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A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement

by Kathleen M. Keller

INTRODUCTION

1 If there are two groups of individuals who currently have very little support among the American people and legislature, it is surely immigrants and criminals. As a result, the brunt of the 1996 immigration reforms fell hardest upon those with criminal backgrounds. The campaign to reform the immigration laws was sold to the American public as a campaign to expel "undeserving aliens," chief among them the so-called "criminal aliens."

However, this politically expedient reform was executed at the expense of the United States obligation of non-refoulement under the Convention Relating to Refugees. As a result, untold numbers of refugees are now eligible to be returned to certain death and imprisonment because of minor or unproven criminal histories. Every such instance of refoulement will constitute a violation of international law.

2 The duty of non-refoulement is at the heart of the Convention Relating to the Status of Refugees.

It is through the concept of non-refoulement that the Convention signatories expressed their commitment that refugees would never again be returned to face death or imprisonment, as had many Jewish refugees during the Holocaust. Most signatory nations have historically taken this commitment seriously, giving more deference to the Convention's words than they have to other international instruments. The United States has been party to the Convention since 1968, when it acceded to the 1967 Protocol Relating to the

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And, like most nations, the U.S has for the most part taken this commitment to heart. Citations to the Convention have occurred in administrative guidelines, in federal case law, in the pages of the Congressional Record, and even in the United States Code itself. However, recent amendments to the Immigration and Nationality Act have chipped away at Convention compliance. One notable way in which the changes have affected the duty of non-refoulement is by greatly expanding the class of individuals subject to deportation based upon actual or alleged criminal acts. The Convention allows for the return of certain "undeserving" refugees. However, U.S. law now goes far beyond what the Convention allows, mandating deportation for many persons who have valid claims for non-refoulement under the Convention.

Against our international law obligations and the moral imperative not to peremptorily return individuals to their death, we should weigh the United States' interests in tightening immigration laws. The 1996 changes, like many of the earlier changes to the immigration law, were fueled by the perception that immigrants are an undue burden on the United States. Immigrants with criminal histories, like immigrants receiving public benefits, were therefore an obvious target. In the words of one federal judge, "[t]he Attorney General is not obliged to shelter people from despotic persecution abroad so that they may enjoy lawful imprisonment in the United States." In addition, much of the 1996 law was motivated by a perception that many asylum claims are frivolous moves intended to postpone inevitable deportation. However, the United State's interest in expediency and economy pale in comparison with the importance of the fundamental human rights norm of non-refoulement embodied by the Refugee Convention. As this Note will show, the drafters of the Refugee Convention carefully provided a certain level of protection for host countries. Other countries have found that they can adhere to the norms established by the Convention without too great a cost to their society. Surely the United States may also strike such a balance within the demands of the Convention.

This Note will examine how the United States immigration law has become increasingly out of synch with the mandate of the Refugee Convention. Section One will show that non-refoulement is one of the most widely respected human rights norms. This section will also examine the various exceptions to non-refoulement allowed by the Refugee Convention, discussing how each exception has been interpreted by both international law experts and various signatory countries. Section Two will deal with U.S. compliance under the Refugee Convention. It will
begin by showing that the Congress and federal courts have long considered the duty of non-refoulement to be binding. However, since 1990, the immigration laws have gradually expanded the class of persons subject to exceptions, so that the class now far exceeds what is permitted by the Refugee Convention. I conclude that the U.S. law not only violates the letter and spirit of the Refugee Convention, but is also out of line with the interpretations accorded the Convention by other signatory nations. The conclusion will also outline specific changes that can be made in order to bring the U.S. into compliance with the standard interpretations of the Refugee Convention.

I. THE MANDATE OF NON-REFOULEMENT

§5 The duty of non-refoulement is enshrined in Article 33 of the Refugee Convention, which prohibits returning any refugee to a country "where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion." Article 33 provides an exception for any refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is," or "who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." In addition, the duty of non-refoulement may be further limited by the Article 1 of the Convention, which states that the term "refugee," by definition, does not include individuals who have: "committed a crime against peace, a war crime, or a crime against humanity...", committed "a serious non-political crime outside the country of refuge prior to his admission to the country of refuge," or "been guilty of acts contrary to the purposes and principles of the United Nations." 

A. Significance in International Law

§6 The duty of non-refoulement is so widely accepted and highly respected within international law that it appears to have achieved the status of customary international law, indicating that it would be

6. Refugee Convention, supra note 2, art. 33(2).  
7. Refugee Convention, supra note 2, art. 1F(a).  
8. Refugee Convention, supra note 2, art. 1F(b).  
9. Refugee Convention, supra note 2, art. 1F(c).  
10. The Restatement of Law states that "[c]ustomary international law results from a general and consistent practice of states followed from a sense of legal obligation." Restatement (Third) of the Law, §102(2). Specifically, the Restatement says that "[i]nternational agreements create law for the states parties thereto and may lead to the creation of customary international law [for states which are not parties] when such agreements are intended for adherence by states generally and are in fact widely accepted." Id.
obligatory even without the clear language of the Refugee Convention. Professor Goodwin-Gill argues that, "[t]here is substantial, if not conclusive, authority that the principle is binding in all states, independently of specific assent. State practice before 1951 is, at the least, equivocal as to whether, in that year, Article 33 of the Convention reflected or crystallized a rule of customary international law." As a result, most states are reluctant to admit to a violation of their Article 33 obligations.

A host of international agreements attest to non-refoulement's broad acceptance within international law. These instruments have steadily expanded the doctrine's scope outside the Refugee Convention. Under the general body of human rights law, the right of non-refoulement is frequently considered to extend beyond those persecuted for the reasons enumerated in the Refugee Convention, to provide protection to all immigrants, depending on the conditions in their home country. Article 45 of the Fourth Geneva Convention of 1949 prohibits refoulement to a country where there are Geneva Convention violations, and any deportation which violates this mandate is considered a "grave breach" of the Convention. Article 3 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment prohibits any refoulement to a country where there are "substantial grounds" for believing the individual will be a victim of torture. And the European Commission on Human Rights has interpreted Article 3 of the European Convention on Human Rights to provide a right of non-refoulement to any country where the person would be subjected to torture or inhuman or degrading treatment. In sum, the international community has signaled its consistent respect for non-refoulement.

