

Michigan Journal of International Law

Volume 15 | Issue 1

1993

The Haitian Refugee Crisis: A Quest for Human Rights

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Recommended Citation

Thomas D. Jones, *The Haitian Refugee Crisis: A Quest for Human Rights*, 15 MICH. J. INT'L L. 77 (1993).
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THE HAITIAN REFUGEE CRISIS: A QUEST FOR HUMAN RIGHTS

Thomas David Jones*

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INTRODUCTION: THE HAITIAN REFUGEE CRISIS AND FUNDAMENTAL HUMAN RIGHTS

On June 14, 1993, the Vienna Conference on Human Rights, sponsored by the United Nations, commenced its opening session mired in controversy over the validity of a universal human rights doctrine. Many Third World or developing nations contended that Western norms of justice and fairness were not applicable to their societies.¹ Thus, the

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I express my gratitude to the Georgetown University Law Center for its Visiting Scholars Program which allowed me to complete the research for this work. I am particularly grateful for the kindness of Professor Dorothy Mayer of Georgetown, and Adene Postar, the librarian. I must also thank my ever faithful secretary, Patricia Williams of Howard University in Washington, D.C. for typing this manuscript. Ms. Williams exhibited the patience of Job in typing and retyping edited versions of this work. A word of appreciation to Dr. James H. Johnson, Dean of the Howard University Civil Engineering Department, is required. As Ms. Williams' supervisor, he tolerated my continued and intrusive presence in his office for the entire summer of 1993. Finally, I commend my research assistant, Michele L. King, a second year law student at Louisiana State University, for her assistance in the preparation of this article.

1. See Iain Guest, *Vision of Rights Lacking in Vienna*, CHRISTIAN SCI. MONITOR, July 15, 1993, at 19; Paul Lewis, *Differing Views on Human Rights Threaten Forum*, N.Y. TIMES, June 6, 1993, at A1, A6; Lucia Mouat, *United Nations Addresses Worldwide Human Rights*, CHRISTIAN SCI. MONITOR, June 9, 1993, at 12 (reporting that "some nations now insist that cultural differences must be taken into account when monitoring human rights They say the West is trying to impose its values on them."); Christopher Reardon, *Talk of "Univer-*

developing nations articulated a culture-bound or relativistic concept of fundamental human rights.² The developing nations' particularistic

sality" *Dominates UN Rights Conference*, CHRISTIAN SCI. MONITOR, June 18, 1993, at 7.

Conflicting views as to the essence of human rights norms were expressed by many countries. Kenneth Roth, Acting Executive Director of Human Rights Watch in New York warned: "Cultural differences . . . are not an excuse to violate fundamental human rights This is in fact a very fundamental attack on . . . the universality of human rights." Guest, *supra*, at 19. See also Alan Riding, *Human Rights: The West Gets Some Tough Questions*, N.Y. TIMES, June 20, 1993, at 5 (China's Deputy Foreign Minister, Liu Huaqiu, stating: "The argument that human rights is the precondition for development is unfounded." Singapore's Foreign Minister, Wong Kan Seng, noting: "[T]oo much stress on individual rights over the rights of the community will retard progress [T]he community's interests are sacrificed because of the human rights of drug consumers and traffickers." Pierre Sané, the head of Amnesty International, commenting: "[Y]ou can't choose between torture and starvation."). See generally *Life, Liberty and the Pursuit of Torture*, TIME, June 28, 1993, at 17 (Chinese Premier Li Peng, stating: "The imposition of a certain conception of democracy and human rights should be opposed." A Burmese Foreign Ministry official, stating: "The Asian countries, with their own norms and standards of human rights, should not be dictated to" A Malaysian Law Minister noting: "What is worrying is the attempt . . . [to] impose definitions, standards and practices based on one-sided views.").

2. See generally ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 71 (1990). Renteln is *en rapport* with ethical relativist Schmidt who holds that "there can be no value judgments that are true, that is, objectively justifiable independent of specific cultures." *Id.* (quoting Paul F. Schmidt, *Some Criticisms of Cultural Relativism*, 70 J. PHIL. 780, 783 (1955)); MELVILLE HERSHKOVITS, CULTURAL ANTHROPOLOGY 364 (1955) (describing cultural relativism as "a philosophy that recognizes the values set up by every society to guide its own life and that understands their worth to those who live by them, though they may differ from one's own."). See also Adda B. Bozeman, *An Introduction to Various Cultural Traditions in International Law*, in THE FUTURE OF INTERNATIONAL LAW IN A MULTICULTURAL WORLD 85 (Rene-Jean Dupuy ed., 1984); MARVIN E. FRANKEL & ELLEN SAIDEMON, OUT OF THE SHADOWS OF NIGHT: THE STRUGGLE FOR INTERNATIONAL HUMAN RIGHTS (1989); Manwo Lee, *North Korea and the Western Notion of Human Rights in Human Rights in East Asia: A Cultural Perspective* 129 (James C. Hsiung ed., 1985). Fernando R. Teson describes cultural relativism as follows:

In the context of the debate about the viability of international human rights, cultural relativism may be defined as the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society. A central tenet of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable. . . . [R]elativists claim that substantive human rights standards vary among different cultures and necessarily reflect national idiosyncracies. What may be regarded as a human rights violation in one society may properly be considered lawful in another, and Western ideas of human rights should not be imposed upon Third World societies. Tolerance and respect for self-determination preclude crosscultural normative judgments. Alternatively, the relativist thesis holds that even if, as a matter of customary or conventional international law, a body of substantive human rights norms exists, its meaning varies substantially from culture to culture.

Fernando R. Teson, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 870-71 (1985) (citations omitted).

For example, the African conception of human rights has been described as primarily communal as opposed to individual in character by Professor A. Uchegbu of the University of Lagos, in Lagos, Nigeria and Osita C. Eze of the Nigerian Institute of International Affairs in Lagos, Nigeria. In commenting on the nature of human rights as reflected in the African

position was championed by such nations as China, Iran, Cuba, and Vietnam,³ signatories to the Bangkok Declaration of 1993.⁴ The Bangkok Declaration provides, *inter alia*, that though human rights are universal, they "must be considered in the context of . . . national and

Charter of Human and Peoples Rights [ACHPR], promulgated by the Organization of African Unity in 1981 (entered into force in 1986), Uchegbu writes:

What the Charter was at pains to emphasize however is that the African traditional system is founded on group association not individuals as the European bourgeois concept of human rights stressed. The Charter recognized that individuals, being humans, have rights but peoples also have rights independent of the individuals making up the peoples. . . . Thus, when the Charter asserts in Article 20 that all people shall have the right of existence, it refers for example, to *ethnic groups* who here have a right to self-determination.

A. Uchegbu, *Economic Rights — The African Charter on Human Rights in LAW AND DEVELOPMENT* 161, 169–70 (J.A. Omotola & A.A. Adeogun eds., 1987).

Eze also explains that the ACHPR reflects a different conception of human rights than the Western idea of human rights by recognizing or emphasizing group or peoples' rights. He has suggested:

Side by side with individual rights and freedoms, the African Charter makes provisions for peoples' rights. Group rights are not by themselves new. The rights of ethnic, racial or minority groups as well as the right of peoples and nations to independence are examples of such rights.

It is not clear what the term peoples' comprises. It does embrace independent states as well as colonies. If one adopted our interpretation of 'peoples,' the term would also include national and ethnic groups as well as other minority groups.

OSITA C. EZE, *HUMAN RIGHTS IN AFRICA: SOME SELECTED PROBLEMS* 215 (1984). Moreover, Eze further observes:

The drafters were guided by the principle that the African Charter of Human and Peoples' Rights should reflect the African conception of human rights. The Africa Charter was expected to take as a pattern the African philosophy of law, and to meet the needs of Africa. One may argue as to the exact import of "African conception of human rights' or "African philosophy of law,' but the recognition that the Charter should serve African needs, it is submitted, created a useful frame for the drafters of the African Charter.

The OAU Council of Ministers, in the preamble to the Charter, took 'into consideration the virtues of the historical traditions and values of African civilization which should inspire and characterize their reflection of the conception of human rights,' and were convinced of the duty to promote and protect human and peoples' rights and freedoms, taking into account the essential importance traditionally attached in Africa to these rights and freedoms. It was, however, recognized by the drafters of the Charter that while sticking to African specifics in dealing with rights, it was thought prudent not to deviate from international norms solemnly adopted in various universal instruments by different member states of the OAU.

Id. at 212. The emphasis placed on group or peoples' rights distinguishes the African conception of human rights from the Western conception. It is a conception of human rights which reflects the African's belief that the welfare of the group is situated at a higher point on the hierarchy of social values than the rights of individuals.

3. Charles Krauthammer, *Human Rights Shell Game*, WASH. POST, June 18, 1993, at A25.

4. See generally *Bangkok Declaration*, Regional Meeting for Asia, Agenda Item 8, U.N. Doc. A/CONF. 157/ASRM/7 (1993) [hereinafter *Bangkok Declaration*]; Krauthammer, *supra* note 3, at A25.

regional particularities and various historical, cultural, and religious backgrounds.”⁵ Even the Secretary-General of the United Nations, Boutros Boutros-Ghali, emphatically echoed the developing nations’ sentiment of cultural relativism when he opined: “Universality is not something that is decreed It would be a contradiction in terms if this imperative of universality . . . were to become a source of misunderstanding among us.”⁶ Yet, Mr. Boutros-Ghali astutely observed that fundamental human rights reflect “the enduring elements of the world’s great philosophies, religions and cultures. . . . We must remember that forces of repression often cloak their wrongdoing in claims of exception.”⁷

The voices of relativism and dissent were met with a firm defense of universalism. Foremost among the advocates of universalism was the United States. Secretary of State, Warren Christopher, addressed the delegates at the conference and stated: “We cannot let cultural relativism become the last refuge of repression.”⁸ John Shattuck, Assistant Secretary of State for Human Rights and Humanitarian Affairs, vowed that “[i]t is the strong purpose of the Clinton Administration to side with the worldwide movement for universal human rights against any effort to undermine it.”⁹ Western nations held the belief that the question of the universality of human rights had been settled with the promulgation of the Universal Declaration of Human Rights in 1948.¹⁰ Ultimately, the universalists won the battle against their relativist opponents. The Vienna Conference on Human Rights reaffirmed the universal nature of human rights and fundamental freedoms by drafting and adopting the Vienna Declaration and Program of Action, a nonbinding, final, conference document.¹¹

5. *Bangkok Declaration*, *supra* note 4, para. 8; Krauthammer, *supra* note 3, at A25.

6. Boutros Boutros-Ghali, *quoted in* Kenneth Roth, *The U.N. Weak on Rights*, WASH. POST, June 25, 1993, at A25.

7. Boutros Boutros-Ghali, *quoted in* *Ending Torture Isn't Colonialism*, N.Y. TIMES, June 13, 1993, at A18.

8. Krauthammer, *supra* note 3, at A25.

9. Lewis, *supra* note 1, at 14.

10. *See* Riding, *supra* note 1, at 5; *see also* *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948); Josef L. Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT'L. L. 316 (1949); René Cassin, *La Déclaration Universelle et la mise en oeuvre de Droits de l'Homme*, 79 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 241 (1951).

11. *See generally* *Vienna Declaration and Program of Action*, U.N. Doc. DPI/1294-39399 (1993); Christopher Reardon, *UN Conference Sustains Universal Nature of Rights*, CHRISTIAN SCI. MONITOR, June 28, 1993, at 2; *see* David B. Ottaway, *Human Rights Post Suggested for U.N.*, WASH. POST, June 26, 1993, at A18; *see also* Christopher Reardon, *Women's Rights, 'Universality' Gain at U.N. Rights Conference*, CHRISTIAN SCI. MONITOR, June 25, 1993, at 3.

