American Immigration Law Foundation
2002 Dubroff Legal Writing Competition
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Too Late for Refuge: An International Law Analysis of IIRIRA's One-Year Filing Deadline for Asylum Applications

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I. Introduction

Richard is a Hutu and was an active member of the opposition political party in Burundi. For more than five years, he was the target of continual harassment and threats by Tutsi soldiers and members of the civilian militia. Several times, armed Tutsi gangs threatened to kill him because of his political activism and Hutu ethnicity. His home was burned to the ground, and he was forced to flee for his life. Richard applied for asylum well within one year of his arrival in the United States, but the asylum officer who interviewed him did not believe that he had demonstrated this fact with clear and convincing evidence and therefore refused to consider the merits of his claim.[1]

Lijun became pregnant out of wedlock in China. She feared that she would have to have an abortion under China's strict family planning policies, or that she and her child would face life without access to basic benefits such as housing and health care. Because Lijun worked for an American electronics firm in China, she was able to escape to America on a work visa. But she did not apply immediately for asylum. Preoccupied with the exigencies of her pregnancy, Lijun relied on her work permit to give her time to deal with these pressing matters. The Immigration and Naturalization Service ("INS") ruled that Lijun did not demonstrate "extraordinary circumstances" for failing to submit her application for asylum within one year. She was therefore barred from applying for asylum.[2]

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[1] Brief in Support of Richard Ndikunkiko, Application for Political Asylum and Withholding of Deportation, United States Immigration Court, Hartford, Conn., Sept. 5, 2001.
[2] John Suval, *An Asian Mother Loses Her First Asylum Battle*, HOUSTON PRESS, Jan. 4, 2001.

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Vladmir is an ethnic Azerbaijani and a citizen of Russia. Soon after entering the United States on a non-immigrant visa, he began searching for a Russian-speaking attorney to help him to file for asylum. At the suggestion of his supervisor at work, he contacted a lawyer who agreed to assist him with his asylum application. Vladmir provided the relevant documentation and spoke to the lawyer over the telephone, but the lawyer never filed an application. Subsequently, the lawyer and Vladmir's supervisor disappeared, taking with them the $4,000 in legal fees that had been deducted from Vladmir's paycheck. During the removal proceedings, the Immigration Judge denied Vladmir's request for asylum and withholding of removal, holding that Vladmir had demonstrated a well-founded fear of persecution but had not submitted his asylum application within one year. The judge did not find the ineffective assistance of Vladmir's lawyer to constitute extraordinary circumstances sufficient to excuse the delay.[3]

As asylum seekers in the United States, Lijun, Joseph, and Vladmir share a common problem. Their failure to demonstrate with "clear and convincing evidence" that they applied for asylum within one year of their arrival in the United States placed them at risk of being returned to a country where they feared persecution, irrespective of the merits of their claims. Since 1996, and with certain limited exceptions, asylum seekers in the United States have been barred from applying for asylum unless they demonstrate with clear and convincing evidence that they submitted their applications within a year of their arrival in the country. This requirement, like a number of other provisions in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), contravenes the United States' obligations under international law. It also has a powerful and devastating

[3] The Eighth Circuit dismissed Vladmir's petition for review. Ismailov v. Reno, 263 F.3d 851 (8th Cir. 2001).

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impact on the lives of real people: from October 2000 to June 2001 alone, the INS rejected the claims of 3,141 asylum seekers simply because they had missed the deadline and did not qualify for the exceptions provided by the statute and elaborated in INS regulations.[4]

This Essay argues that IIRIRA's one-year deadline for asylum applications has led the United States to abrogate its international obligation not to return any refugee to a country where he or she would be in danger of persecution. It begins by describing the one-year deadline as established by the IIRIRA. It then examines the international norm of *nonrefoulement*, as a binding treaty obligation and as a norm of customary international law. The Essay next considers the one-year deadline together with the principle of *nonrefoulement*, arguing that the statutory exceptions to the filing deadline are inadequate to protect legitimate refugees. Finally, the Essay evaluates the potential for enforcing the obligation of *nonrefoulement* within the U.S. legal and political system. It argues that while Congress may pass legislation superceding previously ratified treaties it did not intend to do so through IIRIRA. The Essay concludes by suggesting that all branches of the U.S. government have a responsibility to reconcile domestic law with United States' international law obligation not to send any refugee back to a country where his or her life or liberty would be in danger.

II. IRIRA and the one-year filing deadline

A. Background

In 1968, Congress became a Party to the United Nations Protocol Relating to the

[4] Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 30-31 (2001)(statistics provided to Prof. Schrag by the INS); Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 142 (2001)(citing telephone interview with Joseph Langlois, Asylum Board Director of International Affairs, Office of International Affairs, Immigration and Naturalization Service (Mar. 14, 1999)).

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Status of Refugees ("Refugee Protocol"),[5] which incorporates the 1951 Convention Relating to the Status of Refugees ("Refugee Convention").[6] The Refugee Convention provides, in Article 33, that "no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion."[7]

In 1980, Congress enacted implementing legislation that sought to bring the INS refugee processing system into accord with international standards. The 1980 Refugee Act codified the obligations contained in the 1967 Protocol Relating to the Status of Refugees, adopted the Refugee Convention's definition of a refugee, and established a basic framework for asylum procedures that is still in place today.[8] Most importantly, it amended Section 243 of the Immigration and Nationality Act ("INA") to read: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened . . . ."[9] The Refugee Act also authorized the Attorney General to grant asylum to individuals who meet the refugee definition and are present in the United States or arrive at its borders.[10]

As immigration increased in the 1980s, especially from Latin America and the Caribbean, Congress passed the Immigration Reform and Control Act of 1986, which

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[5] United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967)[hereinafter Refugee Protocol].
[6] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].
[7] Refugee Convention, art. 33.
[8] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107 (1980), 8 U.S.C. § 1253(h)(1988).
[9] Refugee Act of 1980, 8 U.S.C. § 1253(h)(8).
[10] The United States' overseas refugee resettlement program extends permanent asylum to a limited number of refugees who apply from outside of the United States. INA § 207(a), 8 U.S.C. § 1157(a)(1994 & Supp. 4 1999).

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imposed sanctions on employers that hired undocumented migrants. This law, combined with the INA's exemption for asylum applicants, led to a surge in applications that threatened to overwhelm the system. The 1990 Immigration Act implemented a program whereby asylum seekers applied for asylum through an interview with a trained asylum officer. If the officer denied the application, the applicant would be allowed to submit additional evidence within sixty days. If denied a second time, the asylum applicant would be subject to deportation proceedings. Individuals were also permitted to seek asylum defensively when in deportation proceedings.[11] In 1994, the process was amended so that asylum officers no longer denied cases conclusively, but referred them to an Immigration Judge for a further hearing.