B. Interpretations of the Exceptions Within International Law

The purpose of the enumerated exceptions to non-refoulement was to strengthen the norm of non-refoulement by making it a realistic policy for host countries. The preparatory works of the Convention demonstrate that the Convention drafters intended to strike a balance between

[References]

11. See Joan Fitzpatrick, Revitalizing the 1951 Refugee Convention, 9 HARV. HUM. RTS. J. 229, 251 (1996) ("The most enduring contribution of the Convention is its elevation of nonrefoulement to the status of an obligatory norm.").
13. See Fitzpatrick, supra note 11, at 237.
14. Race, religion, nationality, membership in a particular social group, and political opinion are the five bases for Article 33 protection specified in the Refugee Convention.
protecting refugees, including those with criminal histories, and protecting the host countries' communities from potentially dangerous criminals. The drafters of the Refugee Convention debated whether the host country should have discretion in applying the exceptions, or whether the exceptions should be a mandatory bar to receiving refugee status. The United States argued that the host country should have the discretion to grant refugee status even if the individual fell into one of the categorical exceptions to refugee status. The end compromise was that exclusion would be mandatory only for those individuals who had committed an Article 1(F)(a) "crime against peace, a war crime, or a crime against humanity." All other exceptions were to be applied at the host country's discretion. As stated above, there are two classes of exceptions that may apply to the duty of non-refoulement. These are the exceptions contained within Article 33, which are specific to non-refoulement, and the exceptions contained within Article 1, which relate to the definition of refugee. Some commentators have asserted that an individual with an Article 33 claim to non-refoulement is not affected by the definitional exceptions of Article 1. However, because Article 33 specifically employs the term "refugee" (as opposed to "person" or "individual") and because Article 1 states that its exceptions apply to all the Convention's protections, one may reasonably conclude that Article 33 incorporates the additional Article 1 exceptions. When one considers the spirit of Article 33, which is to provide absolute protection for the most at-risk individuals, it is odd to conclude that the Article 33 requirements impose a burden above and beyond that imposed upon the ordinary refugee seeker. However, a strictly textualist approach would support the view that a signatory nation could apply the Article 1 exceptions to an individual seeking non-refoulement without violating the Refugee Convention.

1. Threats to Security

§9 The Article 33 "threats to security" exception appears to be fairly narrowly applied. A strict construction would allow the return of any refugee "whom there are reasonable grounds for regarding as a danger to the security of the country," regardless of whether this danger was previously manifested in criminal acts. However, perhaps due to evidentiary concerns, this bar is typically applied only in the case of immigrants who have manifested their dangerousness by criminal acts. For instance, the Swedish Aliens Act allows return if the alien has already

21. Id. at 364-65 ("[W]hile a serious crime may be sufficient to deny refugee status, it takes a 'particularly serious crime' to deny non-refoulement . . .")
22. On the other hand, because states are required to accept refugees who meet the Article 33 requirements, it may be reasonable to expect these individuals to meet a more exacting standard of behavior.
taken part in activities that make him a security risk, and can still be considered to be such a risk.23 Gunnel Stenberg argues that the "security" clause is meant to be more restrictive than the "particularly serious crime" clause that follows. He contends that only "refugees who seriously threaten the foundations of the State or even its existence" fall under this bar.24 Because of the narrow applicability and the evidentiary concerns, in practice, the "security" bar appears to have been largely subsumed under the "particularly serious crime" bar.

2. Particularly Serious Crime

¶10 The first threshold question in applying this bar is whether the Refugee Convention's language of "a refugee... who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country" imposes one or two requirements. In other words, is commission of a dangerous crime per se evidence of dangerousness to the community, or must the two aspects be proved independently?

¶11 Some commentators have argued that the terminology and jurisprudence are ambiguous.25 However, the weight of opinion has concluded that the two are separate requirements for applying the bar.26 The United National High Commissioner for Refugees (UNHCR) guidelines follow this approach, stating that:

Whether the commission of a crime by a refugee makes him a danger to the community is a quaestio facti.... [A] person, who... has been convicted for a capital crime—which he has committed in a state of emotional stress or in self-defense—would not constitute a danger to the community.27

The Germans have explicitly adopted this approach, requiring their Aliens Office to establish that the alien is in danger of relapsing into crime and thereby constitutes a serious threat to the community before refoulement is allowed.28

¶12 The second threshold question in applying this bar is what types of crimes are "particularly serious." Many international jurists recommend a balancing approach over any per se definition, arguing that "the application of Article 33(2) ought always to involve the question of proportionality, with account taken of the nature of the consequences likely to befall the refugee on return."29

24. Id. at 220.
25. See, e.g., GOODWIN-GILL, supra note 12, at 96.
26. See, e.g., STENBERG, supra note 24, at 221.
27. See id. at 228.
28. See id. at 221.
29. See GOODWIN-GILL, supra note 12, at 96. However, Grahl-Madsen suggests a possible
It is clear that the Refugee Convention drafters attempted to make this a very narrow exception. In the original draft, the language for the exception was "particularly serious crimes or offences" but the language was changed to the singular because "the Conference wished to point out that continuous criminality in itself should not motivate return to a country of persecution." The UNHCR recommends a contextual approach and has issued the following guidelines for applying the "particularly serious crime" exception:

Repatriation must only be applied as a last resort where no other measures appear possible to prevent the person from endangering the community... What constitutes an offence permitting forcible repatriation in one case may not be such an offense in another case because of the circumstances of the crime and the character of the criminal. Only where one or several convictions are symptomatic of the basically criminal, incorrigible nature of the person and where any other measure (detention, assigned residence, resettlement in another country) are [sic] not practical to prevent him from endangering the community may repatriation be resorted to.

The Swedish courts have opted for a contextualist approach in applying their immigration law, which incorporates the Convention terms almost exactly. This approach is inevitably amenable to arbitrary application. For instance, in one case the Swedish Court of Appeal expelled a South African who had been sentenced to a cumulative six and a half years for drug offenses. But in another case, the Court of Appeal found that an Eastern European who had been sentenced to an aggregate fifteen years for drug offenses and smuggling, had not committed crimes which would invoke the "particularly serious crime" exception. However, the contextual approach allows the courts to remain true to the spirit of the Refugee Convention. For instance, in one case an individual, who was convicted of grand larceny, robbery, grand robbery and serious smuggling of goods and sentenced to seven and a half years in prison, was determined to have committed a "particularly serious crime" but was not expelled because of the "particularly serious" nature of the persecution he faced. Similarly, the Canadians will look both to the context of the crime

alternative—that a particularly serious crime is any crime for which the punishment in Europe or North America is five years or more of incarceration or death. See Grah Madsen, 1 Status of Refugees in International Law 294 (1966). This approach already recognizes that some countries apply criminal sanctions more readily than do others, and therefore that using the duration of the criminal sentence as a proxy for seriousness is problematic. As the United States imposes ever-longer terms of incarceration for non-violent crimes, such a per se approach becomes increasingly untenable.

