Defenses for Sanctuary Movement: A Humanitarian Plea Falling Upon Deaf Ears

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"Remember always to welcome strangers, for by doing this, some people have entertained angels without knowing it."
-Heb. 13:2

I. INTRODUCTION

In the past decade, thousands of Guatemalan and Salvadoran refugees fleeing death and persecution in their homelands have sought refuge in the United States.¹ Those requesting political asylum at the border face regular denial of their applications by the Immigration and Naturalization Service (INS), often without an investigation or hearing.² Of the approximately ten thousand five hundred Guatemalan and Salvadoran refugees whose asylum applications were received by the United States in the past three recorded fiscal years, only five percent received favorable rulings.³

With little hope of obtaining political asylum through legal mechanisms, many refugees have forsaken official channels and look to the Sanctuary Movement for help.⁴ The Sanctuary Movement began as a loosely knit group of concerned church leaders who felt compelled to aid those Central American refugees whom the U.S. government had denied emergency immigration relief.⁵ Today, the Movement has grown into a nationwide effort involving more than three

¹ See infra text accompanying notes 104–17.
² Helton, Ecumenical, Municipal and Legal Challenges to United States Refugee Policy, 21 HARV. C.R.-C.L. L. REV. 493, 499 (1986). A refugee at the border of the United States is not technically within its territory and, therefore, may be denied admittance by the government with little regard for his or her due process rights. G. Goodwin-Gill, The Refugee in International Law 74–76 (1983). See, e.g., infra note 167.
⁵ See infra Section IIIA.
hundred church congregations and humanitarian groups.\textsuperscript{6} Over one thousand Guatamalans and Salvadorans have received refuge in the United States due to the efforts of the Sanctuary Movement.\textsuperscript{7}

In 1981, the Sanctuary Movement became the object of INS investigations.\textsuperscript{8} The result of these investigations has been a series of prosecutions against sanctuary workers for violations of federal law prohibiting the bringing in, transporting, or harboring of illegal aliens.\textsuperscript{9} In order to defend themselves against federal indictments, sanctuary workers have constructed defenses based on international principles of human rights.\textsuperscript{10} To date, the courts considering the sanctuary cases have failed to recognize these defenses.\textsuperscript{11}

This Comment concentrates on the defenses offered by sanctuary workers which are based on non-refoulement, a principle prohibiting a state from sending refugees back to territories where they would suffer persecution.\textsuperscript{12} The second section of this Comment defines the principle of non-refoulement and traces its development in international law.\textsuperscript{13} The third section begins with a review of non-refoulement in U.S. law and concludes with a critique of the courts' treatment of the non-refoulement-based defenses offered by the sanctuary workers in a number of recent cases.\textsuperscript{14} This Comment will suggest that the courts' failure to recognize non-refoulement-based defenses is contrary to both international and domestic law.\textsuperscript{15}

II. The Principle of Non-Refoulement in International Law

A. Non-Refoulement and the International Common Law

The principle of non-refoulement prohibits the return of refugees to a territory\textsuperscript{16} where their lives or freedom would be jeopardized.

\begin{itemize}
\item Id.
\item Helton, \textit{supra} note 2, at 493.
\item See infra Section IIIA.
\item See infra Section IIIC(1).
\item Id.
\item See infra Section II.
\item See infra Section III.
\item See infra Sections IIIC and IV.
\item In most instances, "territory" will mean the refugee's country of origin. However, the choice of the word "territory" was deliberate, and evidences the drafter's intent to broaden the scope of the principle to encompass a wider variety of situations. Thus, a state may not deport refugees to any territory, whether it be their homeland, land of last residence, or any country where they may face
ized. Thus, non-refoulement guarantees refugees the right of temporary refuge in the host state until they can safely return to their country of origin or until they are granted political asylum in another state. Commentators agree that non-refoulement is a well-established principle of international common law.

This common law seeks to guarantee such fundamental human rights as the freedom of movement, the right to a nationality, and the freedom from inhumane treatment. The protection of basic human rights is the goal and substance of numerous international agreements. Because many of these

loss of life or freedom. Nor may a country deport a refugee to a state "where there is a reasonable basis to believe that he would be returned subsequently to the country were he fears persecution." Goldman & Martin, International Legal Standards Relating to the Rights of Aliens and Refugees and the United States Immigration Law, 5 Hum. Rts. Q. 302, 313. See, e.g., 1951 Convention, supra note 12, at art. 33.

The scope of non-refoulement protection is dependent upon the meaning of the term "refugee." Thus, in order to understand a particular definition of non-refoulement, the corresponding definition of refugee must be considered as well. See generally notes 23–24, 47–49, 60–64 and accompanying text.

Non-refoulement incorporates the right of temporary refuge. That means one has a right to stay in a place of refuge until the situation in the country of origin warrants return." Parker, Human Rights and Humanitarian Law, 7 Whittier L. Rev. 675, 679 (1985). See also G. Goodwin-Gill, supra note 2, at 119 ("Admission on a temporary basis, especially in situations of large-scale influx, remains an inescapable facet of life, and is practiced by states throughout the world.").

See infra note 24 and accompanying text.


Id. at art. 5. The rights mentioned above are not dependant upon race, sex, language, religion, nationality, or national status. Final Act of the Conference on Security and Cooperation in Europe, reprinted in 73 U.S. DEPT. OF STATE BULL. 323, 325 (1975); American Declaration of the Rights and Duties of Man, reprinted in Inter-American Commission on Human Rights, Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V.l11.60, doc. 28 rev. 1, at 21 (1989) [hereinafter American Declaration]. For an extensive list of fundamental human rights, see American Declaration, supra, at 22–26; Universal Declaration of Human Rights, supra note 20, at arts. 1–30.

See, e.g., Hague Convention of 1907 Part IV, 36 Stat. 2277, 2279, T.S. No. 539, at 5, B.F.S.P. 338 (1910) ("Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization . . . ."); U.N. CHARTER preamble ("[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . . ."); The American Declaration, supra note 22, at preamble ("All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another."); Charter of the Organization of American States, Apr. 30, 1948, art. 5(j), 2 U.S.T. 2416, 2418, T.I.A.S. No. 2361, at 5, 119 U.N.T.S. 3, 54 ("The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."); Universal Declaration of Human Rights, supra note 20 ("[I]t is essential, if man is not to be compelled to have recourse . . . to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."); Geneva Convention of 1949, art. 3(1), 6 U.S.T. 3516, 3518, T.I.A.S. No. 3362, at 4, 75 U.N.T.S. 31, 32 ("Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely without any adverse distinction founded upon race, color, religion or faith, sex, birth or wealth . . . ."); Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), 14 U.N. GAOR Annex I (Agenda Item 64) at 16–17, U.N. Doc. A/4249, at preamble (1959) ("[M]ankind owes to the child the best it has to give . . . ."); International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, at preamble (1966) ("[R]ecognition of the inherent dignity and of the equal and inalienable rights of all
agreements rely on the principle of *non-refoulement* as a means of protecting fundamental human rights, commentators consider it an unconditional right to which every refugee is entitled.\(^{24}\)

**B. Non-Refoulement in International Law Prior to the Formation of the United Nations**

1. Early History

The principle of *non-refoulement* is a contemporary concept.\(^{25}\) The principle did not make its first appearance until the middle 1800s.\(^{26}\) An early example of a *non-refoulement* provision found in the United Kingdom’s Aliens Act of 1905 granted those fleeing political or religious persecution leave to land on British soil despite “want of means, or the probability of [the alien] becoming a [public] charge . . . .”\(^{27}\) This provision, like other early articulations of *non-refoulement*, was not comprehensive. Moreover, subsequent development of the principle itself was slow and sporadic. *Non-refoulement* was not formally articulated in an
international instrument until some thirty years later, after the formation of the League of Nations.28

2. The League of Nations (1922–1946)

The Charter of the League of Nations (League)29 was drafted by fourteen nations on April 28, 1919, and put into force on January 11, 1920.30 A reaction to World War I, the League was created to secure international peace by the “firm establishment of international law as the actual rule of conduct among Governments . . . .”31 As part of that responsibility, the League sought to insure fair treatment of those people made refugees as a result of armed conflict.

The League’s 1933 Convention Relating to the International Status of Refugees (Convention)32 was the first international agreement to refer explicitly to the principle of non-refoulement.33 Article 3 of the Convention provides:

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order.34

28 See infra note 32 and accompanying text.
29 LEAGUE OF NATIONS COVENANT
30 LEAGUE OF NATIONS 3 (J. Johnsen, ed. 1924) [hereinafter LEAGUE OF NATIONS]. President Woodrow Wilson advocated a League of Nations in his famous Fourteen Point Plan, and the United States became one of its original founders. Id. But see infra note 31.
31 LEAGUE OF NATIONS COVENANT, supra note 29, at Preamble. The Preamble states:
In order to promote international cooperation and to secure international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honorable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, the powers signatory to this covenant adopt this constitution of the League of Nations.
Id.

Due to the tumultuous environment in which it was created, and the failure of its founders to reach a meaningful agreement regarding the structure and authority of the institution, the League was largely ineffectual. Smith, Preface to Schwarzenberger, THE LEAGUE OF NATIONS AND WORLD ORDER at xi–xii (1936). President Wilson was not able to convince Congress to approve U.S. membership in the League. LEAGUE OF NATIONS, supra note 30, at 3.
32 Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 201. In 1928, a group of states recommended that Russian and Armenian refugees not be expelled from any member state when they were not in a position to enter a neighboring country in a “regular manner.” Arrangement Relating to the Legal Status of Russian and Armenian Refugees, June 30, 1928, art. 7, 89 L.N.T.S. 55. This recommendation did not extend to those refugees who had intentionally entered the state in violation of domestic law. Id.
33 G. Goodwin-Gill, supra note 2, at 70.
34 Convention Relating to the International Status of Refugees, supra note 32, at art. 3. The exceptions contained in this provision are typical of those found in many of the non-refoulement provisions drafted thereafter. See, e.g., id.; Provisional Arrangement Concerning the Status of Refugees Coming
The Convention, by incorporation, defined a refugee as "[a]ny person . . . who does not enjoy the protection of [his or her] government . . . and who has not acquired another nationality." Article 3 was not well received. Three of the eight participating states—Egypt, Italy, and Czechoslovakia—expressed official reservations to the non-refoulement provision.