B. IIRIRA

In the mid-1990s, concerns about increased immigration led to sweeping changes in asylum policy, both in the United States and in Europe. Anti-immigrant sentiment rarely distinguished between refugees and other immigrants, and both were increasingly blamed for problems of drugs, crime, and unemployment. Congress responded to these concerns by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, which amended numerous sections of the INA. In doing so, it implemented dramatic changes on the refugee protection system in the United States and placed the United States in violation of its obligations under international law.[12]

One provision of IIRIRA introduced a strict one-year time limit for filing asylum claims. Prior to the enactment of IIRIRA, an individual could apply for asylum at any time.

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[11] *See* Ramji, *supra* note 4, at 132-33.
[12] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009 (codified in scattered sections of 8 and 18 U.S.C.) [hereinafter IIRIRA]. *See* Ramji, *supra* note 4, at 133-34.

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However, under the new statute, a refugee is prohibited from filing an application for asylum unless he or she "demonstrates by clear and convincing evidence that the application has been filed within one year after the date of the alien's arrival in the United States."[13] Those who do not apply within the one-year time period are ineligible for asylum and subject to removal, irrespective of the merits of their claims.[14] From the beginning, both the Clinton administration and the refugee advocacy community opposed any filing deadline at all. Their opposition did not succeed in preventing the imposition of a deadline, although it did lead expansion of the duration of the deadline from the initially proposed thirty days to one year, and the inclusion of two legislative exceptions to the deadline.[15]

Applicants who file more than one year after their entry into the United States may circumvent the one-year rule only if they can prove one of two exceptions:

1. changed circumstances which materially affect the applicant's eligibility for asylum;
2. extraordinary circumstances relating to the delay in filing.[16]

Under the 1996 law, the Attorney General—through the Immigration Court and the Board of Immigration Appeals (BIA)—is the final arbiter of the determinations regarding exceptions to the one-year filing deadline.[17]

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[13] IIRIRA, Pub. L. No. 104-208.4, 110 Stat. 3009-691.

[14] *Id*. The one-year deadline does not apply to applicants for withholding of removal, although there are other statutory bars to such applications. *See* INA § 241(b)(3), 8 USC § 1231 (b)(3) (Supp. II 1996). It also does not affect applicants applying for relief from deportation under the Convention Against Torture (CAT).

[15] PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN THE UNITED STATES 179 (2000).

[16] IIRIRA, Pub. L. No. 104-208.4(a)(2)(D), 8 USC 1158 (a)(2)(D) (Supp. II 1996). During the Senate debate over the bill, Senator Mike DeWine proposed an amendment that would have eliminated the filing deadline on the grounds that often "the most deserving people, the most egregious cases, the most heart-wrenching cases, these individuals need the most time to file." SCHRAG, *supra* note 15, at 126 (quoting Senator DeWine). However the Senate rejected DeWine's proposal in favor of a one-year deadline that would apply absent a showing of "good cause." This was later changed to the current, narrower provision that permits changed or extraordinary circumstances as exceptions. *Id.* 125-26, 194. Congress also rejected an earlier version of the act that would have applied the deadline to applications filed as a defense to removal thus targeting applicants most likely to be abusing the asylum process by applying for asylum in the context of a removal proceeding. Michele Pistone, *Assessing the Proposed Refugee Protection Act: One Step in the Right Direction*, 14 GEO. IMMIGR. L.J. 826 (2000).

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In 1997, the INS, under the Department of Justice (DOJ) issued interim regulations that further defined the meaning and applicability of the two exceptions.[18] The regulations were strikingly inadequate in their protection of bone fide refugees. They made no explicit provision for an applicant's delayed awareness of changes in human rights conditions in her country of origin or for situations in which an alien in the United States becomes at risk due to changed religious or political views. The interim rule did not make any provisions for aliens who have permission to enter or remain in the United States independent of their possible refugee status and wait until their visa is about to expire to file an asylum application.

Over the next few years, the INS liberalized its practices by adopting a training manual that provided guidance to the asylum officers who initially adjudicate affirmative asylum applications. However, the manual did not have the force of law and did not bind the immigration judges who resolve asylum claims when the asylum officers do not grant asylum. Also the manual was not printed in the Federal Register or the Code of Federal Regulations so was not easily accessible to asylum seekers or their lawyers.[19]

Nearly five years after the enactment of IIRIRA, in January 2001, The INS issued its final rule on the one-year deadline.[20] The rule incorporated many of the features of the training manual into formal regulations. According to the final regulations, changed circumstances refer to circumstances affecting the applicant's eligibility for asylum.[21] These circumstances may include changes in conditions in the applicant's home country,

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[17] IIRIRA, Pub. L. No. 104-208.4, 110 Stat. 3009-691, 8 U.S.C. § 1158(a)(3) (2001). *See infra* note 82 and accompanying text.
[18] 8 C.F.R. § 208.4 (2000) (interim rule).
[19] *See* Pistone & Schrag, *supra* note 4, at 16.
[20] *See* U.S. Department of Justice, *Questions and Answers: The 208 Final Rule*, *available at* http://www.ins.usdoj.gov/graphics/publicaffairs/questans/asylum208.htm.
[21] 8 C.F.R. § 208(a)(4) (2001).

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the loss of relationship to a spouse or parent who was the principle asylum applicant, or "changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk."[22]

The changed circumstances exception acknowledges that developments in a particular country of origin (such as a regime change) or in the host country (such as the applicant's political activities in the United States) may cause an individual to develop a well-founded fear of persecution even after the tolling of the asylum application deadline. The regulations require that the applicant apply for asylum within a "reasonable period given those 'changed circumstances.'"[23] They do not specify how much time is "reasonable," although the final regulations modify the interim rule by noting that delayed awareness of the changed circumstances may be taken into account in making this determination. [24]

The regulations define "extraordinary circumstances" as "factors directly related to the failure to meet the one-year deadline."[25] These may include such conditions as: serious illness or mental or physical disability during the one year period after arrival; legal disability; a very limited form of ineffective assistance of counsel; the maintenance of Temporary Protected Status or other lawful status; a submission of the application to the

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[22] *Id*. § 208.4 (a)(4) (2001). The interim rule, by contrast, referred to "changes in objective circumstances relating to the applicant in the United States," at least conceivably excluding changes in the asylum seeker's "subjective" awareness of the changed conditions. *See* 8 C.F.R. 208.4(a)(4)(2000)(interim rule).
[23] *Id*. § 208.4(a)(4)(C)(ii).
[24] *Id*. The 2001 regulations are more inclusive than the interim regulations in several other respects. Most notably, they specify that changes in circumstances "include, but *are not limited to*" the enumerated situations. 8 C.F.R. § 208.4(a)(4)(i)(2001)(emphasis added). *Cf.* 8 C.F.R. § 208.4(a)4(i)(2000). They also extend the exception to applicants who had previously been included as a dependent in another alien's asylum application and that relationship was ended by marriage, death,, divorce or attainment of age 21. 8 C.F.R. § 208.4(a)(4(i)(C).
[25] 8 C.F.R. § 208.4(a)(5)(2001).