30. See Stenberg, supra note 24 at 228.
31. See id.
32. See id. at 232.
33. See id. at 235.
and the degree of persecution faced in the home country when determining whether a crime is "particularly serious" and whether the individual is a "danger to the community."34

3. Crimes in violation of international human rights law

15 Article 1(F)(a) of the Refugee Convention Crime explicitly excludes from the definition of "refugee" individuals who have committed crimes against peace, crimes against humanity and war crimes. The exceptions, contained in Article 1(F)(a), are meant to accord with the definitions found in the relevant international treaties and United Nations resolutions.35 The original intent was for the Charter of the International Military Tribunal and the 1949 Geneva Conventions to govern the definitions of "crimes against peace" and "war crimes,"36 but it is reasonable to presume that the definitions have evolved along with international law. The International Law Commission (ILC) interprets the scope of 1(F)(a) as being limited to "crimes which affect the very foundation of human society," taking into consideration "the nature of the act in question (cruelty, monstrousness, barbarity, etc.) or... the extent of its effects (massiveness, the victims being peoples, populations or ethnic groups), or... the motive of the perpetrator (for example, genocide) or... several of these elements."37 The ILC also recommends recognition of the affirmative defenses of coercion and necessity, so long as the harm inflicted by the refugee is not greater than the harm the refugee would face if repatriated.38

16 Signatory countries have typically limited the application of these clauses to particularly shocking crimes in which the refugee had direct involvement. For instance, in refusing to apply Article 1(F)(a) to a refugee who had been an Iranian official during the 1980s, a Belgian court held that "the only fact of having occupied responsible posts in a regime of which certain authorities have been guilty of serious violations of fundamental individual rights, is insufficient...to justify the application of an exclusion clause..." The court held that, in order to repatriate, the government must show that "there exists serious reasons to believe that the claimant has directly committed crimes against humanity..." Because the individual in question had not had any authority over the abusive corps, he was not subject to refoulement.39 Likewise, the Canadian court has held that "mere...
membership in an organization that from time to time commits international offences is not normally sufficient for exclusion from refugee status." However, individuals who are both present at the scene of an offense and are members in the offending group can be considered to be "personal and knowing participants." As a result, the Canadians excluded under Article 1(F)(a) an El Salvadoran army official who rounded up people who were later tortured, but allowed another El Salvadoran, who was forcibly conscripted and once witnessed fellow soldiers torturing a civilian, to stay. 4 This is similar to the approach that has been taken by the Swiss, who allowed a member of the Turkish Communist Party/Marxist-Leninist to remain because he did not play a causal role in the "reprehensible acts" committed by his Party. 4

4. Serious Non-Political Crime Committed Outside the Country of Refuge

The drafting history of this "serious non-political crime committed outside the country of refuge" exception, found at Article 1F(b), suggests that it was meant to provide a modification to the existing law of extradition. As such, the Drafters intended it to apply only to individuals who had committed crimes prior to entry into the host country and who were fugitives from justice, not people who had been convicted and served their time. This interpretation has been adopted by some countries, including Canada. 42

The difficulty in applying this bar is two-fold: determining which crimes are serious enough, and determining which crimes can be termed "political." During the 1980s, when the United States was faced with about 125,000 Cubans seeking entry, it requested guidance from the UNHCR. The High Commissioner's office advised a contextual approach, stating that:

- If an individual had committed homicide, rape, child molestation, wounding, arson, drug trafficking or armed robbery, there would be a rebuttable presumption of "serious, non-political crime;"

- Burglary, stealing, receipt of stolen property, embezzlement, drug possession and use, and assault could be considered "serious, non-political" if combined with any of the following aggravating factors: use of weapons, injury to persons, value of property, dangerous drugs or evidence of habitual criminal conduct.

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40. See Jeanne Donald & Dirk Vanheule, Canada, in WHO IS A REFUGEE? 165, 218 (Jean-Yves Carlier et al. eds., 1997).
42. See Jeanne Donald & Dirk Vanheule, supra note 40, at 165, 218.
Either of the above could be rebutted by a finding of the following mitigating factors: minority of offender, parole, five years or more since conviction, general good character, offender was only an accomplice, provocation or self-defense.

Thus, the UNHCR approach is to consider the crime within the context of the refugee's behavior.

19 The "serious" modifier has not been limited to crimes causing death or bodily harm. As the UNHCR suggestions indicate, even drug offenses may qualify if they are sufficiently serious. In France serious breaches regarding dangerous narcotics are commonly considered "serious common law crimes" for purposes of Article 1F(b). The Canadian Court has indicated that for a crime to be "serious", it must "carry with it a heavy penalty which at a minimum will entail a lengthy term of imprisonment . . .".

20 Most parties also appear to agree that crimes that are extremely violent are not "political," regardless of their motivation. The UNHCR Handbook indicates that, in determining whether a crime is "political", an adjudicator should look to its nature, the actors' motive, and whether there is a close and direct causal link between the crime and the political objective. UNHCR further states that the political element should outweigh the common law crime element, and the act should not be "grossly out of proportion" to the political objective.

21 The European Union states that "particularly cruel actions" can always be termed "non-political." In this vein, the Canadian Federal Court has stated that, "[o]ne must look to the target of the attacks to determine whether a person can be classified as being a freedom fighter or a terrorist," arguing that political crimes attack military or governmental targets, whereas mere terrorists attack civilian targets. The United Kingdom's test is whether there is a direct causal link between the offense and any genuine political cause, and whether the offense is disproportionate to the cause. Following this reasoning, the Court of Appeal concluded that the bombing of an airport by an Algerian Muslim paramilitary organization was not a political offense.

22 An issue of debate is whether Article 1F(b) requires countries to consider the severity of persecution that the individual would face upon

43. See GOODWIN-GILL, supra note 12, at 62-63.
44. See Klaudia Schank & Carlos Pena Galiano, France, in WHO IS A REFUGEE? 373, 421 (Jean-Yves Carlier et al. eds., 1997).
47. See id.
48. See Donald & Vanheule, supra note 40, at 219. In the case mentioned, the Canadian court deported an Iranian claimant who had bombed the shops of merchants who supported the Ayatollah.
49. See Dirk Vanhuele, United Kingdom, in WHO IS A REFUGEE? 563, 606 (Jean-Yves Carlier et al. eds., 1997).
repatriation. At least one member of the British House of Lords has held that the definition of political "cannot depend on the consequences which the offender may otherwise suffer if he is returned." This case, however, involved a claimant who had killed ten innocent bystanders in an airport, an act that would not be considered political by any signatory country.

