 622.

qualify as family members.[163] In October of 2008, the Bureau of Population Refugees and Migration (**PRM**), an organ of the U.S. State Department and the responsible body for the coordination and management of the USRAP, suspended the P-3 Program for 'security reasons', giving no indication as to when the program will resume.[164] This part will outline the two programs and the protection afforded to the refugee family in each of those respective programs.

B. The Right to Family: A Freedom Holding a "Preferred Position" in U.S. Law

The United States Constitution does not expressly make provision for the rights of the family, however, the Supreme Court in *Moore v. Cleveland*[165] has given it implied constitutional protection remarking, "'(i)f any freedom not specifically mentioned in the Bill of Rights enjoys a "preferred position" in the law, it is most certainly the family."[166] In the case of *Moore*, a housing ordinance required that only a single family could occupy a dwelling unit at any given time. "Family" was very narrowly defined under the ordinance and did not encompass extended family members (e.g. – grandparents, aunts and uncles etc.). The Appellant, who was the grandmother and de-facto care giver of two grandchildren, challenged the constitutionality of the ordinance on the basis that it violated her fundamental right to reside with her relatives. The Supreme Court agreed that the ordinance violated the rights of the family, and Justice Powell[167] made the following remarks regarding the importance of the extended family:

[163] Holland, 2011, p.1643.
[164] *Idem*, pp.1649-1650.
[165] *Moore v. Cleveland*, 431 US 494 (1977).
[166] *Moore v. Cleveland*, 431 US 494, 545 (1977); See also: Anderfuhren-Wayne, 1996, p.348; Hawthorne, 2007, p.810. See generally: Billingsley, 1978.
[167] Brennan, Marshall, and Blackmun JJ. concurring.

> "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home."[168]

This statement from the Supreme Court is highly significant when viewed in light of the meaning afforded to family in U.S. immigration law. Although over thirty years have passed since the decision in *Moore,* which is still good law, frequently cited and applied, the equivalent scope of protection for the extended family has never made its way into the reunification laws of the United States.[169] As will be seen in the following section, the family worthy of protection in United States immigration law is hardly as inclusive as that which has been recognized by the U.S. Supreme Court.[170] Rather, the refugee "family" in the current reunification

[168] *Moore v. Cleveland*, 431 US 494, 504-505 (1977).
[169] Guendelsbergert,1988, p.3
[170] Anderfuhren-Wayne, 1996, p.379; Hawthorne, 2007, p.818.

laws includes only select members from the nuclear family,[171] thus suggesting that a different standard of protection applies to non-citizens.[172]

Additionally, and perhaps one of the most perverse aspects of *Moore* is that the case was decided by the same Court and in the same year as that in *Fiallo v. Bell*. In *Moore*, the Court willingly accepts the prevalence of non-nuclear families in U.S. society and extends protection to that family formation, and yet, in *Fiallo v. Bell*, the Court denies illegitimate fathers the same type of protection, citing the doctrine of plenary power as the basis for that denial.[173] The impassioned decision delivered by Justice Powell regarding the importance of family in *Moore* is difficult to reconcile with his decision in *Fiallo* in the very same given year. One is left wondering how the Court can speak of the sanctity of family, but mean that such sanctity only applies to the U.S. citizen family. Is the responsibility that the grandmother applicant felt towards her grandchildren in *Moore* any less important than the responsibility that the father applicants felt towards their children in *Fiallo v. Bell*? The juxtaposition of the two cases reaffirms the notion that immigration law stands in a category of its own, subject to different standards, and ultimately to the changing winds of the political branches of government.

[171] See USCIS, 'Refugee/Asylee Relative Petition: Instructions', available at http://www.uscis.gov/files/form/i-730instr.pdf: Relatives eligible for reunification include a refugee's spouse and unmarried child(ren) under the age of 21 years.
[172] Anderfuhren-Wayne, 1996, p.379; Hawthorne, 2007, p.818.
[173] *Fiallo v. Bell*, 430 U.S. 787 (1977) in Aleinikoff, Martin, Motomura, Fullerton, 2008, p. 315

C. The Two Vehicles for Reunification: The I-730 and the P-3 Program

The United States immigration statutory framework regarding family reunifications includes, relevantly, the INA and the U.S. Citizenship and Immigration Service (**USCIS**) regulations in Title 8 of the Code of Federal Regulations (**the Federal Regulations**). Despite the narrow construction afforded to family within the statute and regulations, the mere existence of family reunification provisions does indicate a willingness, albeit a misguided one, to respect family unity.

Prior to explaining the specific mechanics of the family reunification vehicle, it is worth mentioning that to date, there have been no precedent decisions[174] relating to the only available petition to refugees for reunification, the Refugee/Asylee Relative Petition (**the I-730**).[175] This is of course significant in that it means, firstly, that there is limited guidance from the Administrative Appeals Office (**AAO**) or the Board of Immigration Appeals (**BIA**) as to the way in which the relevant statutes and regulations relating to refugee reunifications should be interpreted by immigration officers.[176] Secondly, it means that the refugee relative

[174] 'Precedent decisions' meaning decisions of the Administrative Appeals Office (**AAO**), the Board of Immigration Appeals (**BIA**), and the Attorney General, which have been selected and designated as precedent by the Secretary of the Department of Homeland Security (**DHS**), the BIA, and the Attorney General. Precedent decisions are legally binding on immigration officers.
[175] USCIS, 'Adjudicators Field Manual, Chapter 21.1, Refugee/Asylee Petition,' available at http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm.
[176] It is conceded that the Adjudicators Field Manual, which details USCIS policies and procedures for adjudicating applications and petitions, is available for immigration officers; however, the Manual typically includes all related precedent decisions as a primary source of guidance, which are not available in the case of I-730 petitions.

petition has gone largely unchallenged, despite falling notably short of international human rights standards and, arguably, legal standards within the United States.[177]

a. Form I-730, Refugee/Asylee Relative Petition (1-730)

As mentioned, Form I-730 is currently the only application available to U.S. resettled refugees seeking reunification and may be used by either those refugees admitted to the United States through the USRAP[178] or those granted asylum status in the United States.[179] Asylum seekers, or individuals whose refugee claim has not yet been determined, are not eligible to apply for families to join them in the United States under the I-730.

i. Which 'family' members are eligible to join under the I-730?

'Family' has been very narrowly defined under the petition as a refugee may apply only for spouses and/or unmarried children under the age of 21 to join them in the United States.[180] The relationship between the petitioner and the relative must have existed on the date the refugee was admitted to the United States or

[177] Family unity has been much more frequently considered in U.S. case law from the vantage point of removal proceedings and its interference with the family unit, as opposed to the interference with family unity for failure to reunite. In the *Matter of Gonzalez Recinas*, 23 I. & N. Dec. 467 (2002), for example, it was argued that a removal order for a single mother of six children would amount to exceptional and extremely unusual hardship for both the mother and family. The BIA agreed, finding that it would be a major disruption to the integrity of the family unit and the development of the children if relief from removal was not granted.

[178] Refugee petitioner must have been the principal applicant for the family when applying for US refugee status.

[179] The petition must be lodged within two years of either the refugee's admission to the U.S. or the successful asylum decision; however USCIS has discretion to extend this two-year limitation if it can be shown that there are sufficient humanitarian grounds for doing so: 8 C.F.R section 207.2(d).

[180] Section 207(c)(2) and 207 (b)(3) INA.

granted asylum.[181] However, beneficiaries of the I-730 are not required to demonstrate separate refugee status as there is a presumption that they derive such status from the anchor relative.[182]

The INA and Federal Regulations define "child" to mean biological children and also adopted children, but only if the adoption was formalized at law, took place prior to the child turning 16 years of age, and the refugee parent had legal custody of the child for at least two years prior to filing the petition.[183] Likewise, a stepchild is also included in the meaning of "child", but the marriage that created such a parent-step-child relationship must have occurred prior to the child turning 18 years of age.[184]

The INA and Federal Regulations do not define "spouse" per se,[185] however the evidentiary requirements make it clear that the marriage must have been registered with the civil authorities.[186] Thus, traditional and/or ceremonial marriages, whether they were formalized in a church or otherwise, will not be recognized under the I-730.[187] Likewise, both parties must have been of marriageable age according to the laws of the country in which they married, and

[181] 8 C.F.R. section 207.7(c).
[182] Section 208 (b)(3) INA; 8 C.F.R section 207.7(a); See also Report to Congress, 2012, pp. 6, 14.
[183] "Child" defined at sections 101(b)(1)(A)-(E) INA. Adopted children are included in definition at Section 101(b)(1)(E) INA.
[184] Section 101(b)(1)(B) INA.
[185] USCIS, 'Adjudicators Field Manual, Chapter 21.2, 'Factors Common to the Adjudication of all Relative Visa Petitions,' available at http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm.
[186] 8 C.F.R section 207.7(e), 208.21(c)-(d).
[187] 8 C.F.R. section 204.2.

the union must have been consummated.[188] Polygamous and same-sex marriages are not recognized under the I-730.[189]