Although the United States has been at the forefront with its public support of universal human rights, it has recently demonstrated, both through its political conduct and judicial decisions, a distinct ambivalence toward the protection of human rights and fundamental freedoms accorded political refugees under domestic and international law. Most notably, the U.S. government has disregarded the universal human rights norm of *nonrefoulement* in its treatment of Haitian refugees who have been systematically interdicted on the high seas as they attempt to flee the present repressive military regime ruling their country.¹² Such

In the past, the United States was the leader in providing political asylum to those who claimed persecution in their own countries by reason of nationality, race, religion, or political opinion. See Alice Jackson Smith, Note, *Temporary Safe Haven for De Facto Refugees from War, Violence, and Disaster*, 28 VA. J. INT'L L. 509 (1988) (noting that "[b]etween 1975 and 1980, the United States accepted as many refugees for permanent resettlement as did the rest of the world's countries combined").

12. The international human rights norm of nonrefoulement is memorialized in the United Nations Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Refugee Protocol]. Article 1(1) of the 1967 Refugee Protocol incorporates by reference articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention]. Article 33(1) of the 1951 Refugee Convention provides:

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

Section 243(h)(1) of the Immigration and Nationality Act [INA], amended by the Refugee Act of 1980, 8 U.S.C. § 1253(h)(1) (Supp. 1993) tracks the language of article 33(1) of the 1967 Refugee Protocol and the 1951 Refugee Convention and provides *inter alia*:

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 on account of race, religion, nationality, membership in a particular social group or political opinion.

Congressional intent in amending the INA, by passage of the Refugee Act of 1980, was to make the statute consistent with the 1967 Refugee Protocol. In *INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987), the U.S. Supreme Court stated:

If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968.

Id. at 436-37 (emphasis added). See H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 19 (1980). See also Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981); Maryellen Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights*, 29 VA. J. INT'L L. 35 (1988).

political behavior by the United States suggests that this country adheres to a malleable doctrine of universal human rights, subject to the political whims and expediency of the political party in power during a particular historical epoch. The foregoing conclusion is strongly supported by the U.S. Supreme Court's decision in the case of *Sale v. Haitian Centers Council*.¹³ The *Sale* decision is an unfortunate reaffirmation of *Haitian Refugee Center v. Baker*¹⁴ which this author has characterized as the *Dred Scott* decision of immigration law.¹⁵

Article 1(A)(2), of the 1951 Refugee Convention defines a refugee as any person who: owing to a 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, as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

189 U.N.T.S. at 152, reprinted as appendix to 1967 Refugee Protocol, 19 U.S.T. at 6261. Compare the definition of refugee found in the INA at 8 USC § 1101(a)(4-2) (1988):

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 persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

During his presidential campaign, President Clinton pledged to provide hearings for every Haitian interdictee. He described the Second Circuit's decision in *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir.), cert. granted, 113 S. Ct. 52 (1992), as the right decision. See *Excerpts From President-Elect's News Conference in Arkansas*, N.Y. TIMES, Nov. 13, 1992, at A18; Al Kamen, *Haitian Exodus Could Pose Early Clinton Test*, WASH. POST, Nov. 12, 1992, at A1, A8. However, the President changed his position and decided to maintain the Bush policy of interdiction and repatriation. Bill Nichols, *Clinton Flip-flops on Haitian Refugee Issue*, USA TODAY, March 4, 1993, at 4A.

13. *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

14. *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498 (11th Cir.), cert. denied, 112 S. Ct. 1245 (1992) [hereinafter *Baker III*]; but see *McNary*, 969 F.2d 1350.

15. See generally Thomas David Jones, *Haitian Refugee Center, Inc. v. James Baker, III: The Dred Scott Case of Immigration Law*, 11 DICK. J. INT'L L. 1-48 (1992). The author explains his characterization of *Baker* as the *Dred Scott* case of immigration law as follows:

The case of *Haitian Refugee Center, Inc. v. James Baker, III*, might best be characterized as the *Dred Scott* case of immigration law. In *Dred Scott v. Sandford* the United States Supreme Court (hereinafter "Supreme Court"), through Chief Justice Taney, decided that the temporary residence of a slave, *Dred Scott*, in free territory did not free him under the common law doctrine articulated in *Somerset v. Stewart*. Lord Mansfield in *Somerset* held that a slave was *sui juris*, a free man, once he entered a jurisdiction that did not acknowledge slavery, even though the slave escaped and was recaptured by the master. The Supreme Court decided that the federal courts which heard *Dred Scott's* claim did not have jurisdiction to determine his claim. Slaves were not citizens within the meaning of the Constitution and therefore did not enjoy the rights, privileges and immunities guaranteed those who were citizens of the United States. Slaves were property owned by their masters. The most famous passage from the decision states:

I. THE PATH TO SALE: POLITICAL TURMOIL, HUMAN RIGHTS, BAKER AND McNARY

A. *Political Turmoil and Human Rights Abuses in Haiti*

In 1804, after a successful slave insurrection, Haiti won its independence from France and became "the world's first black republic."¹⁶ The Haitian democratic experience was short-lived and civil strife became the order of the day. Prior to the U.S. invasion and occupation from 1915–1934; Haiti had approximately 102 revolts or civil wars.¹⁷ As MacLean has written:

In the 72 year period before the invasion, . . . [o]f 22 presidents, just one served a complete term. Only four died of natural causes. Thirteen were ousted by coup. One was blown to smithereens by an explosion in the palace. One was deposed, then executed. One was torn to bits in the streets.¹⁸

Subsequent to the withdrawal of U.S. troops in 1934, political chaos and violence reemerged as the order of the day until 1957.¹⁹ In 1957, the

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit . . . This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of the opinion.

The Court of Appeals for the Eleventh Circuit essentially held that Haitian refugees, though seized by the United States on the high seas, have no substantive legal rights under the Constitution which a domestic court is bound to respect. Like fugitive slaves, these refugees have been returned to their symbolically political masters with a clear and probable consequence of punishment, persecution, or death.

Id. at 24 (citations omitted).

16. Barbara L. Bernier, *Democratization and Economic Development in Haiti: A Review of the Caribbean Basin Initiative*, 17 INT'L LAW. 455, 457 (1993); Frances MacLean, *They Didn't Speak Our Language; We Didn't Speak Theirs*, SMITHSONIAN, Jan. 1993, at 44, 47; William G. O'Neill, *The Roots of Human Rights Violations in Haiti*, 7 GEO. IMMIGR. L.J. 87 (1993).

17. Bernier, *supra* note 16, at 457; MacLean, *supra* note 16, at 46.

18. MacLean, *supra* note 16, at 46.

19. O'Neill, *supra* note 16, at 90.

notorious Duvalier regime was instituted by François Duvalier, and its infamous para-military organization called the Tontons Macoutes (Macoutes) was born. The Macoutes preyed upon citizens who were deemed to be subversive by the Duvalier regime. They exacted punishment through arrests, beatings, and murders.²⁰ Bribing the Macoutes with money was a common method of avoiding punishment.²¹ The Macoutes not only engaged in the surveillance of the public, but were also used by both François Duvalier and his son and successor Jean-Claude Duvalier to infiltrate the military for surveillance purposes.²²

The Duvalier era ended in 1986. Thereafter, several attempts at creating a viable government were failures. Such leaders as Leslie Manigat, General Henri Namphy, General Prosper Avril, and Ertha Pascal-Trouillot briefly lead the Haitian government.²³ On December 16, 1990, Jean-Bertrand Aristide, a Catholic priest, won the first democratically held presidential election in Haiti's history with a two-thirds majority of the votes.²⁴ With the election of Aristide, respect for and protection of human rights and fundamental freedoms improved dramatically.²⁵ Unfortunately, Aristide's reign was abruptly terminated by military putschists led by Lt. Gen. Raoul Cédras. Ironically, the military junta that ousted Aristide accused him of using "inflammatory rhetoric" which represented "evidence of his betrayal of human rights."²⁶

The fall of Aristide's government spawned a mass exodus of Haitians who claimed they were fleeing from a politically repressive military regime which fostered disrespect for human rights. These refugees became known as "Haitian boat people." The refugees attempted the dangerous sea passage in the hopes of reaching the shores

20. *Id.*

21. *Id.*

22. *Id.* See generally MICHAEL-ROLPH TROUILLOT, HAITI, STATE AGAINST NATION: THE ORIGINS AND LEGACY OF DUVALIERISM (1982).

23. O'Neill, *supra* note 16, at 97-105.

24. *Id.* at 104.

25. HOUSE COMM. ON FOREIGN AFFAIRS, SENATE COMM. ON FOREIGN RELATIONS, 102D CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992 (1992); LAWYERS COMMITTEE FOR HUMAN RIGHTS, HAITI: A HUMAN RIGHTS NIGHTMARE 3-4 (1992) [hereinafter HAITI: A HUMAN RIGHTS NIGHTMARE]; THE NATIONAL COALITION FOR HAITIAN REFUGEES AND CARIBBEAN RIGHTS, HAITI: THE ARISTIDE GOVERNMENT'S HUMAN RIGHTS RECORD, A REPORT BY AMERICA'S WATCH 3 (1991).

26. O'Neill, *supra* note 16, at 108; HAITI: A HUMAN RIGHTS NIGHTMARE, *supra* note 25, at 6-7. See generally BRIAN MOORE, NO OTHER LIFE (1993) (a novel which presents a fictionalized account of President Aristide's rise and fall from power in Haiti). See also JEAN-BERTRAND ARISTIDE & CHRISTOPHER WARGNY, ARISTIDE (1992) (an autobiography of President Aristide).

of the United States, other countries in the Caribbean, or South America.²⁷ However, over 40,000 refugees were interdicted by the U.S. Coast Guard on the high seas. The Coast Guard subsequently repatriated the vast majority of these refugees to Haiti.²⁸ Most of the Haitian refugees alleged that they were political refugees consistent with the definition of a political refugee under international law and the domestic law of the United States. They contended that their *hegira* had been forced upon them by the political oppression they faced in their homeland.²⁹ The refugees insisted that repatriation to Haiti would mean persecution or death.³⁰ Although the Haitian refugees have been more

27. Organization of American States, *Report on the Situation of Human Rights in Haiti*, OEA/Ser. L/V/II. 83, Doc. 18, at 41–45 (Mar. 9, 1993) [hereinafter *Report on the Situation of Human Rights in Haiti*]; see generally Alex Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, in U.S. IMMIGRATION POLICY (Richard R. Hofstetter ed., 1984).

28. *Report on the Situation of Human Rights in Haiti*, *supra* note 27, at 41; Jean-Pierre Benôit & Lewis A. Kornhauser, *Unsafe Havens*, 59 U. CHI. L. REV. 1421, 1451 (1992); Ben Barber, *Clinton Turns Up Heat On Haiti's Military Regime*, CHRISTIAN SCI. MONITOR, Apr. 7, 1993, at 3 (reporting that most Haitian refugees intercepted on the high seas were returned to Haiti); Clara Germani, *Clinton Mulls Haiti Policy in Face of Refugee Threat*, CHRISTIAN SCI. MONITOR, Jan. 8, 1993, at 6.

29. See definitions of refugee, *supra* note 12. See also GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1983); ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (vols. 1 and 2) (1966, 1972); JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 64–66 (1991); Edward Barnes, *A Passage from Petit-Trou*, TIME, July 5, 1993, at 42; Howard R. French, *Haitians Express Sense of Betrayal*, N.Y. TIMES, Jan. 17, 1993, at 3; Larry Rohter, *Long Exodus Nears End for H.I.V.-Infected Refugees from Haiti*, N.Y. TIMES, June 13, 1993, at L24. (refugee stating that “his background and experience are typical of those in Guantanamo camp. . . . [a]n active member of a political party that supported . . . Aristide”).