¶23 In contrast, the European Union has advocated a balancing approach, which takes into consideration both the context of the crime and the nature of the persecution faced by the refugee in determining the seriousness of a crime. This approach has been implemented by the European Court of Human Rights. The UNHCR has stated that countries should balance the nature of the crime against the severity of the potential persecution, and has indicated that this was the intent of the Convention drafters.

5. Crimes Contrary to the U.N. Principles

¶24 Article 1(F)(c) excludes individuals who have committed crimes contrary to the U.N. principles from the definition of "refugee." This exemption is rarely applied and seems to overlap almost entirely with the Article 1(F)(a) exception for international human rights violators. The European Union maintains that this clause "is directed notably at persons in senior positions in the State who, by virtue of their responsibilities, have ordered or lent their authority to action at variance with those purposes and principles as well as at persons who, as members of the security forces, have been prompted to assume personal responsibility for the performance of such action." In one of the few cases regarding this clause, the Portuguese Supreme Administrative Court held that membership in a Uruguayan guerrilla movement did not constitute acts contrary to the aims and principles of the United Nations. In another case, the Canadian courts overturned a holding by its Immigration and Refugee Board and stated that extensive trafficking in heroine is not a crime contrary to the principles and purposes of the United Nations.

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51. See European Union, supra note 36, at § 13.2.
54. See European Union, supra note 36, at § 13.3.
II. UNITED STATES COMPLIANCE WITH ITS CONVENTION DUTY

A. Recognition of the Obligatory Nature of Non-Refoulement

¶25 The United States became a party to the Refugee Convention when it acceded to the 1967 Protocol Relating to the Status of Refugees.57 The Protocol incorporates by reference the relevant provisions of the Refugee Convention by stating in Article 1 that, "[t]he States Parties to the present Protocol undertake to apply article 2 to 34 inclusive of the [1951 Refugee] Convention to refugees..."58 In acceding to the Protocol, Congress recognized the importance of non-refoulement, stating that "foremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened."59

¶26 However, the non-refoulement duty was not clearly incorporated into the Immigration and Nationality Act, leading to some confusion within United States law. Specifically, it was not clear whether Congress believed that the Protocol's provisions were self-executing within U.S. law.60 As a result, the Refugee Act of 198061 was passed in order to bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees.62 This created a provision entitled "Withholding of Deportation," found at the Immigration and Nationality Act § 243(h).63

¶27 The House Committee stated that "the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements."64 This purpose was recognized by the U.S. Supreme Court in United States v. Stevic.65

58. See id. at Article I(1). One of the purposes of the Protocol was to extend the Convention's protection to refugees whose status was the result of acts after 1951 and to eliminate geographical limitations on the protections. These were the only changes which the Protocol made to the definition of "refugee." The Protocol in no way modified Article 33 of the Convention.
60. The debate revolves around whether the Protocol's terms were self-executing, or whether they only took effect after Congress explicitly incorporated their terms into U.S. law. See United States v. Aguilar, 883 F.2d 662, 680 (9th Cir. 1989). Treaty and Convention terms which are non-self-executing may in some cases be treated as a form of federal common law, but generally can not override an existing state or federal law. See e.g., Sei Fujii v. California, 38 Cal.2d 718, 242 P.2d 617 (1952).
63. The addition of the Withholding of Deportation provision did not affect the existing statutory provisions for asylum, which involve a less strenuous standard than did the Withholding provisions.
Furthermore, the language of the Stevic opinion indicates that the Court recognized that this obligation, as well as the U.S. desire to meet its obligation, predated the 1980 amendments. The Court stated that "although the language through which Congress has implemented this policy... has changed slightly from time to time, the basic policy has remained constant—to provide a haven for homeless refugees and to fulfill American responsibilities in connection with the International Refugee Organization of the United Nations." Therefore, the obligatory nature of our commitment under the Convention and Protocol has been repeatedly confirmed.

¶28 Because of the Refugee Convention's mandate, the U.S. Supreme Court determined that withholding is mandatory, unlike simple asylum, which is granted at the Attorney General's discretion. Therefore, a refugee with a meritorious withholding claim has an "entitlement" under U.S. law. Because of the mandatory nature of the withholding provision, it was only available upon a showing of "clear probability" of persecution upon repatriation. As a result, federal courts allowed for special procedural precautions in withholding of deportation cases. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) changed the withholding provision, renaming it "Restriction on Removal." Nothing in the new law, however, indicated that the mandatory nature of the provision had changed.

B. A Troubled History of Compliance: Particularly Serious Crimes

¶29 Despite these positive statements regarding compliance, the United States has always had a troubled and contradictory history in interpreting the Convention's enumerated exceptions. The "particularly serious crime" provision, derived from the Conventions' Article 33(2) and inserted into U.S. law as a bar to Withholding of Deportation, has been the subject of the most litigation and judicial debate. In 1982, the Board of Immigration Appeals indicated that it would apply a contextual approach, such as has been recommended by many international scholars and adopted by many Convention signatories. The Matter of Frentescu case stated that


66. Id. at 415 (quoting Rosenberg v. Yee Chin Woo, 402 U.S. 49, 52 (1971)).
67. Id. at 423, 428 n. 22.
68. See Cardoza-Fonseca, 480 U.S. at 430-31 (1987). Ordinary asylum may be granted upon showing a "well-founded fear of persecution."
69. See, e.g., Amanullah v. Cobb, 862 F.2d 362 (1st Cir. 1988) (requiring advance assurance of acceptance by third country before deportation to a safe third country); Zavala-Bonilla v. INS, 730 F.2d 562, 564 (9th Cir. 1984) (holding that, because of the mandatory nature of withholding, courts have discretion to review the entirety of the record on appeal).
71. Due to the extraordinarily slow nature of immigration proceedings, most of the cases at the BIA and federal court level, including all cases cited in this Note, invoked the old Withholding of Deportation provision.
In judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.  

In 1990, the Ninth Circuit adopted this approach as the proper inquiry. However, in Crespo-Gomez, the Eleventh Circuit rejected Frentescu, instead holding that the statute established a causal link between the two—if the immigrant had committed a serious crime, he was necessarily a danger. The BIA followed this approach soon thereafter, holding that that once an immigrant's crime was determined to be "particularly serious," it necessarily followed that the immigrant was a "danger to the community." In addition, the BIA rejected the balancing approach, indicating that the severity of persecution faced by the refugee was irrelevant in applying the bar.  

The Immigration Act of 1990 resolved the split between the Ninth and Eleventh Circuits by establishing a list of so-called "aggravated felonies" which were to constitute "particularly serious crimes." Although the Act did not specify how the new "particularly serious" definition was to interact with the "danger to the community" language, the federal courts subsequently interpreted the "aggravated felony" list as establishing per se dangerousness. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act changed the definition of "particularly serious crime" to specify that aggravated felonies that led to an aggregate term of imprisonment of at least five years were to be considered "a particularly serious crime." In addition, IIRAIRA greatly expanded the list of aggravated felonies that triggered the statutory mandatory bars.  