Two later agreements seeking to protect refugees coming from Germany also refer to the principle of non-refoulement. Once again, however, the signatories of these agreements expressed reservations to the principle. In both agreements, for example, Great Britain excluded all refugees subject to extradition under existing treaties from the protection of the non-refoulement provisions. Only one of these agreements was ever ratified, and then, only by one of the participating states, thus emasculating the effectiveness of the non-refoulement provisions even among those states who signed the agreements without reservation.


35 Convention Concerning the Status of Refugees, supra note 12, at art. 1 ("The present Convention is applicable to Russian, Armenian and assimilated refugees, as defined by the Arrangement . . . of May 12th, 1926 . . ."). By the inclusion of the words "and assimilated refugees," the Convention defines refugee more broadly than the Arrangement Concerning the Status of Refugees which includes only Russians and Armenians in its definition. Arrangement Concerning the Status of Refugees, supra, at art. 2.

36 Egypt reserved the right "to expel such refugees at any moment for reasons of public security." Convention Concerning the International Status of Refugees, supra note 32, at state signatures. Italy likewise reserved the authority to expel refugees "for reasons of national security and public order." Id. Czechoslovakia reserved the right to expel aliens who posed a danger to the safety of the state and public order as well as those subject to expulsion under existing extradition treaties. Id.

37 See Provisional Arrangement Concerning the Status of Refugees, supra note 34, at art. 4(2) ("[R]efugees . . . may not be subjected by the authorities of that country to measures of expulsion or be sent back across the frontier . . ."); Convention Concerning the Status of Refugees, supra note 34, at art. 5(2) ("[R]efugees . . . may not be subjected by the authorities to measures of expulsion or reconduction . . .").

38 Provisional Arrangement Concerning the Status of Refugees, supra note 34 at, state signatures; Convention Concerning the Status of Refugees, supra note 34 at, state signatures.

39 Provisional Arrangement Concerning the Status of Refugees, supra note 34, at state signatures; Convention Concerning the Status of Refugees, supra note 34, at state signatures. Further, the British included certain criminal and morally suspect refugees among those excepted from the article’s protection, thus increasing the number of refugees subject to refoulement. Provisional Arrangement Concerning the Status of Refugees, supra note 34, at state signatures; Convention Concerning the Status of Refugees, supra note 34, at state signatures.

40 3 P. ROHNS, WORLD TREATY INDEX 302, 327 (2d ed. 1983).
As a result of such qualified acceptance of *non-refoulement*, the principle was slow to gain widespread formal recognition. The great increase in refugees during World War II, however, resulted in a limited practical compliance with *non-refoulement* by the Allied nations in Europe. As large numbers of refugees poured into the countries of Western Europe, the sovereign nations there began to protect those fleeing political persecution. While this change of attitude was neither extreme nor global, it did represent the first major step toward international acceptance of the principle of *non-refoulement*.

C. Non-Refoulement in International Law After the Formation of the United Nations

1. 1946–1951

On February 12, 1946, the United Nations General Assembly, of which the United States remains a member, resolved to create a special committee to deal with the refugee problem. Within this resolution, the General Assembly recommended that the proposed committee recognize the principle of *non-refoulement*, thus expressing, for the first time, the United Nation's (U.N.) official acknowledgement of the principle. This recommendation suggested that no refugees or displaced persons who have finally and definitely, in complete freedom, and after receiving full knowledge of the facts, including adequate information from the government of their countries of origin, expressed valid objections to returning to their coun-

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41 G. Goodwin-Gill, supra note 2, at 71.
42 Id.
43 Id. Large numbers of refugees fleeing Russia, Spain, Germany, and the Ottoman Empire found refuge in neighboring countries. Id. For example, in 1939, France admitted four hundred thousand Spanish refugees in just ten days. Id. at 71 n.12 (quoting A. Kiss, *Répertoire de la pratique française en droit international public* 433–35 (1966)).
Although it was not unknown for refugees to be refused admittance to a country bordering on that from which they were escaping, such cases were rare and the general picture was one of persons at least being able to escape from persecution. That was of course not the case as regards Jews during the war; but after the war, when the movement of Spaniards continued and a movement from the countries of Eastern Europe began, first asylum was not normally refused to persons who appeared to be *bona fide* refugees; nor were persons forcibly repatriated to those countries who had left them during the war . . . .

Id.
46 Resolutions, supra note 45, at 12.
tries of origin . . . shall be compelled to return to their country of origin.\textsuperscript{47} 

The principle was again recognized by the General Assembly, though indirectly, in the 1948 Universal Declaration of Human Rights.\textsuperscript{48} Although the Declaration contained no provision expressly devoted to non-refoulement, article 3 ("the right to life, liberty and security of the person"), article 13 ("the right to . . . residence within the borders of a state . . . [and] the right to leave any country"), article 14 ("the right to seek and to enjoy . . . asylum from persecution"), and article 15 ("the right to a nationality" and the freedom from denial of the right to change nationality), when viewed in concert clearly recognize the acceptance of the principle of non-refoulement.\textsuperscript{49} 

Notwithstanding the existence of non-refoulement principles in international agreements, the practice of expelling refugees in the period following World War II was relatively widespread among individual states.\textsuperscript{50} While a few of these refugees were expelled in accordance with certain war time extradition treaties,\textsuperscript{51} many more refugees were subjected to forced repatriation than could be accounted for by these agreements.\textsuperscript{52} 


The 1951 U.N. Convention on the Status of the Refugee (1951 Convention)\textsuperscript{53} is the first international instrument to provide meaningful protection for the refugee by matching specific refugee rights with corresponding state obligations.\textsuperscript{54} Like the U.N. Charter and the Universal Declaration of Human Rights, the 1951 Convention seeks to guarantee the "fundamental rights and freedoms" of the refugee.\textsuperscript{55} One of the fundamental rights guaranteed by the 1951 Convention is the right of non-refoulement.\textsuperscript{56}
Save those instances when the refugee falls under one of the enumerated exceptions in article 33(2) of the 1951 Convention, the language of article 33 makes non-refoulement an absolute obligation upon the signing state:\(^57\)

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.\(^58\)

The 1951 Convention defines a refugee as anyone who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.\(^59\)

Article 33 is the only article of substance which allows no reservations by a signing party.\(^60\) The scope of article 33 expands the obligations of non-refoulement beyond the limits imposed by prior international agreements.\(^61\)

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\(^57\) Id. The protections of article 33(1) are absolute in so far as the refugee's legal status in the country of refuge is immaterial. See infra note 61. The only exceptions are provided for in article 33(2):

The benefit of the present provision may not, however, be claimed by a 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.

\(^58\) Id. at art. 33(2). Note how the article extends the national security exception to include those refugees convicted of serious crimes. The exceptions, however, though drafted in broad terms, were not meant to be applied mechanically, thereby defeating the purpose of article 33(1). G. Goodwin-Gill, supra note 2, at 95–96. Indeed, a state may not expel a refugee under the color of one of the exceptions unless that refugee has been afforded due process of law. Id. ("The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law."). The phrase "reasonable grounds" is not defined by the 1951 Convention, however, leaving a possible loophole for those member states desiring to escape the obligations of article 33.

\(^59\) 1951 Convention, supra note 12, at art. 33(1) (emphasis added).

\(^60\) Id. at art. 1(2).

\(^61\) Id. at art. 42(1). See also Martin, supra note 24, at 361 (Article 33 is the only "major substantive article" in the 1951 Convention "to which no [reservations] are allowed.").

\(^62\) Compare 1951 Convention, supra note 12, at art. 33 with supra notes 27, 34, 37, 47 and accompanying text. Unlike prior agreements, article 33 prohibits direct as well as indirect expulsion. 1951 Convention, supra note 12, at art. 33. See also Goldman & Martin, supra note 16, at 313 ("[N]ot only may a state not directly expel a refugee to another country where he risks persecution, but similarly may not expel him to another country where there is a reasonable basis to believe that he would be returned subsequently to the country where he fears persecution.").

Further, article 33 applies regardless of whether the alien is legally in the territory or not. 1951 Convention, supra note 12, at art. 33. See also Goldman & Martin, supra note 16, at 313 ("Article 33, unlike other provisions in the Convention, makes no distinction between a refugee lawfully or unlawfully in the state party's territory.").
As of 1983, forty-nine nations have ratified or acceded to the 1951 Convention. Many other nations, including the United States, which were not signatories to the 1951 Convention, have ratified it indirectly through the 1967 Protocol Relating to the Status of Refugees which incorporates the substantive provisions of the 1951 Convention. The 1951 Convention is perhaps the most significant international agreement which provides for non-refoulment. It is the foundation upon which a vast body of international refugee law has developed.


A major shortcoming of the 1951 Convention is its limited retrospective application. Article 1 extends the protections of the 1951 Convention to individuals who became refugees as a result of incidents occurring prior to January 1, 1951. Thus, while the number of refugees increased with every new political upheaval, the corresponding number of those eligible for protection under the 1951 Convention declined sharply. This problem was addressed sixteen years after the 1951 Convention was put into force. In the 1967 Protocol Relating to the Status of Refugees (Protocol), the January 1, 1951 time limitation was eliminated.

The Protocol applies without geographic limitation save those expressly reserved by the parties to the 1951 Convention. Except for the amended eli-
bility date, the definition of refugee found in the 1951 Convention is incorporated verbatim in the Protocol.\(^{70}\) Also, article 7(1) of the Protocol continues the prohibition against any reservations or qualified positions regarding article 33 of the 1951 Convention.\(^{71}\) One commentator has stated that “[t]he presence of this limitation indicates that, sixteen years after the drafting of the 1951 Convention, the principle of *non-refoulement* remained of such importance as to allow no conditional or alternative provisions.”\(^{72}\) As of 1983, sixty-one nations, including the United States, have ratified or acceded to the Protocol.\(^{73}\)

4. Other International Instruments Containing *Non-Refoulement* Provisions

In addition to the 1951 Convention and the Protocol, there are a number of other important international instruments which contain provisions regarding *non-refoulement*. While the United States has not signed or ratified any of these agreements,\(^{74}\) their presence in the international community is not without legal significance.\(^{75}\)

The 1966 International Covenant of Civil and Political Rights (International Covenant),\(^{76}\) though not mandating *non-refoulement*, does recognize the international rights of refugees facing expulsion.\(^{77}\) The International Covenant’s due process provision,\(^{78}\) coupled with its express recognition of “fundamental hu-

\(^{70}\) See *supra* note 68.

\(^{71}\) “At the time of accession, any State may make reservations in respect . . . of any provisions of the *Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof . . . .*” Protocol of 1967, *supra* note 63, at art. VII(1) (emphasis added). *See supra* note 60 and accompanying text.