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INS before the deadline expired that was rejected by the INS as not properly filed and returned to the applicant; or the death, serious illness or incapacity of the applicant's immediate family member or legal representative.[26] In contrast to the interim regulations, the applicant need not prove that the extraordinary circumstances were beyond her control.[27] Yet the burden placed upon the applicant remains high: she must prove that the circumstances were not intentionally created through her own action or inaction, that the circumstances were *directly* related to the failure to file within the one-year period, and that the delay was reasonable under the circumstances.

The final regulation thus represents a shift from the strict liability standard of the interim regulations to a negligence standard with respect to actions under the applicant's control that are a cause of the delay. However, allocating to the asylum officer discretion to determine the "reasonableness" of the delay may well yield similar outcomes given the deep suspicion among immigration officials toward applicants who do not apply for asylum immediately after entering the country. By adding a requirement of directness that is not part of the statutory standard, the final rule suggests that an applicant will not prevail if the delay was not related with sufficient directness to the missed deadline. Perhaps most significantly, the final rule contains no mandatory language but provides only that the enumerated circumstances "*may* excuse the delay,"[28] suggesting that asylum officers may choose to reject even those circumstances described in the rule as possible exceptions to the deadline.

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[26] *Id*.
[27] *See* 8 C.F.R. § 208.4(a)(5)(2000).
[28] *Id*. (emphasis added).

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III. The International Norm of Nonrefoulement

Like several of the provisions of the IIRIRA, the one-year deadline for asylum applications, as applied, places the United States in violation of its international law obligations. At the heart of the refugee protection regime lies the fundamental principle of *nonrefoulement*, which prohibits the return of refugees to a country in which they fear persecution. The principle is binding on all States Party to the 1951 Convention Relating to the Status of Refugees or to the 1967 Protocol Relating to the Status of Refugees. It is reinforced by the Convention Against Torture and has further assumed the status of a principle of customary international law. When a State sends a refugee back to a country where he or she fears persecution, it contravenes its duty of *nonrefoulement*, regardless of whether the refugee submitted his or her asylum application in a "timely" fashion.

The principle of *nonrefoulement* is the central protection afforded to refugees by the Refugee Convention, which was adopted by the U.N. Economic and Social Council (ECOSOC) in 1951.[29] Article 33 of the Convention provides:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[30]

While the United States has not signed or ratified the Refugee Convention, it ratified the Refugee Protocol on November 1, 1968. The Protocol eliminated the Convention's temporal and geographic constraints,[31] extending the law's protections beyond post-World

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[29] Refugee Convention.
[30] *Id*. at art. 33 (1).
[31] The 1951 Convention conferred refugee status only on individuals who had fled their countries "as a result of events occurring before 1 January 1951" and permitted states to restrict their obligation to European refugees. Refugee Convention, art. 1.

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War II Europe. In doing so, it incorporated Articles 2 through 34 of the 1951 Refugee Convention. Read together, the Refugee Convention and Protocol prohibit states from *refouling any* bona fide refugee, regardless of whether he or she has yet been extended formal recognition as such.[32] Therefore, a State Party to the Convention may not avoid its obligation not to *refoule* by simply declining to consider an individual's asylum claim. In ratifying the Refugee Protocol, the United States effectively assumed the obligations of the Convention, including Article 33's prohibition of *refoulement*.

Several other international treaties contain *nonrefoulement* provisions. The United States is a Party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"), Article 3 of which prohibits the *refoulement* of any individual to another State where there are substantial grounds for believing that he or she would be at risk of being subjected to torture.[33] In some respects the *nonrefoulement* provision of the CAT is broader than that of the Refugee Convention. It applies to individuals irrespective of whether their risk of torture stems from their status as a protected group[34] and does not exclude from protection people convicted of serious crimes or who pose a risk to national security. The CAT, however, applies only to a narrow class of refugees, excluding those who would be at risk of forms of persecution other than torture, or who cannot meet its high "substantial grounds" burden of proof.

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[32] The only exceptions to the *nonrefoulement* provision of Article 33 are for refugees who pose a danger to the security of the host country or who have been convicted by final judgment of a particularly serious crime. Refugee Convention, art. 33(2).

[33] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GOAR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51, entered into force June 26, 1987, art. 3(1) [hereinafter Convention Against Torture] ("No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

[34] In other words, those who were persecuted "on account of" race, religion, nationality, membership in a social group, or political opinion.

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The International Convention on Civil and Political Rights ("ICCPR"), to which the United States is a Party, also prohibits *refoulement*. Article 7 provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."[35] General Comment 20 of the Human Rights Committee highlights the implicit *nonrefoulement* provision contained in this Article: "In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."[36] The General Comment thus prohibits *refoulement* with regard to all Article 7 treatment, including cruel, inhuman or degrading treatment or punishment as well as official torture.[37]

In addition to its international treaty obligation to refrain from sending refugees to a country where they would be at risk of persecution, the United States is also bound by the customary international norm of *nonrefoulement*. Customary international law "results from a general and consistent practice of states followed by them out of a sense of legal obligation."[38] The relevant State practice is reflected in international conventions; international custom, as evidence of general practice accepted by law; general principles of

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[35] International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368, 368-83 [hereinafter ICCPR].
[36] Human Rights Committee, General Comment 20 ¶ 9.
[37] Like the CAT and Refugee Convention, the ICCPR is considered non-self-executing. However, unlike the former treaties, the Covenant has not been given domestic teeth through implementing legislation. This does not mean that the United States has no obligation of *nonrefoulement* under the ICCPR, but it does mean that individuals do not have a private right of action under the ICCPR and cannot seek relief in a U.S. court.
[38] Restatement of Foreign Relations at 102, comment b, at 111.

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law recognized by civilized nations; and, secondarily, judicial decisions and the teachings of the most highly qualified publicists of the various nations.[39]

In July 2001, international legal experts on refugee matters gathered in Cambridge, U.K. for the Cambridge Expert Roundtable, organized by UNHCR and the Lauterpacht Centre for International Law as party of UNHCR's Global Consultations on International Protection. On July 9-10, the Expert Roundtable concluded that:

> 1. Nonrefoulement is a principle of customary international law….
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> . . . .
>
> 4. The principle of non-refoulement embodied in Article 33 encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier, or indirect refoulement. [40]

These conclusions accord with the findings of the Executive Committee of the UNHCR, which has continually affirmed that the principle of *nonrefoulement* is a matter of customary international law.[41] As early as 1977, the Committee noted the general acceptance by states of the principle of *nonrefoulement*.[42] In 1982, it suggested that the principle of *nonrefoulement* had become a rule of customary international law: "In all cases the fundamental principle of *non-refoulement*—including non-rejection at the

[39] Statute of the International Court of Justice, June 26, 1945, art. 34(1), 59 Stat. 1055, 1059.
[40] *See* Elihu Lauterpact and Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement*, opinion discussed at the expert roundtable meeting under the second track of the Global Consultations, Cambridge, UK, July 2001.
[41] *See* UNHCR Ex. Comm., Conclusion No. 79 (XLVII) (1996); UNHCR Ex. Comm., Conclusion No. 22 (XXXII) (1982) § II(2); UNHCR Ex. Comm., Conclusion No. 6 (XXVIII) (1977).
[42] UNHCR Ex. Comm., Conclusion No. 6 (XXVIII) (1977) ([T]he fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.").