When Congress passed the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), it included a provision, Section 413(f), which expressly gave the INS discretionary authority to withhold the deportation of individuals subject to the mandatory bars, if the grant of withholding was necessary to ensure compliance with the 1967 Protocol. The provision is a clear statement that Congress did not believe that the aggravated felony list was co-extensive with the Convention's exception for "a particularly serious crime" committed by an individual who "constitutes a danger to the community." However, Congress's attempt to comply with

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73. See Matter of Betran-Zavala, 912 F.2d 1027 (9th Cir. 1990).
74. See 780 F.2d 932, 934 (11th Cir. 1986).
78. See generally Matter of Q-T-M-T-, Interim Decision 3300 (B.I.A. 1996), 17 Imm. Rptr. B1-21, 1996 WL 784581 (listing federal court cases construing the statute as a per se rule).
80. See CHARLES GORDON, ET AL., IMMIGRATION LAW AND PROCEDURE, § 33.06[4][a] (1998); Abriel, supra note 19, at 370.
the Convention's mandate was eviscerated by the BIA in *Matter of Q-T-M-T-*. The Board, rejecting an advisory opinion of the UNHCR, held that a deportation under the per se rule could *not* contravene the 1967 Protocol. The Board argued that

> were we to rely upon UNHCR’s opinion and therefore accept the respondent's position that a categorical classification of per se 'particularly serious crime' contravenes Article 33 of the Convention, we would be essentially ruling that the United States has been in violation of the Protocol since 1990 when Congress first established the aggravated felony bar...  

That argument82 effectively rendered Section 413(f) meaningless.83 The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the authority granted by Section 413(f) of the AEDPA.84

83. The results of the five-year per se rule have already appeared in several cases. In one recent case, an Iranian refugee who faced torture and possibly death if repatriated, was denied Withholding based upon a conviction for possession with intent to distribute heroin and conspiracy to possess with intent to distribute. The BIA refused to make any finding as to whether he was a danger to the community because his conviction met the five-year sentence per se test for "particularly dangerous."88 Similarly, in the case of a Laotian man, the BIA found that whether the man had committed the crime "when his mental capacity was in a 'reduced state,'" as he claimed, was irrelevant to whether he posed a danger.86

84. For crimes with aggregate sentences of less than five years, IIRIRA gave the Attorney General discretion to consider whether they are "particularly serious" and thus a bar to Restriction on Removal or

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82. This reasoning is without support in legal doctrine. There is a doctrine of statutory construction (sometimes known as "the acquiescence rule") which argues that if an executive agency follows a particular course of action and Congress fails to correct that action, a court may assume that Congress intended for the law to be applied in that manner. *See generally WILLIAM N. ESKRIDGE JR. & PHILLIP P. FRICKEY, LEGISLATION 814 (2d ed. 1995).* However, in this case, Congress affirmatively expressed its dissatisfaction with the existing per se rule by including Section 413(f) in the AEDPA.
83. The BIA holding thus violated the accepted rule that statutory interpreters should presume that every phrase is meant to add meaning to the statute. *See e.g.,* American National Red Cross v. S.G. and A.E., 505 U.S. 247, 269 (1992).
84. *See GORDON, supra* note 80.
85. *See In Re H-M-V-*, Interim Decision 3365 (B.I.A. 1998), 1998 WL 611753. The BIA stated that "[t]he regulations specifically address the appropriate interpretation of the Protocol and the question of whether a separate consideration of an alien's dangerousness to the community is required," and concluded it was not required. The individual's attempt to invoke the Convention Against Torture's non-refoulement provision, which makes no exception for "particularly serious crime[s]," was unavailing because the BIA claimed that the Convention Against Torture was not self-executing and had not been incorporated into U.S. law. *See id.*
Withholding. In 1996, the BIA decided that immigrants with sentences less than five years were presumptively ineligible for Withholding of Deportation. Immigrants in that class bore the burden of rebutting their ineligibility for Withholding of Deportation by showing some "unusual aspect" of their conviction.

In one case that seems particularly questionable, the District Court upheld a BIA decision applying the presumption of ineligibility to a young Laotian refugee sentenced to two years in prison for driving a car from which a drive-by shooting occurred. In another, a Kurdish Iraqi whose father had actively opposed Saddam Hussein's party was deported based upon a single conviction in 1992 for controlled substance and firearms possession for which he had served eighteen months. In that case, the Sixth Circuit held that the man had "no colorable defense to deportation." In many of these cases, the adjudicators entirely fail to recognize that Withholding of Deportation is governed by a different standard than is simple asylum.

The Board now states that Q-T-M-T- was premised upon section 413(f) of AEDPA, now repealed. This is a convoluted argument: that a section intended to help the INS comply with its international obligation to refugees had the effect of establishing a presumption against the refugees. The Attorney General still has the statutory authority to consider crimes with sentences less than five years to be "particularly serious" and the new BIA decision does not establish any criteria for determining when this discretion should be exercised.

The expansion of the "particularly serious crime" bar has the potential to exclude a vast number of immigrants with valid claims for non-refoulement. Although the term "aggravated felony" conjures up visions of crimes that would certainly be considered "particularly serious," the U.S. immigration law employs a much broader definition of the term. The "aggravated felony" definitional grab-bag now includes crimes as varied as fraud, tax evasion, theft, bribery, and illegal entry or re-entry into this country by one previously deported, without any view to whether the

88. See In Re Q-T-M-T-, Interim Decision 3300 (B.I.A. 1996), 17 Imm. Rptr. B1-21, 1996 WL 784581. This holding was applied in subsequent BIA decisions. See e.g., In Re H-M-V-, Interim Decision 3365 (B.I.A. 1998), 1998 WL 611753. However, in at least one case, the BIA rejected the Q-T-M-T- presumption of ineligibility in favor of a contextual balancing approach for crimes with sentences under five years. See e.g., In Re L-S-J-, Interim Decision 3322 (B.I.A. 1997), 1997 WL 423130 (deporting 26-year old to Haiti based on finding that robbery with a handgun of about $600 from various individuals constituted a "particularly serious crime.").  
89. See e.g., In Re H-M-V-, Interim Decision 3365 (B.I.A. 1998), 1998 WL 611753.  
90. See e.g., Choeum v. INS, 129 F.3d 29 (1st Cir. 1997) (holding that alien was not entitled to a separate finding on dangerousness to community under the Refugee Convention).  
crimes were committed in a violent or particularly harmful manner."³⁸

The requirement that this crime merits a sentence of five or more years must be evaluated within the context of the United States's strict sentencing guidelines and rising mandatory minimums. In addition, thanks to a 1988 BIA decision, even a suspended sentence is still considered a "sentence" for INA purposes.⁹ Five IIRAIRA not only did not overturn this holding, but in fact codified this practice, stating that "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."⁹⁶ This provision is particularly offensive to the Convention because if a court has suspended a criminal's sentence, leaving them at liberty within society, one must presume that the court did not find them to be a danger to the community. As a result of this provision, an individual serving a five-year suspended sentence for a crime like fraud could be returned to a country where he will be killed, despite not having committed a "particularly serious crime" or being a danger to the U.S. community.