30. Barnes, *supra* note 29, at 42–43 (reporting that Jonas Esterlin, a refugee, claims “he was pistol-whipped in the head and jabbed with an electric cattle prod,” and Obrin Ossou, a political activist, has not been seen or heard from since he was pulled from a group of refugees upon disembarkment in Port-au-Prince); Greg Chamberlain, *Duvalier's Man on the Quayside*, MANCHESTER GUARDIAN WKLY., Feb. 2, 1992, at 1 (reporting that Colonel Manod Phillippe, head of security at the port in Port-au-Prince, has been present when repatriates returned to Haiti); *Court Lets Haitian Repatriation Go On*, WASH. POST, Feb. 12, 1992, at A9 (reporting that refugees who were repatriated related accounts of beatings, shootings, and persecution of family members); Howard W. French, *U.N. Finds Haitians Who Fled Anew*, N.Y. TIMES, Feb. 16, 1992, at A1; Howard W. French, *Some Haitians Say Continuing Abuses Forced a 2d Flight*, N.Y. TIMES, Feb. 10, 1992, at A1.

But see Haiti: A Status Report on Repatriation, FEDERATION FOR AMERICAN IMMIGRATION REFORM (Washington, D.C.) at 11a (June 26, 1992) (concluding after a fact-finding mission to Haiti that “there is no retribution directed from the leaders of the military government in Port-au-Prince, but . . . returnees are often harassed and intimidated by local police and militia in the provinces”). See also Kenneth Freed, *No Evidence Haitians Sent Home by U.S. Have Been Mistreated, Investigators Say*, L.A. TIMES, Mar. 16, 1992, at A10.

There are organizations which contend that the current “in country processing” at the U.S. Embassy is ineffective. See generally Brief of Human Rights Watch, *Amicus Curiae*, in Support of Respondents, *McNary v. Haitian Ctrs. Council, Inc.*, 969 F.2d 1350 (2d Cir.) (No. 92-344), *cert. granted*, 113 S. Ct. 52 (1992). See also Howard W. French, *Haitian Dissident*

often characterized as economic emigrants, the abysmal human rights record of Haiti alone is evidence that large numbers of these refugees probably satisfied the requirements for political refugee status and therefore qualified for political asylum in the United States.³¹

The status of human rights in Haiti subsequent to the 1991 *coup d'état* lends credibility to the claims of Haitian refugees. The Lawyers Committee for Human Rights (Lawyers Committee) has described Haiti as a "human rights nightmare."³² In its recent report, the Lawyers Committee observes:

The promise of a civil society that seemed imminent following the free, fair, and peaceful election of Jean-Bertrand Aristide as President in December 1990, has given way to the return of authoritarian control and military domination after a bloody coup forced him from the country on September 30, 1991. . . . The human rights situation in Haiti is worse than at any time since the Duvalier era. The military has executed, tortured and illegally arrested countless Haitians. Government harassment and intimidation of journalists, human rights monitors and lawyers, priests, nuns and grass-roots leaders is intense. Popular expressions of support for ousted President Aristide are routinely met with violent reprisals by the military. Repression of any perceived threat to military control has led the Haitian armed forces to place such stringent restrictions on the right of association that foreign development workers have been detained for meeting with the members of agricultural cooperations. Even priests and nuns, who have historically enjoyed some special protection from illegal detention and arrest, have been targeted by military authorities. At the same time, government interference in the judicial process has, if anything, become more blatant. . . . To assure their hold over the country, Haiti's military leaders and their civilian allies have imposed greater restrictions on

Loses Plea for U.S. Visa, N.Y. TIMES, Mar. 7, 1993, at 11A (reporting that Ferleau Nordé, a Haitian dissident, was denied visa to United States); Deborah Sontag, *Haiti Arrests Man on Way to Asylum in the U.S.*, N.Y. TIMES, Mar. 14, 1993, at 6A (reporting that "Haitian military has arrested and imprisoned a 22-year old Haitian deserter who last week was granted political refugee status by the United States officials in Haiti.").

31. See *Report on the Situation of Human Rights in Haiti*, *supra* note 27; AMERICA'S WATCH ET AL., RETURN TO THE DARKEST DAYS: HUMAN RIGHTS IN HAITI SINCE THE COUP (1991); AMNESTY INTERNATIONAL, HAITI: THE HUMAN RIGHTS TRAGEDY (1992); HAITI: A HUMAN RIGHTS NIGHTMARE, *supra* note 25; LAWYERS COMMITTEE FOR HUMAN RIGHTS, PAPER LAWS, STEEL BAYONETS: BREAKDOWN OF THE RULE OF LAW IN HAITI (1990); O'Neill, *supra* note 16; Douglas Farah, *Haitian Armed Forces Repressing Aid Groups*, WASH. POST, Oct. 10, 1992, at A17, A23.

32. See HAITI: A HUMAN RIGHTS NIGHTMARE, *supra* note 25.

freedom of expression, assembly and association than Haiti has known since the end of the Duvalier dictatorship. Haiti is a human rights nightmare where most fundamental freedoms are violated and where violations enjoy virtual impunity.³³

The Organization of American States (OAS) has similarly concluded that the human rights situation in Haiti has significantly deteriorated. Civilians have been subject to unlawful detention, execution without due process of law, and torture by members of the military, police, and civilian collaborators.³⁴ In addition, the Department of State in its Country Reports on Human Rights Practices for 1992 revealed that political and extrajudicial killings continue. The actual number of such cases cannot be adequately determined. Many of those murdered were individuals associated with deposed President Aristide.³⁵

33. *Id.* at 1, 8.

34. *Report on the Situation of Human Rights in Haiti*, *supra* note 27, at 1. In the wake of Aristide's scheduled return, civil discord continues to plague Haiti. On September 11, 1993, a prominent supporter of Aristide, Antoine Izmary, was assassinated at a Catholic mass. *Prominent Backer of Aristide is Slain After Mass*, N.Y. TIMES, Sept. 12, 1993, at A8. See Chris Angelo, *Demonstrators Disrupt Haiti Installation Rite*, ADVOC. (Baton Rouge, LA), Sept. 18, 1993, at 6A (describing that one hundred demonstrators attempted to disrupt the installation ceremonies of Foreign Minister Claudette Werleigh and called for the departure of U.N. envoy Dante Caputo). See also Howard W. French, *Many Disappear in Haitian Terror Campaign*, N.Y. TIMES, Sept. 5, 1993, at 8; Howard W. French, *Public Killing Defines Barriers to Aristide's Return*, N.Y. TIMES, Sept. 26, 1993, at 4; *Save the Haiti Agreement*, N.Y. TIMES, Sept. 19, 1993, at 16 (stating that "the administration needs to get tough again with the military and police leaders who are out to wreck that agreement by letting thugs murder and intimidate Aristide supporters during the final weeks of the scheduled transition"); Iain Guest, *Aristide Reaches for Reins*, CHRISTIAN SCI. MONITOR, Sept. 17, 1993, at 19; *Is Haiti Viable?*, CHRISTIAN SCI. MONITOR, Sept. 16, 1993, at 18; Kathie Klarreich, *Haitian Group Attempts to Bar Aristide's Return*, CHRISTIAN SCI. MONITOR, Sept. 21, 1993, at 6; Kathie Klarreich, *UN Police and Engineers Will Lend a Hand in Haiti*, CHRISTIAN SCI. MONITOR, Sept. 30, 1993, at 3.

Due to the civil unrest in Haiti, Haitians again have begun fleeing the island by boat. See David Beard, *Rights Group Blasts U.S. Haitian Policy*, ADVOC. (Baton Rouge, LA), Sept. 24, 1993, at 11B (reporting that the Human Rights Watch report, "No Port in a Storm," accused the United States of complicity in Haiti's persecution of refugees by returning them to Haiti); *Coast Guard Stops 297 Haitians on Boat*, ADVOC. (Baton Rouge, LA), Sept. 24, 1993, at 2A; Iain Guest, *Let Haitians Seek Asylum: Refugees are Intercepted at Sea and Returned to the Haitian Military*, CHRISTIAN SCI. MONITOR, Nov. 4, 1993, at 19 (reporting that 24 Haitian boats have been intercepted by the U.S. Coast Guard since January 1993). See also Jill Smolowe, *Haiti: With Friends Like These*, TIME, Nov. 8, 1993, at 44.

35. DEP'T OF STATE, HOUSE COMM., ON FOREIGN AFFAIRS, SENATE COMM., ON FOREIGN RELATIONS, 103D CONG., 1ST SESS. 1421 (Joint Comm. Print 1993). See William Booth, *Fear Grips Aristide's Shelter*, WASH. POST, May 1, 1993, at A14 (reporting that soldiers threatened and harassed boys in orphanage founded by Aristide); Kathie Klarreich, *Haiti's Democracy in Limbo*, CHRISTIAN SCI. MONITOR, June 30, 1993, at 20 (reporting people were beaten and arrested throughout the countryside on the day negotiations between Cedras and Aristide began for restoration of democracy in Haiti; members of the military attacked Catholic parishioners at a mass where parishioners chanted for Aristide's return).

In response to the overthrow of President Aristide, the United Nations and the OAS initially issued resolutions deploring the action of the military *golpistas* and demanded that the military surrender and restore democratic rule to Haiti by returning Aristide to power.³⁶ The OAS and the United States then imposed a trade embargo against Haiti.³⁷ On June 4, 1993, the Clinton administration imposed new sanctions against the military-backed government of Haiti. Sanctions included the denial of entry to the United States of approximately 100 government officials, military officers, their families, and other supporters of the *de facto* military government. The Clinton administration also froze the assets of eighty-three individuals and thirty-five institutions associated with Haiti.³⁸ Since June 16, 1993, the United Nations has imposed a worldwide oil and arms embargo on Haiti, which includes a global freeze of the financial assets of the government.³⁹ Shortly after the imposition of the U.N. embargo, Lt. Gen. Cédras agreed to begin discussions with President Aristide concerning his return to power in Haiti. Consequently, Cédras and Aristide, with the assistance of U.N. mediator, Dante Caputo, negotiated the Governor's Island Accord of July 3, 1993, which provides for the restoration of democracy and the return of Aristide as president of the

36. See *The Situation of Democracy and Human Rights in Haiti*, G.A. Res. 46/7, U.N. GAOR, 46th Sess., Supp. No. 49, at 13, U.N. Doc. A/46/49 (1992); see also U.N. Press Release, Dep't of Public Information, GA/8233 (Oct. 11, 1991); O.A.S. Res. MRE/RES. 1/91 OEA/SER. F/V.1 (Oct. 3, 1991) (Ad Hoc Meeting of Ministers of Foreign Affairs, Washington, D.C.); O.A.S. Res. MRE/RES. 2/91, OEA/SER. F/V.1 (Oct. 8, 1991) (Ad Hoc Meeting of Ministers of Foreign Affairs, Washington, D.C.).

37. Prohibiting Certain Transactions with Respect to Haiti, Exec. Order No. 12,779, 3 C.F.R. 349 (1992), reprinted in 50 U.S.C. § 1701 (Supp. III 1991); Prohibiting Certain Transactions with Respect to Haiti, Exec. Order No. 12,775, 3 C.F.R. 367 (1992), reprinted in 50 U.S.C. 1701 (Supp. III 1991); Notice of Suspension of Munitions Export Licenses to Haiti, 56 Fed. Reg. 50,968 (1991). See also Howard W. French, *U.S. Will Impose a Trade Ban on Haiti*, N.Y. TIMES, Oct. 30, 1991, at A3; John M. Goshko, *U.S. Seizes Tanker as Violator of O.A.S. Embargo Against Haiti*, WASH. POST, Apr. 3, 1992, at A4; *O.A.S. Ministers Tighten Squeeze on Haiti*, ADVOC. (Baton Rouge, LA), May 18, 1992, at 5A; *U.S. Puts Embargo on Haiti*, ADVOC. (Baton Rouge, LA), Oct. 30, 1991, at A2.