The biological and nuclear meaning accorded to family in the statute and regulations of US immigration law means that, in addition to the excluded relationships listed above, the following relatives will not be eligible to reunite with their refugee family member under the I-730: parents, sisters, brothers, grandparents, grandchildren, nephews, nieces, uncles, aunts, cousins, in-laws, children that are married, children over the age of 21, children informally adopted, spouses from common law marriages and partners from de-facto relationships.[190] Equally, it is of no consequence to USCIS if a person falling outside of the proscribed eligible relationships had an *in loco parentis* or de-facto parental role for the whole of a child's life, if a family member is disabled and depends wholly on the support and care of the separated family member, or if a de-facto couple enjoined their lives cohabitating for many years and had children together. The list of situations continues, but the point to be highlighted is that, while some provision for the protection of families is afforded by virtue of the I-

[188] Section 101(a)(35) INA; 8 C.F.R. section 207.7; See *Matter of B*, 5 I&N Dec. 698 (BIA 1954).
[189] Regarding Same Sex Marriages: See USCIS, 'Adjudicators Field Manual, Chapter 21.3, 'Petition for a spouse,' available at http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm :"For a relationship to qualify as a marriage for purposes of Federal Law, one partner must be a man, and the other a woman. This definition applies to the construction of any Act of Congress and to any Federal regulation. USCIS , therefore, must administer the Immigration and Nationality Act in light of section 7 of Pub. L. 104-199 and deny any relative visa petition (or any other application for an immigration benefit) which is based on a same sex marriage."; Regarding Polygamous Marriages: See *Matter of H*, 9 I&N Dec. 640 (BIA 1962): "A polygamous marriage, though valid where contracted, is not recognized for immigration purposes."
[190] 8. C.F.R. section 207.7(b).

730 petition, there is still great room for the argument that the protection afforded is insufficient to meet international human rights standards.

ii. Evidentiary Requirements

All I-730 petitions must be filed with documentary evidence verifying the bona fide nature of the relationship alleged.[191] A refugee petitioning for their natural child must provide a birth certificate in support of their petition, which lists the refugee petitioner as the parent of that child.[192] In instances of adoption, a copy of the civil adoption certificate must be included in the petition.[193] A refugee petitioning for their spouse must submit a civil marriage certificate and the birth certificate of the spouse.[194] Civil marriage and birth certificates are considered primary evidence and failure of to include them with the petition will amount to a presumption of ineligibility.[195] In limited situations, secondary evidence, such as formal Affidavits of Relationship, school records, correspondence and census records, will be accepted when primary evidence is not available.[196] Although the law includes slight flexibility for refugees in this regard, the situations in which secondary evidence may be relied upon are rare. Typically, for example, USCIS will only accept secondary evidence when the Department of State's Foreign Affairs Manual indicates that certain civil documents in a country are unavailable.[197] Most countries, including most refugee producing countries which are undergoing situations of severe political instability, list that civil documents

[191] 8 C.F.R. 207.7(e).
[192] 8 C.F.R. section 204.2(d)(2).
[193] 8 C.F.R. section 204.2 (d)(2)(vii).
[194] 8 C.F.R. sections 204.2 (a)(1)(i)(B); 204.2(a)(1)(iii)(B); 204.2(a)(2).
[195] 8 C.F.R. section 207.7(e), 208.21(c)-(d).
[196] 8 C.F.R. section 204.2(d)(2)(v).
[197] *Idem.*

are available in that country.[198] The practical reality, however, is that either in the lead up to fleeing one's country or once resettled in the United States, the refugee petitioner was or still is unable to obtain the necessary documents to support their I-730 petition. This will be revisited in the following Chapter.

b. Priority 3 (P-3) Category

i. Which 'family' members were eligible to join under the P-3?

As mentioned, there were previously two separate pathways for refugee reunification, being the I-730 and the P-3 Program. Prior to its suspension, refugees (18 years and older), who had been admitted to the United States through the USRAP[199] or granted asylum status in the United States, could apply under the P-3 to bring certain family members from a select number of nationalities to the United States. The list of 'eligible' nationalities were established at the beginning of each fiscal year by PRM, in consultation with Department of Homeland Security (**DHS**) or USCIS and based largely on considerations of which countries represented humanitarian concerns for the United States in regards to refugee family reunifications.[200] Under the P-3, the following relatives were eligible for

[198] See Reciprocity Schedule by country: DOS, 'Foreign Affairs Manual: 9 FAM Appendix C Unassigned', available at http://travel.state.gov/visa/fees/fees_3272.html (consulted 2 July 2012).
[199] Refugee petitioner must have been the principal applicant for the family when applying for US refugee status.
[200] UNHCR's annual assessment of refugee situations and US foreign policy interests are also cited as a relevant consideration when determining eligible nationalities. Report to Congress, 2012, pp.12-13 states that the following countries will be P-3 eligible when the program resumes: Afghanistan , Bhutan, Burma, Burundi, Central African Republic , Chad , Colombia, Cuba , Democratic People's Republic of Korea (DPRK) , Democratic Republic of Congo (DRC), Eritrea , Ethiopia , Iran , Iraq, Republic of Congo (ROC) , Somalia, Sri Lanka , Sudan , Uzbekistan , Zimbabwe.

reunification: spouses, unmarried children under the age of 21 and parents.[201] Additionally, and on a case-by-case basis, an individual that lived in the same household and was part of the same economic unit as the anchor relative and was able to demonstrate exceptional and compelling humanitarian circumstances to justify inclusion, was eligible for the P-3 Program.

Similar to the I-730, the relationship between the anchor refugee and his/her relative must have existed prior to the refugee's arrival in the United States.[202] Unlike processing requirements under the I-730, however, all beneficiaries joining a U.S. residing refugee relative were required to independently establish their refugee status under the P-3.[203]

ii. Evidentiary Requirements

A refugee seeking to reunite with his/her family member under the P-3 was required to submit a formal Affidavit of Relationship (**AOR**) on behalf of that separated relative.[204] Juxtaposed to the evidentiary criteria of the I-730, it becomes clear that the P-3 was far more forgiving in terms its documentary requirements.[205] Although P-3 admissions required individuals to independently prove refugee status and to undergo additional background checks, the evidentiary criteria was far more forgiving and sensitive to the documentary issues many refugees encounter.

[201] Holland, 201, p.1641; Lunn, 2010, p.841.
[202] 8 C.F.R. section 207.7(c).
[203] Report to Congress, 2012, p.12.
[204] Report to Congress, 2012, p. 6; Holland, 2011, p. 1641.PRM, 2009, available at http://www.state.gov/j/prm/releases/factsheets/2009/181066.htm.
[205] Holland, 2011, p.1643.

iii. Suspension of the P-3 for Security Reasons

In March of 2008, PRM suspended the P-3 Program in part, issuing a moratorium on P-3 arrivals from a number of eligible countries.[206] The reason cited for the suspension was based on 'indications of extremely high rates of fraud obtained through pilot DNA testing.'[207] A few months later, in October of that year, PRM suspended the program entirely, refusing the acceptance of all AORs and freezing all cases with determinations pending.[208] The consequences of the closure were significant. Although the president had set the refugee admission for that fiscal year at 80,000 refugees, only 74,000 of the admission allocations were actually used.[209]

As the program has been out of operation for close to four years now, the question on many refugee and immigration specialists' minds is when, and on what new terms, the P-3 program will resume. PRM and DHS/USCIS have only remarked that they are currently in the process of examining additional procedures to be incorporated which would prevent the alleged abuse of the system and safeguard the integrity of the program.[210] The recent Report to Congress for the Fiscal Year 2012 indicates that it is likely that mandatory DNA testing will be introduced for certain claimed biological relationships if and when the program is re-launched.[211]

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[206] Report to Congress, 2012, p.12.
[207] *Idem*, p.12.
[208] Holland, 2011, p.1649.
[209] *Idem*, p.1649.
[210] PRM, 2009, available at http://www.state.gov/j/prm/releases/factsheets/2009/181066.htm.
[211] Report to Congress, 2012, p.12; See also PRM, 2009, available at http://www.state.gov/j/prm/releases/factsheets/2009/181066.htm. For a discussion on the policy considerations of mandatory DNA Testing in the field of family reunification for refugees, see: Holland, 2011, p.1649.

In the interim, the pool of family members eligible for reunification has been reduced significantly by the suspension of the P-3. Parents, brothers, sisters and de-facto family members are no longer eligible for reunification, and in this regard there appears to be a systematic downsizing of the family reunification program.

D. Securitization of the USRAP and the Implications for Families

The P-3 program is not the only division of the U.S. refugee resettlement program that has attracted the scrutiny of the DHS. In fact, the USRAP as a whole is currently undergoing significant security reforms, causing considerable delay in refugee admissions across the board.[212] The numbers are concerning: although the presidential determination for projected refugee admissions for the fiscal year of 2011 was set at 80,000, only 54,000 refugees were actually admitted last year. [213] The flow on effect of this is of course coming at a cost for refugee families seeking to reunite under the only remaining I-730 relative admissions channel.