\(^{72}\) Martin, *supra* note 24, at 362.

\(^{73}\) 3 P. ROHN, *supra* note 40, at 1394–95.

\(^{74}\) The United States has ratified very few international human rights agreements. Goldman & Martin, *supra* note 16, at 318. “To date, the United States has ratified only the 1967 Protocol Relating to the Status of Refugees; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; and the Slavery Convention of 1926, amended by the 1953 Protocol.” *Id.*

\(^{75}\) *See infra* Section IID.

\(^{76}\) International Covenant on Civil and Political Rights, *supra* note 23. The Covenant recognizes that “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights . . . .” *Id.* at preamble.

\(^{77}\) Article 13 of the International Covenant on Civil and Political Rights states: “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall . . . be allowed to submit the reasons against his expulsion and to have his case reviewed by . . . competent authority . . . .” *Id.* at art. 13. Unlike the 1951 Convention, the legal status of the refugee in the host state may jeopardize his or her standing under the provisions of this article. Compare *id.* with *supra* note 61.

\(^{78}\) International Covenant on Civil and Political Rights, *supra* note 23, at art. 13. The Covenant assures due process to the refugee by allowing expulsion “only in pursuance of a decision reached in accordance with law . . . .” *Id.* *See also* Martin, *supra* note 24, at 365.
man rights,” indicates a clear intent to restrict a state’s authority to expel refugees.80

The 1967 Declaration on Territorial Asylum of the U.N. General Assembly provides for non-refoulement in article 3(1): “No person [seeking asylum from persecution] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.”82 While this non-refoulement provision applies to refugees legally or illegally within the territory, exceptions are recognized when a vital concern exists for national security or domestic well-being.83

Article 22 of the American Convention on Human Rights (American Convention) provides an absolute right of non-refoulement:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.85

Unlike article 33 of the 1951 Convention, the American Convention recognizes no exceptions to article 22.86 As in earlier instruments, the protections of article 22 extend to all persons within the borders of the state, whether they have crossed them legally or not.87

The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa promulgated by the Organization of African Unity (O.A.U. Conven-
tion)\textsuperscript{88} contains the most comprehensive non-refoulement provision to date.\textsuperscript{89} Article IV of the O.A.U. Convention prohibits the denial of non-refoulement for discriminatory reasons.\textsuperscript{90} Additionally, article I(2) of the O.A.U. Convention broadens the definition of refugee, extending the protections of non-refoulement to groups previously ineligible.\textsuperscript{91}

D. Non-Refoulement and the International Norm

The agreements mentioned above are a few of the many international instruments which recognize the principle of non-refoulement.\textsuperscript{92} The number of such documents attests to the wide acceptance this principle has achieved in the international community. It also indicates that non-refoulement has become a recognized international legal norm.\textsuperscript{93}

International legal norms carry great weight. The International Court of Justice (ICJ) applies international legal norms as evidence of accepted law and

\textsuperscript{88} O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 46 [hereinafter O.A.U. Convention]. The O.A.U. Convention espouses a practical approach to the refugee problem. While concerned with providing extensive protection for the bona fide refugee, the member states were also mindful of the national frictions caused by a joint refugee policy, as well as the inherent problems associated with assimilating potential political dissidents:

We, the Heads of State and Government . . .
1. [Note] with concern the constantly increasing number of refugees in Africa and [desire] . . . finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future,
2. [Recognize] the need for an essentially humanitarian approach towards solving the problems of refugees.
3. [Realize,] however, that refugee problems are a source of friction among many Member States, and [desire] . . . eliminating the source of such discord,
4. [Desire] to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sake of fomenting subversion from [the] outside . . . .

\textit{Id.} at preamble.

\textsuperscript{89} "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened . . . ." \textit{Id.} at art. II(3).

\textsuperscript{90} Signatories agree to administer the provisions of the O.A.U. Convention without regard to race, religion, nationality, membership of a particular social group, or political views. \textit{Id.} at art. IV.

\textsuperscript{91} "The term 'Refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order . . . is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." \textit{Id.} at art. I(2).

\textsuperscript{92} For an extensive list of documents which contain non-refoulement provisions, see Goldman & Martin, \textit{supra} note 16, at 313–15.

\textsuperscript{93} Hoffman, \textit{The Application of International Human Rights Law in State Courts: A View from California}, 18 \textit{Int'l L.J.} 61, 61–67 (1984). International legal norms are also referred to as the customary international law (Martin, \textit{supra} note 24, at 365; Parker, \textit{supra} note 18, at 677; G. Goodwin-Gill, \textit{supra} note 2, at 97), law of nations (Hassan, \textit{supra} note 24, at 17), customary law (Goldman & Martin, \textit{supra} note 16, at 306), and international custom (\textit{see infra} note 100). The author uses international legal norm merely for convenience.
principle among nations.94 Legal norms have been defined as principles which have gained the force of binding law on all nations through repeated and consistent use.95 Evidence of an international norm may be found in "recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs . . . resolutions relating to legal questions in the United Nations General Assembly"96 and decisions of the ICJ.97 According to the Restatement of Foreign Relations Law of the United States, if a principle of international law is recognized as a "customary rule," all members of the international community are bound by its obligations, notwithstanding express acknowledgement.98

The authority given legal norms is justified by an analogy to universal common law.99 That is, because the norm embodies a recognized human right

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94 Statute of the International Court of Justice art. 38 ("[The [International] Court [of Justice] . . . shall apply . . . international custom, as evidence of a general practice accepted as law [and] . . . the general principles of law recognized by civilized nations . . . ."). See also North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 42 (judgment of Feb. 20, 1969) [hereinafter Continental Shelf Cases]. In the Continental Shelf Cases, the petitioner asserted that an article in an international agreement had become a customary international law. In response, the International Court of Justice stated:

In so far as this contention is based on the view that [the Article] has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to become binding even for countries which have never, and do not, become parties to the Convention [wherein the Article is contained.] There is no doubt that this process is a perfectly possible one and does from time to time occur; it constitutes indeed one of the recognized methods by which rules of customary international law may be formed.

Id.

95 "According to traditional international law, a general practice is the result of the repetition of individual acts of States constituting consensus in regard to a certain content of a rule of law." South-West African Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 248 (judgment of July 18, 1966) (Tamaka, J., dissenting) [hereinafter South-West African Cases]. See also Continental Shelf Cases, supra note 94, at 44 ("[T]he passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law . . . .").


98 Restatement, supra note 97, at § 102 comment i, § 524 comment e. See also South-West African Cases, supra note 95, at 289 ("Concerning the question whether the consent of all States is required for the creation of a customary international law or not, we consider that the answer must be in the negative . . . ."). See supra note 24.

99 Hassan, supra note 24, at 20–21. In Filartiga v. Pena-Irala, Justice Kaufman states:

United States courts are "bound by the law of nations, which is part of the law of the land."

These words were echoed in The Paquete Habana . . . . "[I]nternational law is part of our law, and must be ascertained and administered by the courts . . . as often as questions of right depending upon it are duly presented for their determination."

Filartiga v. Pena-Irala, 630 F.2d 876, 887 (1980) (footnotes omitted) (quoting The Paquete Habana,
common to all, no state should be allowed to deny its consequential duty to honor that right.\textsuperscript{100} Thus, as one commentator states, "it is both reasonable and legitimate to expect that . . . domestic law will accommodate international humanitarian norms."\textsuperscript{101} While other commentators continue to argue that the consent of individual states is not irrelevant,\textsuperscript{102} non-refoulement is accepted as a binding principle of law by most states.\textsuperscript{103}

III. The Sanctuary Movement, Non-Refoulement-Based Defenses, and the U.S. Courts

A. The Sanctuary Movement

The U.S. Sanctuary Movement originated in the early 1980s with a retired rancher from Tucson, Arizona named Jim Corbett.\textsuperscript{104} Corbett became involved with the South American refugee situation after learning that a Salvadoran hitchhiker was forced from his friend's car at an INS checkpoint.\textsuperscript{105} Concerned for the Salvadoran's well-being, Corbett discovered where the refugee was being held by the INS.\textsuperscript{106} Upon arrival at the INS holding center, Corbett saw desperate refugees living in over-crowded, unsanitary holding cells.\textsuperscript{107} Shocked by these conditions, Corbett joined the Task Force on Central America of the Tucson Ecumenical Council, an activist group which posted bond for refugees detained in INS holding centers.\textsuperscript{108} Corbett allowed many of these bonded refugees to stay in his home until their asylum applications were processed by the INS.\textsuperscript{109} The Tucson Ecumenical Council freed over one hundred refugees from INS detention.\textsuperscript{110} Despite its success, the Council abandoned the legal route when it became clear that more drastic measures were required to meet

\textsuperscript{100} See supra note 24 and accompanying text.
\textsuperscript{101} Helton, supra note 2, at 522.
\textsuperscript{102} "[W]e still have not reached the stage in the formation and evolution of international legal norms wherein the consent of the state becomes irrelevant." Hassan, supra note 24, at 29.
\textsuperscript{103} See supra note 24 and accompanying text.
\textsuperscript{104} SANCTUARY: A RESOURCE GUIDE 18–19 (G. MacEain ed. 1985); R. Golden & M. McConnell, supra note 4, at 39–40.
\textsuperscript{105} Id. at 39; SANCTUARY: A RESOURCE GUIDE, supra note 104, at 18.
\textsuperscript{106} Id.; R. Golden & M. McConnell, supra note 4, at 39–40.
\textsuperscript{107} Id. at 39.
\textsuperscript{108} SANCTUARY: A RESOURCE GUIDE, supra note 104, at 18–19; R. Golden & M. McConnell, supra note 4, at 40.
\textsuperscript{109} SANCTUARY: A RESOURCE GUIDE, supra note 104, at 18–19; R. Golden & M. McConnell, supra note 4, at 40.
\textsuperscript{110} Id.
the needs of the Central American refugee.\footnote{Id. at 46-47; SANCTUARY: A RESOURCE GUIDE, supra note 104, at 19.} By attempting to house both bonded and illegal aliens, Corbett's undertaking became unmanageable, and he turned to his friend, John Fife, for help.\footnote{Id.} Fife, the pastor of Southside Presbyterian Church in Tucson, Arizona, presented the situation to his congregation. After an affirmative secret vote, Fife publicly declared his church the first sanctuary for Central American refugees.\footnote{Id. at 19-22; R. GOLDEN & M. McCONNELL, supra note 4, at 46. While the Catholic Church has become the spearhead of the Movement, other congregations such as the Quakers, Presbyterians, Unitarians, and Jews have joined the effort. The Washington Post, March 25, 1985, at B1, col. 4; L.A. Daily J., Jan. 29, 1985, at 4, col. 3.}