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frontier—must be scrupulously observed."[43] In its 1996 Conclusion, the Executive Committee stated that the principle of *nonrefoulement* was not subject to derogation.[44] Most recently, on September 13, 2001, the Committee noted:

> The obligation of States not to expel, return, or *refoule* refugees to territories where their life or freedom would be threatened is a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all states.[45]

Treaties and treaty practice affirm the experts' findings.[46] In addition to the Refugee Convention, Convention Against Torture, and ICCPR, many regional instruments prohibit the return of individuals to a country where their life and liberty would be in danger. The Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa,[47] the American Convention on Human Rights,[48] and European Convention on Human Rights[49] all implicitly or explicitly contain *nonrefoulement* provisions. The 1984 Cartagena Declaration and 1966 Asian-African Refugee Principles, though nonbinding, lend support to the status of *nonrefoulement* as a

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[43] UNHCR Ex. Comm., Conclusion No. 22 (XXXII) (1982) § II(2). *See also* UNHCR Ex. Comm., Conclusion No. 79 (XLVII) (1996).
[44] UNHCR Ex. Comm., Conclusion No. 79 (XLVII) (1996).
[45] UNHCR Ex. Comm., Conclusion No. 98 (LI) (2000)
[46] Treaties and treaty practice provide an important source of international law. In the North Sea Continental Shelf cases, for example, the ICJ held that a principle of customary international law may develop through State practice in compliance with a conventional rule. North Sea Continental Shelf, Judgment, ICJ REPORTS 1969, 3, para. 64, 70-74. To become a customary rule, the conventional rule should: 1. be of a fundamentally norm-creating character. 2. widespread participation in the Convention, including among those whose interests are specially affected; 3. consistent state practice and general recognition that a legal obligation or rule of law is involved.
[47] OAU Convention Governing Specific Aspects of Refugee Problems in Africa, adopted 1974, 1001 U.N.T.S. 45 (entered into force June 20, 1974), art. 2(3).
[48] American Convention on Human Rights "Pace of San Jose, Costa Rica" (1969), 9 I.L.M. 673, art. 22(8).
[49] European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted Nov. 4, 1950, art. 3, 213 U.N.T.S. 221.

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principle of customary international law.[50] Additionally, the writings of the most highly respected international law scholars affirm that the principle of *nonrefoulement* has evolved into a rule of customary international law.[51]

IV. The Application of the Principle of Nonrefoulement to U.S. Policy and Practice

The one-year deadline places the United States at continual risk of violating its obligation of *nonrefoulement* under the Refugee Act, Refugee Protocol, and customary international law. The deadline means that legitimate refugees are in danger of being returned to a country where they fear persecution simply because they have not met a formal, procedural requirement. There are many reasons that refugees might not apply for asylum within one year of their arrival in the United States, or that they might not be able to present "clear and convincing evidence" that they had done so. This failure to comply with a technical requirement might, in some cases, raise a question as to the seriousness of an applicant's claim to refugee status. It should not, however, serve as an absolute bar to asylum. If, on the merits, an asylum seeker meets the definition of a refugee set forth in

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[50] Cartagena Declaration, Published by the UNHCR, embodying the Conclusions of the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, Nov. 19-22, 1984, *available at* http://www.asylumlaw.org/docs/international/CentralAmerica.pdf, (holding that the principle of *nonrefoulement* "is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a principle of *jus cogens*"); Report of the Eighth Session of the Asian-African Legal Consultative Committee held in Bangkok from Aug. 8-17, 1966, 335 ("No one seeking asylum in accordance with these Principles should . . . be subjected to measures such as rejection at the frontier, return, or expulsion which would result in compelling him to return or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.").

[51] *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."); Louis Sohn and Thomas Buergenthal, THE MOVEMENT OF PERSONS ACROSS BORDERS 123 (1992) ("The general prohibition against a State's return of a refugee to a country where is or her life would be threatened . . . has become a rule of customary international law."); Guy Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 899, 902 (1986) ("The binding obligations associated with the principle of nonrefoulement are derived from conventional and customary international law."); *see also* 8 ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 246 ([T]he principle of non-refoulement of refugees is now widely recognized as a general principle of international law.").

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Article 1 of the Refugee Convention, she should not be sent back to her country of origin, regardless of whether or not she met the filing deadline. In such instances, deportation constitutes *refoulement* and clearly violates international law.

In spite of the safeguards contained in the regulations and INS training manuals, the INS continues reject thousands of asylum seekers because they have missed the one-year deadline, without considering the merits of their claims. Between October 2000 and June 2001, asylum officers interviewed 6,198 applicants deemed to have filed their applications more than one year after arriving in the United States. While 3,057 were judged to have demonstrated changed or extraordinary circumstances that justified the delay, 3,141, or 51% saw their claims rejected because they had missed the deadline and their "excuses" did not constitute statutory exceptions as interpreted by the INS regulations and training manual.[52]

By assuming that legitimate asylum seekers will have little difficulty filing their applications within one year, the filing deadline for asylum applications misapprehends the situation facing most genuine refugees. A statistical survey conducted by the Lawyer's Committee for Human Rights just prior to the enactment of IIRIRA showed that only 37.5 percent of successful asylum applicants applied within one year of their entry into the United States.[53] In most cases, refugees leave their home countries with nothing but the clothes that they are wearing. Upon arriving in the United States, they must find a way to secure the basic necessities they need to survive. Filing for asylum, let alone retaining and paying for legal counsel, is likely to be the last thing on their minds.

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[52] *See* Pistone & Schrag, *supra* note 4, at 30-31.
[53] *Cited in* SCHRAG, *supra* note 15, at 132 (citing LCHR report).

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Refugees are often unfamiliar with the process of applying for asylum. Many do not speak English, are unaware of the filing deadline, or do not even know that they are eligible for asylum.[54] Amchok Gyamtso Thubten, a refugee from Tibet, founded a Tibetan organization in New York to inform the Tibetan refugee community about the deadline for filing asylum applications. In May 2001, Amchok told the Senate Judiciary Committee Subcommittee on Immigration the story of a Tibetan refugee who lost his chance for asylum because of his ignorance of the deadline:

> Like me [the Tibetan asylum seeker] was detained and tortured by the Chinese authorities because of his peaceful activities on behalf of the Tibetan independence. After arriving in the United States, he did not apply for asylum immediately because he could not understand English. He did not know about the filing deadline. He was also suffering the effects of torture and had difficulty talking about what had happened to him. As a result, he missed the filing deadline. In March of this year [2001], his asylum claim was rejected by the INS based on the filing deadline.[55]

In a survey of 600 Tibetans in the city, Amchok found that more than half did not know about the filing deadline. Yet the final rule does not explicitly recognize ignorance of the law as a legitimate exception to the deadline.[56]

As individuals who have fled a situation of extreme danger, refugees often suffer the physical and psychological effects of torture and persecution. Some refugees have learned from their past experiences to avoid government officials at any cost. They may fear to come forward because they are in the United States illegally or may be afraid that

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[54] According to Eleanor Acer, director of the Asylum Representation Program with the Lawyer's Committee for Human Rights, many asylum seekers "believe that because it's called political asylum they had to be politically involved." Mae M. Cheng, *New Deadline on Asylum Application Approaching*, NEWSDAY, Mar. 22, 1998 (quoting Eleanor Acer, Director, Asylum Representation Program, Lawyers Committee for Human Rights).