The terrorist attacks of September 11 dramatically changed the United States approach to immigration policies, moving national security to the forefront of the congressional agenda.[214] Although the basic structure of the INA and Refugee Act remained intact, significant modifications were made to the administrative policies of US immigration law, which radically changed the nature of the USRAP.[215] Immediately after September 11, increased security measures were

[212] Press Interview with Robinson & Barlett, 2012, available at http://fpc.state.gov/188085.htm.
[213] Report to Congress, 2012, p. 5.
[214] Aleinikoff, Martin, Motomura and Fullerton, 2008, p.180; Schoenholts, 2007, p.9; The Post-2011 climate saw the introduction of notable national security driven legislation largely targeted at immigrants such as the *USA Patriot Act*, Pub. L. 107-56, 115 Stat. 272 (2001) and the *Enhanced Border Security and Visa Entry Reform Act*, Pub. L. 107-173, 116 Stat. 543 (2002).
[215] Aleinikoff, Martin, Motomura and Fullerton, 2008, p.181.

implemented which amounted a notable reduction in the number of refugees admitted, under the P-3, I-730 or otherwise. In the fiscal year of 2002, for example, only 27,110 of the president's determined 80,000 were admitted to the United States. In the years to follow, the admission numbers rebounded, but in mid-2011, additional security checks were introduced once again as a top-up to the existing post-September 2011 checks, including pre-departure checks and increased background screening for refugees.[216] The administrative delays have resulted in family separation that could conceivably endure years. Below it is argued that the area of overlap between national security and the rights of the refugee requires serious reconsideration and policy attention.

[216] Report to Congress, 2012, p. iv; Press Interview with Robinson & Barlett, 2012, available at http://fpc.state.gov/188085.htm. ; Background and security checks typically include the Interagency Border Inspection System (IBIS) Name Check, FBI Fingerprint Check, FBI Name Checks. See Aleinikoff, Martin, Motomura and Fullerton, 2008, pp. 670-671.

V. U.S. REFUGEE REUNIFICATION: COMPLIANCE WITH INTERNATIONAL LAW

A. Overview

The Obama Administration concedes that the immigration system in the United States is a 'broken system.'[217] Prompted by the copious debates regarding the need for reform, the Whitehouse recently released the publication '*Building a 21st Century Immigration System,*'[218] which calls for bipartisan consensus and legislative restructuring in all fields of domestic immigration policies.[219] Specifically in relation to the family reunification framework,[220] the administration made the following remarks, making it clear: the immigration laws which purport to protect family unity are falling short of international human rights standards.

> "Family unity has always been a fundamental cornerstone of America's immigration policy, yet current immigration laws undermine this cherished value. Because of outdated family-based immigration policies, American citizens and legal permanent residents must wait years to be reunited with their closest family members. The gaps in our family-based immigration visa system are clear and apparent; they hamper the successes

[217] The White House, Washington, 'Fixing the Immigration System in our 21st Century Economy,' available at http://www.whitehouse.gov/issues/fixing-immigration-system-america-s-21st-century-economy.
[218] *Idem*.
[219] Idem, p.29.
[220] Including family reunifications under Form I-730 for refugees and also Form I-130, available to legal permanent residents and U.S. citizens.

> of immigrant families. Our laws must respect families following the rules instead of splitting them apart. Crucial reforms are needed to reunify families, streamline our processes and reduce the unnecessary paperwork, backlogs, and lack of transparency that hobble our current system."[221]

This Chapter will evaluate the areas of non-compliance with regards to refugee reunifications. The Chapter will be divided into two further parts: The first part relies on three case examples to demonstrate the short-fallings of the I-730 in practice. The cases are based on real situations from a collection of family reunification petitions and decisions.[222] The examples are intended to take the discussion outside of the strictly legal sphere, reminding readers of the significant and often life altering impacts that reunification laws have upon the family life of refugees. The second part of the Chapter will discuss the short-fallings of the I-730, including the overly restrictive definition of family members eligible for reunification, the unreasonable evidentiary requirements, the marginalization of children's rights and the implications of processing delays resulting from the recent security measures. Ultimately, it will be argued that the laws fail in-part to reflect the refugee reality and the values of the United States, arbitrarily and unreasonably impinging upon family unity for refugees.

[221] The White House, Washington, 2011, p.24, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf.
[222] All personal details and distinguishable facts have of course been changed.

B. Case Examples: Refugee Reunification in Practice

a. Example 1:

Consider the case of Jannie. Jannie was born in the Democratic Republic of Congo in the late 1980s. Following the outbreak of war in the country at the end of the 1990s, Jannie and her two parents were forced to flee to Tanzania. On route, the family was caught in conflict; the mother of Jannie was killed during the outbreak and she and her father were separated in the chaos. As a young girl with no apparent remaining family, Jannie was absorbed by a neighbouring family also fleeing the conflict. She and her adopted family were eventually afforded refuge in at a refugee camp in Tanzania, which would become her home for the next 12 years.

At the age of 16, while still residing in the refugee camp, Jannie married a young man in a large religious ceremony at a church located within the refugee camp. As there were no civil registry services available within the camp, and movement outside of the camp was in practice never granted, Jannie and her husband did not formally register their marriage with the Tanzanian authorities.[223] Nevertheless, in the minds of the couple, their marriage was a binding union and they continued to live their lives accordingly, cohabitating in the refugee camp as husband and wife for almost a decade and nurturing a union based on support, respect and hope. When she was 22, Jannie and her husband conceived a child. When she gave birth

[223] See Rutinwa, 2005, p.8: "...[t]he majority of refugees are not issued with documents confirming civil status such as birth, marriage and death certificates which may not therefore be legally recognized and can be an obstacle to accessing durable solution...Most refugees in Tanzania are required to live in designated areas and not leave such areas without a permit. In practice, camp-based refugees have been permitted to move within a 4 kilometer radius of the camps, however even this permission is not consistently applied." See also Da Costa, 2006, p.13.

to her son, she and her husband were provided with a UNHCR birth certificate which listed only Jannie's name as the birth mother.

Jannie was eventually considered for resettlement in the United States. She was told that once she gained entry into the United States, she would be able to apply to bring her husband over. Following the interview and screening process, she and her now six year old son departed for the United States. Upon arrival, Jannie was offered substantial benefits, including housing, health care, welfare and social services through her resettlement agency,[224] but the thing which concerned her most was when she will have the opportunity to see her family again. With no real knowledge of the language, no cultural familiarity, no country, no job and no support network, Jannie felt what so many resettled refugees admit to feeling, a sense of supreme dislocation. Although her life had been patterned with dislocation, she had learned to rely on family as the primary means of support to redress the imbalance.

Under the I-730, the family which effectively adopted and raised Jannie would not be permitted to join under the reunification laws, as parents and siblings, blood or adopted, are not 'eligible' beneficiaries under the I-730.[225] A petition for her husband to join based on their spousal relationship was submitted, but the evidentiary requirements of the I-730 require that a civil marriage certificate be provided in support of the petition as primary evidence to demonstrate that the

[224] All refugees entering the United States through the USRAP are teamed up with one of the nine national volags (resettlement agencies) in the United States who assist in the transition, offering, amongst other things, social services and immigration support.
[225] 8. C.F.R. section 207.7(b).

marriage in question is valid.[226] As secondary evidence, Jannie provided a copy of the church marriage certificate and a formal Affidavit of Support detailing the specifics of her relationship with her husband, including the fact that they share a child together. The UNHCR birth certificate, however, was not particularly helpful as secondary evidence in support of her petition as it does not list the name of both birth parents, only the birth mother.

USCIS did not accept the secondary evidence and the petition was ultimately denied. A petition could not be lodged on behalf of the young child as i.) I-730s may only be lodged by the principal applicant, Jannie in this instance; and ii.) parents are not eligible for reunification under the I-730.[227]

b. Example 2:

Olivier was originally from Cote d'Ivoire. He and his wife had one young son together. Following the death of Olivier's sister, he assumed the role of guardian and father of his young niece and nephew, raising the children as his own. Olivier never formally adopted the children as it was not culturally common to do so and seemed unnecessary to formalize the relationship. Conflict broke out one day while Olivier was away from home, and he had no choice but to flee to Liberia. Olivier went through the resettlement process, and once in the United States, he immediately sought to reunite with his family. Separate petitions were filed for his wife and 3 children to accompany him under the I-730 reunification process.

[226] Although the unavailability of civil marriage certificates creates a presumption of ineligibility (8 C.F.R section 207.7(e), 208.21(c)-(d)), an applicant may submit secondary evidence or affidavits from individuals who possess personal knowledge of the marriage if it can be argued that primary evidence does not exist.
[227] 8. C.F.R. section 207.7(b).

A copy of the civil marriage certificate, birth certificate for the biological child and an Affidavit of Parenthood regarding the relationships for his adopted children were each submitted with their respective I-730s. Ultimately, the petitions for the wife and biological child were successful, but the petitions for the two adopted children were denied on the basis that adoptions must be formally recognized at law.[228] As Olivier's wife could of course not leave her two children behind, the family would be forced apart.

c. Example 3:

Awa and Khalid came to the United States as refugees under the USRAP. As a result of the conflict in Somalia, they were separated from their daughter prior to resettlement. Within two years of their admission, they received notice from the International Red Cross that their daughter, now 19 years old, is still alive. They immediately applied for her to join them in the United States, and their petition was successful. Due to the enhanced security measures, it is expected that they will have to wait an indeterminate number of months or perhaps years before their daughter will actually be allowed to enter the United States.