From these humble beginnings, the Sanctuary Movement has grown rapidly, with membership estimated at over three hundred church and humanitarian support groups throughout the United States.\footnote{Id. The sanctuary tradition dates back to the ancient Egyptians, Greeks, and Israelites. R. GOLDEN & M. McCONNELL, supra note 4, at 15; The Boston Globe, Jan. 27, 1985, at 18, col. I. See also Comment, Sanctuary: The Legal Institution in England, 10 U. PUGET SOUND L. REV. 677 (1987). While the United States has never officially recognized the right of sanctuary, humanitarian and church groups have offered sanctuary to runaway slaves in the mid-19th century, and to conscientious objectors and AWOL soldiers during the Vietnam conflict. Id. For a brief discussion of sanctuary in the United States, see Colbert, The Motion in Limine: Trial Without Jury—A Government's Weapon Against the Sanctuary Movement, 15 HOFSTRA L. REV. 5, 40-43 (1986); Helton, supra note 2, at 550-55.} These groups offer food, shelter, and legal assistance to Salvadorans and Guatamalans who have fled to the United States in order to escape persecution and death.\footnote{Colbert, supra note 113, at 24 n.106; Helton, supra note 2, at 493. See also R. GOLDEN & M. McCONNELL, supra note 4, at 52-54 (the authors estimate the number of sanctuary groups to be as high as three thousand).} While the Sanctuary Movement was originally centered in California and Southwestern Texas,\footnote{R. GOLDEN & M. McCONNELL, supra note 4, at 14; Helton, supra note 2, at 493, 505. Current civil unrest in El Salvador began in 1977 when General Carlos Humberto Romero usurped the presidency through a sham election. Fisher, Human Rights in El Salvador and U.S. Foreign Policy, 4 HUM. RTS. Q. 1, 1 (1982). Thereafter, Romero began a reign of terror marked by torture, rape, and murder. The violence in El Salvador captured world attention in 1980 when Archbishop Oscar Romero was assassinated while performing Mass, and four Maryknoll missionaries were raped and murdered by Salvadoran National Guardsmen. Colbert, supra note 113, at 31. Reports of human rights violations in Guatemala are no less disturbing. According to the Organization of American States' human rights report, violence practiced by the Guatemalan Government "has shown characteristics of brutality and barbarism by the massive assassinations of peasants and indians with guns, machetes or knives; the bombing and machine-gunning of villages by land and air; the burning of houses, churches and communal houses as well as crops." ORGANIZATION OF AMERICAN STATES, REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF GUATAMALA 61 (1985). For a concise history of the violence and civil unrest in El Salvador and Guatemala see generally Colbert, supra note 113, at 25–31.} it has grown considerably, and sanctuary groups can be found in cities throughout the United States, including Tucson, Arizona; Seattle, Washington;
Milwaukee, Wisconsin; Minneapolis, Minnesota; Chicago, Illinois; and Cambridge, Massachusetts.\(^{117}\)

When the movement was in its infant stages, the INS did not consider it "a serious threat to enforcement efforts"\(^{118}\) and allowed the sanctuary groups to conduct their operations with little interference.\(^{119}\) According to Bill Joyce, INS Assistant General Counsel, "[w]e're not about to send investigators into a church to start dragging people out in front of the television cameras. We just wait them out . . . . This is a political thing dreamed up by the churches to get publicity. If we thought it was a significant problem, then maybe we'd look at it."\(^{120}\) The situation changed drastically between 1981 and 1984 when sanctuary groups became the focus of INS investigations and prosecutions\(^{121}\) under 8 U.S.C. § 1324, which prohibits the bringing in, transporting, or harboring of illegal aliens.\(^{122}\)

Moved by political conviction and moral obligation,\(^{123}\) sanctuary workers continue to defy the INS by offering support to fleeing refugees.\(^{124}\)

Their battle has now moved to the courts, where sanctuary workers are asserting that Salvadorans and Guatamalans have a right of refuge guaranteed by both domestic and international law.\(^{125}\) This fact, they claim, insulates the sanctuary workers against the government's § 1324 prosecutions.\(^{126}\) To this day, the courts remain unconvinced.\(^{127}\)


\(^{118}\) Colbert, supra note 113, at 43 (quoting Dean B. Thatcher, INS Intelligence Agent).

\(^{119}\) Id. at 43.

\(^{120}\) R. Golden & M. McConnell, supra note 4, at 71 (quoting Bill Joyce, INS Assistant General Counsel).

\(^{121}\) The author is not clear, from a review of sources, why the government moved away from their "hands off" position regarding the Sanctuary Movement. However, there is little doubt that a "conscious government decision" was made to pursue the illegal activities of the Sanctuary Movement. Helton, supra note 2, at 554; see also Colbert, supra note 113, at 44; Sanctuary: A Resource Guide, supra note 104, at 23 ("Actually, as is now known, the INS and the administration were deeply worried" despite their "professed . . . [unconcern for] what they described as an insignificant sideshow . . . .").


\(^{123}\) Many sanctuary workers believe they have an obligation to help these refugees in lieu of U.S. involvement in the affairs of El Salvador. Note, United States Political Asylum for Salvadoran Refugees: A Continuing Debate, 8 Hous. J. Int'l L. 131, 134 (1985). See also Helton, supra note 2, at 505.

\(^{124}\) Colbert, supra note 113, at 47. Commenting on the Government's crack down on the Sanctuary Movement, Rev. William Sloane Coffin, Jr., pastor of Riverside Church in New York, remarked: "There's only two things in life that increase in value when they're stepped on: Persian rugs and the church." The Boston Globe, Jan. 27, 1985, at 1, col. 1.

\(^{125}\) See infra Section III.C.

\(^{126}\) Id.

\(^{127}\) Now that the Sanctuary Movement is the subject of INS prosecutions, humanitarian organizations are hesitant to join the Movement. Undercover investigations have roused mistrust among members of sanctuary church congregations. Those who continue to support the Movement are faced with strong opposition from less convicted parishioners who fear for the survival of their church. See, e.g., Helton, supra note 2, at 558–59. It is clear that the Sanctuary Movement cannot continue as a movement of consequence if the courts continue to hand down convictions.
B. Non-Refoulement and U.S. Law

In order to thwart government prosecutions, sanctuary workers have devised affirmative defenses based on non-refoulement.\textsuperscript{128} They argue that non-refoulement gives refugees the absolute right not to be returned to a territory where they fear political, social, or religious persecution.\textsuperscript{129} Thus, aliens who qualify for refugee status have the right of temporary refuge within the host state until another country is willing to accept them or until they are granted asylum.\textsuperscript{130} If refugees have a right of temporary refuge guaranteed by non-refoulement, then they are not illegally within the country, and thus, the sanctuary workers assert that they are immune from § 1324 convictions.\textsuperscript{131}

If this argument solely depended upon international law, sanctuary workers could not look forward to much success in light of the Reagan Administration's inconsistent commitment to its international obligations.\textsuperscript{132} With the U.S. accession to the Protocol of 1967 and the passage of the Refugee Act of 1980, however, sanctuary workers believe they can find support for their defenses within domestic law.\textsuperscript{133}

1. Early History

The equivalent to non-refoulement in U.S. law is § 243(h) of the Immigration and Nationality Act (INA), the withholding of deportation provision.\textsuperscript{134} The

\textsuperscript{128} See infra Section III.C.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.

For a brief description of the deportation process in the United States, see Martin, supra note 24, at 366–67:

In United States law, deportation is an administrative process under the jurisdiction of the Attorney General. The Attorney General or his delegate determines whether to initiate deportation proceedings. These begin with notice to the refugee, ordering him to show cause why he should not be deported. A hearing, before an INS immigration judge, determines this question. The refugee is entitled to representation by counsel, to present evidence and argument in his behalf, and to cross-examine government witnesses. Deportation orders are appealable to the Board of Immigration Appeals. After exhaustion of administrative remedies, the refugee may seek judicial review by petitioning a federal district court for a writ of habeas corpus. At the deportation hearing the refugee may plead anticipated persecution in order to contest deportation. The immigration judge usually requests an advisory opinion from the
withholding of deportation provision gives the Attorney General discretionary power to temporarily withhold the deportation of a refugee if he believes the refugee has made the necessary demonstration of persecution required under the INA. With few exceptions, the Attorney General's determinations are above judicial review.

The withholding of deportation provision was first incorporated into U.S. law in 1950, when the Immigration Act of 1917 was amended by the Internal Security Act (ISA). The ISA contained a provision that required the Attorney General to withhold the deportation of a refugee to any country where the refugee could show a fear of physical persecution. The provision was repeated in the INA, however, the language of the withholding provision was changed, making deportation a discretionary decision of the Attorney General. The Attorney General would withhold an alien's deportation only when he was convinced there existed a "clear probability of [physical] persecution." The Attorney General was reluctant to make this determination, and the courts refused to upset his rulings unless he had clearly abused his administrative discretion.
The INA was amended in 1965. The need to show “physical persecution” was relaxed, in favor of a new standard requiring the refugee to show “persecution on account of race, religion, or political opinion.” Thus, the Attorney General was authorized to withhold the deportation of any alien who had been persecuted for any of the specified reasons, whether or not this persecution resulted in physical abuse. The 1965 amendments did not, however, alter the discretionary authority of the Attorney General to determine who qualified for the withholding of deportation.


In 1968, the International Year of Human Rights, the U.S. government ratified the U.N. Protocol of 1967. The Protocol, as interpreted in international law, is more sympathetic to the plight of the refugee than the 1965 amendments to the INA which require a refugee to show a “clear probability” of persecution in order to have his or her deportation withheld. The Protocol prohibits refoulement of a refugee who meets the more lenient standard of “well-founded fear of persecution.” Additionally, the Protocol provides a broader discretion reposed in the Attorney General but we do not substitute our own opinion for his so long as his reasons for denying suspension of deportation in any case are sufficient on their face.”).
definition of "persecution," contains no ideological or geographical limitations, and limits the scope of discretion permitting a state to expel refugees. Under the provisions of the Protocol, the state can only deport a refugee when the individual poses a threat to national security or has been convicted of a serious crime, thus representing a danger to the community.