[55] Testimony of Amchok Gyamtso Thubten, Asylee from Tibet, to the U.S. Senate Committee on the Judiciary Subcommittee on Immigration, May 3, 2001.

[56] Pistone & Schrag, *supra* note 4, at 10.

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by coming forward they will place their family back home in danger. According to the Committee to Preserve Asylum, a coalition of organizations formed to counter the harsh immigration reforms proposed by Congress in 1995, "many legitimate applicants who fear persecution by repressive governments are reluctant to present claims until they gain confidence that their claims will be treated fairly and confidently and not result in retaliation against them or their loved ones back home."[57] Others may wait to apply for asylum because they hope that the situation at home will improve, allowing them to return to their families.[58]

Some asylum seekers simply find themselves unable to produce sufficient evidence that they applied for asylum within one year. By definition, a refugee is an individual who have fled a country where her life, liberty, or safety were at risk. Yet if she were to appear at the U.S. Embassy in her country of origin asking for documentation to travel to the United States in order to escape persecution, she would undoubtedly be turned away. With the exception of a relatively small quota of refugees accepted on the recommendation of UNHCR, the United States, like other countries of asylum, does its best to deter would-be asylum seekers from ever reaching its shores. In order to escape to safety, refugees must often rely on false documents, smugglers, and irregular modes of transportation. The

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[57] The Committee to Preserve Asylum's First Mailing to Senators, Dec. 21, 1995, *reprinted in* SCHRAG, *supra* note 15, at App. B; *see also* Barbara Bradley, *Seeking Political Asylum*, NPR MORNING EDITION, Mar. 30, 1998 ("[Refugees] are, by definition, coming from countries where because of their political dissidence, they have been subject to persecution. They have an innate fear of coming forward and disclosing what their activities are. So even if it's in their interest, it could take them awhile to come to the realization that this is the only means that they're going to be able to stay in the United States.") (statement of Neil Nolan, staff attorney at AUTA, a nonprofit legal services group for immigrants).
[58] One such individual, a student activist and torture survivor from Burma, was denied asylum by an immigration court in California because he failed to meet the one-year deadline, although the judge believed that he would otherwise be eligible for relief based on his well-founded fear of persecution. Testimony of Eleanor Acer, Director, Asylum Representation Program, Lawyer's Committee for Human Rights, U.S. Senate Committee on the Judiciary Subcommittee on Immigration, Hearing on Asylum Policy, May 3, 2001 [hereinafter Acer, Senate Immigration Subcommittee Testimony].

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Refugee Convention recognizes this reality and prohibits States from penalizing refugees for illegal entry or presence in the country.[59] However, insufficient or illegal documentation may result in the denial of an applicant's claim, because it does not enable her to prove that she arrived in the United States less than a year prior to initiating asylum proceedings.[60]

In light of the many reasons that genuine refugees may not file for asylum within one year or manage to prove that they did so by clear and convincing evidence, it is clear that the "changed circumstances" and "extraordinary circumstances" exceptions are inadequate to guard against the *refoulement* of legitimate refugees. While the INS regulations list ineffective assistance of counsel as one of the situations that may constitute an "extraordinary circumstance," Vladmir's delay in submitting his application, as described above, was not found to be "reasonable under the circumstances," although his lawyer had run away with his legal fees and failed to file an application on his behalf.[61] Under the new regulations, Lijun's lawful nonimmigrant status *might* qualify as an exceptional circumstance, but it would not necessarily do so,[62] and her decision to postpone her application until after the birth of her child—a circumstance "intentionally created by the alien"—would almost certainly fail to excuse the delay. Nor do the exceptions prevent the *refoulement* of individuals like Richard, whose lack of evidence

[59] Refugee Convention, art. 31(1).
[60] Like Richard, whose situation is described above, Makani Jalloh, who suffered torture in Sierra Leone, applied for asylum with her two children soon after she arrived in the United States. However, the INS rejected her claim because she did not have enough evidence to show that she had complied with the one-year deadline. Only with the assistance of pro bono lawyers, did Makani and her children eventually win asylum. Acer, Senate Immigration Subcommittee Testimony, *supra* note 58.
[61] *See* Ismailov v. Reno, 263 F.3d 851 (8th Cir. 2001).
[62] The Final Rule provides that maintaining lawful immigrant or nonimmigrant status until a reasonable time before the filing of the asylum application "may" excuse the delay in filing. 8 C.F.R. § 208.4(a)(5)(2000). *See supra* note 28 and accompanying text.

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documenting arrival in the United States lead asylum officers to reject their claims. The "reasonableness" standard of the regulations accords tremendous discretion to asylum officers, who are likely to take a narrow view of what constitutes a reasonable and unintentional delay in filing for asylum. In any event, international law permits exceptions to the principle of *nonrefoulement* only for individuals who have committed a serious nonpolitical crime or who constitute a threat to the national security of the host state.[63] Failure to submit an asylum application in a timely fashion may raise a question about the credibility of the claim, but it does not give States a carte blanche to reject all applicants on this ground.

Similarly, while refugees whose asylum applications are rejected on the basis of the one-year deadline may still apply for withholding of removal or relief under the Convention Against Torture (CAT), these alternatives do not adequately prevent *refoulement*.[64] The CAT's protections exclude the majority of refugees, whose well-founded fear of persecution does not include a fear of official torture. Moreover, the standard of proof under the CAT or provision for withholding of removal is much higher than the standard for asylum. An applicant for withholding of removal must demonstrate that it is "more likely than not" that she will be persecuted, while a judge or asylum officer must have "substantial grounds for believing that [a person] would be in danger of being subjected to torture" in order to grant relief under the CAT.[65] Both of these tests require the applicant to show that she has a fifty-one percent chance of being persecuted if she were to return, a much higher standard of proof than that of the "well-founded fear" standard of the

[63] Refugee Convention, art. 33(2).
[64] *See* Ramji, *supra* note 4, at 142.
[65] Convention Against Torture, art. 3.