C. Eligibility and Evidentiary Requirements of the I-730: The Short-fallings

a. The Narrow Meaning Afforded to Family

As evident from the case examples, the meaning afforded to family in the INA largely misunderstands the refugee reality, which often includes cultural and

[228] Section 101(b)(1)(E) INA.

circumstantial modifications to the 'nuclear family'.[229] Perversely, it does not reflect the reality of the family framework within the United States;[230] and finally, the best interests of the child are too frequently marginalized in the reunification process.[231] If the refugee creates a functional family that is integral to his/her identity, dignity and survival; *and* functional families are clearly evident in United States society, should it not fall within the purview of protection guaranteed by the rights of the family under the ICCPR? I respond to this question in the affirmative and explain my reasoning below.

The rights of families as codified within the ICCPR, coupled with the statements flowing from the HRC General Comments and their case law suggest that a State may very well have the discretion to import their own meaning into the definition of family,[232] however it must also, relevantly and amongst other things,: i.) reflect the way in which 'family' is understood in the society of that State;[233] and ii.) afford due consideration to cultural traditions and specific situations when defining 'family.'[234] In doing so, consideration may be given to whether family life is 'effective', either through a prolonged life together, economic ties and/or a regular and intense relationship.[235]

[229] Hathaway, 2005, p.534; Holland, 2011, p.1651; Jastram and Newland, 2003, p.562
[230] Hawthorne, 2007, p. 824, 826; King, 2009, p. 522.
[231] Thronson, 2010, p.393.
[232] General Comment 16, paragraph 5; Burchill, 2004, p.207. See also: *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (1997), paragraph 10.3.
[233] General Comment 19, paragraph 2
[234] *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (1997), paragraph10.3.
[235] *Balaguer Santacana v. Spain*, Communication No. 417/1990, U.N. Doc.CCPR/C/51/D/417/1990 (1994), paragraph 10.2.

i. Is the 'family' eligible for the I-730 the same 'family' valued in the United States?

In regards to the first point, the meaning given to 'family' for the purposes of the I-730 must accord with the way that 'family' is understood in the United States.[236] The I-730, through the INA and Federal Regulations, restricts family members eligible for reunification to spouses and unmarried children under the age of 21.[237] As already mentioned, functional families are largely excluded from this list of eligibility. I argue that this definition of family is narrower than that which is the reality in the United States.[238] The statements from the Supreme Court in *Moore v. Cleveland*[239] and the recently published statistics from the US Census Bureau support this assertion.

The 2010 Census Brief regarding Households and Families, released in April 2012, demonstrates that the nature of the US household is increasingly becoming less nuclear.[240] Self-evidently the Census does not include a poll of people's subjective understanding of what constitutes family to them, but it does signal that the household formations are moving outside of the husband, wife and biological/legally adopted children paradigm.[241] By way of example, cohabitating unmarried partners[242] numbered 7.7 million in 2010, a 41% increase from 2000.[243] Likewise, approximately 6.1% of the household population were not related to the

[236] General Comment 19, paragraph 2.
[237] Section 207(c)(2) and 207 (b)(3) INA.
[238] Hawthorne, 2007, p.824, 826; King, 2009, p. 522.
[239] *Moore v. Cleveland*, 431 US 494, 511 (1977).
[240] U.S. Census Bureau, 2012, pp.2-6.
[241] U.S Census Bureau, 2012, pp. 2-6. See also Scherpe, 2005, p.206.
[242] 'Unmarried partner' in the Census was defined to includes close and personal relationships that go beyond sharing household expenses. See U.S. Census Bureau, 2012, p.3.
[243] U.S. Census Bureau, 2012, p. 5.

person owning or renting the house, which is compared to 5.2% recorded in 2000.[244]

A chart which has been extracted in-part from the United States 2010 Census Brief is included for reference at Table 2 below.[245] As demonstrated on the chart, the number of housing units in 2010 was 116.7 million. When polled, a 'householder'[246] was designated for each housing unit and asked to identify their relationship with the other members of the household. Of the 300.8 million people living in households in the United States, 116.7 million of those being the householder, there were 45.2 million people that the householder identified as living with that *would not qualify as* their family under the I-730. There were a further 17.5 million sons and daughters between the ages of 18 to 29 that still only *might qualify* as a family of the householder, dependent on whether they whether they were over or under the age of 21 years. Although 121.3 million of individuals living with the householder *would qualify* as their family under the I-730, the millions of individuals that would not are numbers that cannot be ignored.

It is conceded that it cannot be said that simply because a person lives in the same household as another, they share an effective family life, as required under the auspices of the ICCPR;[247] however, the figures do reveal that a considerable number of households in the United States are non-nuclear and reliant on

[244] *Idem*, p. 5.
[245] See U.S. Census Bureau, 2012, p. 2 for chart it its original form.
[246] The 'householder' means the person who owns or rents the housing unit. In the case of joint-ownership, one individual was chosen as the householder. See Census Bureau, 2012, p. 1.
[247] *Balaguer Santacana v. Spain*, Communication No. 417/1990, U.N. Doc.CCPR/C/51/D/417/1990 (1994), paragraph 10.2.

extended family member formations. A notable percentage of individuals in the U.S. are currently living with their grandparents, grandchildren, aunts, uncles, in-laws, de-facto partners and other non-relatives. Even though it is likely that many of these household members would share an 'effective family life', they would be ineligible under the I-730 criteria. The point is that the definition of family in the I-730 is not reflective of the household and family configurations occurring in the United States.

The frequently quoted statement of the Supreme Court in *Moore v. East Cleveland*, set forth in the previous Chapter, supports the census conclusions. Although some families in the United States consist of only a husband, wife and their minor biological/legally adopted children, many U.S. families do not fit this construct. Effective family life in the United States, including a prolonged life with family members, dependency and emotional and economic ties, too frequently does not meet the neat parameters of the I-730. For this reason, I argue that the laws of eligibility criteria for the I-730, as contained in the INA and the Federal Regulations, do not accord with the formations of 'family' within U.S. society and are therefore not compliant with international law.

ii. Does the meaning afforded to family under the I-730 afford due consideration to specific situations and cultural traditions?

The HRC in *Hopu and Bessert v France*[248] stated that the definition given to family must take specific situations and cultural traditions of the individual into account. In that case, France was required to take into account the cultural

[248] *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (1997).

traditions of the ethnic Polynesian applicants who considered the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life.[249] In *Bakhtiyari's Case*[250] the HRC also made a highly fact-specific inquiry into the particular circumstances of the refugee family, including the difficulties the family had endured leading up to Australia's deportation order and the fact that the refugee family would not be able to enjoy their family life elsewhere.[251] In *Winata and Lan Li v. Australia*[252] the State was prohibited from applying broad brush immigration laws without having due regard to the specific situation and dynamics of the family.[253]

One begins to see a pattern in the HRC jurisprudence. Although a State has some discretion to determine the threshold for 'family' and develop their immigration laws accordingly – the cases above remind us that 'family' exists in a sphere of one's private life and personal identity. There is no 'one size fits all' to family and a certain level of flexibility is required to respect the individual private lives of familial relations with others. Indeed, it was no coincidence that the term 'family' was included alongside privacy in Article 17 of the ICCPR. Although States have a right to regulate migration, and they equally have a right to create a definition for family in those migration policies, these rights must ultimately be balanced

[249] *Idem*, at paragraph 10.3.
[250] *Bakhtiyari v. Australia*. Communication No 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002 (2003).
[251] *Idem*, paragraph 9.6.
[252] *Hendrick Winata and So Lan Li v. Australia*, Communication No. 30/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001).
[253] Joseph, Schultz & Castan, 2005, p. 603.

against the privacy rights of individuals to manage their personal and family affairs.[254]

There is a strong argument to say that the eligibility requirements of the I-730 do not incorporate enough flexibility to take into account the specific situations and cultural trends of refugees as required under the ICCPR. The I-730 criteria of eligibility, being spouses and unmarried child under the age of 21, is so rigidly drawn that the private family lives of refugees, which are frequently created out of necessity and circumstance, are not respected.[255] In situations of war and emergency, refugee families commonly separate and reconfigure into non-nuclear formations as required by the situation.[256] Children find refuge with neighbours and extended families; siblings merge their lives in platonic, but equally supportive ways as spouses would; those that are disabled and alone are absorbed into the care of other relatives and households.[257] In short, families become functional. They may not be based on biology, but as many refugees will comment, the love and support is nevertheless the same. The UNHCR Report, '*Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*'[258] notes:

> "Given the disruptive and traumatic factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various

[254] See *Coeriel and Aurik v The Netherlands*, Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991 (1994), paragraph 10.2.
[255] Holland, 2011, p. 1651.
[256] Hathaway, 2005, p.534; Holland, 2011, p.1651; Jastram and Newland, 2003, p. 585.
[257] *Idem*.
[258] UNHCR, 2001.

households, who depend on each other for mutual support and survival. These families may not fit neatly into preconceived notions of a nuclear family (husband, wife and minor children)."[259]

The current reunifications laws largely do not take into account the distinct way in which refugees enter into their family relationships. They draw lines of inclusion and exclusion on the basis of biology and nuclear constructs and then do not offer any bend for situations which do not fit this paradigm. Of all of the various immigrant categories that seek family reunification it is arguably, however, the refugee that needs the *most* forgiving and situation-specific eligibility criteria. Unlike other immigrant classifications, the refugee that comes to the United States through the USRAP does not have the liberty of returning safely to their country of origin or integrating into their first country of asylum to enjoy their family life.[260] If the United States does not recognize the family that the refugee has created and the hardships they have endured in that creation, then that family has no other country in which to take up residence together. This goes against the spirit of the human rights framework. I therefore argue that the current laws which do not allow for a certain level of common-sense flexibility in regards to the specific circumstances of the refugee narrative violate the private family lives of refugees as set out in Articles 17, 23 and 24 of the ICCPR.