38. Douglas Farah, *U.S. Tightens Sanctions on Regime in Haiti*, WASH. POST, June 5, 1993, at A18; Howard W. French, *Clinton Faulted on Haiti Sanctions*, N.Y. TIMES, June 6, 1993, at L7; Steven A. Holmes, *New Sanctions by U.S. Aimed at Haiti Rulers*, N.Y. TIMES, June 5, 1993, at A2.

39. Douglas Farah, *Generals Said to Gamble Haiti Has Enough Oil*, WASH. POST, June 18, 1993, at A27; Howard W. French, *No Quick Solution in Haiti Foreseen*, N.Y. TIMES, June 20, 1993, at L11; Clara Germani, *Impunity of Haiti's Military and Leaky Embargo Weigh on Aristide*, CHRISTIAN SCI. MONITOR, Feb. 4, 1993, at 7; Kathie Klarreich, *Haitians Jockey for Power as a Blockade Is Proposed*, CHRISTIAN SCI. MONITOR, June 11, 1993, at 7; Julia Preston, *U.N. Votes to Clamp Oil Embargo on Haiti*, WASH. POST, June 17, 1993, at A1, A37.

Haitian republic.⁴⁰ On July 26, 1993, exiled President Aristide chose publisher Robert Malval, a political moderate, as his prime minister. Mr. Malval was duly installed as prime minister on August 23, 1993 in a Washington, D.C. ceremony.⁴¹ U.N. sanctions against Haiti were lifted after the Prime-Minister-designate was ratified by the Haitian parliament.⁴² The confirmation of Mr. Malval by the Haitian parliament was required before he could legally assume the office of prime

40. See *Governor's Island Accord*, OEA/Ser. G CP/INF. 3480/93 (July 3, 1993). See also *Another Chance for Haiti*, WASH. POST, July 5, 1993, at A18; Richard Berstein, *Haitians Achieve 'Political Truce'*, N.Y. TIMES, July 18, 1993, at A24; *Clinton Applauds Haiti Agreement*, WASH. POST, July 5, 1993, at A5; Howard W. French, *Haitian Military and Aristide Sign Pact to End Crisis*, N.Y. TIMES, July 4, 1993, at A1, A12; Howard W. French, *Mediators in Accord Over Haiti*, N.Y. TIMES, Apr. 11, 1993, at A8; Kathie Klarreich, *Haitian Military Chief Ready to Step Down*, CHRISTIAN SCI. MONITOR, July 19, 1993, at 3; Kathie Klarreich, *Haiti Embarks on Return to Democratic Rule*, CHRISTIAN SCI. MONITOR, July 6, 1993, at 2; Julia Preston, *Aristide, Officer Sign Haiti Pact*, WASH. POST, July 4, 1993, at A1, A28. The 10 points of the Governor's Island Accord are:

- (1) Discussion among all parties to achieve a political truce and normally functioning Parliament able to legislate transition to constitutional rule.
- (2) Nomination of prime minister by president Aristide.
- (3) Confirmation of prime minister by Parliament.
- (4) Suspension of embargoes put in place by United Nations and Organization of American States.
- (5) Resumption of foreign aid, with programs to modernize armed services and create a new police force.
- (6) A presidential amnesty for those involved in the 1991 coup.
- (7) Creation of the new police force and appointment by Aristide of its commander.
- (8) Retirement of Commander-in-Chief Cédras and appointment by Aristide of his replacement, who shall appoint a general staff.
- (9) Retirement of Port-au-Prince Police Chief Joseph.
- (10) Francois Aristide's return to Haiti on Oct. 30, 1993.

Cf. Douglas Farah, *Haitians Despair of Aristide's Return in Time to Save Economy*, WASH. POST, June 23, 1993, at A27 (reporting that Haiti's rural poor are losing hope that Aristide will return before economy is shattered); *Haiti: American Dilemma*, CHRISTIAN SCI. MONITOR, July 6, 1993, at 18 (reporting of Haitian skepticism of U.N. negotiations); Tony P. Hall, *Tame the 'Elephants' in Haiti*, CHRISTIAN SCI. MONITOR, July 13, 1993, at 20 (discussing the need for humanitarian aid, in addition to political stability); Elaine Sciolino, *Haiti's Man of Destiny Awaiting His Hour*, N.Y. TIMES, Aug. 3, 1993, at A1, A6 (describing Aristide's lack of experience and psychological problems).

41. George Gedda, *Haiti Gets New Prime Minister, Vows Democracy*, ADVOC. (Baton Rouge, LA), Aug. 31, 1993, at 6A; *Rights Groups Welcome Haiti's New Premier*, N.Y. TIMES, Aug. 29, 1993, at A7.

42. Victoria Graham, *U.N. Lifts Sanctions on Haiti*, ADVOC. (Baton Rouge, LA), Aug. 28, 1993, at 1A; Lucia Mouat, *Obstacles Confront Malval After Lifting of Sanctions*, CHRISTIAN SCI. MONITOR, Aug. 30, 1993, at 4; see Ben Barber, *U.S. Asked to Aid Nigerian, Haitian Democracy Bids*, CHRISTIAN SCI. MONITOR, Sept. 2, 1993, at 2. See also Michael Norton, *Haitian Army Wields Reign of Terror, Group Says*, ADVOC. (Baton Rouge, LA), Aug. 29, 1993, at 18A (reporting that Inter-American Human Rights Commission has observed an intensification of human rights violations in Haiti, even as Aristide prepares to return. "The army creates a climate of terror for the rural population. . . . Paramilitary agents attack the population, rape the women and destroy their homes.").

minister.⁴³ Consequently, the future of democracy and human rights appeared brightened by virtue of these recent developments.

Unfortunately, the implementation of the Governor's Island Accord faced a serious setback on October 11, 1993, when a U.N. mission composed, of U.S. and Canadian military personnel, was prevented from landing in Port-au-Prince by armed demonstrators, including attachés of the Front for the Advancement and Progress of Haiti (FRAPH). These demonstrators were supported by the Cédras military regime.⁴⁴ On October 16, 1993, the United Nations imposed economic sanctions against Haiti and approved a naval blockade of the country.⁴⁵ Despite

43. *Aristide Names Publisher as Prime Minister of Haiti*, WASH. POST, July 27, 1993, at A18. *But see* Howard W. French, *Haitians Delaying Action on Premier*, N.Y. TIMES, Aug. 1, 1993, at 11; *Haiti's Shaky Reformation*, CHRISTIAN SCI. MONITOR, July 27, 1993, at 18; Kathie Klarreich, *Haitian Senate Appears Engaged in Ploys to Delay Aristide's Return*, CHRISTIAN SCI. MONITOR, Aug. 5, 1993, at 7; Margaret Ellen Roggensack & Ira Kurzban, *Restoring Haiti's Leader*, CHRISTIAN SCI. MONITOR, Aug. 11, 1993, at 19.

44. Howard W. French, *U.S. Withdraws Troop Ship From Haiti*, N.Y. TIMES, Oct. 13, 1993, at A4; Howard W. French, *Haitians Block Landing of U.S. Forces*, N.Y. TIMES, Oct. 12, 1993, at A1, A4; Robert S. Greenberger, *Clinton Orders Ship Off Haiti to Withdraw*, WALL ST. J., Oct. 13, 1993, at A3; *Haiti's Uncertain Future*, CHRISTIAN SCI. MONITOR, Oct. 14, 1993, at 18; Steven A. Holmes, *Effort to Restore Haiti's Leader Is Halted*, N.Y. TIMES, Oct. 13, 1993, at A1, A4; Kathie Klarreich, *Haiti's Grim Mercenaries Tighten Their Steely Grip*, CHRISTIAN SCI. MONITOR, Oct. 29, 1993, at 8; Linda Robinson, *Turning the Screws — A U.N. Embargo and U.S. Pressure Fail to Impress Haiti's Rulers*, U.S. NEWS & WORLD REP., Nov. 1, 1993, at 50, 52; Michael Tarr & Linda Robinson, *Haiti's Bloody Message to Clinton*, U.S. NEWS & WORLD REP., Oct. 25, 1993, at 36.

45. S.C. Res. 875, U.N. SCOR, 3293d mtg., U.N. Doc. S/RES/875 (1993). The text of the resolution provides, *inter alia*, that the Security Council is:

Deeply disturbed by the continued obstruction to the dispatch of the United Nations Mission in Haiti (UNMIH), pursuant to resolution 867 (1993), and the failure of the Armed Forces of Haiti to carry out their responsibilities to allow the mission to begin its work,

Condemning the assassination of officials of the legitimate Government of President Jean-Bertrand Aristide,

Taking note of the letter of President Jean-Bertrand Aristide to the Secretary-General of 15 October 1993 (S/26587), in which he requested the Council to call on Member States to take the necessary measures to strengthen the provisions of Security Council resolution 873 (1993),

Mindful of the report of the Secretary-General of 13 October 1993 (S/26573) informing the Council that the military authorities in Haiti, including the police, have not complied in full with the Governors Island Agreement,

Reaffirming its determination that, in these unique and exceptional circumstances, the failure of the military authorities in Haiti to fulfill their obligations under the Agreement constitutes a threat to peace and security in the region.

Acting under Chapters VII and VIII of the Charter of the United Nations,

the recent problematic enforcement of the Governor's Island Accord, the light of hope still flickers for the restoration of democracy. U.N.

1. Calls upon Member States, acting nationally or through regional agencies or arrangements, cooperating with the legitimate Government of Haiti, to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to ensure strict implementation of the provisions of resolutions 841 (1993) and 873 (1993) relating to the supply of petroleum or petroleum products or arms and related material of all types, and in particular to halt inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations;

2. Confirms that it is prepared to consider further necessary measures to ensure full compliance with provisions of relevant Security Council resolutions;

3. Decides to remain actively seized of the matter.

Id. at 1-2. See R.W. Apple Jr., *President Orders Six U.S. Warships for Haiti Patrol*, N.Y. TIMES, Oct. 16, 1993, at 1, 4; Kathie Klarreich, *U.N. Embargo Takes Its Toll on Haitians*, CHRISTIAN SCI. MONITOR, Oct. 27, 1993, at 3; Kathie Klarreich, *In Haiti, the Gunboats Take on the Generals*, CHRISTIAN SCI. MONITOR, Oct. 20, 1993, at 1, 4; Kathie Klarreich, *Haitian Military Digs in Heels, As U.S. Ships Carry Out Blockade*, CHRISTIAN SCI. MONITOR, Oct. 16, 1993, at 1, 14; Kathie Klarreich, *U.N. Threatens to Reimpose Sanctions Against Haiti*, CHRISTIAN SCI. MONITOR, Oct. 13, 1993, at 1, 4; Steve Komarow, *U.S. Set to Squeeze Haitians*, USA TODAY, Oct. 15-17, 1993, at 1A; Paul Lewis, *U.N. Backs Use of Ships to Enforce Haiti Embargo*, N.Y. TIMES, Oct. 17, 1993, at 11.

On October 18, 1993, President Clinton issued Exec. Order No. 12,872, 58 Fed. Reg. 54,029, freezing the assets of certain Haitians in the United States. The Executive Order provides, in relevant part:

Section 1. Except to the extent provided in regulations, orders, directives, or licenses, which may hereafter be issued pursuant to this order, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before the effective date of this order, all property and interest in property of persons:

- (a) Who have contributed to the obstruction of the implementation of the United Nations Security Council Resolutions 841 and 873, the Governors Island Agreement of July 3, 1993, or the activities of the United Nations Mission in HAITI;
- (b) Who have perpetuated or contributed to the violence in HAITI; or
- (c) Who have materially or financially supported any of the foregoing, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are blocked.