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Refugee Convention, which has been interpreted by the Supreme Court to require an approximately ten percent chance of persecution.[66] Because the standard of proof is so high, the right to petition for withholding of removal does not necessarily significantly narrow the number of bona fide refugees placed at risk of *nonrefoulement* by the one-year filing deadline.[67]

Additionally, withholding of removal does not carry the same rights or security of status as an affirmative grant of asylum. Unlike asylum, withholding of removal does not extend derivative status to the recipient's family nor does it allow the recipient to eventually apply for U.S. citizenship. Withholding of removal thus leaves the recipient in limbo in a country where she has no possibility of reuniting with her family or looking forward to a more secure legal status despite her inability to return home.[68]

The United Nations High Commissioner for Refugees (UNHCR) has expressed grave concerns about the filing deadline, suggesting that does not include sufficient safeguards against *refoulement*:

> Failure to submit an asylum request within a certain time limit should not lead to an asylum request being excluded from consideration as outlined in UNHCR Executive Committee Conclusion No. 15 (1979). The United States is obliged to protect refugees from return to danger regardless of whether a filing deadline has been met.[69]

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[66] 8 C.F.R. § 208.16 (b) (1) (1997). U.S. courts have generally interpreted the standard of "well founded fear" to require a ten-percent chance of persecution. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).
[67] *See* E-mail from Joanna Habib, Lawyers' Committee for Human Rights, to author (May 6, 2002)(on file with author).
[68] *See id*.
[69] Carolyn Patty Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, BERK. J. OF INT'L LAW 38, 48 (quoting letter from Anne William Bijleveld, UNHCR Representative in Washington to Sen. Orrin Hatch (Sept. 20, 1996) (citing UNHCR Executive Committee Conclusion No. 30 (1983) (on file with author))).

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The UNHCR Executive Committee has described this "imposition of unreasonable time limits for the filing of asylum requests" as a measure that could lead to the *refoulement* of refugees.[70] With respect to this and other provisions of the IIRIRA, a UNHCR representative, in a letter to the Chairman of the House Judiciary Committee in 1995, expressed its fear that these provisions "will have a grave impact on the ability of the United States to offer protection to those fleeing from persecution." [71]

Former President Clinton, who opposed the one-year deadline but eventually signed it into law, acknowledged that the provision violated the United States' international legal obligations.[72] Upon signing the IIRIRA legislation, Clinton frankly remarked that he would "seek to correct provisions in this bill that are inconsistent with international principles of refugee protection, including the imposition of rigid filing deadlines for asylum applications."[73] Yet neither the Clinton nor the Bush Administration has indicated any intent to seek revisions of the section. In the aftermath of the terrorist attacks of September 11, 2001, reform appears even more elusive.

V. Domestic Enforcement of the International Legal Obligation of Nonrefoulement

The one-year asylum deadline, as it has been applied, violates the United States' international legal obligations under the Refugee Protocol and customary international law. However, asylum applicants whose rights have been violated by this provision may not rely on international law alone to obtain relief in a U.S. court. The Supreme Court has long

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[70] UNHCR Ex. Comm., Note on International Protection, UN Doc. A/AC.96/898 (1998).
[71] Michele R. Pistone, *Asylum Filing Deadlines: Unfair and Unnecessary*, GEO. IMMIGR. L. J. 95, 103 (1996) (quoting Letter from Rene van Rooyen, Representative, UNHCR, to Sen. Henry Hyde (Aug. 25, 1995)).
[72] *See* Pamela Constable, *Foreigners Struggle to Meet Asylum Deadline*, WASHINGTON POST, Mar. 23, 1998, B3 (quoting statement of Phyllis Coven, director of asylum for the INS, that "[t]he administration was not in favor of the one-year time limit").
[73] Statement by President William J. Clinton upon Signing H.R. 3610, Pub. L. 104-208 (Oct. 7, 1996).

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distinguished between self-executing and non-self-executing treaties, holding that "only a treaty that "operates of itself, without the aid of any legislative provision" creates rights and obligations that courts may enforce."[74] A treaty classified as "non-self-executing" may not be implemented for years, if at all. The Refugee Convention and Protocol are considered non-self-executing and therefore do not give rise to a private right of action.[75]

This in no way suggests that the United States is not bound by its international obligations. Under Article VI, clause 2 of the U.S. Constitution, all duly ratified treaties are "the Supreme Law of the Land," equivalent to an act of Congress and superceding inconsistent state laws.[76] The Refugee Protocol therefore has the force of domestic as well as international law, regardless of whether it gives rise to a private right of action.[77] While non-self-executing treaties do not provide new avenues for relief from violations of the rights guaranteed by the treaty, they do allow those who suffered violations of their rights as defined by the treaty to raise the treaty as a defense or to seek relief under already existing avenues.[78] Even without implementing legislation, courts have the ability and obligation to apply the Refugee Protocol in construing existing domestic federal, state, and constitutional law.

Moreover, the United States *has* enacted federal legislation implementing the Refugee Protocol. By adopting the Refugee Act of 1980, Congress amended 243(h) of the

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[74] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).
[75] *See* Barapind v. Reno, 225 F.3d 1100, 1107 (9th Cir. 2000); Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 n.13 (11th Cir. 1995); Bertrand v. Sava, 684 F.3d 204, 218 (2d Cir. 1982).
[76] U.S. Const., art. VI, cl. 2.
[77] *See* United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992) ("The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual . . . .")
[78] *See* Maria V. Morris, *Racial Profiling and International Human Rights Law: Illegal Discrimination in the United States*, 15 EMORY INT'L L. REV. 207, 230-231 (2001).

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Immigration and Nationality Act make the previously discretionary obligation of non-return mandatory. Section 243(h) now reads:

> The Attorney General shall not deport or return any alien except those involved in Nazi war crimes to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[79]

The Refugee Act represents an affirmative and purposeful undertaking by Congress to bring the United States into accord with the international regime of refugee protection.[80] The plain language of 243(h) makes clear Congress's intention that U.S. officials and agencies responsible for immigration and asylum proceedings ensure that asylum applicants are not returned to a country where their life or freedom would be threatened in violation of Article 33 of the Refugee Convention.

Of course, while the U.S. constitutional system considers both statutes and treaties the supreme law of the land, not all valid treaties have the force of domestic law. Where a treaty is irreconcilable with a later enacted statute, the later statute or treaty supercedes the earlier as the law of the land. As the Supreme Court held in *Reid v. Covert*, "an Act of Congress . . . is on a full parity with a treaty, and [] when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."[81] Similarly, in *Breard v. Greene*, the Court held that provisions of the AntiTerrorism and Effective Death Penalty Act (AEDPA), which prohibited habeas corpus petitioners from raising new claims not raised in state court proceedings, prevented the petitioner from

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[79] 8 U.S.C. § 1253(h)(2001).
[80] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987) ("If one thing is clear from the legislative history of . . . the 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.").
[81] Reid v. Covert, 353 U.S. 1, 18 (1957) (plurality opinion); *see also* Whitney v. Robertson, 124 U.S. 190, 194 (1988) (holding that if a treaty and a federal statute conflict, "the last one in date will control the other").