While the language of the Protocol of 1967 appears more permissive than the withholding of deportation provision of the 1965 amendments to the INA, accession to the Protocol has been viewed as merely symbolic, leaving the immigration laws of the United States unaltered. The history of the U.S. accession to the Protocol, however, does not necessarily support this conclusion. According to Secretary of State Dean Rusk's submittal letter to the President, "United States accession to the Protocol would not impinge adversely upon the laws of this country." This was not to say that accession to the Protocol would have no effect on U.S. immigration law whatsoever. In his testimony before the Senate Foreign Relations Committee, Laurence A. Dawson, Acting Deputy Di-

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Fonseca, 107 S.Ct. 1207, 1208-09 (1987). The matter was finally decided in Immigration and Naturalization Service v. Cardoza-Fonseca:

We do not attempt to set forth a detailed description of how the well-founded fear test should be applied. Instead, we merely hold that the Immigration Judge and the BIA [Board of Immigration Appeals] were incorrect in holding that [the well-founded fear and the clear probability] standards are identical.

[T]o show a "well-founded fear of persecution," an alien need not prove that it is more likely than not that he or she will be persecuted by his or her home country.

Id. at 1222.

153 Inclusive of the 1965 amendments, the INA did not contain a definition of the word "persecution." INA, supra note 134; INA Amendments of 1965, supra note 144. However, according to the court in Kovac v. INS, "there is nothing to indicate that Congress intended section 243(h) to encompass any more than the word 'persecution' ordinarily conveys—the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive." 407 F.2d 102, 107 (1969).

The Protocol, on the other hand, defines persecution as "[the threat to life or freedom ... on account of ... nationality, membership of a particular social group or political opinion." 1951 Convention, supra note 12, at art. 33(1) (as incorporated in the Protocol of 1967, supra note 63, at arts. 1(1)-(3)). A showing of a threat to life or freedom seems more easily established than offensive suffering. Note, The Refugee Act of 1980—What Burden of Proof? Controversy Lives on After Stevie, 18 VAND. J. TRANSNAT'L L. 875, 882 n.40 (1985).

154 Id. at 882. See supra note 69 and accompanying text.

155 Section 243(h) of the INA gives the Attorney General authority to withhold deportation of any alien who he believes would be subject to persecution under the provisions of the 1965 amendments. INA, supra note 134, at § 243(h). In contrast, the Protocol prohibits the refoulement of any alien who qualifies as a refugee under the provisions of article 1 of the 1951 Convention. See 1951 Convention, supra note 12, at art. 33(1) (as incorporated in the Protocol of 1967, supra note 63, at arts. 1(1)-(3)).

156 1951 Convention, supra note 12, at art. 33(2) (as incorporated in the Protocol of 1967, supra note 63, at arts. 1(1)-(3)).


158 114 CONG. REC. 27758 (1968) (emphasis added) (submittal letter from Secretary of State Dean Rusk to President Lyndon B. Johnson).
rector of the Office of Refugee and Migrations Affairs, stated that "accession [to the Protocol] does not ... commit the contracting state to enlarge its immigration measures for refugees ... . The deportation provisions of the [INA] ... are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act." Thus, while amendment to U.S. immigration law was considered unnecessary, acting in conformity with the Protocol within the existing legal structure was contemplated. This view is supported by the testimony of Eleanor McDowell, Office of Legal Advisor, Department of State. After noting a possible conflict between article 32 of the Protocol and two deportation procedures allowed under the current U.S. law, McDowell stated that "[t]hese two areas would not be enforced against refugees if the protocol [sic] were in force." Although accession to the Protocol did not necessitate any formal amendment to U.S. immigration law, it is clear that accession did anticipate a change in the enforcement of the existing law.

The fine distinction between the Protocol's effect on U.S. law, versus its effect on the enforcement of the law, was not preserved with any consistency during the Senate hearings. In his closing remarks, Acting Deputy Director Dawson appeared to contradict his earlier testimony by suggesting that accession to the Protocol was merely symbolic in light of the fact that the “United States already meets the standards of the Protocol ... .” President Lyndon B. Johnson appeared to echo this sentiment in his letter to Congress presenting the Protocol for ratification: “United States accession to the Protocol would ... constitute a significant and symbolic element in our ceaseless effort to promote everywhere the freedom and dignity of the individual and of nations ... .” Few courts were willing to view the U.S. accession to the Protocol as anything more than a meaningless gesture of good will. Those courts which were willing to subject the Attorney General's decisions to a more exacting judicial review refused to articulate any official recognition of a limitation on his discretionary authority. Most courts simply refused to recognize the creation of any new rights for refugees as a result of U.S. accession to the Protocol.

159 Id. at 27844 (statement of Laurence A. Dawson).
161 Id.
163 Id. at 27758 (letter from Lyndon B. Johnson to Congress).
164 Martin, supra note 24, at 371-73.
165 See, e.g., Coriolan v. Immigration and Naturalization Service, 559 F.2d 993 (5th Cir. 1977). The court remanded for reconsideration a Haitian refugee's claim of political persecution after determining that an INS immigration judge had made errors of fact and law. Id. at 998-1002, 1004. However, the court declined to decide "whether the Protocol restricts the Attorney General's discretion to refuse to stay deportation when he has determined that an alien would face persecution if deported." Id. at 997.
166 Martin, supra note 24, at 373.
3. The Refugee Act of 1980

After twelve years of U.S. lip service to the Protocol, Congress passed the Refugee Act of 1980168 in an attempt to bring U.S. law into conformity with the international obligations of the United States. Senator Edward Kennedy, the original sponsor of the Refugee Act, noted: "[This Act] will rationalize and put in the statute how we treat all refugees, and make our law conform to the United Nations Convention and Protocol Relating to the Status of Refugees, which we signed in 1969."169

Significant portions of the Refugee Act are borrowed from the Protocol. First, the Refugee Act introduces a definition of "refugee" into U.S. law using language essentially similar to article I(2) of the 1951 Convention as incorporated in the Protocol:

The term "refugee" means ... any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of ... a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion ... .170

Furthermore, the Refugee Act amends the withholding of deportation provision, modeling it after the non-refoulement provision contained in the Protocol.171

167 Helton, supra note 3, at 247. U.S. disrespect for the Protocol was brought to national attention in 1970 when a Lithuanian sailor aboard a Soviet vessel jumped ship and swam to a U.S. Coast Guard vessel, seeking asylum. O'Brien, The Kudirka Affair—Bringing Sanity to the Laws of Asylum, 8 HUM. RTS. 38, 39 (1980). Even though both the U.S. and the Soviet vessels were in U.S. waters at the time of the incident, the INS would not investigate the Lithuanian's application for asylum, and refused to grant him temporary refuge because he was not technically in the United States. Id. at 39-40; Note, supra note 153, at 884-85. Five Soviet sailors were allowed to board the Coast Guard vessel where they beat the Lithuanian sailor and then forced him to return to their ship. O'Brien, supra, at 30. This so called Kudirka Affair proved highly embarrassing to the U.S. government and served as a major impetus to the coming changes in U.S. immigration law. Note, supra note 153, at 884-86. See also Helton, supra note 3, at 249.


169 The Refugee Act of 1979: Hearings on S. 643 Before the Committee on the Judiciary, 96th Cong., 1st Sess. 1-2 (1979) [hereinafter Hearings on S. 643]. See also The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcommittee on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 1 (1979) [hereinafter Hearings on H.R. 2816] (statement of Hon. Eliz. Holtzman, Subcommittee Chairwoman) ("There is a broad consensus that our refugee policy up to this time has been haphazard and inadequate."); Hearings on S. 643, supra, at 9 (statement of Hon. Dick Clark, U.S. Coordinator for Refugee Affairs) ("[W]e have carried out our refugee programs through what is essentially a patchwork of different programs that evolved in response to specific crises. The resulting legislative framework is inadequate ... .").

170 Refugee Act, supra note 168, at § 201(a), 94 Stat. at 102. See supra text accompanying notes 59, 70.

171 "The Attorney General shall not deport or return any alien ... to a country if the Attorney
The Refugee Act's version of § 243(h) is significantly different from the corresponding provision in the 1965 amendments to the INA in two respects. First, it recognizes more forms of persecution than the 1965 amendments. Prior to 1980, § 243(h) recognized persecution based on "race, religion, [and] political opinion" only. The Refugee Act acknowledges persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." Thus, two additional grounds for persecution, nationality and membership in a particular social group, are included in the amended § 243(h).

The second, and more important, change is the limitation on the Attorney General's discretionary authority to deport refugees. The 1965 amendments provided the Attorney General with broad authority to withhold the deportation of a refugee who would face persecution upon return. The Refugee Act, however, requires the Attorney General to withhold deportation when such fear of persecution exists: "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 in such country . . . ."

With the passage of the Refugee Act, the Attorney General's discretion regarding the deportation of refugees rests solely on his authority to decide whether the conditions in a refugee's country of origin would prevent deportation. In the case of the Central American refugee, the Attorney General has regularly determined that existing conditions do not warrant withholding of deportation. As noted above, however, the U.S. accession to the Protocol did alter at least one court's attitude towards judicial review of the Attorney General's findings. Reaffirmed by the passage of the Refugee Act, with its

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." Refugee Act, supra note 168, at § 203(h), 94 Stat. at 107. Compare id. with 1951 Convention, supra note 12, at art. 33 (as incorporated in the Protocol of 1967, supra note 63, at arts. I(1)–(3)). See also H.R. Rep. No. 96-781, 96th Cong., 2d Sess. 20, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 160, 161 ("The Conference substitute adopts the House [deportation] provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.").

See supra note 145.

See supra note 171.

See infra notes 175–76 and accompanying text. According to Griffin B. Bell, then Attorney General of the United States, "[m]y complaint all along has been that like foreign policy, [refugee policy] should not be vested in the Attorney General, but in the President and the Secretary of State." Hearings on H.R. 2816, supra note 169, at 26.

See supra note 147 and accompanying text.

Refugee Act, supra note 168, at § 203(h), 94 Stat. at 107 (emphasis added).

Id. "Thus, while the Attorney General has lost the discretion to decide whether to deport, he is still vested with the sole authority to decide when conditions are such as to allow deportation." Martin, supra note 24, at 371.