Sec. 2. Any transaction subject to U.S. jurisdiction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order, or in Executive Orders Nos. 12775, 12779, or 12853, is prohibited, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before the effective date of this order, except to the extent provided in regulations, orders, directives or licenses issued pursuant to the relevant Executive Order and in effect on the effective date of this order.

officials have welcomed a compromise peace proposal suggested by a group of lawmakers who are opponents of President Aristide.⁴⁶

Indisputably, there have been advances toward the restoration of democracy and the amelioration of the human rights climate in Haiti. Concerted political action has been the tool used to effect political change. However, Haitians who are political refugees or who have been interdicted on the high seas and repatriated to their persecutors have been, for the most part, lent a deaf ear by the judiciary of the United States and denied the protection of international and domestic law. In the *Sale* case, the Supreme Court, reminiscent of its decision 137 years earlier in *Dred Scott*,⁴⁷ ruled that Haitian refugees, interdicted on the high seas by the Coast Guard, have no legal rights which a federal court is bound to enforce.⁴⁸ A brief discussion of the decisions in *Haitian Refugee Center v. Baker* and *Haitian Centers Council v. McNary*, two conflicting pronouncements from federal courts of appeals in the Eleventh and Second Circuits, sets the stage for the Supreme Court's ruling in *Sale*.

B. *Conflicting Voices: Baker and McNary*

The ousting of President Jean-Bertrand Aristide in September 1991 created a deluge of refugees attempting to flee their Haitian homeland by boat. Ultimately, the tide of refugees was curtailed by the U.S. Coast

46. Kathie Klarreich, *Talks in Haiti Renew Hope for a Diplomatic Solution*, CHRISTIAN SCI. MONITOR, Oct. 25, 1993, at 1, 14. See also Howard W. French, *Haiti's Curse — Power Means Brutality; Practice Makes Perfect*, N.Y. TIMES, Oct. 17, 1993, at 1E; Howard W. French, *As Aristide Fails to Return His Foes Celebrate in Haiti*, N.Y. TIMES, Oct. 31, 1993, at 8; Steve Komarow, *Haiti Slaying Is Latest Effort To Derail U.N. Mission There*, USA TODAY, Oct. 15, 1993, at 5A (reporting that Guy Malary, Justice Minister of Haiti and member of the transition government, was assassinated by gunmen near Sacre Coeur Church); Paul Lewis, *Haitian Military Condemned by U.N.*, N.Y. TIMES, Oct. 31, 1993, at 8; *U.S. Rejects Report on Aristide Instability*, N.Y. TIMES, Oct. 31, 1993, at 8. See generally Bess Abrahams & Elizabeth Chance-Weigel, *Bureaucratic Bumbling Spoiled Haiti Effort*, CHRISTIAN SCI. MONITOR, Oct. 15, 1993, at 2; Ben Barber, *U.S. Policy on Haiti Unlikely to Produce Any Quick Results*, CHRISTIAN SCI. MONITOR, Oct. 15, 1993, at 2; Howard W. French, *U.S. Tells Haiti How To Remove Trade Embargo*, N.Y. TIMES, Oct. 21, 1993, at A4; Howard W. French, *Tension Is Rising As Haiti Military Tightens Its Grip*, N.Y. TIMES, Oct. 17, 1993, at A1, A10; Thomas L. Friedman, *Dole Plans Bill to Bar The Use of G.I.'s in Haiti*, N.Y. TIMES, Oct. 18, 1993, at A1, A4; *Haitian Defiance Leaves Clinton Limited Choices*, CHRISTIAN SCI. MONITOR, Oct. 19, 1993, at 1, 4; Peter Grier, *Crises in Haiti and Somalia Test U.S. Internationalism*, CHRISTIAN SCI. MONITOR, Oct. 14, 1993, at 1, 4; Terry L. McCoy, *U.S. Committed to a Free Haiti*, CHRISTIAN SCI. MONITOR, Oct. 18, 1993, at 18; Bruce W. Nelan, *Is Haiti Worth It?*, TIME, Nov. 1, 1993, at 26; Garry Pierre-Pierre, *Troops Are Active in Haitian Capital*, N.Y. TIMES, Oct. 24, 1993, at 13.

47. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

48. See Jones, *supra* note 15, at 24.

Guard who systematically interdicted the Haitians on the high seas. This interdiction program was the result of a bilateral agreement entered into between Haiti and the United States in 1981.⁴⁹ At the time the agreement was concluded, Haiti was ruled by Jean-Claude Duvalier who had continued the "kleptocratic" state created by his father François Duvalier.⁵⁰ However, the bilateral agreement, Executive Order 12,324,⁵¹ and Immigration and Naturalization Services Interdiction Guidelines⁵² (INS Guidelines) promulgated to effectuate the interdiction program, all contained provisions specifying that those individuals who were accorded political refugee status would not be returned to Haiti.⁵³ Pursuant to the INS Guidelines, Haitians interdicted on the high seas were to be interviewed at sea to determine if they were political refugees with a credible fear of persecution. If a refugee was found to have a credible fear of persecution, he would be "screened in" and permitted to enter the United States to apply for political asylum.⁵⁴ Those refugees whom the Coast Guard determined did not have a credible fear of persecution

49. See Migrants Interdiction Agreement, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T., 3559, 3560 [hereinafter Interdiction Agreement].

50. O'Neill, *supra* note 16, at 92. See also Jones, *supra* note 15, at 33.

51. Interdiction of Illegal Aliens, Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981), reprinted in 8 U.S.C. § 1182 (1982).

52. INS ROLE IN AND GUIDELINES FOR INTERDICTION AT SEA, Oct. 6, 1981, revised Sept. 24, 1982 [hereinafter INS GUIDELINES]; see relevant provisions of INS GUIDELINES quoted in Jones, *supra* note 15, at n.17.

53. The Interdiction Agreement between the United States and Haiti specifically states that the United States will comply with "the international obligations mandated in the Protocol Relating to the Status of Refugees" and that "the United States does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." Interdiction Agreement, *supra* note 49, at 3559-60. Executive Order 12,324 requires that when interdictions occur beyond the territorial waters of the United States "no person who is a refugee will be returned without his consent." Exec. Order No. 12,324, *supra* note 51, § 2(c)3. Section 3 of Exec. Order No. 12,324 provides, *inter alia*:

The Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of our law relating to immigration . . . and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

The INS Guidelines similarly provide that:

INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

INS GUIDELINES, *supra* note 52, at C.

54. See generally INS GUIDELINES, *supra* note 52, at C; Sarah Ignatius, *Haitian Asylum-Seekers: Their Treatment as a Measure of the INS Asylum Officer Corps*, 7 GEO. IMMIGR. L.J. 119 (1993).

were "screened out" and repatriated to Haiti.⁵⁵ In November of 1991, the United States opened Guantanamo Bay, Cuba for the purpose of interviewing interdictees.⁵⁶

On May 24, 1992, then President George Bush, by Executive Order 12,807 (Kennebunkport Order) terminated the screening process and allowed the Coast Guard to interdict Haitians on the high seas and to immediately return them to Haiti without making any determination as to their political refugee status.⁵⁷ The Kennebunkport Order provides, in relevant part:

Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create or shall be construed to create any right or benefit, substantive, or procedural (including without limitation any right or benefit under the Administrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedure to determine whether a person is a refugee.⁵⁸

Consequently, the minimal due process rights granted Haitian refugees on the high seas by the bilateral agreement, Executive Order 12,324, and INS Guidelines were effectively rescinded by the Kennebunkport Order.

The interdiction program became the fodder for litigation in the federal courts. Class action suits were initiated by the Haitian Refugee Center (HRC) and the Haitian Centers Council (HCC), two nonprofit organizations providing assistance to Haitian emigrants. The issue as to whether the Coast Guard's interception of Haitian refugees on the high seas contravened domestic and international law by violating section 243(h) of the INA, as amended by the Refugee Act of 1980, and article 33 of the 1967 Refugee Protocol was litigated in both the *Baker* and *McNary* cases.⁵⁹ The Eleventh Circuit in *Baker* and the Second

55. Ignatius, *supra* note 54, at 119.

56. *Id.*

57. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992) [hereinafter Kennebunkport Order].

58. *Id.* at 23,134; see Haitian Migrants, 28 WEEKLY COMP. PRES. DOC. 938 (May 27, 1992) (President Bush describing the Haitian refugees as economic refugees and stating that the refugees would now be screened at the Embassy).

59. See generally *Baker III*, 953 F.2d 1498, 1499 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir.), *cert. granted*, 113 S. Ct. 52 (1992). Although there were other legal issues decided in both *Baker* and *McNary*, such as the right to counsel and collateral estoppel, the focus of the discussion in this Article will be on the legality of the interdiction process under international law and the domestic law of the United States. The legality of the interdiction program and the

Circuit in *McNary* reached contrary conclusions in deciding the legal question. These conflicting voices were silenced when the Supreme Court resolved the conflict in the *Sale* decision. Nevertheless, a brief review of both *Baker* and *McNary* will aid in understanding the evolution of the law.

In *Baker*, the plaintiffs, represented by the HRC requested the federal district court for the Southern District of Florida to grant injunctive and declaratory relief against the U.S. government to prevent the interdiction and repatriation of Haitian refugees on the high seas.⁶⁰ The plaintiffs alleged, among other contentions, that Executive Order 12,324, INS Guidelines, the INA, as amended by the Refugee Act of 1980, and article 33 of the 1967 Refugee Protocol prohibited the interdiction and repatriation of refugees on the high seas without a determination of political refugee status.⁶¹ The *Baker* litigation involved three separate appeals from the federal district court to the Eleventh Circuit Court of Appeals (*Baker I*, *Baker II*, *Baker III*).⁶²

In *Baker I*, the district court judge, Clyde Atkins, issued a preliminary injunction ruling that the plaintiffs had demonstrated a substantial likelihood of success on the merits of at least two of their claims. First, Judge Atkins ruled that the HRC would likely succeed at trial on the

Kennebunkport Order was the sole issue resolved in *Sale*.

60. See Jones, *supra* note 15, at 3-6 (discussing in detail the allegations in the complaints filed by Haitian Refugee Center, Inc.). See generally *Haitian Refugee Ctr., Inc. v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987) (upholding interdiction program because the HRC did not have standing to challenge it). In his concurring opinion, Judge Harry T. Edwards wrote:

This section applies to aliens in exclusion and deportation proceedings. Thus, section 1253(h), applying as it does both to aliens seeking entry and to aliens within the United States, is actually more generous than is required by the Protocol.

* * *

At that time "[t]he relief authorized by § 243(h) [8 U.S.C. § 1253(h)] was not . . . available to aliens at the border seeking refuge in the United States due to persecution.

* * *

This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy. The stark reality here is that, pursuant to the allegations of the amended complaint, this court is constrained to conclude that the HRC has not alleged a claim upon which relief can be granted.

Id. at 841.

61. *Baker III*, 953 F.2d at 1510.