The vast majority of "criminal aliens" are convicted for non-violent offenses. In 1994, drug-related offenses accounted for forty-five percent of the prosecution of non-citizens, while immigration violations accounted for thirty-four percent and violent crimes only 1.4 percent.⁹⁷ The frequency of prosecutions for immigration violations is particularly telling, as individuals facing certain death or imprisonment in their home country have a particular incentive to try to circumvent the immigration laws. The mean term of incarceration imposed for immigration violations in 1994 (prior to the IIRAIRA increase in sentences) was 22.6 months.⁹⁸ And the United States has been steadily increasing the number of immigrants removed each year because of their criminal history. For example, during the first half of 1997, 67 percent more immigrants were removed because of federal convictions than were removed in the first half of 1996.⁹⁹ In 1997 and 1998, more than 106,000 immigrants with criminal records were deported, a 52% increase over the preceding two years.¹⁰⁰

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⁹⁷. See Helen Morris, Zero Tolerance: The Increasing Criminalization of Immigration Law, 74 INTERPRETER RELEASES 1319, 1322 (Aug. 29, 1997). See also In Re S-S-, Interim Decision 3317 (B.I.A. 1997), 1997 WL 258946 (applying law to Laotian who had received a five-year suspended sentence and two years of probation).
⁹⁸. Id. at 1319.
⁹⁹. See Paul Virtue, Acting Executive Association Commissioner Programs, Immigration and Naturalization Serv., Testimony before the Subcommittee on Immigration and Claims, House Judiciary Committee (July 15, 1997), available at 1997 WL 11234766.
C. A New Cause for Worry: Political Crimes Committed in Country of Origin

¶40 The applicability of the "serious, non-political crime outside the country of refuge" came before the Supreme Court this term.101 As a result, the Supreme Court has now clarified some of the questions surrounding this bar to Withholding.

¶41 In this case, Juan Anibal Aguirre-Aguirre claimed asylum and withholding of deportation based upon probable imprisonment or death upon repatriation.102 Mr. Aguirre-Aguirre states that in his home country of Guatemala, he was involved in student protests against the government which involved burning several buses, after having ousted the passengers, and otherwise disrupting the government through private property damage and protests. The Immigration Judge who initially heard his case found Mr. Aguirre-Aguirre entirely credible and found that his crimes were sufficiently "political" in nature. The INS appealed the award of Withholding.

¶42 Upon appeal, the BIA found that Mr. Aguirre-Aguirre was not barred from Withholding based upon having committed terrorist acts, nor was he barred by virtue of being a danger to the security of the United States. Nonetheless, the BIA found Mr. Aguirre-Aguirre ineligible for Withholding and ordered him deported based upon their conclusion that the common criminality of his acts outweighed any political justification for them.103 The BIA opinion did not give any deference to the Immigration Judge's assessment of the historical facts, and seemed to suggest that Mr. Aguirre-Aguirre did not deserve Withholding because of his criminal history. As Withholding of Deportation, unlike simple asylum, is not discretionary, the Attorney General is not authorized to make a discretionary determination as to the individual's merit—Mr. Aguirre-Aguirre should have been granted Withholding unless his crimes were both "serious" and "non-political."104

¶43 The Ninth Circuit reversed the BIA because it failed to follow the mandates set forth by the Refugee Convention and Protocol. The panel cited an earlier Ninth Circuit opinion, McMullen v. Immigration and Nationalization Service. McMullen applied the Convention's exception for individuals who had committed a "serious, non-political crime" to deport an individual who had bombed innocent civilians.105 In Aguirre-Aguirre, the Ninth Circuit again applied the Refugee Convention and specifically invoked the UNHCR recommendations governing the application of the

102. 121 F.3d 521 (9th Cir. 1997).
103. See id. at 522.
105. 788 F.2d 591 (9th Cir.1986). The McMuller court considered several factors to determine whether the act was "political": whether the act was sufficiently linked to its political objectives, whether the act was disproportionate to the political objectives, and the degree of atrocity of the act. Id. at 596-97.
"serious, non-political crime" exception. As a result, the Ninth Circuit found that Mr. Aguirre's acts were both political in nature and not serious enough, when balanced against the threat he faced in Guatemala, to warrant departure from non-refoulement.

44 The Supreme Court, in a unanimous decision, reversed the Ninth Circuit's decision. The Supreme Court reversal hinges essentially on the standard of review and the degree of deference due to agency determinations under the Chevron doctrine. The BIA found that the criminal nature of the acts outweighed their political nature, and the Court found that to be a reasonable finding, which could not be overturned by the federal courts. Furthermore, the Court deferred to the BIA's determination that the severity of persecution need not be factored into a determination of whether the crimes was "serious", thus rejecting the balancing method favored by the UNHCR and the European Court of Human Rights.

45 The Aguirre-Aguirre decision fails to recognize the importance of international law standards to how the Withholding law should be applied. The Court states that "the [Ninth Circuit] should have asked whether 'the statute is silent or ambiguous with respect to the specific issue' before it; if so 'the question for the court [was] whether the agency's answer is based on a permissible construction of the statute." By treating this solely as a question of deference to agency interpretation, the Court ignores the federal court's obligation to construe statutes so as to avoid conflict with international law. In fact, the Court treats the international nature of this issue as reason for increased deference. The Court admits that the UNHCR handbook "provides some guidance" and "may be a useful interpretative aid", but the opinion implies that the BIA has the discretionary authority to reject this guidance at will. Thus, the Aguirre-Aguirre decision is dangerous not for what it says—the language in the case, for the most part, comports with international law. Rather, the opinion is dangerous because of what it fails to say about the importance of adhering to international law.