[259] *Idem,* p.1.
[260] Report to Congress, 2012, pp ii, 6.

iii. Conclusion of Non-Compliance with respect to the meaning given to family under the I-730

Chapter II incorporated a diagram of the in-principle relationship between sovereignty, human rights and migration.[261] As seen from the analysis above, the meaning afforded to family in the reunification laws for refugees in the United States distorts that relationship. Rather than balancing the power of the sovereign with the human rights regime, the United States relies unproportionally on their sovereign power to determine who will meet the family threshold and who will not. The imbalance is evident from the fact that the eligibility criterion does not accord with the way family is understood in the United States and the specific situations of the refugee family are largely ignored. On this basis, it is argued that the laws breach the positive obligation to protect family unity as set forth in Article 23 of the ICCPR. In regards to the negative obligation contained at Article 17, the narrow eligibility criteria of the I-730 carries the potential of operating arbitrarily, unreasonably, and without proportion, thereby defeating the aims and objectives of the Covenant which seeks to promote family unity, not dislocate it.

b. Evidentiary Requirements

As the case of Jannie illustrates, the evidentiary requirements regarding marriage certificates and birth certificates for the I-730 carry with them the potential of operating unreasonably in certain refugee-specific situations. This is most evident in situations where refugees have given birth and married within refugee camps without access to proper civil authorities and documentation to verify this event.

[261] Refer to page 18 above.

The threshold for evidence in these instances is so unreasonably high and often wholly unattainable that it can therefore be said to violate Articles 17, 23, and potentially 24 of the ICCPR.

In regards to the evidentiary requirements for spousal relationships, the INA and Federal Regulations require that all I-730 refugee petitioners seeking to extend beneficiary immigration status to their spouses provide a civil marriage certificate.[262] Religious marriage documents are considered secondary evidence and not acceptable documentation to demonstrate a valid marriage according to the INA and Federal Regulations.[263] In regards to the evidentiary requirements for refugee parents seeking to extend immigration status to their birth child, the laws require that the petitioner provide a birth certificate listing both the name of the child and petitioning parent.[264] The practical reality is that documents of this nature are simply not available to the average refugee who marries and gives birth in a refugee camp.[265]

It is not uncommon for refugees to reside in refugee camps for anywhere between years to decades. In this time, individuals may both marry and give birth as an expression of their fundamental right to found a family. However, it is well documented that in practice refugees are often not permitted to exit the refugee camp to register that marriage with civil authorities, nor are they granted access to civil registry services within the camp. Likewise, UNHCR produces birth certificates for children born in refugee camps, but the certificate does not always

[262] 8 C.F.R. sections 204.2 (a)(1)(i)(B); 204.2(a)(1)(iii)(B); 204.2(a)(2).
[263] 8 C.F.R. section 204.2(d)(2)(v).
[264] 8. C.F.R. section 204.2(d)(2).
[265] Da Costa, 2006, p.13; Rutinwa, 2005, p.8.

list the name of the birth father. The consequences of this can be devastating for families which are not resettled together and then unable to meet the evidentiary requirements for the I-730. In line with the HRC statements which require States to have due regard to cultural situations when determining the meaning of family, it is argued that adequate consideration should equally be given to the cultural and circumstantial realities of refugees that marry and give birth in refugee camps.

Evidentiary requirements which do not take such considerations into account will interfere with family relations in such a way so as to be considered arbitrary and in contravention of Articles 17, 23 and 24, if the rights of the child were also violated. Although the United States has legitimate interests in protecting the integrity of the USRAP by way of laws which require a refugee petitioner to prove the existence of an alleged relationship, such laws must not be unreasonable and be balanced against the rights of the refugee family to effectuate family unity. A law which only extends reunification to a refugee who registers that marriage with civil authorities - when it was impossible to do so in practice - is unreasonable and defeats the aims and objective of the Covenant which seek to protect the interests of families. The same applies for laws which require a birth certificate that lists the names of the birth father, when such a birth certificate is not even produced by UNHCR. This particular aspect of the I-730 requires urgent reconsideration. Recommendations for reform will be discussed in the following Chapter.

c. Marginalizing the Rights of the Child

The United States immigration system continually receives criticism for its marginalization of children's rights.[266] There are a number of aspects of the I-730, and its related laws and regulations, which are highly problematic with regards to children specifically. Firstly, the I-730 operates in only one direction in that child refugees are not able to extend beneficiary immigration status to their parents, but adult refugees may petition for their children.[267] Although an anchor refugee child could previously apply for his parents to come to the United States under the P-3 Program prior to its suspension, that refugee child was still required to be at least 18 years of age to lodge such an application.[268] In other words, the minor refugee child in the United States has been entirely unable, under both the I-730 and the P-3, to petition for reunification with one or both parents.[269] This becomes particularly problematic in situations where parents have not legally married but share a child together. If the child is resettled in the United States with only one of their parents, neither the child nor the US residing refugee parent may apply to bring the other parent to the United States.

A second problematic situation arises where a parent does not apply correctly or at all for reunification with the other parent.[270] As a consequence, the child is punished for the acts or omissions of their parents and re-victimized as a refugee in the process.[271] Legal restrictions of this nature are virtually impossible to

[266] See generally: Hawthorne, 2007; King, 2009; Thronson, 2010.
[267] Sections 207(c)(2); 208(b)(2), INA.
[268] See discussion regarding the P-3 requirements above at pages 57-60.
[269] 8. C.F.R. section 207.7(b).
[270] Thronson, 2010, p.402
[271] *Idem*, p. 402.

reconcile with the rights of the child and family integrity as set forth in the ICCPR. Not only is the child not awarded special protection based on their status as a minor, their rights are largely sidelined in the refugee reunification context.

Family cohesion and reunion is a critical component of a refugee child's general development, well-being and chances for integration into a new country.[272] The traumas that flow from war, conflict, persecution and resettlement are difficult for most adults to process and endure, let alone for the minor child to process and endure. The protection offered to the child in Article 24 is not mere rhetoric and should not be treated as such on the domestic plane. Accordingly, there is a strong argument to say that in the two situations explained in this part above, as well as in situations where a child's rights are affected because of the restrictive meaning afforded to family and the burdensome evidentiary requirements, the laws breach Article 24 of the ICCPR. Resettled refugee children are in a particularly vulnerable state, firstly by virtue of their refugee status and the distress caused by their persecution, secondly by virtue of their status as a minor, and finally by virtue of the dislocation caused and readjustment required for resettlement.[273] On the basis of these considerations and decisions from the HRC such as *Winata v. Australia,*[274] I find little argument to say that the United States is justified in marginalizing the rights of children as explained in their refugee reunification laws and regulations. Such laws are disproportionate, arbitrary and unreasonable and require urgent alignment with international human rights standards.

[272] Abram, 1995, p. 399; Jastram and Newland, 2003, p.563
[273] Abram, 1995, p.399.
[274] *Hendrick Winata and So Lan Li v. Australia*, Communication No. 30/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

d. Processing Delays in the Interests of Security

The third case example of Awa and Khalid's family reveals one of the most commonly criticized deficiencies of the family reunification programs in the United States - processing delays.[275] The vast majority of delays in the system can be put down to the security and background checks, including IBIS/FBI name and fingerprint checks, which are both labour intensive and time consuming.[276] The recent *Report to Congress on Proposed Refugee Admissions for Fiscal Year 2012*[277] expressly recognizes the problem and reveals that USCIS and the Department of State are working together to streamline the process:

"As the wait for processing of I-730 petitions has been substantial in some countries, USCIS and the Department of State have developed new procedures to increase the efficiency, consistency, and security of overseas processing of I-730 Refugee/Asylee Petitions, and have launched a pilot program to test them prior to worldwide implementation."[278]

This appears to be a step in the right direction, however, in the interim, family unity remains delayed.[279] UNHCR Report, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*,[280] states that as a guiding principle family reunification should occur with the 'least possible delay' and

[275] The White House, Washington, 2011, p.24, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf.
[276] Jastram and Newland, 2003, p.562.
[277] Report to Congress, 2012.
[278] *Idem*, p.14.
[279] Demleitner,2003, p.282.
[280] UNHCR, 2001.

expedited procedures should be available for separated children seeking to reunite with the family unit.[281]

The United States defends the additional and most recent security checks as a means of preventing 'dangerous individuals from gaining access to the United States through the refugee program.'[282] On one hand, the principles of international law permit the United States to regulate the entry of individuals into its territory.[283] In doing so, immigration control and the fight against terrorism must be weighed against the interests of the individual refugee seeking to realize his/her right to family life on the other hand. Immigration policies require balance and the measures adopted must be proportional to the perceived threat. In other words, if security measures are applied in the pretext of countering terrorism, such measures must be strictly proportional to the nature of that objective.[284]

As so much of the national security intelligence regarding terrorism and other persons considered threats to national security is classified, it is difficult to analyze how significant the probability is that 'dangerous persons' have attempted to utilize the USRAP channel as a means of entering the United States. If such information was available, the task of assessing the proportionality and reasonableness of limiting the rights of the refugee in the interests of security would be far more straightforward.