62. *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109 (11th Cir. 1991) [hereinafter *Baker I*]; *Haitian Refugee Ctr., Inc. v. Baker*, 950 F.2d 685 (11th Cir. 1991) [hereinafter *Baker II*]; *Baker III*, 953 F.2d at 1498.

allegation that the refugees had a judicially enforceable claim under article 33 of the 1967 Refugee Protocol not to be returned to Haiti where they would be subjected to persecution or death. Second, Atkins decided that the HRC had a substantial likelihood of success on its First Amendment claim. The HRC asserted that the government had impinged upon its right to association, as well as its right to advise and counsel the interdictees, since the government would not allow the HRC access to interdicted refugees.⁶³ The Eleventh Circuit Court of Appeals disagreed with Judge Atkins and held that Haitian refugees on the high seas had no enforceable rights under article 33 because the provision was not self-executing nor directly applicable at the domestic level in the United States.⁶⁴ Since Congress had not passed implementing legislation to bring article 33 of the 1967 Refugee Protocol into effect as domestic U.S. law, the benefits or rights under article 33 could not be invoked by the plaintiffs.⁶⁵ Moreover, the Eleventh Circuit indicated that the Haitians had not reached the territory of the United States.⁶⁶ The logical inference to be drawn from the opinion is that the Eleventh Circuit did not believe article 33 applied extraterritorially. The preliminary injunction was dissolved by the Eleventh Circuit and the case was remanded with instructions that the article 33 claim be dismissed on the merits.⁶⁷ It must be noted that the appellate court failed to justify its conclusion that article 33 was not self-executing.⁶⁸

Subsequent to the Eleventh Circuit's ruling on December 17, 1991, in *Baker II*, the district court issued a temporary restraining order prohibiting the repatriation of Haitian interdictees based upon the Administrative Procedure Act (APA).⁶⁹ The essence of the APA claim was that the subordinates of the President had violated their discretion by failing to follow procedures and guidelines established to carry out the President's interdiction program.⁷⁰ In reviewing *Baker II*, the Eleventh Circuit

63. *Baker I*, 949 F.2d at 1110.

64. *Id.*

65. *Id.* The court defines a self-executing treaty as an international agreement "that directly accords enforceable rights to persons without the benefit of Congressional implementation." *Id.*

66. *Id.*

67. *Id.* at 1111.

68. The Court of Appeals, in a conclusory statement with no explanation, held that article 33 was not self-executing. *Id.* at 1110.

69. *Baker II*, 950 F.2d 685, 686 (11th Cir. 1991).

70. *Id.* See discussion of APA claim in Jones, *supra* note 15, at 11-12, (citing *Baker II*, 950 F.2d at 687-88), 35 (citing Order Memorializing Oral Rulings, Case No. 91-2653, at 1, n.1 (S.D. Fla. Dec. 18, 1991)).

characterized the district court's ruling as a preliminary injunction.⁷¹ The Eleventh Circuit held that the district court had previously decided the APA claim and had refused to grant injunctive relief based on the claim.⁷² Without presenting detailed legal reasoning,⁷³ the Eleventh Circuit decided that the plaintiffs had no likelihood of success on the APA claim and suspended, pending appeal, the so-called temporary restraining order issued by the district court.⁷⁴

Finally, in *Baker III*, the Eleventh Circuit ruled that the plaintiffs had no legally cognizable rights under the INA, as amended by the Refugee Act of 1980, or international law.⁷⁵ First, the majority of the court held that section 1253(h)(1) (section 243(h)1 of the Refugee Act of 1980) was included in part V of the INA.⁷⁶ Part V of the INA, concerning deportations, applies only to aliens within the United States. The court concluded that the Haitian refugees were beyond the borders of the United States and therefore could not avail themselves of judicial review based upon the INA. The Eleventh Circuit supported its interpretation of section 1253(h)(1) of the INA by discussing several cases which it asserted revealed congressional intent to preclude judicial review of administrative decisions covering aliens who had not reached the borders of the United States or who were not within the country.⁷⁷

Second, the Eleventh Circuit summarily concluded that the plaintiffs' claim of rights under customary international law or international common law was "meritless."⁷⁸ Accordingly, the appellate court remanded the case to the district court with the order that the action be dismissed for failure to state a claim upon which relief could be granted.⁷⁹ In sum, *Baker* was a harbinger of the Supreme Court's ruling in *Sale*, which reached the same legal conclusion in permitting Haitian refugees to be interdicted on the high seas by the Coast Guard and returned to Haiti.

Following the *Baker* decision, on March 18, 1992, the HCC and several other civil rights organizations filed suit, on behalf of Haitians who had been interdicted pursuant to the U.S. government's interdiction

71. *Baker II*, 950 F.2d at 686.

72. *Id.*

73. *See id.* at 685. The lack of detail is reflected in the length of the opinion; the Eleventh Circuit resolved the issue in less than two pages.

74. *Id.* at 687.

75. *Baker III*, 953 F.2d 1498, 1510-11 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992).

76. *Id.* at 1506.

77. *Id.* at 1506-1507.

78. *Id.* at 1511.

79. *Id.* at 1515.

program, in the U.S. District Court for the Eastern District of New York. *McNary* raised all of the same issues already litigated in *Baker*.

In *McNary*, the substance of the plaintiffs' claim challenged the legality of the Kennebunkport Order issued by former President George Bush, in light of U.S. accession to the 1967 Refugee Protocol.⁸⁰ As did the Eleventh Circuit in *Baker I*, Judge Sterling Johnson ruled that the 1967 Refugee Protocol was not self-executing. It was therefore unenforceable by the court for the benefit of the plaintiffs.⁸¹ Nevertheless, Judge Johnson concluded:

It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. The court is astonished that the United States would return Haitians to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The government's conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of nonrefoulement. Article 33 is a

80. See *Haitian Ctrs. Council, Inc. v. McNary*, No. 92-CV-1258, 1992 U.S. Dist. LEXIS 8452 (E.D.N.Y. June 5, 1992) (order denying plaintiff's request for a preliminary injunction).

81. *Id.* at *5.

Although Judge Johnson was moved to reject plaintiffs' argument concerning the applicability of article 33 of the 1967 Refugee Protocol and § 243(h)(1) of the INA to Haitian refugees in international waters, he must be applauded for his recent decision requiring the United States to move HIV-infected Haitians from Guantanamo Bay for treatment in the United States. Judge Johnson held that the due process clause of the Fifth Amendment required that the government provide adequate medical care to detainees who needed such care. *Haitian Ctrs. Council, Inc. v. Sale*, 817 F. Supp. 336, 337 (E.D.N.Y. 1993) (order granting preliminary injunction). Judge Johnson ordered the defendants to provide adequate medical care for "screened-in" HIV-infected Haitians or medically evacuate the Haitians to a place, other than Haiti, "where adequate medical care is available[.]" *Id.*

By his order of June 8, 1993, Judge Johnson ordered the government to evacuate HIV-infected Haitians from Guantanamo Bay to some place where they might receive proper medical care. The judge further ruled that the government was required to cease and desist from denying the plaintiff Haitian Service Organizations access to the "screened-in" plaintiffs at Guantanamo Bay. The Haitian Service Organizations had a right to communicate and associate with the "screened-in" plaintiffs by virtue of the First Amendment. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993). Judge Johnson found:

Although the defendants euphemistically refer to its Guantanamo operation as a "humanitarian camp," the facts disclose that it is nothing more than an HIV prison camp presenting potential health risks to the Haitians held there. . . . It is outrageous, callous and reprehensible that defendant INS finds no value in providing adequate medical care even when a patient's illness is fatal.

Id. at 1038-39.

See William Booth, *27 Haitians Freed from 'HIV Prison'*, WASH. POST, June 15, 1993, at A1; Bruce Frankel & Bill Nichols, *Judge: HIV Policy Callous*, USA TODAY, June 9, 1993, at 1A; *Help Guantanamo Haitians*, N.Y. TIMES, Mar. 14, 1993, at A16; Bill Nichols & Bruce Frankel, *Ruling to Free Haitians Is Yet Another Problem*, USA TODAY, June 9, 1993, at 11A; Martin Sieff, *Clinton Won't Challenge Haitian Release Order*, WASH. TIMES, June 10, 1993, at A3. But see Samuel Francis, *Flouting the Law on AIDS Refugees*, WASH. TIMES, June 22, 1993, at F1.

cruel hoax and not worth the paper it is printed on unless Congress enacts legislation implementing its provisions or a higher court reconsiders *Bertrand*.⁸²

In denying the plaintiffs' request for a preliminary injunction enjoining repatriation, Judge Johnson concluded that he was bound by *Bertrand v. Sava*,⁸³ a Second Circuit decision. Judge Johnson ruled that *Bertrand* held that the provisions of the 1967 Refugee Protocol were not self-executing.⁸⁴ Hence, *Bertrand* was the controlling precedent. He further ruled that section 243 (h)(1), of the INA as amended by the Refugee Act of 1980,⁸⁵ did not apply to Haitians in international waters.⁸⁶ However, the district court judge criticized the U.S. government for hypercritically accusing Great Britain of forcibly repatriating Vietnamese boat people in 1990 when the United States was now engaging in similar conduct.⁸⁷ Finally, Judge Johnson reiterated his previous legal conclusion that section 243(h)(1) of the INA, as amended by the Refugee Act of 1980, did not provide a right to counsel for Haitians who were not within the borders of the United States.⁸⁸

The plaintiffs appealed the district court's denial of their request for injunctive relief. On July 29, 1992, the United States Court of Appeals for the Second Circuit reversed the district court's decision.⁸⁹ Although technically a ruling on a preliminary injunction is not a decision on the merits, the Second Circuit held that section 243(h)(1) of the INA, as amended by the Refugee Act of 1980, was *applicable* to aliens intercepted in international waters.⁹⁰ The Second Circuit therefore concluded

82. Haitian Ctrs. Council, Inc. v. McNary, No. 92 CV 1258, 1992 U.S. Dist. LEXIS 8452, at *5 (order denying plaintiffs' request for a preliminary injunction).

83. *Id.* at *5. See also *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982).

84. Haitian Ctrs. Council, Inc., v. McNary, No. 92 CV 1258, 1992 U.S. Dist. LEXIS 8452, at *5. See also *Bertrand*, 648 F.2d at 204.

85. 8 U.S.C. § 1253(h)(1).

86. Haitian Ctrs. Council, Inc. v. McNary, No. 92 CV 1258, 1992 U.S. Dist. LEXIS 8452, at *6. See also *Judge Slams Bush But Clears his Haitian Repatriation Policy*, WASH. TIMES, June 6, 1993, at A3; *U.S. Policy Appears to Deter Haitian Refugees*, WASH. POST, June 6, 1993, at A7.

87. Haitian Ctrs. Council, Inc. v. McNary, No. 92-CV-1258, 1992 U.S. Dist. LEXIS 8452, at *5 n.2.

88. *Id.* at *6. Judge Johnson's previous legal conclusion that no right to counsel exists for refugees not within U.S. borders can be found in *Haitian Ctrs. Council, Inc. v. McNary*, No. 92-CV-1258, 1992 WL 155853, at *6 (E.D.N.Y. April 6, 1992).

89. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir.), cert. granted, 113 S. Ct. 52 (1992). See generally Michael G. Heyman, *McNary v. Haitian Centers Council et al.*, 6 REVIEW OF UNITED STATES SUPREME COURT CASES 249-51 (February 19, 1993); Jonathan Harris, *International Decisions: Haitian Centers Council, Inc. v. McNary*, 87 AM. J. INT'L L. 112-17 (1993).

90. *McNary*, 969 F.2d at 1367.

that the Kennebunkport Order was illegal because it allowed the Coast Guard to return Haitians to "their persecutors" in Haiti without a determination of political refugee status.⁹¹

In reaching its decision that the request for preliminary injunctive relief should have been granted, the Second Circuit applied the plain meaning doctrine in its construction of the language found in section 243(h)(1) of the INA. Prior to 1980, section 243(h)(1) read:

The Attorney General is authorized to withhold deportation of *any alien within the United States* to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time he deems to be necessary for such reason.⁹²

After amendment by the Refugee Act of 1980, the provision read:

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.⁹³

The Second Circuit reasoned that the new statute prohibited the Attorney General from returning "any alien" to a place of persecution rather than "any alien in the United States."⁹⁴ The court stated that section 243(h)(1) applied to any alien without regard to the alien's location within or outside the United States.⁹⁵ Since the language of the statute is unambiguous, the majority of the court concluded that judicial inquiry of the statute was complete.⁹⁶ The Second Circuit explained that prior to 1980, section 243(h)(1) created a distinction between those aliens "within the United States" and those aliens not within the country's borders.⁹⁷ Because Congress had removed the words "within the United States," the court concluded that Congress could not have intended "*sub silentio*, to enact statutory language that it [had] earlier discarded."⁹⁸ Thus, the government's conduct constituted a return of aliens to

91. *Id.* at 1366-67.