R. GOLDEN & M. McCONNELL, supra note 4, at 42–43.

See supra notes 164–65 and accompanying text.
clear intent to bring U.S. law into closer conformity with international law, other courts have utilized their power of review more freely and critically to curb any abuse of discretion by the Attorney General.\textsuperscript{180}

C. Non-Refoulement and Defenses to 8 U.S.C. § 1324(a)

1. Section 1324(a)

Sanctuary workers are being prosecuted under 8 U.S.C. § 1324(a),\textsuperscript{181} which prohibits the bringing in, transporting, or harboring of illegal aliens. Section 1324(a) is a criminal statute and carries a possible fine not to exceed two thousand dollars or a prison term not to exceed five years or both.\textsuperscript{182} It is well established that a § 1324(a) conviction requires proof beyond a reasonable doubt\textsuperscript{183} that the defendant knew he or she was aiding an alien who was not entitled to be in the United States.\textsuperscript{184} This element of "actual knowledge" is included in this section to insure that those who innocently and unknowingly aid illegal aliens will not face criminal prosecution.\textsuperscript{185}

\textsuperscript{180} Martin, supra note 24, at 371. Accordingly, the courts now consider the Attorney General's determination of the probability that a refugee would not face persecution if deported an appropriate subject of judicial review. \textit{Id.} See generally \textit{id.} at 373–77.

\textsuperscript{181} 8 U.S.C. § 1324(a), in relevant part, states:

\begin{verbatim}
Any person . . . who-
(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, house, or shield from detection in any place, including any building or any means of transportation; or
(4) willfully and knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony . . . .
\end{verbatim}

\textit{Id.}

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} Because § 1324(a) is criminal in nature, it must be strictly construed and proven beyond a reasonable doubt. U.S. v. Shaddix, 693 F.2d 1135, 1139 (5th Cir. 1982) (quoting U.S. v. Moreno, 561 F.2d 1291, 1293 (9th Cir. 1977)). \textit{See generally 30 AM. JUR. 2D Evidence} § § 1170–72 (1967).

\textsuperscript{184} Even though the "actual knowledge" requirement is not stated in § 1324(a)(1), it has long been accepted that "[k]nowledge of the aliens' illegal status (their lack of entitlement to reside) is an essential element of the crime proscribed by § 1324(a)(1)." U.S. v. Bunker, 523 F.2d 1262, 1264 (9th Cir. 1976). The language of the remaining three subsections expressly require actual knowledge (See § 1324(a)(2): "knowing;" § 1324(a)(3): "willfully and knowingly;" § 1324(a)(4): "willfully and knowingly"). \textit{See supra note 181}.

\textsuperscript{185} Senator Celler, the chief supporter of the 1952 version of § 1324 assured Congress that the purpose of § 1324 was not to ensnare unsuspecting humanitarians in criminal convictions.
Relying on non-refoulement, the sanctuary workers have challenged their § 1324(a) prosecutions on two grounds. First, the workers argue that their good faith belief that the domestic and international principle of non-refoulement entitles a refugee to enter the United States demonstrates their lack of intent to violate § 1324(a), thereby defeating the government's charges.\textsuperscript{186} In the alternative, the workers argue that their belief regarding the refugee's entitlement to enter the United States is correct, and therefore, they assert that their actions violate no law because the refugees whom they assist are legally within the country.\textsuperscript{187}

2. Actual Knowledge and Intent—The "Ignorance of Law" Defense

The sanctuary workers indicted under § 1324(a) have sought to demonstrate their good faith belief that the aliens assisted were refugees, and thus, entitled to enter the United States under § 243(h) of the Refugee Act and the international principle of non-refoulement.\textsuperscript{188} They argue that the defendant who reasonably believes, however mistakenly, that a refugee is entitled to enter the United States cannot possess the requisite intent to violate § 1324(a) by knowingly and willfully bringing in, transporting, or harboring illegal aliens.\textsuperscript{189}

The government has responded to this defense by asserting that "ignorance of the law is no defense."\textsuperscript{190} However, the "ignorance of the law" tenet no longer plays as vital a role in U.S. criminal jurisprudence as it once had. It is now modified and limited by both constitutional and statutory law.\textsuperscript{191}

\textsuperscript{186} See infra Section IIC(2).
\textsuperscript{187} See infra Section IIC(3).
\textsuperscript{188} See, e.g., infra text accompanying notes 218 and 229.
\textsuperscript{189} See, e.g., Aguilar Appellate Brief, supra note 185, at 45 ("[A] defendant who honestly believes, however mistakenly, that an alien is entitled to enter and reside in the United States under the 1980 Refugee Act cannot commit the crime of bringing that alien into the country, nor of illegally transporting or harboring him.").
\textsuperscript{190} See, e.g., U.S. v. Merkt, 764 F.2d 266, 273 (5th Cir. 1985). In Merkt, the court stated: "We hold that the district court properly based its instruction on the well established rule that a citizen is presumed to know the law, and that ignorance of the law will not excuse." Id.
\textsuperscript{191} Aguilar Appellate Brief, supra note 185, at 38. See also infra notes 193–203 and accompanying text.
rule recognizes ignorance or misunderstanding of the law as a valid defense whenever knowledge of the law is made an element of the crime in question.\textsuperscript{192}

In \textit{Lambert v. California},\textsuperscript{193} the Supreme Court reviewed a California statute which required convicted felons to register in the community within which they reside.\textsuperscript{194} When a defendant was charged with failure to so register, she claimed as a defense that her due process rights had been violated, presumably as a result of her ignorance of the statutory law.\textsuperscript{195} The Court considered and rejected the tenet, "a mistake of law is no defense," reasoning that conviction of an ignorant defendant, in this instance, would violate that person's due process rights.\textsuperscript{196}

Similarly, in \textit{Liparota v. U.S.},\textsuperscript{197} the Supreme Court recognized an analogous mistake of law defense when the legislature makes knowledge of the law an element of the statute involved.\textsuperscript{198} The defendant in \textit{Liparota} was convicted under 7 U.S.C. § 2024(b)(1) which makes it a crime to knowingly use, transfer, acquire, alter, or possess food stamps in an unauthorized manner.\textsuperscript{199} The district court and the court of appeals held that the knowledge element of the crime required only that the defendant realize he was acquiring or purchasing food stamps.\textsuperscript{200} The Supreme Court disagreed, holding that the statute must be construed to reach only those who knew they were acquiring or possessing food stamps unlawfully.\textsuperscript{201}

The Court found reversible error in the district court's refusal to submit an instruction requiring the jury to consider whether the prosecution had shown that the defendant acquired the food stamps in knowing violation of the law.\textsuperscript{202} The Supreme Court agreed with the petitioner that knowledge was an element

\textsuperscript{192} See, e.g., U.S. v. Fierros, 692 F.2d 1291, 1294 (9th Cir. 1982), cert. denied, 462 U.S. 1120 (1983) (ignorance of the law is a defense when knowledge of the law is an "operative \[fact\] of the crime.").
\textsuperscript{193} 355 U.S. 225 (1957).
\textsuperscript{194} Id. at 226.
\textsuperscript{195} Id. at 226–27.
\textsuperscript{196} Id. at 228–30.

Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

\textsuperscript{197} 471 U.S. 419 (1985).
\textsuperscript{198} Id.
\textsuperscript{199} Id. at 421.
\textsuperscript{200} Id. at 422.

\textsuperscript{201} "Absent indication of contrary purpose in the language or legislative history of the statute, we believe that § 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations." Id. at 425.
\textsuperscript{202} Id. at 433.
of the offense charged and held that lack of such knowledge, whether by mistake or ignorance, constitutes a complete defense.203

As discussed above, § 1324(a) requires the prosecutor to prove that the defendant knew of the alien’s illegal status before he or she can be found in violation of the section.204 A reasonable but mistaken belief that an alien is entitled to reside in the United States is arguably similar to the mistake of law held to be a valid defense in Liparota.205

This conclusion is supported by the Fifth Circuit Court of Appeal’s decision in Bland v. U.S.206 The defendants in this case, who brought two Cuban refugees into the United States, were charged with violating § 1324(a)(1).207 The defendants argued that they lacked both intent and knowledge to violate the statute because they mistakenly believed that the two aliens involved possessed the proper entry papers.208 The court acknowledged the defense, stating: “[V]iolation of § 1324(a)] without knowledge or intent would not constitute the offense charged.”209

The validity of the defense was reaffirmed by the Ninth Circuit in U.S. v. Fierros.210 After stating that knowledge of the alien’s illegal status is an element of § 1324(a),211 the court explained how ignorance of the law might serve as a valid defense:

There are . . . cases in which a defense of ignorance of the law is permitted even though it is not specifically written into the criminal statute . . . . [One such case] involves instances where the defendant

203 In footnote nine of the Court’s holding, Justice Brennan states:
The dissent repeatedly claims that our holding today creates a defense of “mistake of law.” Our holding today no more creates a “mistake of law” defense than does a statute making knowing receipt of stolen goods unlawful. In both cases, there is a legal element in the definition of the offense. In the case of a receipt-of-stolen-goods statute, the legal element is that the goods were stolen; in this case, the legal element is that the “use, transfer, acquisition,” etc. were in a manner not authorized by statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a § 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal. It is, however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to a charge of a § 2024(b)(1) violation that one did not know that one’s possession was unauthorized.

204 See supra note 184 and accompanying text.
205 See, e.g., infra note 229.
206 299 F.2d 105, 108 (5th Cir. 1962).
207 Id. at 106–07.
208 Id. at 107.
209 Id. at 108.
210 692 F.2d 1291, 1294 (9th Cir. 1982), cert. denied, 462 U.S. 1120 (1983).
211 When discussing the knowing and willful elements of § 1324(a), the court noted: “[T]he first requirement of knowledge is that of the status of the alien . . . .” Id. at 1294.
is ignorant of an independently determined legal status or condition that is one of the operative facts of the crime.\textsuperscript{212}

The defendants in this case were convicted of transporting and harboring illegal aliens in order to provide local farmers with cheap labor.\textsuperscript{213} Because the defendants' testimony indicated that they were aware of the aliens' status and because their only "mistake" was their belief that transporting undocumented aliens violated no law, the court was not willing to extend the mistake of law defense to cover the defendants' situation.\textsuperscript{214} However, the court conceded that "[the mistake of law] defense \textit{would have been available} to [defendants] in this case if, for example, they had asserted reasonable grounds to believe that the workers were not aliens or that \textit{they had been legally admitted to the United States}."\textsuperscript{215}

Thus, if the defendant had reasonable grounds to believe that the aliens were legally entitled to enter the United States, the court would have recognized this belief, even if mistaken, as a valid defense.