[281] *Idem*, p.2.
[282] Report to Congress, 2012, p.iv
[283] Aleinikoff, 2003, p. 3; Vedsted-Hansen, 1999, p. 273.
[284] OHCHR, 2008, p.23.

We do know, however, that none of the September 11 hijackers or any reported terrorist since September 11th for that matter was a refugee, or entered the United States via the USRAP.[285] Commentators have remarked that it is no surprise that potential terrorists find the USRAP an unappealing entry channel into the United States, as it would typically require them to spend years, possibly decades, in a refugee camp prior to resettlement.[286] This of course somewhat diffuses the United States' argument which justifies further limiting of individual rights regarding family unity in the name of security.[287]

Limitations and suspension of fundamental rights on the basis of security are intended to apply only in very limited and exceptional circumstances.[288] However, as exemplified by these measures, the reality is that the use of security measures in relation to refugee admission policies has become the norm in the USRAP.[289] The increasing trend to ground restrictive immigration policies in the interests of security means that the exception is actually becoming the rule and the application of the rule, the exception.[290] This is not the intention of the human rights regime; and any such reliance on security concerns as a "catch all" legal loophole to the application of rights can be said to be unproportional and non-compliant with those standards.

In saying that, it is conceded that we simply do not know the real motivations of the United States in putting increased security measures into place. We can

[285] Waibsnaider, 2006, p.422
[286] *Idem*.
[287] Report to Congress, 2012, pp. iv; 14; Press Interview with Robinson & Barlett, 2012, available at http://fpc.state.gov/188085.htm.
[288] OHCHR, 2008, p. 23.
[289] Dauvergne, 2007, p. 534.
[290] OHCHR, 2008, p. 23.

suspect that their motivations are misguided and unproportional, but these are, at best, mere suspicions. Here of course lies the problem with grounding the limitation and suspension of human rights in the interests of security. The dearth of transparency regarding concrete and specific reasons for tightening security in the USRAP makes it difficult to justify or dispute the legitimacy of the measures one way or another. Nevertheless, the point remains that it is not sufficient to sideline human rights and apply unnecessary "blanket" security as the norm if such measures disproportionately impact the individual rights of the refugee and their family.[291] The United States should reveal their specific justifications for subjecting all refugees to increased security, so the proportionality, reasonableness and necessity for such measures can be necessarily weighed against the rights of the refugee family pursuant to Articles 17, 23 and 24 of the ICCPR.

[291] Schoenholtz, 2007, p.22; Dauvergne,2007, p.534

VI. RECOMMENDATIONS FOR REFORM

A. Overview

If the answer to the question of whether the refugee reunification system is insufficient and falls short of international standards, is yes, then the question which follows is: how can we make it so that it is not? This Chapter will evaluate how to reform the existing refugee reunification model so that it is reflective of the values of the 21st Century and broader international human rights standards. There will be five parts that follow, as these are the primary areas of non-compliance which require attention. Firstly, recommendations will be made as to how to modify the scope of eligibility for refugee families under the I-730. Thereafter, the reform that is needed in regards to the evidentiary component of the petition will be mentioned. Thirdly, the ratification of the CRC will be discussed. Fourthly, the relationship between state security for the collective and the rights of the individual with respect to family reunifications will be analyzed, illustrating the need and ways of balancing the former against the latter, and finally, it will be recommended that the doctrine of plenary power must be abolished if there is to be a true realization of equal protection and the rights of the refugee family in the reunification context.

B. Widening the Scope of "Family"

As illustrated above, the scope of individuals eligible for reunification under the I-730 requires broadening if it is to be aligned with the United States' obligations under international law. The laws must both reflect the way family is understood

in the United States and take into account the specific situations and cultural traditions of refugees.[292]

The arguments, at least in the academic arena, supporting a widening of the definition of family in U.S. immigration law have been significant.[293] Academics such as Monique Lee Hawthorne, for example, have made useful contributions to the debate, exploring cross-cultural approaches and policy justifications for permitting a more inclusive pool of eligibility to guide reunification policies.[294] Hawthorne considered the reunification laws of Canada under the *Refugee Protection Act*, finding it much more forgiving in terms of individual eligibility for reunification.[295] Due to the limited scope of this paper, it is not possible to critically analyze the reunification laws of Canada; however, it is worth mentioning that the country, which is also one of the world's largest resettlement countries, appears to be far more advanced in their appreciation of the refugee reality. For example, the Act permits reunification with a "common-law partner or conjugal partner", grandparents, unmarried orphans less than 18 years of age, so long as they are a brother or sister of the petitioner, nephews, nieces and grandchildren.[296] If a resettled refugee does not have any of the above family members, they will be permitted to bring in any relative.[297] Due regard should be made to the ways in which the neighbouring country of the United States is approaching the issue of refugee reunification. It supports the argument that it is

[292] See discussion above at Chapter II .
[293] See, for example: Anderfuhren-Wayne, 1996; Demleitner, 2003; Guendelsbergert, 1988; Hawthorne, 2007; Jastram & Newland, 2003; King, 2009; Thronson, 2010.
[294] Hawthorne, 2007.
[295] Hawthorne, 2007, pp.827-828. See also for similar analysis: Demleitner, 2003, pp. 280,292; UNHCR, 2002, paragraphs 7- 12.
[296] Hawthorne, 2007, pp. 827-828.
[297] *Idem*.

in fact possible, both administratively and from a security standpoint, to reform the system to account for broader relations of refugees.

Further, and perhaps one of the most useful sources of guidance regarding effective ways to bring the law into conformity in this regard, is the UNHCR's guiding principles in *Family Reunification in the Context of Resettlement and Integration*.[298] The report suggests that in adopting a broad meaning of family, States should ground family eligibility in dependency and care-giving criteria, as opposed to arbitrarily drawing the lines of predetermined eligibility as has largely been the approach in the past.[299] Specifically, reunification laws which have been developed according to the refugee condition and notions of dependency would use the nuclear family as a starting point, but for relationships outside of this formation which include sufficient 'financial, physical, emotional as well as spiritual'[300] ties, the laws would permit reunification. UNHCR offers guidance as to how the word 'dependent' could be incorporated on a domestic plane in this nature:

> "*Dependent* persons should be understood as persons who depend for their existence substantially and directly on any other person, in particular because of economic reasons, but also taking emotional dependency into consideration."[301]

[298] UNHCR, 2001.
[299] UNHCR, 2001, pp. 4-6; Hawthorne, 2007, p. 827.
[300] UNHCR, 2001, pp.5-6.
[301] *Idem*, p.5.

Further, *UNHCR Guidelines on Reunification of Refugee Families*[302] expands upon this, supporting the position that dependent persons should specifically include: i.) 'dependent parents of refugees', if they were dependent on the child prior to separation and if they would be left alone or destitute in a country without reunification; ii.) 'other dependent relatives', if that relative had lived as a dependent with the family unit prior to separation; or if after resettlement the circumstances of the relative living abroad changed so that that they have no other source of support (e.g. the death of both parents); and iii.) 'other dependent members of the family unit', if that dependent person had been wholly cared for by the US residing refugee as part of a family unit prior to separation (e.g. foster children).[303]

Interestingly, the P-3 Program, prior to its suspension, included a more expansive meaning of family, which was not as far-reaching as the UNHCR guidelines and guiding principles, but did allow reunification with individuals outside the nuclear family in compelling humanitarian circumstances.[304] As the P-3 has been pushed to the side for security reasons, however, and the dependency principle never received inclusion into the I-730 petition, this has meant that thousands of refugee families have lost their opportunity to enjoy their right to family life as foreseen under the protection of the ICCPR. The matter requires urgent reform and policy attention.

[302] UNHCR, 1983.
[303] *Idem*, p.3.
[304] See pages 57-60 above.

Grounding the scope of eligibility in principles of dependency would afford the United States the necessary 'operational flexibility'[305] in the implementation of human rights obligations relating to refugee families.[306] Further, it would align the meaning given to family in the immigration context with the meaning given to it by the Supreme Court and the way it is understood in reality in American society.