D. The Campaign Against Terrorism

46 The U.S. immigration law also provides that any individual who

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106. See 121 F.3d at 523-24.
111. See nn. 132, 136 & text accompanying.
112. See INS v. Aguirre-Aguirre, 1999 WL 257638 ("The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.")
has engaged or is engaged in terrorist activities\textsuperscript{114} is considered to be a threat to the security of the U.S. and thus ineligible for Restriction on Removal.\textsuperscript{115} Although this provision seems reasonable on its face, it goes far beyond the bounds of the Convention. The Convention allows for refoulement if the individual is a danger to the security of the United States, was convicted of a particularly serious non-political crime abroad, or has committed crimes against humanity or peace. However, the definition of "engaged in terrorist activities" employed by the INA includes sabotaging any type of conveyance, the use of explosives to cause substantial property damage, providing any type of material support (including transportation) to terrorists, or performing any sort of recruitment for a terrorist organization or government.\textsuperscript{116} This broad definition includes activities that may be political protest acts. In addition, if these acts were directed at a repressive government, there is no "reasonable grounds" for believing the actors would pose any threat to U.S. security.

\textsuperscript{47} The terrorism exception is further complicated by the lack of procedural protection for immigrants charged with past terrorist acts.\textsuperscript{117} The 1996 AEDPA added a new removal procedure for alleged terrorists. Evidence substantiating charges of terrorist activity can now be submitted ex parte and in camera, and under seal of court, to a special removal court.\textsuperscript{118} With this system in place, immigrants charged with terrorism do not know what evidence the government has against them and so they cannot effectively defend themselves. For instance, an immigrant who provided material support to a terrorist organization under threat of death may have an affirmative defense to the terrorism charges and certainly would not pose a security threat to the United States. In addition, the government may use evidence obtained illegally, and therefore perhaps unreliably.\textsuperscript{119} This lack of process accorded to refugees constitutes another violation of the Refugee Convention\textsuperscript{120} and probably also of the International Covenant on Civil and Political Rights.\textsuperscript{121}

\textsuperscript{48} As of December 1998, the INS had brought about two dozen deportation cases based on secret terrorism charges.\textsuperscript{122} For instance, Yahia Meddah came to this country from Algeria and claimed that he faced persecution from Algerian opposition forces who had already kidnapped and killed several members of his family. He was accused of involvement

\textsuperscript{114} 8 U.S.C.A. § 1227(a)(4)(B).
\textsuperscript{117} See generally Jennifer Beall, Note, Are We Only Burning Witches?: The AntiTerrorism and Effective Death Penalty Act's Answer to Terrorism, 73 IND. L. J. 693 (1998).
\textsuperscript{120} Refugee Convention, supra note 2, art. 32(2).
\textsuperscript{122} Benjamin Weiser, Immigrant Held on Secret Data Faces False Statement Charge, N.Y. TIMES, Dec. 9, 1998, at B5.
in terrorism, but not presented with any evidence to support the charges. His application for asylum and Withholding of Deportation was denied. In another case, several Iraqi asylum seekers were ordered deported based on unspecified counts of terrorism and after a secret hearing in which they were not allowed to see any evidence or to hear any witnesses. These individuals face near certain death upon return to Iraq, as they had acted in concert with U.S. intelligence forces while participating in Iraqi dissident groups which have since been eliminated by the regime; some claim that Saddam Hussein has already attempted to have them killed. On appeal, some of the evidence in their case was de-classified and subsequently deemed to be insubstantial. The INS's explanation was particularly disturbing: "We don't do investigations," said general counsel Paul Virtue, "There is a low evidentiary threshold for finding whether someone is eligible for asylum here. It is wholly unlike a criminal case, where the burden is on the Government to prove someone has committed an offense."

E. Procedural Difficulties Posed by Expedited Removal

The primary procedural change enacted by IIRIRA was the so-called "expedited removal process" for immigrants who arrive at the border with no immigration documents or with fraudulent documents. Under the new law, those immigrants may be returned to their home country immediately, unless they indicate a "credible fear" of persecution which would warrant a grant of asylum or Restriction on Removal. Since the passage of IIRIRA, this procedure has been much criticized by immigration advocates because it subjects tired, scared refugees to a summary procedure, which they are unlikely to understand, without providing them with counsel. Expedited removal has already had an enormous impact on the face of immigration law; the majority of individuals deported are now individuals entering the U.S. at the Southwest border with no immigration documents or fraudulent immigration documents. Between August of 1997 and the end of January 1998, 1300 individuals with fraudulent or no documents expressed a fear of
return to their home country. Out of that number, 1066 were deported through expedited removal.\textsuperscript{128}

\textsuperscript{50} In addition to the pressure on individual asylum applicants, expedited removal also raises serious worries over the application of the statutory bars to individuals potentially eligible for Restriction on Removal. Although the implementation of this process may vary according to INS district, one INS official has stated that it is INS policy to refuse credible fear interviews to immigrants who are subject to one of the mandatory bars.\textsuperscript{129} The official insisted that asylum officers will not apply the bars unless the immigrant admits to the facts, or the INS official has independent "proof."\textsuperscript{130} For instance, if an immigrant admits to a criminal record or the officer has a record of the conviction, the immigrant may be returned home without even a credible fear interview. It seems likely that fine distinctions, such as the difference between a political crime and a common crime, will frequently be lost in this expedited process. An honest immigrant who admits to a conviction in his home country may find himself on a plane back home, without a chance to explain that the conviction was related to political persecution. In addition, not all first-level immigration officials may be aware of the differences between the mandatory bars for asylum\textsuperscript{131} and the much narrower bars for Restriction on Removal. The expedited removal process may therefore create serious risk of Convention violations that will never be discovered because the refugee will never have the opportunity to assert a claim for non-refoulement.

\textbf{F. International Law Claims in U.S. Courts}

\textsuperscript{51} International law is a recognized part of the law that governs the United States and is subject to the jurisdiction of the federal court system. In 1900, the Supreme Court clarified that it would enforce the dictates of international law, stating that: "International law is part of our law and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination."\textsuperscript{132} Treaties are declared to be the law of

\begin{itemize}
\item \textsuperscript{129} Roundtable Meeting led by Phyllis Coven, Director of International Affairs, Immigration and Naturalization Service, in Washington, D.C. (July 9, 1997). Approximately 1200 individuals per week are subject to expedited removal procedures. Of that, about five percent are referred for a credible fear interview. About eighty percent of those interviewed are found to have credible fear, at which point they are allowed to remain in the United States (frequently in detention) until their asylum and Restriction on Removal claims are adjudicated. \textit{See Office of Pub. Affairs, Immigration and Naturalization Serv., Fact Sheet Update on Expedited Removals} (July 9, 1997).
\item \textsuperscript{130} \textit{See Roundtable Meeting, supra} note 123.
\item \textsuperscript{131} \textit{See Immigration and National Act, § 208} (1997).
\item \textsuperscript{132} \textit{The Paquete Habana}, 175 U.S. 677 (1900).
\end{itemize}
the land by Article VI of the Constitution. In addition, customary international law is now considered a type of federal common law which is supreme over state law based on Article VI of the Constitution. As with any law, it is reasonable to look to other jurisdictions for views on how to interpret the law. Therefore, the interpretations accorded the Convention and Protocol by other signatory states can provide persuasive, non-binding authority.