While it appeared at the time that the clear language of \textit{Fierros} had established the mistake of law defense in § 1324(a) cases, two later decisions cast doubt on the continued validity of the defense. In \textit{U.S. v. Merkt (Merkt I)},\textsuperscript{216} the defendant, a sanctuary worker from Texas, was found guilty of two counts of transporting illegal aliens.\textsuperscript{217} The defendant alleged that, while she was aware that the aliens whom she assisted had entered the country unofficially, she believed them to be refugees, and as such, entitled to enter the United States under the Refugee Act.\textsuperscript{218} The court summarily dismissed her defense relying on the "well established rule" that ignorance of the law is no excuse.\textsuperscript{219} The court neither cited nor discussed \textit{Liparota} or \textit{Fierros} in its opinion.\textsuperscript{220} In support of its holding, the court cited \textit{Lambert v. California}, a case which, as noted above, concluded that

\begin{footnotes}
\item[212] \textit{Id.} The court further states that "[i]n such a case, the mistake of law is for practical purposes a mistake of fact." \textit{Id.} It is essentially what Justice Brennan is saying in footnote nine of his opinion in \textit{Liparota}. See supra note 203. See also United States v. Merkt, 764 F.2d 266, 275 (5th Cir. 1985) (Rubin, J. dissenting in part) ("If 'an apparent 'mistake of law' was actually a 'mistake of fact' in that the mistake pertained to a question of legal status . . . ' such a mistake constitutes a valid defense.").
\item[213] \textit{Fierros}, 692 F.2d at 1292–93.
\item[214] \textit{Id.} at 1293–95.
\item[215] \textit{Id.} at 1294 (emphasis added).
\item[216] 764 F.2d 266 (5th Cir. 1985).
\item[217] Merkt was convicted of violating § 1324(a)(2). \textit{Id.} at 268.
\item[218] \textit{Id.} at 270.
\item[219] \textit{Id.} at 273. See supra note 190.
\item[220] Judge Rubin, in a separate opinion, disagreed with the majority regarding their treatment of the actual knowledge issue. "The aphorism that imputes knowledge of the law to all is not applicable if a mistaken belief concerning how the law would treat a situation negatives the existence of the mens rea essential to the crime charged." \textit{Id.} at 278. Judge Rubin cited \textit{Liparota}, \textit{Fierros} and \textit{Bland}. \textit{Id.} See supra note 212.
\end{footnotes}
in certain cases the "mistake of law is no defense" tenet denies the defendant's due process rights.\footnote{764 F.2d at 273. See supra notes 193–96 and accompanying text.}

In U.S. v. Merkt (Merkt II),\footnote{794 F.2d 950 (5th Cir. 1986).} the defendants were convicted of § 1324(a) violations arising from a separate incident.\footnote{Id. at 953–54.} In footnote eighteen of the opinion, the court dismissed the defendants' mistaken status defense with a direct cite to Merkt I.\footnote{Id. at 965 n.18 and accompanying text.} Once more, neither Liparota nor Fierros were considered.\footnote{Id.}

At the time of this writing, U.S. v. Maria del Socorro Pardo de Aguilar,\footnote{U.S. v. Maria del Socorro Pardo de Augilar, No. CR 85-008 PHX-EHC (D. Ariz. 1985).} the "Sanctuary case," is on appeal in the Ninth Circuit.\footnote{Interview with Michael Altman, attorney for the Defendants (Jan. 7, 1988).} In this case, the government, after extensive undercover operations, indicted sixteen sanctuary workers on various § 1324(a) violations.\footnote{The Boston Globe, Jan. 27, 1985, at 1, col. 1. The investigation, code named "operation sojourner," began in March 1984. Colbert, supra note 113, at 44 n.206. The government employed two undercover agents and two paid informants. Id. These individuals infiltrated church meetings held by sanctuary workers and collected enough information to enable a Grand Jury to return indictments against 16 sanctuary workers. Id.} Once again, the defendants seek to escape conviction by asserting that they were unaware of the aliens' illegal status due to their good faith belief that the aliens were refugees, and thus entitled to enter the United States under the Refugee Act and international law.\footnote{See Aguilar Appellate Brief, supra note 185, at 33–34, 77 & n.44. The Court would later exclude evidence of international law as inapplicable. Court Order of October 25, 1985, at 3, Aguilar, No. CR 85-008 PHX-EXC [hereinafter Aguilar Court Order of Oct. 25, 1985].}

At the trial level, the government sought to prohibit testimony of mistaken belief, claiming that such evidence went to the defendants' motives for acting, not to their intent to violate the statute.\footnote{Government's Memoranda in Support of Motion in Limine, Aguilar, No. CR 85-008 PHX-EHC. The district court echoed this contention in its pretrial order of October 28th: "No evidence will be received/offered to establish good or bad motive on the part of a defendant or defendants." Court Summary Order of October 28, 1985, Aguilar, No. CR 85-008 PHX-EHC [hereinafter Aguilar Court Summary Order]. Similarly, in an instruction to the jury, the court stated:

Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers to the state of mind with which the act is done. Personal advancement, financial gain, political reason, religious beliefs, moral convictions or some adherence to a higher law even of nations are well recognized motives of human conduct . . . .

So, if you find beyond a reasonable doubt that the acts constituting the crime charged were committed by the defendant with the intent to commit the unlawful act and bring about the prohibited result, then the requirement that the act be done knowingly or willfully . . . . has been satisfied even though the defendant may have believed that his conduct was politically, religiously or morally required, or that the ultimate good would result from such conduct.} Jury Instruction No. 47, Aguilar, No. CR 85-008 PHX-EHC (emphasis added).
Court for the District of Arizona did not dispute the defendants' contention that ignorance of an alien's legal status is a valid defense when that knowledge is an operative fact of the crime. Rather, the court held that the defendants' reliance on the Refugee Act was improper because only the Attorney General is authorized to make such status determinations. Therefore, the district court refused to consider the defendants' mistaken belief regarding the aliens' legal status because of the incorrect process by which that status determination was made. This ruling ignores that mistaken belief regarding an alien's status, regardless of the validity of its derivation, is the very premise of the defense. On appeal, the defendants seek to make it clear that regardless of the propriety of their reliance on the Refugee Act, their good faith belief that the refugees were entitled to enter the United States precludes a finding of the requisite intent to violate § 1324(a).

3. Entitlement to Enter

Sanctuary workers contend not only that they believe in good faith that the aliens whom they assist are entitled to enter the United States, but further, they contend that this belief is correct. Thus, relying on the Protocol of 1967 and the Refugee Act amendments to § 243(h), as well as various international documents and norms which provide for non-refoulement, sanctuary workers claim

However, drawing lines between motive and intent is often nothing more than a game of semantics. The only way to determine the [Sanctuary] Workers' intent in offering safety to these aliens is to examine [their] motives. Any attempt to separate intent from motive would be artificial and contrary to statutory requirements; the statute itself requires a subjective examination of the state of mind of the accused harborer, rather than a mechanical, objective determination merely of whether the act was committed.


Thus, it was arguably improper for the district court to take this issue from the jury in pretrial proceedings. See generally Colbert, supra note 113.


233 Aguilar Appellate Brief, supra note 185, at 52.

The trial court ruled that a good faith defense exists under § 1324 only to the extent that a defendant believes (a) that the person he assists is not an alien or (b) that the alien entered the United States legally. The court thereby drew a distinction that accepts some mental state defenses based on a misunderstanding of the law while illogically rejecting others.

Id. (record cites omitted).

234 Id. at 46 n.25.

235 Id. at 53–55.
that any alien qualifying as a refugee pursuant to article I(2) of the Protocol is legally entitled to enter the United States. Accordingly, they argue that § 1324(a) is inapplicable because no illegal aliens are being brought in, transported, or harbored.

a. Official Status

The sanctuary workers' entitlement defense has met with little success primarily due to the aliens' lack of official refugee status. Thus far, the courts presented with this defense have refused to hold that the Refugee Act or international law provides the refugee with an automatic right to enter the United States. Instead, they have concluded that only the Attorney General has the authority to give such entitlement.

In *U.S. v. Elder*, the respondent was arrested for transporting three "undocumented" aliens in violation of § 1324(a)(2). Elder maintained that the aliens were refugees under the terms of the Refugee Act, and thus, rightfully in the country under § 243(h) of the Refugee Act. The district court rejected this argument stating that an alien is not legally in the country until he or she has submitted an application for asylum with the INS. Further, the court held that neither Elder nor the court was authorized to determine the status of an alien; that determination, they said, could only be made by the Attorney General.

This holding was affirmed by the district court in *U.S. v. Aguilar*. The defendants in *Aguilar* argued that the language of § 1324(a) made the determination of refugee status dependent upon all appropriate immigration law,

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237 Of course, a § 1324(a) violation cannot be made out if the alien is not illegally in the country. See, e.g., *United States v. Merkt*, 764 F.2d 266, 270 (5th Cir. 1985) ("To establish a violation of 8 U.S.C. § 1324(a)(2), the government must prove that . . . the alien was in the United States in violation of the law . . . .").


239 See infra notes 243, 248 and accompanying text.

240 *601 F. Supp.* at 1576.

241 Id. at 1580.

242 "Fifth circuit law clearly holds that before Salvadoran aliens may reside legally within this country they must submit applications for asylum with the Government." Id.

243 Id. at 1580–81.

including the Protocol and the Refugee Act of 1980. In support of their position, the defendants cite the final clause of § 1324(a) which makes the determination of legal status dependent upon due admission by an immigration officer or by entitlement "to enter or reside within the United States under the terms of this Chapter or any other law relating to the immigration or expulsion of aliens . . . ."246

The district court disagreed with the defendant's argument, ruling that the U.S. accession to the Protocol did not provide additional grounds by which an alien might be admitted into the United States. Therefore, the court held that the only process of legal entry available to a refugee is submission of an application to the INS. In a later pretrial order, the court went still further. After reaffirming that the Protocol did not entitle aliens to enter or reside in the United States without authorization from the Attorney General, the court ruled:

[T]he mere possibility that aliens could file asylum applications at some time in the future and thus [be] allowed to remain at liberty while their right to asylum was determined does not make them, from the time they enter the country, entitled to "reside" in the country for the purposes of 8 U.S.C. § 1324(a).249

These holdings can be criticized on two grounds. First, the 1951 Convention, which the United States acceded to by incorporation in the Protocol, recognizes the urgent need which drives refugees from their homeland to seek refuge abroad. Thus, article 31(1) prohibits a host state from imposing penalties

245 Aguilar Appellate Brief, supra note 185, at 73.
To come within the statute's definition of entitlement, the alien must be "lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens." 8 U.S.C. § 1324(a).
The defense pointed to two legal bases upon which the aliens they allegedly assisted were entitled to enter or reside in the United States: the 1980 Refugee Act and the principle of international refugee law.