I do not intend to suggest that broadening the scope of eligibility will not come without inherent challenges. Some issues may perhaps unfold unexpectedly; however, others may be anticipated in advance. Firstly, it is likely that there will be difficulties in verifying alleged de-facto familial relationships, particularly in regards to applicants relying on claims of psychological or emotional dependency.[307] In these instances, the dependency principle incorporates both subjective and objective elements; and the subjective component carries the risk of fraudulent claims being lodged. Secondly, claims which do not fall within the nuclear family parameters will require a case-by-case assessment, which may very well lead to inconsistency in the decisions reached. [308] These potential problems are not entirely dissimilar to the problems associated with adjudicating asylum claims generally, and perhaps the most useful means of overcoming them is through the proactive adoption of procedures and guidelines for immigration case-officers. In this regard, the Adjudicators Field Manual should include comprehensive and extensive guidelines as to how credibility assessments should be made. In regards to assessing the subjective element, for example, immigration officers should be required to consider all circumstantial evidence including the

[305] UNHCR, 2001, p.5.
[306] Jastram and Newland, 2003, p.584.
[307] UNHCR, 2002, paragraph 14.
[308] *Idem*, paragraph 18.

background of the applicant and their personal considerations of their relative. In instances where the emotional or psychological ties are unclear, immigration officers should be granted discretion to request further evidence by way of a psychological report. A change in legislation of this nature would of course require officer training, which should be run in consultation with UNHCR and the Office for Refugee Resettlement (**ORR**). Immigration officers should accordingly be briefed on common culture-specific familial relationships, the frequent circumstances surrounding the forced separation of refugee families, and the obligation to ensure the rights of families and children as codified in the ICCPR.

C. Reform to Evidentiary Requirements

The evidentiary requirements of the I-730 require critical attention and reform. Firstly, there must be enhanced collaboration and communication between DHS/USCIS and UNHCR regarding the situations in refugee camps, which must translate into more flexible and situation-specific documentary requirements. UNHCR publications verify that refugees, in practice, frequently do not have access to civil departments and civil officers within their refugee camps, despite being entitled to such authorities at law.[309] It is therefore unreasonable to require civil marriage certificates for refugees married within the camps. The Federal Regulations and Adjudicators Field Manual should be revised to permit petitioners to rely on religious certificates as primary evidence when marriage has occurred within the refugee camps. Likewise, this would accord with a broadening of the eligibility criteria, which would permit both legally recognized marriages as well as traditional marriages and de-facto partnerships, provided an effective family life and the requisite dependency ties were also in existence.

[309] Da Costa, 2006, p.13; Rutinwa, 2005, p.8.

Reliance on a broader scope of family would also mean that adoptions which had not been formalized at law would be permissible under the principles of dependency. This would mean that the evidentiary requirements for the production of legal adoption papers would not be mandatory. As a final point of reform that is central to the rights of children *vis-a-vis* the family, UNHCR should revise their policies so that all birth certificates produced following a refugee camp birth include both the names of the birth mother *and* birth father, or as a second option, the Federal Regulations and Adjudicators Field Manual should be revised to accept Affidavits of Relationships/Parenthood as primary evidence verifying the bona fide nature of such parent-child relationships.

D. Ratification of the CRC

Despite the active role that the United States played in the drafting of the CRC, and the fact that they are the only remaining country with a recognized civil government to object to the Convention's ratification, the United States resistance to full implementation of the CRC persists.[310] Although Obama has commented that he will review the U.S.' position regarding ratification,[311] to date, the U.S. remains a mere signatory of the Convention. This paper has demonstrated the myriad of problems associated with the protection, or lack thereof, of children's rights in the context of U.S. immigration law. The United States must assume the leadership role that it proclaims to possess and afford children the protection deserving of their status as minors.[312] The time has come to ratify the CRC and

[310] Todres, 2009, p.20.
[311] *Idem*.
[312] Report to Congress, 2012, p.11: Secretary of State Clinton remarked, "The United States has a history of upholding human rights and humanitarian principles. For decades we have led the world in overseas support for humanitarian protection and assistance, and we have provided asylum and refugee resettlement for millions. In doing so, we show through example our dedication to basic

align U.S. refugee reunification standards with the protection afforded to children in the family reunification provisions of the CRC.[313] In practice, this would mean that the laws would need to be reformed so as to i.) permit refugee children within the United States to petition for reunification with their parents, as opposed to the status quo, which only permits a one-way approach allowing parents to apply for children, but not vice versa; ii.) adopt the dependency framework for eligibility criteria and evidentiary requirements as discussed above; iii.) afford children the opportunity to re-submit applications which have been incorrectly submitted by parents and denied as a consequence; and iv.) ensure reunification petitions involving minor children are dealt with as a matter of urgency.

E. Finding the Balance Between National Security and Human Rights

Barry Buzan remarked in his book, *People, States and Fear*,[314] "[t]he security of individuals is locked into an unbreakable paradox in which it is partly dependent on, and partly threatened by, the state."[315] This is markedly evident in the context of the refugee reunification program and the USRAP generally; security of the individual is weighed against the security of the collective, and when the latter prevails, the former is side-lined and sometimes entirely disregarded. For the refugee seeking to reunite, the family is the source of security, and human rights are, or ought to be, the vehicle for that security. For the state, security may come in a myriad of different forms, including economic, cultural, political and/or

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human decency, to our responsibilities under international law, and - along with the rest of the international community - to ensuring refuge when innocent lives hang in the balance. We do this because our country's values must be a critical component of our foreign policy."

[313] See generally: King, 2009.

[314] Buzan, 1983.

[315] *Idem*, pp.. 363-364.

human security.[316] Although in theory, human rights should guide immigration policies such that the two co-exist in a complementary and balanced manner, too often it is the case that immigration laws disproportionately favour state security over the individual security as it flows from human rights.[317]

The concerns over national security, which have surged since September 11, combined with the long-standing concerns about the costs, both cultural and economic associated with supporting refugees in the process of resettlement (e.g. – education, medical care, dilution of cultural identity) have grown considerably since the economic downturn. This of course has contributed to a general decline in political will to develop more inclusive reunification policies.[318] Typically, and now more than ever, the government sees its policy options as either prohibiting or limiting migration, not enhancing or enlarging it.[319] However, this approach is misguided particularly in the context of family reunification as it fails to take into account the strong moral and policy reasons for devising effective, efficient and just immigration laws to protect refugee families, not separate them.

The family provides the necessary support to enable newly resettled refugees to integrate, economically, socially and culturally into their new home.[320] Refugee families have been shown to frequently pool their financial resources and devise

[316] For a discussion regarding the security threats in the 21st Century, See: Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 2004. The word 'security' has been said to imply various meanings amongst authors and international lawyers as there is in fact no single and universally agreed definition of security and those matters that legitimately threaten its existence. Although many would agree that the term includes, 'political, economic, societal, environmental as well as military aspects.'
[317] Jastram and Newland,2003, p.562.
[318] Aleinikoff, Martin, Motomura and Fullerton, 2008, p.182; Jastram and Newland, 2003, p.558.
[319] Aleinikoff, Martin, Motomura and Fullerton, 2008, p.247.
[320] UNHCR, 1983, p.1.; UNHCR, 2002, paragraph 5; Jastram and Newland, 2003, p.558.

strong support networks for one another, enabling them to have greater success in accessing the job market, education sector and social and cultural activities of the resettlement society.[321] Likewise, the right to create a family and to enjoy in that creation is inherent to individual dignity and lies at the cornerstone of our society. The support, be it physical, psychological, emotional, spiritual or financial, that flows from family is what anchors the individual in the world on a micro level and what creates a productive and stable society on a macro level. These are the critical points and the matters which must necessarily be afforded proper consideration when balancing state security against the security of the individual and family integrity.

F. Abolishing the Doctrine of Plenary Power

The conundrum that the United States finds itself in with regards to its immigration laws becomes most evident when viewed from the lens of the doctrine of plenary power. The doctrine has afforded the political branches of government absolute and full power to design immigration laws as they see fit. However, as seen from the discussion above, Congress too often see the protection of state security and sovereignty as its priority in the context of immigration, not the application of human rights.[322] Thus, when basic fundamental rights fall to the way-side, violating constitutional rights, including privacy, due process and equal protection rights, the judiciary is bound to close its eyes to those violations. It is no wonder that leading immigration scholars such as Professor Louis Henkin have harshly attacked the doctrine, highlighting its racist

[321] UNHCR, 2001, p.10; Jastram and Newland, 2003, p.563.
[322] Jastram and Newland, 2003, p.562.

undertones and its toleration, and perhaps even encouragement, of xenophobic and paranoid attitudes towards immigrants.[323]

> "The doctrine that the Constitution neither limits governmental control over the admission of aliens nor secures the right of admitted aliens to reside here emerged in the oppressive shadow of a racist, nativist mood a hundred years ago. It was reaffirmed during our fearful, cold war, McCarthy days. It has no foundation in principle. It is a constitutional fossil, a remnant of a pre-rights jurisprudence that we have proudly rejected in other respects. Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint. No such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional."[324]

Indeed, the grounds of justification for a judicial doctrine which affords "special" deference to Congress regarding the constitutional validity of laws - only in the realm of immigration - do not appear to be well-founded or logical.[325] The reality is that Congress is simply not always capable of properly balancing national self-interests against the rights of migrants, as made evident throughout the duration of this paper. Thus, imbuing them with a virtually 'untouchable' level of power, with no proper channels of review for the laws which flow from that power, is simply inappropriate.[326]

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[323] Henkin, 1987, p.857.
[324] Henkin, 1987, p.862.
[325] Legomsky, 1994, p.937.
[326] Guendelsbergert,1988, p.3. See also: Anderfuhren-Wayne, 1996, pp.369-372; Hawthorne, 2007, pp.811-814; Henkin, 1987; Legomsky, 1994; Saito, 2001.