§52 As with any federal law, Congress has the authority to repeal treaty law by implication through subsequent enactments. The Supreme Court made this clear in 1888, stating that "if there be any conflict between the stipulations of the treaty and the requirements of the [subsequent] law, the latter must control." However, on numerous occasions the Court has emphasized that federal courts have a duty to attempt to construe subsequent legislation so as to avoid a conflict. There is much room for statutory construction within the language of the Immigration and Nationality Act.

§53 Several provisions discussed earlier in this Note seem particularly amenable to this doctrine of presumption against derogating from international law. For instance, although the statute clearly specifies that certain crimes constitute a "particular serious crime," it says nothing about whether the refugee must also be shown to be a "danger to the community." In fact, the most natural reading of the language is that this is a two-prong requirement. If Congress had wanted to establish a rule of per se dangerousness, it easily could have stated "by virtue of having committed a particularly serious crime, is a danger to the community" or "is a danger to the community in that he has committed a particularly serious crime." Or, Congress could have eliminated the "danger to the community" language entirely. Instead, Congress enacted and re-enacted the exact language of the Refugee Convention, strongly suggesting that it wished to

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133. Note, however, that the current prevailing view is that, "a "Non-self-executing" agreement will not be given effect as law in the absence of necessary implementation." Restatement (Third) of the Law, §111.

134. See Restatement (Third) of the Law, Part I, Chapter 2, Introductory Note.

135. Whitney v. Robertson, 124 U.S. 190 (1888). See also Restatement (Third) of the Law, Part I, Chapter 2, Introductory Note ("Like the strictly domestic law of the US, international law as law of the US is subject to the Constitution, and is also subject to "repeal" by other laws of the US.").

136. Id. ("When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."); see also Murray v. Schooner Charming Betsy, 6 U.S. 64, 188, 2 L.Ed. 208 (1804) (Marshall, J.) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . "). See also Restatement (Third) of the Law, § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); Restatement (Third) of the Law, §115(a) ("An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.").

137. Under the current construction employed by the BIA and most federal courts, the "danger to the community" language is entirely superfluous. See infra note 83.
comply with its duties under this law.

¶54 Another example is the definition of "particularly serious crime." The law clearly states that crimes with aggregate sentences of more than five years are "particularly serious" and thus will invoke the exception to Withholding of Deportation or Restriction on Removal. However, the law gives the Attorney General discretion as to crimes with sentences of less than five years. In many cases, the exercise of this discretion puts the U.S. in conflict with the Refugee Convention. Courts should presume that Congress did not intend for this discretion to be exercised in contravention of our treaty obligations.

¶55 There are other areas of the law in which the statutory terminology creates a clear conflict with the Convention and Protocol obligations. For instance, the provisions regarding those accused of terrorist acts go far beyond what is allowed by the Convention to protect the security of the host country. In cases where the statutory language is clear, the federal courts probably have no authority to follow the Convention rather than the subsequent federal law. However, as Charles Evan Hughes advised President Wilson, "Congress has the power to violate treaties, but if they are violated, the Nation will be none the less exposed to all the international consequences of such a violation. . .The treaty still exists even although it may not be enforceable by the courts or administrative authorities."138 Although the federal courts are divested of their jurisdiction,139 the United States's obligation under international law remains perfectly intact. It is well accepted that, "when international law is not given effect in the United States because of constitutional limitation or supervening domestic law, the international obligations of the United States remain and the United States may be in default."140 Therefore, although the federal courts may lack the power to act when the Immigration and Nationality Act is in clear contravention of the Refugee Convention, it does not change the fact that the United States is violating its duties under binding international law.

III. CONCLUSION

¶56 Comparing the U.S. law with the manner in which the Convention is interpreted by both international legal scholars and other party nations is a distressing task. Although the U.S. Congress and courts pay much lip service to Convention adherence, there appears to have been little attempt to ascertain what individuals outside of the U.S. federal court system think
It is evident that at least some American jurists honestly believe that the mandatory and discretionary bars fall within the parameters established by the Convention's exceptions. One could attempt to justify the vast U.S. "aggravated felony" bar under the Convention's "particularly serious crime" provision. However the U.S. has ignored the predominant international law in this area in at least three ways:

- By conflating the two independent requirements of "conviction of a particularly serious crime" and "danger to the community" through the use of a per se rule;
- By refusing to implement any sort of a balancing test which would consider the threat which the immigrant would face upon repatriation; and
- By expanding the class of crimes warranting repatriation to include a vast number of non-violent crimes with no aggravating circumstances.

Similarly, the U.S. laws governing prior terrorist activity could be justified under either the "danger to the security" exception in Article 33, the "serious non-political crime" provision of Article 1, or the exceptions for humanitarian law violators contained in Article 1. However, in order to comply with the bulk of international precedent, the U.S. should:

- Allow an affirmative defense of political activity for crimes which were not targeted at civilians;
- Only apply the human rights law violation exceptions to individuals who were actual participants or had supervisory authority over the violations;
- Require a showing that the individual constitutes an on-going threat to the existence or stability of the U.S. for any repatriation that is not dependent on the exceptions for serious non-political crimes, particularly serious crimes, or humanitarian law violations.

141. However, in the recent oral argument of the Aguirre-Aguirre case, one of the Justices did inquire about how other countries interpret the Protocol and convention. See 1999 WL 141033 at 5.

Although the United States has indicated a desire to comply with its obligations under international treaties, past experience has shown that political exigency will usually triumph over even clear-cut treaty obligations. A specific case in point with regards to non-refoulement is *Sale v. Haitian Centers Council*, in which the Supreme Court upheld the policy of returning Haitian refugees intercepted on the high seas based essentially upon the reasoning that, despite what the French say, "refoule" does not mean return. However, this does not make the treaty obligation any less binding, nor the moral obligation any less compelling.

If one can get past the media spin regarding "criminal aliens" and "aggravated felons," one sees that the U.S. can easily comply with its obligations under the Convention while still protecting its citizenry from dangerous individuals. This was the goal of the Convention drafters, and it has been the predominant mode of Convention interpretation throughout Europe. If the United States were to adopt a more nuanced approach and abandon its excessively strict per se rules, it could fulfill both its treaty obligations and its promise to be a refuge for the persecuted and endangered.