248 Aguilar Court Order of Oct. 25, 1985, supra note 229, at 3. Of course, presentation to an immigration officer would only guarantee the refugee a temporary stay, usually in a detention camp, while his or her application is being processed by the INS. See Helton, supra note 3, at 256–59.
250 The Secretary General of the United Nations recognized that "a refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements of legal entry . . . into the country of refuge." He thus recommended that the convention officially recognize such aliens as bona fide refugees. Ad Hoc Committee on Statelessness and Related Problems, Jan. 3, 1950,
upon those refugees who have unofficially crossed the border. The article preserves the aliens' right to refugee status provided they present themselves to the proper authorities "without delay." According to the Secretary General of the U.N., "[a] refugee who presents himself to the authorities of the country of asylum, after crossing the border clandestinely, would thus be recognized as a bona fide refugee." In the interim, the refugee would be entitled to the protection of non-refoulement pending final determination of his or her status.

This urgency argument, however, is susceptible to narrow construction. Arguably, getting in touch with the "proper authorities" is not the highest priority of the newly arrived refugees. Often, these refugees have suffered unspeakable persecutions in their own countries, and their primary concern is with the needs of the mind and body. Aliens in this situation might possibly forfeit their status as refugees for failing the "without delay" requirement. Consequently, the sanctuary worker would also lose his or her defense because the alien could no longer be considered legally in the territory. There is some support, however, for the proposition that an alien in this situation is still entitled to the protection of non-refoulement in the host state, based upon the legal effect of article 33.


According to article 31(1) of the 1951 Convention:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

1951 Convention, supra note 12, at art. 31(1) (as incorporated in the Protocol of 1967, supra note 63, at arts. 1(1)–(3)). When acceding to the Protocol of 1967, the United States recorded two reservations, neither of which affect the application of article 31(1). Annex: Ratifications, accessions, prorogations, etc., concerning treaties and international agreements registered with the secretariat of the United Nations, 1968, 649 U.N.T.S. 372. See also 114 Cong. Rec. 27844, 29391 (1968).

According to the United Nations' Handbook on Procedures and Criteria for Determining Refugee Status:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 9 (1979). See also G. Goodwin-Gill, supra note 2, at 159 (because formal channels of recognition are often "overburdened" in cases of mass influx, "the benefit of Article 31 is due to the broad class of bona fide asylum-seekers . . . pending formal determination, if any, of refugee status.

Coleman, Political Pandemic, 15 STUD. L. 6, 6 (Dec. 1986). See supra note 115.

See infra notes 257–67 and accompanying text. See also Helton, supra note 2, at 509 n.52 (quoting
The second criticism of the Elder and Aguilar decisions turns upon the legal effect of article 33.257 The Restatement of Foreign Relations Law of the United States provides: "Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation."258 Thus, the courts may continue to interpret article 33 in conformity with the more restrictive provisions of the INA only if it is non-self-executing.259 If article 33 is self-executing, however, then the courts are obligated to execute the provision as directed by its language.260 Arguably, this would give all aliens who qualify as refugees under article 1(2) of the Protocol automatic entitlement to enter a state of refuge despite their lack of legal status.261

For a number of reasons, article 33 of the Convention appears to be self-executing. First, the article does not use "conditional or prospective" language which is commonly found in non-self-executing agreements.262 Second, the
Convention requires adoption of the article without reservation. Finally, U.S. accession to the Protocol in 1968 made the agreement the "supreme law of the Land," supporting the conclusion that the United States is legally bound by the Protocol, and thus, the non-refoulement provision. In concert, these three elements support the conclusion that article 33 is self-executing. Therefore, aliens are arguably entitled to refugee status, non-refoulement, and temporary refuge in the host country notwithstanding their unofficial status. This being the case, sanctuary workers are not in violation of the law when they assist these refugees.

b. Sovereign Right

A further reason why courts have refused to recognize the entitlement defense is the conflict it creates with the sovereign authority of the United States. In Elder, the respondent argued that his actions were sanctioned by international law, asserting that "international laws and treaties automatically entitle the aliens to receive refugee status without regard to our own national laws." The court declined to answer the issue raised. Instead, after affirming the Attorney General's exclusive authority to designate the status of refugees, the court declared: "[We] cannot interfere with political decisions which the United States as a sovereign nation chooses to make in the interpretation, enforcement, or rejection of treaty commitments which affect immigration."

Similarly, the court in Merkt II refused to acknowledge any international limitations upon the sovereignty of the United States. When urged by amici to provide legal status for refugees based upon international norms, the court

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263 See supra notes 71-72 and accompanying text.
264 U.S. Const. art. VI, § 2.
265 Cf. Restatement, supra note 97, at § 111 comment d ("Customary international law, while not mentioned explicitly in the Supremacy Clause, [is] also federal law and as such [is] supreme over State law.").
266 The INS itself has ruled that the Protocol of 1967 "being self-executing, has the force and effect of an act of Congress." In re Dunar, 14 I. & N. Dec. 310, 313 (1975) (the court held, however, that there were no facts to support the petitioner's claim that he would face persecution if sent back to Hungary).

However, according to the district court in Aguilar, "[i]t is well established that the 1967 United Nations Protocol Relating to the Status of Refugees is not self-executing and thus does not afford aliens any rights enforceable in courts of the United States." Aguilar Court Order of Oct. 25, 1985, supra note 229, at 2. In support, the court cites Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982) ("In concluding that the Refugee Act of 1980 was designed ... to bring the United States into compliance with the Protocol, we indicated that the Protocol's provisions were not themselves a source of right under our law unless and until Congress implemented them by appropriate legislation."). and Haitian Refugee Center v. Gracey, 600 F. Supp. 1396, 1406 (D.D.C. 1985) ("The United Nations Protocol is not self-executing."). Id.
267 See supra note 254.
269 Id.
responded: "In enacting our refugee statute . . . Congress was not bound by international law, much less purported 'custom' of international law."

The sovereign right of the United States to determine its immigration policy is firmly established. As part of the international community and as a signatory to some of its laws, however, the United States is obligated to respect those international treaties which it has ratified, as well as international legal norms. If sovereign authority allows a state to alter its recognition of international obligations according to the needs of the moment, "then the refugee's status in international law is denied and the standing, authority, and effectiveness of the principles and institutions of protection are seriously undermined."

Whenever possible, the United States is obligated to construe its domestic law in a way that does not conflict with customary international law. While the authority of a sovereign to expel or exclude aliens is undeniable, it does have its limits. When domestic law is used to deny basic human rights, these limits have been exceeded.

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270 794 F.2d 950, 964 n.16 (5th Cir. 1986), cert. denied, 107 S. Ct. 1603 (1987).
271 See Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959) ("There is no power in this Court to declare null and void a statute adopted by Congress . . . merely on the ground that such provision violates a principle of international law.").
272 "[A]n act of congress [sic] ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). See Restatement, supra note 97, at § 114 ("When 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."); Goldman & Martin, supra note 16, at 318:

[T]he very fact that the United States has signed but not ratified certain conventions also creates certain legal obligations. Under an authoritative principle of treaty law, a state, on signing a treaty, is obligated to refrain from acts which could defeat the object and purpose of the treaty until that state makes clear its intention not to become a party to it.

Id. See also supra notes 92–103 and accompanying text.
273 G. Goodwin-Gill, supra note 2, at 99.
274 See supra note 272.
275 Shaugnessey v. Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute . . . ."). But see Ad Hoc Committee on Statelessness and Related Problems, Jan. 3, 1950, U.N. Doc. E/AC.32/2, at 45–56:

The sovereign right of a state to remove or keep from its territory foreigners regarded as undesirable cannot be challenged. Nevertheless, expulsion or non-admittance at the frontier are serious measures in any event; they are especially serious in the case of a refugee who cannot be sent back to his country of origin and whom no other state can be compelled to accept. There is little likelihood that a foreign country will consent to receive a refugee whose expulsion has been ordered and who is stamped as an undesirable . . . . Caught between two sovereign orders, one ordering him to leave the country and the other forbidding his entry into the neighboring country, he leads the life of an outlaw and may in the end become a public danger.

In this way measures of expulsion or non-admittance at the frontier, intended to protect law and order, achieve apposite results when an attempt is made to apply them to refugees without taking into account their peculiar position.

Id.
276 "Sovereignty and control of immigration are important, but they cannot justify the excesses that have been employed in the name of American immigration policy. Even if aliens in exclusion and
IV. Conclusion

The above discussion of the Sanctuary Movement, and the attending issues of immigration law, is necessarily narrow in scope. However, to consider the Central American refugee crisis a problem easily addressed is erroneous. Sanctuary workers have acted admirably, often at great cost to themselves, in order to attend to the immediate needs of a few Central American refugees. Nonetheless, a permanent and effective solution can only be devised after candid, humane, and forethoughtful consideration of the problem by the U.S. government.277

Immigration from Central and South America has reached an alarming rate. With this mass influx of people come complex issues of health care, economics, unemployment, civil rights, and crime.278 These issues must be analyzed carefully, and feasible solutions must be integrated into an immigration policy which will address the immediate needs of these refugees, and anticipate the future needs and concerns of the refugees, border communities, the INS, and the U.S. government.

The U.S. government has spent far too much of its time and resources splitting hairs over such hypertechnical issues as the definition of a refugee, likelihood of persecution, etc., all in an effort to circumvent the spirit and intent of the Protocol, the Refugee Act, and immigration law generally. Instead, the government must focus its efforts on the development of a well-studied and socially responsible immigration policy which frankly addresses the issues and concerns of the parties involved. Such a policy would be open to debate and refinement, resulting in a fair immigration policy which would insure consistent court treatment and due process for the refugee and respect for U.S. sovereignty.

The history of sanctuary in the United States demonstrates that the Movement will only surface when the government has failed to address adequately a situation of vital human concern.279 The selfless efforts of the Sanctuary Move-

deportation have only narrowly-defined rights under U.S. law, it is undeniable that they possess certain basic human rights.” Helton, supra note 2, at 600.

277 Cf. Helton, supra note 2, at 500.


279 See Helton, supra note 2, at 550–53.
ment to assume the government’s social responsibility to the Central American refugee is indeed laudable. The time has long passed, however, for the rightful bearers of refugee policy to return to their obligation. The longer the government shirks its responsibilities, the more dearly the Central American refugee will have to pay.

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