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obtaining relief based on a violation of the Vienna Convention on Consular Relations.[82] By the same logic, it could be argued that because IIRIRA was enacted subsequent to the adoption of the Refugee Protocol, its one-year-deadline trumps the right to *nonrefoulement* guaranteed by the treaty.[83]

However, a later enacted statute takes precedence over an earlier treaty *only* if the two are irreconcilable and if Congress has clearly evinced its intent to abrogate the treaty by enacting the statute.[84] While Congress has the power to enact statutes that supercede prior treaties, unless this power is clearly exercised, courts have a duty to interpret later enacted domestic laws in a way that is consonant with international law. [85] This rule of statutory construction has been sustained since the Supreme Court held in *The Charming Betsy*, that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."[86] The Restatement (Third) Foreign Relations Law of the United States (1988) reflects the continued force of this doctrine, providing that "[a]n 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

[82] Breard v. Greene, 523 U.S. 371 (1998) (per. curiam) (Souter, J., statement);
[83] *See* Ramji, *supra* note 4, at 118 (arguing that under the last-in-time rule, "there is no domestic remedy for victims of the United States' derogations from international standards," including individuals whose human rights have been violated by IIRIRA).
[84] *See* South African Airways v. Dole, 817 F.2d 119, 121, 125-26 (D.C. Cir. 1987) (finding the Anti-Apartheid Act of 1986, directing the Secretary of State to "terminate the Agreement Between the United States of America and the government of the Union of South Africa" irreconcilable with that treaty), *cert denied*, 484 U.S. 896 (1987); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 599-602 (1889) (finding clear intent to supersede). *C.f.* United States v. PLO, 695 F. Supp. 1456 (SDNY1988) (finding no intent to supercede UN Headquarters Agreement); Menominee Tribe of Indians v United States, 391 U.S. 404, 413 (1968) (finding no clear intent to abrogate treaty).
[85] *See* Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000) (holding that the court was obligated to construe the Administrative Procedure Act so as not to violate Article 3 of the Torture Convention as implemented by the Foreign Affairs Reform and Restructuring Act, and that an individual facing extradition was therefore permitted to petition for habeas review of the Secretary of State's decision to extradite); United States v. PLO, 695 F. Supp. at 1465 (holding that unless Congress's power to abrogate prior treaties or international obligations is "clearly and unequivocally exercised, this court is under a duty to interpret statutes in a manner consonant with existing treaty obligations").
[86] Murray v. The Charming Betsy, 6 U.S. (2 Chranch) 64, 118 (1804).

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the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled."[87]

The question of whether the one-year deadline supercedes the treaty obligation of *nonrefoulement* in domestic U.S. law depends upon whether Congress intended to abrogate the United States international law obligations by enacting IIRIRA, and if not, whether it is possible to interpret the one-year-deadline contained in the statute in a way that is consonant with the prohibition against *refoulement* that lies at the heart of the Refugee Convention and Protocol. With respect to the first question, a survey of IIRIRA's legislative history indicates that Congress did not intend to abrogate the United States' treaty obligations. The overriding purpose of the one-year deadline was to prevent individuals from abusing the system by filing illegitimate claims for asylum.[88] However, the members of Congress who supported the deadline believed that its exceptions would be sufficient to protect legitimate claimants from *refoulement*. In a Senate floor speech, Senator Orin Hatch, who had played an instrumental role in the passage of the bill, suggested that the extraordinary and changed circumstances exceptions were sufficient to "provide adequate protections to those with legitimate claims of asylum."[89] When later questioned by Senator Spencer Abraham about the danger that the exceptions would not provide adequate protections, Senator Hatch had responded that he would in such a case support the revision or repeal of this provision:

Sen. Abraham: If the time limit and the exceptions you have

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[87] Restatement (Third) Foreign Relations Law of the United States (1988) § 115(1)(a).
[88] Senator Alan Simpson described the rationale for enacting IIRIRA as follows: "The present system is vulnerable to . . . persons who exploit the numerous levels of administrative and judicial review to stay in this country for years even though they have . . . entered this country with fraudulent documents or no documents and such individual have no grounds for being in the United States of America except the possibility of asylum." 142 Cong. Rec. S4462 (daily ed. May 1, 1996)(statement of Sen. Simpson).
[89] 142 Cong. Rec. S11491 (Sept. 27, 1996).

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> discussed do not provide sufficient protection to aliens with bona fide claims of asylum, I will be prepared to work with my colleagues to address the problem. Is it my understanding that you too will pay close attention to how this provision is interpreted?
>
> Sen. Hatch: Yes, like you, I am committed to ensuring that those with legitimate claims of asylum are not returned to persecution, particularly for technical difficulties. If the time limit is not implemented fairly or cannot be implemented fairly, I will be prepared to revisit this issue in a later Congress.[90]

Senator Hatch's pledge reflected the intention of Congress that the one-year deadline remain consistent with the United States' international legal obligations. Senator Alan Simpson, the sponsor of the original bill (which was more restrictive than the final version, providing for only a 30-day rather than one-year filing deadline), expressed this intent even more forcefully:

> Our laws and treaties prevent our Government from returning any person to any country where their life or freedom may be in danger. That is the law of the United States. It is the law of the United Nations. It is the sacred law. It is called *nonrefoulement*: You cannot return a person to a country where their life or freedom may be in danger. That is not done. We do not do it and that is the law of the United States. That is the law of the United Nations. No matter if a person can establish a credible fear or not, the person will not be returned to certain imprisonment and danger. That will not change under any provisions of this bill.

As indicated by Senator Simpson's floor statement, the purpose of IIRIRA's one-year deadline was to curtail abuse of the asylum procedure, but not to abrogate the United States' duty of *nonrefoulement*.

Assuming, based on the relevant legislative history, that Congress intended to uphold its obligation of *nonrefoulement* under the Refugee Protocol, U.S. courts are

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[90] 142 Cong. Rec. S11840 (Sept. 30, 1996). In his earlier speech, Hatch had also affirmed that, "if the time limit and its exceptions do not provide adequate protection to those with legitimate claims of asylum, I will remain committed to revisiting this issue in a later Congress." 142 Cong. Rec. S11492 (Sept. 27, 1996).

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obliged, wherever it is possible, to interpret the provisions of IIRIRA in a way that is consonant with the international treaty. It may be *possible,* though difficult, to construe the one-year-deadline in a way that is consistent with the duty of *nonrefoulement*. One could argue that the "exceptions" that exempt from the rigid deadline those aliens who can demonstrate that changed or extraordinary circumstances prevented their timely filing should be interpreted broadly (both in considering individual claims and in drafting regulations) so as to prevent the *refoulement* of bona fide refugees. This is a potentially powerful argument and one which legal counsel for asylum applicants might usefully employ when presenting their clients' cases. However, several appellate courts have held that the statutory language of IIRIRA prohibits judicial review of administrative decisions concerning exceptions to the one-year-deadline,[91] and there is at least a plausible argument that asylum officers, immigration judges, and the BIA may not be bound in the same way that Article III judges are bound to apply international law in construing domestic statutes. On the other hand, as officers of the branch of government that, with the U.S. Senate, purposefully assumed the obligations of the Refugee Protocol in 1968, INS and EOIR officials should be at least as vigilant as the courts in ensuring that the United States complies with its treaty obligations toward asylum seekers and refugees. Nonetheless, it is difficult to see how any interpretation of the rigid one-year deadline could prevent all legitimate refugees from being returned to the country where they fear persecution, since

[91] Fahim v. INS, 2002 U.S. App. LEXIS 295 (11th Cir. 2002); Hakeem v. INS, 273 F.3d 812, 815 (9th Cir. 2001); Ismailov v. Reno, 263 F.3d 851 (8th Cir. 2001). *See* IIRIRA, Pub. L. No. 104-208.4, 110 Stat. 3009-691, 8 U.S.C. § 1158(a)(3) (2001) ("No court shall have jurisdiction to review any determination of an applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).").