If there ever was a time that the political branches of government require an objective branch of government to review their legislative decisions regarding immigration, it is now. The prioritization of national security, including cultural and economic security, is blurring the lines of compliance with regards to human rights obligations. Globalization and the technological revolution have changed the way in which humans and states relate in the twenty-first century, and the way in which threats to peace and security are perceived and addressed. Although this situation of interconnectedness has come with great benefits, it is equally challenging state sovereignty and the security climate in which we exist, either in reality or perception.[327] When those perceptions translate into laws, which do not accord with the reality, it becomes necessary for the Courts to step in to invalidate those laws. This is how our legal system operates in all other respects; immigration should no longer be the exception.

There are great difficulties reconciling the decision in *Moore*, which recognizes that the family should be afforded constitutional protection with the same Court's decision in *Fiallo v. Bell*, which permits the doctrine of plenary power to deny that protection to the immigrant family, simply because they seek to find protection through the immigration channels. Family unity, and the right for a family to reside as an integral whole, is a fundamental right for a reason. It goes to the core of an individual's identity and sense of dignity. It is not intended to apply only sometimes, and in some contexts. It is intended to apply as the rule; and when Congress only permit it to apply in part or as the exception, the judiciary needs to step in. The doctrine was decided over half a century before the United

[327]Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 2004, pp. 13-14.

States treaty obligations regarding human rights and has stayed beyond its welcome in the United States' legal system. As Henkin concludes, "*Chinese Exclusion* – its very name is an embarrassment – it must go."[328]

[328] Henkin, 1987, p.863

VII. CONCLUSION

In a recent speech regarding the debate on immigration reform, President Obama commented, "Nearly every American has their immigration story."[329] Indeed, the United States is a country composed largely of immigrants; before we were 'American', we were mostly immigrants. This is a point worth remembering when devising our immigration laws and policies. Refugees are not the other, and our protection of human rights in the United States should not be applied as such.

Family is the common denominator of humanity. It has existed since our creation in every country, in all parts of the world. Perhaps it may manifest differently in different contexts, but the core feature of families - being support - transcends social, cultural and societal boundaries. The challenge to be tackled now is to create an immigration system which appreciates and reflects the importance of family and the support that is derived from that social unit. If we are to respect our legal and moral commitments to the international community and the founding principles upon which our country was built, this is the task that awaits our embrace.

Respecting the right to family for refugees is not just a feel-good exercise; it is common sense. Family support leads to integration. Side-stepping international human rights obligations by way of either questionable or entirely legless security

[329] The White House, Washington, 'Fixing the Immigration System in our 21st Century Economy,' available at http://www.whitehouse.gov/issues/fixing-immigration-system-america-s-21st-century-economy.

and sovereignty arguments may blur the lines of compliance at first glance, but at a second glance, the United States is the one paying the cost. From an economic standpoint, refugees that are denied the basic financial, psychological and physical support of family too often end up reliant upon the welfare channels for support, rather than achieving independence through their family structures.[330] From a cultural standpoint, our immigration system, which relies on different treatment, an outdated doctrine that permits laws to be extra-constitutional and prioritizes security above all else, is contributing to a culture of racism, xenophobia and fear of the other that cannot be tolerated at this day in age.

In a recent press statement regarding the triumphs of the USRAP, the PRM Deputy Assistant Secretary, Reuben Brigety, quoted an extract from the 17th Century English poet, John Donne's Meditation XVII:

> "No man is an island,
> entire of itself.
> Every man is a piece of the continent;
> a part of the main."[331]

I do not disagree with Mr. Brigety's choice of prose as I find it illustrates the United States' obligations regarding the protection and assistance of refugees well. However, I see even further meaning in the poem, analogous to the refugee family reunification system in particular. Our interconnection carries with it both responsibility and dependency: the United States is part of the greater international community; the individual is a part of the family. Both entail

[330] Jastram and Newland, 2003, p.563.
[331] Reuban, Press Conference, 20 June 2012.

respective duties to the greater entity. Before the refugee may fulfil their responsibilities to the family, the United States must first fulfil their obligations to the international community. This is the challenge to be tackled in the forthcoming reforms regarding immigration laws in the United States.

TABLE 1

Protection of the Refugee Family: Obligations of the United States within the International Human Rights Framework [332]

Legally Binding Provisions	
International Covenant on Civil and Political Rights (signed 5 October 1977 and ratified 8 June 1992)	**"Article 17: [privacy]** 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home... 2. Everyone has the right to the protection of the law against such interference or attacks."
	"Article 23: [protection of the family] 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized..."
	"**Article 24: [rights of children]** 1. Every child shall have without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor on the part of the family, society and the State..."

[332] List does not include regional instrument, American Convention on Human Rights – the "Pact of San Jose" (22 November 1969), which was signed but not ratified by the United States (non-binding). It is noted, however, that Articles 11, 17 and 19 of the Convention refer to protection of the family, similar to that mentioned in the ICCPR.

Non-Binding Persuasive Provisions *	
Universal Declaration of Human Rights	**"Article 12: [privacy]** No one shall be subjected to arbitrary interference with his privacy, family, home... Everyone has the right to the protection of the law against such interference or attacks."
	"Article 16: [right to marry and family life] 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal right as to marriage, during marriage and at its dissolution... 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State**.**
	"Article 25 [motherhood and childhood]... 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."
International Covenant on Economic, Social and Cultural Rights (signed 5 October 1977 but not yet ratified)[333]	**"Article 10: [protection of family, mothers and children]** 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children... 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth... 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions....

[333] While the signing of a treaty does not commit the United States to ratification, it does oblige it to refrain from acts that would defeat or undermine the treaty's objective and purpose.

Convention on the Rights of the Child (signed 16 February 1995 but not yet ratified)	"**Article 3: [best interests of the child]** 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and to this end, shall take all appropriate legislative and administrative measures. 3. States shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."
	"Article 5 [rights and duties of parents] State Parties shall respect the responsibilities, rights and duties of parents, or where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."
	"Article 8: [right to the preservation of identity] 1. States Parties undertake to respect the right of the child to preserve his or her identity, including...family relations as recognized by law without lawful interference..."
	"Article 9: [separation from parents] 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will..." 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known…"

	"Article 10: [family reunification] 1. Applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by State Parties in a positive, human and expeditious manner. State Parties shall further ensure that the submission of a request shall entail no adverse consequences for the applicants and for the members of their family..."
	"Article 16: [protection of privacy] 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home... 2. The child has the right to the protection of the law against such interference or attacks."
	"Article 18 [responsibility of parents] 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern..."
	"Article 22 [refugee children]... 2. State parties shall take appropriate measures to ensure that a child...considered a refugee... shall... receive appropriate protection and humanitarian assistance.... 3. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention."

TABLE 2

2010 United States Census: Households and Families

RELATIONSHIP TYPE	TOTAL
Total household population	**300,758,215**
Householder	**116,716,292**

		Under 18 years	18 to 29 years	30 to 44 years	45 to 64 years	65 years and over
Biological son or daughter	*	**60,466,596**	**16,087,762**	**3,941,728**	**2,093,818**	**72,132**
Adopted son or daughter	*	**1,527,020**	**403,568**	**99,376**	**41,282**	**1,076**
Stepson or stepdaughter	*	**2,784,531**	**1,080,511**	**217,220**	**61,226**	**2,398**
Spouse	**56,510,377**					
Brother or sister	**3,433,951**					
Father or mother.	**3,033,003**					
Grandchild	**7,139,601**					
Parent-in-law	**925,713**					
Son-in-law or daughter-in-law	**1,216,299**					
Other relative	**4,662,672**					
Roomer or boarder	**1,526,210**					
Housemate or roommate	**5,223,365**					
Unmarried partner	**7,744,711**					
Other non-relative	**3,805,765**					

	Household members that **would generally fit within the meaning of family** under the I-730, provided that children are unmarried and adopted/stepchildren
	Household members that **might be said to fit within the meaning of family** under the I-730, provided that children are unmarried and under 21 years
	Household members that **do not fit within the meaning of family** under the I-730

*** Totals have been broken down into age categories as I-730 only permits reunification with children under the age of 21 years so it is relevant to see the ages of the sons and daughter of the householder.**

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