92. *Id.* at 1357 (emphasis added).

93. *Id.*

94. *Id.* at 1357-59.

95. *Id.* at 1358-59.

96. *Id.* at 1358.

97. *Id.* at 1359.

98. *Id.* (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980)).

their persecutors within the meaning of the statute.⁹⁹ The court concluded that the government's action flagrantly violated section 243(h)(1) of the INA as amended by the Refugee Act of 1980.¹⁰⁰

The Second Circuit also rejected the government's argument that article 33 of the 1967 Refugee Protocol and the 1951 Refugee Convention did not apply extraterritorially on the high seas.¹⁰¹ The majority contended that the practical effect of the government's action was to prevent Haitians from not only entering the United States, but to also prevent them from gaining entrance to the Bahamas, Jamaica, Cuba, Mexico, the Cayman Islands, or any other country in which they might seek safe haven.¹⁰² The government's assertion "that returning . . . Haitians to their persecutors is somehow 'in regard for their safety' is itself absurd."¹⁰³ Unfortunately, the Second Circuit refused to reach the issue as to whether article 33 was self-executing. The majority characterized any decision concerning the self-executing nature of article 33 as "academic" because the plain language of section 243(h)(1) of the INA prohibited the United States from returning aliens to their persecutors "no matter where in the world these actions are taken."¹⁰⁴

On July 29, 1992, the U.S. government filed an application for a stay of the Second Circuit's decision with the Supreme Court. On August 1, 1992, the Court granted the request for a stay pending the filing of a writ of certiorari by the applicants. The Court ordered that:

the judgment of the United States Court of Appeals for the Second Circuit, 969 F.2d 1350 (1992), and the subsequent July 29, 1992 order of the United States District Court for the Eastern District of New York . . . are stayed pending the filing of a petition for a writ of certiorari on or before August 24, 1992. Should the petition for a writ be filed on or before that date this order is to remain in effect pending the Court's action on the petition. If the petition for a writ of certiorari is denied, the order is to terminate automatically. In event the petition is granted, this order is to remain in effect pending the sending down of the judgment of this Court.¹⁰⁵

Justices Blackmun and Stevens dissented, emphasizing that the plaintiffs in the case faced the real and immediate prospect of persecution, terror,

99. *Id.* at 1360.

100. *Id.* at 1360-61.

101. *Id.* at 1361-66.

102. *Id.* at 1366.

103. *Id.* at 1367.

104. *Id.*

105. *McNary v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3 (1992).

and possible death at the hands of those to whom they were being forcibly returned.¹⁰⁶ In their dissent, they noted that the government did not make a strong showing that a balancing of the equities would be in its favor. The government had simply presented the Court with "a vague invocation of harm to foreign policy, immigration policy, and the federal treasury."¹⁰⁷

The petition for a writ of certiorari was granted and *Haitian Centers Council v. McNary* was restyled *Sale v. Haitian Centers Council*.

C. *Sale: The Dred Scott Case of Immigration Law Revisited and Reaffirmed*

The President has directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees. The question presented in this case is whether such forced repatriation, 'authorized to be undertaken only beyond the territorial sea of the United States,' violates § 243(h) of the Immigration and Nationality Act of 1952 We hold that neither § 243(h)(1) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applies to action taken by the Coast Guard on the high seas.¹⁰⁸

In the preceding quotation, the Supreme Court framed the narrow issue decided in *Sale* and held that Haitian refugees, intercepted on the high seas by the Coast Guard, have no cognizable legal rights under the domestic law of the United States or under conventional international law.

The Court's opinion in *Sale* can be divided into three issues. Following a summary of the historical background of the Haitian refugee phenomenon, the Court first analyzed the plain language of section 243(h)(1) of the INA, and whether it restricted the actions of the President. Second, the Court examined the validity of an extraterritorial application of section 243(h)(1). Finally, the Court analyzed article 33 of the 1967 Refugee Protocol to determine whether it was intended to have extraterritorial effect.

The Court began its discussion by indicating that the interdiction program was the result of a 1981 agreement between the U.S.

106. *Id.*

107. *Id.* at 4.

108. *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2552 (1993).

government and the Haitian government of Jean-Claude Duvalier.¹⁰⁹ The Haitian government guaranteed the United States that it would not punish repatriated citizens because of their "illegal departure."¹¹⁰ The majority of the Court noted that the interdiction program was further promoted by the issuance of Executive Order 12,324 which provided, *inter alia*, that "no person who is a refugee will be returned without his consent."¹¹¹ Justice Stevens, speaking for the majority, recounted the historical progression of the Haitian refugee crisis, detailing and describing the events which ultimately led to the demise of the Aristide government and the dramatic flood of refugees who attempted to escape Haiti and the Cedras regime by way of the high seas.¹¹²

Justice Stevens suggested that the resulting refugee flow was overwhelming. The facilities at Guantanamo Bay, Cuba were overcrowded and unseaworthy vessels sank, causing thousands of deaths.¹¹³ The U.S. government could no longer protect the nation's borders or implement a screening process of the Haitians to determine political refugee status, as was required by Executive Order 12,324.¹¹⁴ Consequently, President Bush, by promulgating Executive Order 12,807, the Kennebunkport Order, had decided to authorize repatriation of Haitian refugees to Haiti without a determination of political refugee status.¹¹⁵

The first issue resolved by the Court focused on the language of section 243(h)(1) of the INA. Justice Stevens began the majority opinion by quoting the language:

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 on account of race, religion, nationality, membership in a particular social group, or political opinion.¹¹⁶

This above-quoted provision resulted from the passage of the Refugee Act of 1980 which amended the INA. The pre-1980 provision read as follows:

109. *Id.* at 2553.

110. *Id.*

111. *Id.*

112. *Id.* at 2553-56.

113. *Id.* at 2554-55.

114. *Id.* at 2555.

115. *Id.*

116. *Id.* at 2558.

The Attorney General is authorized to withhold deportation of *any alien within the United States* to any country in which his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time he deems to be necessary for such reason.¹¹⁷

The HCC contended that the removal of the words "within the United States" and the addition of the word "return" was effected to conform section 243(h)(1) with article 33(1) of the 1951 Refugee Convention and 1967 Refugee Protocol and to assure that the benefits or protection of section 243(h)(1) applied extraterritorially.¹¹⁸ The HCC argued that the language of section 243(h)(1) is unambiguous¹¹⁹ and further contended that the legislative history of the 1980 amendment supported their position.¹²⁰ The petitioners submitted that an analysis of the entire INA reveals that section 243(h)(1) does not apply to actions of the President and Coast Guard occurring on the high seas.¹²¹

The Court, in agreement with the interpretation of the petitioners, held that although section 243(h)(1) restricts the action of the Attorney General, it could not be read as a restriction on the conduct of the President.¹²² The Court was not persuaded that section 243(h)(1) placed any limitations on the President's authority to repatriate aliens interdicted in international waters.¹²³ The Supreme Court observed that other provisions of the INA specifically or expressly conferred powers or certain responsibilities on the Secretary of State, the President, the Secretary of Labor, the Secretary of Agriculture, and even the federal courts.¹²⁴ Both Executive Orders 12,324 and 12,807 "expressly relied on statutory provisions that confer authority on the President to suspend entry of 'any class of aliens' or to 'impose on the entry of aliens any restrictions he may deem to be appropriate.'"¹²⁵ Accordingly, the majority of the Court concluded that the reference to the Attorney General in section 243(h)(1) did not circumscribe the authority of the President to order the interdiction and repatriation of Haitian refugees by the Coast

117. See *supra* note 83 and accompanying text.

118. *Sale*, 113 S. Ct. at 2558.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 2559.

123. *Id.* at 2567.

124. *Id.* at 2559.

125. *Id.*

Guard.¹²⁶ The provision placed limitations on the Attorney General in the performance of her normal responsibilities, such as conducting deportation and exclusion hearings where requests for political asylum are made pursuant to section 243(h)(1).¹²⁷ The Court emphasized that there are no provisions in the INA which authorize holding deportation or exclusion proceedings outside of the country. Moreover, Justice Stevens noted that part V of the INA "obviously contemplates" that such proceedings will be performed in the United States.¹²⁸ Therefore, section 243(h)(1) could not be interpreted so as to limit or restrict the Attorney General's actions in geographic areas where she has no authority to conduct deportation or exclusion hearings.¹²⁹ The Court concluded that nothing in part V of the INA, which includes section 243(h)(1), suggests that it is to be applied extraterritorially.¹³⁰ The Court also briefly alluded to the presumption that acts of Congress generally do not have force or application outside of the borders of the United States.¹³¹ Section 243(h)(1) is one such act of Congress, and the presumption is that it applies only within the United States.¹³²

The second issue the Court discussed related to the definition of the word "return" which was added to section 243(h)(1) when the language "within the United States" was deleted. The Court concluded that if Congress had intended to refer to all aliens who might be returned to their persecutors, without regard to location, the use of the word "deport" would not have been necessary.¹³³ Thus, the use of both "deport" and "return" in the statute "imply[d] an exclusively territorial application" in both deportation and exclusion proceedings.¹³⁴ Earlier in its opinion, the Court had distinguished between deportation and exclusion proceedings by stating:

Aliens residing illegally in the United States are subject to deportation after a formal hearing. Aliens arriving at the border, or those who are temporarily paroled into the country, are subject to an exclusion hearing, the less formal process by which they, too, may eventually be removed from the United States. In either a

126. *Id.*

127. *Id.* at 2559-60.

128. *Id.* at 2560.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

deportation or exclusion proceeding the alien may seek asylum as a political refugee for whom removal to a particular country may threaten his life or freedom.¹³⁵

Consequently, the Court characterized the HCC's definition of "return" as expansive and stated that the HCC's interpretation of the word would make the usage of the word "deport" redundant.¹³⁶ The HCC argued that the word "return" referred to the location or destination to which the refugee would be removed or sent back.¹³⁷ The Court asserted that if this interpretation of "return" was correct, there would be no need to use the word "deport."¹³⁸ The word "return" would have been adequate to cover both deportation and exclusion proceedings.¹³⁹ Thus, Congress had included both words to be certain that the protection provided by section 243(h)(1) was available both in deportation and exclusion proceedings.¹⁴⁰

In support of its conclusion, the majority of the Court looked to the legislative history of the Refugee Act of 1980. The Supreme Court decided that there was not a "scintilla of evidence" in the legislative history or in the language of the post-1980 section 243(h)(1) provision that revealed congressional intent to give section 243(h)(1) extraterritorial effect.¹⁴¹ The Court suggested that "[it] would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect."¹⁴² The Court reasoned that the 1980 amendment to section 243(h)(1) of the INA had served only to destroy the distinction between deportable and excludable aliens for the purposes of political asylum. Congress had removed the term "within the United States" and added the word "return," so that the benefits of section 243(h)(1) applied to both deportation and exclusion proceedings. Prior to the 1980 amendment to section 243(h)(1), the protection of the norm of *nonrefoulement* was available only to aliens subject to deportation.¹⁴³ Hence, the purpose of the post-1980 section 243(h)(1) provision is to provide protection for those who are illegally in the country and subject to deportation as well as those who are at the border or "on the

135. *Id.* at 2552-53.