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there is no *necessary* connection between delay in filing for asylum and fear of persecution.[92]

Another possible way to construe IIRIRA's filing deadline in a manner compatible with international law is to find that while Section 208 bars some individuals from attaining asylum, it does not require that States send them back to their countries of origin.[93] Such a construction would be consistent with international law, which prohibits *refoulement* but nowhere requires states to grant asylum.[94] The United States would therefore be required to find some other way to protect from *refoulement* claimants who miss the asylum application deadline, fail to convince the asylum officer of changed or extraordinary circumstances, and cannot meet the high standard of proof required for relief under the CAT or withholding of removal provision of the INA. Many of these asylum seekers may not be refugees, but without providing access to status determination procedures, it is impossible to screen out those who would risk persecution if returned to their home country. The United States could legitimately send these individuals to a safe third country, provide them with a form of temporary protected status, or find other solutions that prevent *refoulement* without affording the right to apply for asylum. However, while compatible with international law, this interpretation of IIRIRA is impractical. Finding realistic alternatives to deportation for all individuals who fail to meet

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[92] *See* Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, 81 IOWA L. REV. 671, 685 (1996) (refuting the premise that bone fide claimants have no reason to file late and asking, "is the torture or death that persecution can entail really the appropriate penalty for a missed deadline?").

[93] The one-year-deadline prevents individuals from claiming the benefits of Section 208(1), which reads: "Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this section, or where applicable, section 235(b)." IIRIRA, § 208(a)(1), Pub. L. 104-208, 110 Stat. 3009-690.

[94] Article 14 of the non-binding Universal Declaration of Human Rights provides that all individuals have the right to seek and enjoy asylum but does not assign to any State the obligation to *grant* asylum. No binding international instrument sets forth such an obligation. Universal Declaration on Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

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the one-year deadline would be costly, time consuming, and politically unpopular. It would also inevitably extend protection to illegitimate claimants, defeating the original purpose of the deadline to counter abuse of the asylum process.

The third and most likely possibility is that there is no way to reconcile the one-year filing deadline with the international norm of *nonrefoulement*. A broad construction of IIRIRA's exceptions may insufficient to protect aliens with legitimate claims of asylum. While the statute excludes tardy applicants from applying for asylum rather than directing the Attorney General to return them to persecution, the high burden of proof under the withholding of removal provision and the presumption of illegitimacy that may color removal proceedings are likely to exclude many individuals who would otherwise qualify for asylum. In this case, it is the responsibility of Congress to amend or repeal the one-year deadline in order to realize its express intention not to return *any* individual to a country where his or her life or freedom would be in danger.

Some members of Congress have recognized that IIRIRA's filing deadline creates a serious risk that genuine refugees will be returned to persecution. On March 20, 2002, a bipartisan group of Congresspersons introduced a Refugee Protection Act (RPA), the third to be introduced in the House or Senate since 1996.[95] The bill replicates the language of the Refugee Protection Act of 2001,[96] which was introduced in the Senate on August 3, 2001 but saw no further action as Congress became preoccupied with the war on terrorism and increasingly anxious to tighten control over immigration.

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[95] Refugee Protection Act of 2002, H.R. 7074, 107th Cong. (2002)(declaring, in Section 2, that while "[p]rotecting people from persecution is a cherished goal and a guiding principle of the United States . . . United States law fails to ensure that a person fleeing persecution who arrives in the United States has a fiar and adequate opportunity to present a claim for protection").
[96] Refugee Protection Act of 2001, S. 1311, 106th Cong. (2001).

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Like its predecessor, the Refugee Protection Act of 2002 reflects a welcome step toward ameliorating the harshest provisions of IIRIRA. In contrast to the first reform bill proposed in 1999, which simply added "good cause" as a third exception to the one-year deadline, the 2002 bill would eliminate the one-year deadline altogether. As Senator Edward Kennedy, one of the co-sponsors of the 2001 Senate bill, explained:

> Since the enactment of [the one-year] deadline more than 10,000 asylum seekers have had their claims rejected by the INS. Many of these individuals did not file their claims because they were unfamiliar with our legal system and did not know they are required to file a timely application. Asylum seekers should be able to apply for protection regardless of when the file their claims. Our bill will eliminate the one-year deadline thereby preserving the ability of persons seeking refuge to be granted safe haven without regard to the timing of their application. This provision will offer much needed protection to persons who have fled their home countries out of fear and terror.[97]

By eliminating the arbitrary one-year deadline, the RPA would dispense with a deeply problematic requirement that is at odds with the United States' international treaty obligations.

VI. Conclusion

By enacting IIRIRA, Congress sought to curb illegal immigration and stem abuse of the asylum system by illegitimate claimants. It did not intend to abrogate the United

[97] 147 Cong. Rec. S8723 (Aug. 3, 2001)(statement of Sen. Edward Kennedy). Senator Patrick Leahy, also a cosponsor of the 2000 RPA, similarly explained the rationale behind the proposed elimination of the deadline:

> By definition, worthy asylum applicants have arrived in the United States following traumatic experiences abroad. They often must spend their first months here learning the language and adjusting to a culture that in many cases is extraordinarily different from the one they know. Therefore, although I can understand the desire to have asylum seekers submit timely applications, the existing one-year rule does not make sense.

147 Cong. Rec. S8720 (Aug. 2, 2001)(statement of Sen. Patrick Leahy).

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States' treaty obligations under the Refugee Protocol. However, IIRIRA's rigid, one-year deadline for asylum applications places the United States at risk of violating the fundamental norm of *nonrefoulement* that lies at the heart of international and domestic systems of refugee protection.

It is at least theoretically possible to construe the one-year deadline in a way that is consistent with international law. When applying the deadline, courts and administrative officers should strive to ensure that it does not cause legitimate refugees to be returned to country where their life or liberty would be in danger. To this end, the Department of Justice should provide training in international refugee law to all asylum officers and immigration judges, and direct officials to apply this law when interpreting the deadline and its exceptions.

However, in the end, it is unlikely that any construction of the existing statute can adequately guard against the return of legitimate refugees. Ultimately, Congress must take action to bring the United States into compliance with its international obligations by repealing the one-year deadline. Whether Congress can muster the political will to pass the Refugee Protection Act or a similar bill remains to be seen. The current political environment suggests that the harsh provisions of IIRIRA will remain in force, at least for the foreseeable future. However, the legislative reforms proposed in March 2002 would in no way undermine national security or impede the war against terrorism. On the contrary, eliminating the one-year deadline and other draconian measures of the 1996 Act would reaffirm the United States' commitment to promoting liberty, freedom, and human rights, at home and throughout the world.

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