136. *Id.* at 2560.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 2561.

143. *Id.*

threshold of initial entry," and those who have been temporarily paroled into the country and subject to exclusion hearings. Therefore, no extra-territorial application was intended by the changes in section 243(h)(1).

In its disposition of the third issue, the Court held that neither a textual analysis nor the negotiation history of the treaties supported the position that article 33 of the 1957 Refugee Convention and the 1967 Refugee Protocol is applicable on the high seas or extraterritorially.¹⁴⁴ Article 33(1) and article 33(2) are reproduced as follows:

Article 33. — Prohibition of expulsion or return ('*refoulement*')

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

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.¹⁴⁵

The majority of the Court explained that article 32(2) does not allow an alien to invoke the benefits of the principle of *nonrefoulement* set forth in article 33(1), if the alien creates or poses a threat or danger to the country in which he is present. The Court stated that if article 33(1) applied extraterritorially on the high seas, no country could apply the exception found in article 33(2) with respect to an alien found in international waters, since the high seas is not a country.¹⁴⁶ The Court further expatiated:

If Article 33.1 applied extraterritorially . . . Article 33.2 would create an absurd anomaly: dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not. It is more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory.¹⁴⁷

144. *Id.* at 2563.

145. *Id.* (emphasis in original).

146. *Id.*

147. *Id.*

Interpreting article 33(1), the Court further ruled that the phrase “expel or return (*refouler*)” paralleled the phrase “deport or return” found in section 243(h)(1) of the INA. The Court explained that “expel” has the same meaning as “deport;” the expulsion of an alien already present in the host country.¹⁴⁸ “Return” (*refouler*) refers to the exclusion of an alien who is at the borders, or “on the threshold of initial entry.”¹⁴⁹ The Court stated that, contrary to the HCC’s interpretation, the denotation of the word “return” was narrower than its common or ordinary meaning because the French word “*refouler*” is not a synonym for “return.” In support of its conclusion, the Court referred to two French-English dictionaries and noted that “*refouler*” is not translated as “return” and “return” is not translated as “*refouler*.”¹⁵⁰ However, the Court conceded that “*refouler*” is translated as “repulse,” “drive back,” or “expel.”¹⁵¹ Therefore, the Court stated that within the context of the 1951 Refugee Convention, “return” denoted “a defensive act of exclusion at a border rather than an act of transporting someone to a particular destination [T]o ‘return’ means to ‘repulse’ rather than to ‘reinstate.’ ”¹⁵² Hence, the Court held that article 33 of the 1967 Refugee Protocol does not have extraterritorial effect.

The Court turned to the *travaux preparatoires*, the preparatory works or legislative history of the 1951 Refugee Convention, to prove that article 33(1) was not intended to apply extraterritorially. The majority of the Court quoted at length statements made by the Swiss and Netherlands delegates as to their understanding of the meaning of the terms “expel” and “return.” The Swiss delegate stated that the word “expel” or “expulsion” referred to refugees who had been admitted to the territory of the host nation.¹⁵³ Thus, the term “*refoulement* had a vaguer meaning” and could not be applied to refugees who had not entered the territory of a nation.¹⁵⁴ The Swiss government interpreted the English word “return” as applicable only to refugees who had entered a country but were not residents of that country.¹⁵⁵ The Swiss government desired to clarify the term “return” to make sure that article 33, then article 28, did not require them to open their frontiers to large groups of

148. *Id.*

149. *Id.* (quoting *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 212 (1953)).

150. *Id.* at 2564.

151. *Id.*

152. *Id.*

153. *Id.* at 2565.

154. *Id.* at 2556–66.

155. *Id.* at 2566.

refugees engaged in mass migration.¹⁵⁶

The Court suggested that there was a general consensus by several delegates that the right of *nonrefoulement* applied only to aliens physically present within a country.¹⁵⁷ Justice Stevens highlighted the absence of any express disagreement with the Swiss delegate's position at the Conference of Plenipotentiaries as to his explanation of the words "expel" and "return."¹⁵⁸ Indeed, Justice Stevens emphasized that two weeks later, the Netherlands delegate supported the Swiss delegate's opinion, arguing that article 33 then article 28 would not create an obligation upon a party to admit refugees in a case of mass migration or attempted mass migration across borders.¹⁵⁹ The Netherlands delegate then requested that his agreement with the Swiss delegate's position be "placed on the record" to reassure his government.¹⁶⁰ The President of the Conference ruled that the Netherlands delegate's representation should be placed on the record as requested. There was no objection to this action.¹⁶¹ In addition, the Court stated that the word "*refouler*" was placed in the English text of the 1951 Refugee Convention to avoid the erroneously expansive interpretation of the word "return."¹⁶² Accordingly, in light of the negotiating history of the treaty, the majority of the Court refused to interpret article 33 as prohibiting the extraterritorial interdiction and repatriation of aliens on the high seas.

D. A Critical Analysis of the *Sale* Decision

The Supreme Court in *Sale* can justifiably be accused of engaging in "politically correct" judicial activism of the conservative mode.¹⁶³ The *Sale* decision reaffirms *Baker* which decided that Haitian refugees interdicted on the high seas by the Coast Guard have no legal rights under the domestic laws of the United States or conventional international law. However, the legal analysis in *Sale* is flawed in numerous respects. Specifically, the Court's opinion raises troublesome issues in five distinct areas: (1) the legal and moral validity of the bilateral interdiction agreement between the United States and Haiti; (2) the Court's conclusion that section 243(h)(1) of the INA places no limitations on

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 2567.

163. Michael Kinsley, *Right-Wing P.C. Is Still P.C.*, TIME, Aug. 9, 1993, at 66.

presidential action; (3) the Court's reliance on the presumption against extraterritorial application of a congressional act; (4) the Court's failure to interpret the plain meaning of section 243(h)(1) of the INA; and finally, (5) the Court's analysis of article 33.

Initially, the Court's invocation of the bilateral interdiction agreement between the United States and Haiti as a justification for the interdiction program is perplexing. The bilateral interdiction agreement was an agreement between the Reagan administration and the Jean-Claude Duvalier regime — a regime which has been described as "a ferocious system of political repression."¹⁶⁴ The reliance on the bilateral agreement is most peculiar because the United States has returned or repatriated Haitians to a political regime which it does not recognize and has declared an illegal and illegitimate entity. Moreover, the bilateral interdiction agreement itself reflects the *nonrefoulement* principle, since the United States vowed not to return political refugees to Haiti.¹⁶⁵ Further, the Court emphasized a provision in the agreement which states that the Secretary of State obtained assurances from Haiti that the interdicted Haitians would not be prosecuted upon their repatriation to Haiti.¹⁶⁶ There is clear and convincing evidence that individuals who have been repatriated to Haiti have suffered persecution and death.¹⁶⁷ There is no rational basis upon which the United States could conclude that the illegal and nefarious Cédras regime, whose legitimacy the United States does not recognize, would abide by the rule of law with regard to the treatment of repatriates. The Cédras regime demonstrated its contempt for the rule of law by overthrowing President Aristide.

The very existence of the bilateral interdiction agreement which restricts the movement of persons on the high seas raises serious issues as to the validity of such agreements under international law. The Court cited no legal authority for the proposition that nations may enter into agreements or treaties which restrict access or movement on the high seas. The bilateral agreement may violate the international, juridical principle of freedom on the high seas. The high seas are the property of no particular nation; the high seas are *res communis*.¹⁶⁸ The U.N. Convention on the High Seas provides, *inter alia*: "The high seas being

164. William G. O'Neil, *The Roots of Human Rights Violations in Haiti*, 7 GEO. IMMIGR. L.J. 87, 92 (1993).

165. *Sale*, 113 S. Ct. at 2532.

166. *Id.*

167. See *supra* note 29 and accompanying text.

168. Thomas D. Jones, *The International Law of Maritime Blockade — A Measure of Naval Economic Interdiction*, 26 How. L.J. 759, 760 (1983).

open to all nations, no state may validly purport to subject any part of them to its sovereignty."¹⁶⁹ By restricting the access of Haitian refugees to the high seas and interfering with the movement of refugees on the high seas, arguably, both Haiti and the United States are in violation of conventional and customary international law. The United States and Haiti have attempted to exercise their sovereignty in international waters. Indeed, it must give us pause that the United States would condemn the Cédras regime as illegal and then cooperate with this international criminal entity by repatriating Haitian refugees pursuant to an interdiction agreement between the United States and a prior legitimate government.

Second, the Court's analysis of section 243(h)(1) is logically flawed. The Court concluded that section 243(h)(1) of the INA does not restrict the power of the President to require the Coast Guard to repatriate Haitian interdictees without a determination of political refugee status. The Court explained that section 243(h)(1) only restricted the actions of the Attorney General within the United States.¹⁷⁰ Although the language of section 243(h)(1) does refer specifically to the Attorney General when it prohibits her from deporting or returning aliens to the country of their persecutors, the Court erred in its conclusion that the President is not bound by the categorical imperative expressed in the language of section 243(h)(1) of the INA. It is beyond dispute that the Refugee Act of 1980 was promulgated by Congress to conform our refugee law to the international obligations set forth in the 1967 Refugee Protocol to which the United States is a party.¹⁷¹ Section 243(h)(1) mirrors article 33 of the 1967 Refugee Protocol. In order for the 1967 Refugee Protocol to become the law of the United States, the President, in exercise of his constitutional, treaty-making power, was required to negotiate and sign the treaty. Ratification of the treaty occurred with the advice and consent of two-thirds of the Senate, consistent with Article II(2) of the U.S. Constitution. The legal obligations under the 1967 Refugee Protocol bind the government of the United States. Therefore, it is ludicrous to suggest that an agent of the President is bound by section 243(h)(1) which mirrors article 33 of the 1967 Refugee Protocol, but the President

169. Convention on the High Seas, Apr. 29, 1958, art. 2, 13 U.S.T. 2312, 2314, 450 U.N.T.S. 582 (entered into force Sept. 30, 1962).

170. *Sale*, 113 S. Ct. at 2559-60.

171. *INS v. Cardoza-Fonesca*, 480 U.S. 421, 436-37 (1987). The Cardozo-Fonesca court stated: "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which United States acceded in 1968."

himself is not so bound, even though as the chief executive he negotiates and concludes treaties with the advice and consent of the Senate. Article 33 of the 1967 Refugee Protocol is substantially identical in substance to section 243(h)(1) of the INA. Therefore, section 243(h)(1) binds the President and all agents of the President. Any other conclusion "turns" logic on its head.

Third, the Court's conclusion that section 243(h)(1) has no extraterritorial effect is based solely upon a canon of statutory interpretation. To deny the extraterritorial effect of section 243(h)(1), the Supreme Court relied upon the so-called presumption against the extraterritorial reach of congressional acts.¹⁷² The presumption states that the domestic or internal laws of the United States are ordinarily applicable only within the borders of the country.¹⁷³ It must be noted that the presumption against the extraterritorial application of the domestic laws of the United States is only a presumption of statutory construction; it is not a rule of law. Moreover, the policy arguments against extraterritorial effect of the statute are absent in the Haitian "boat people" situation. The presumption is usually applied where there is ambiguity as to whether a statute is to apply extraterritorially or where congressional intent as to its extraterritorial application is unexpressed.¹⁷⁴ The presumption is also applied where there is some risk that the extraterritorial application of a statute might impinge upon the jurisdictional rights of another nation.¹⁷⁵ Originally, the presumption was a conflict of laws doctrine. Courts applied the presumption to avoid conflicts between sovereign states in certain cases where each state attempted to apply its law to the same event or transaction. In the Haitian refugees cases, since the high seas belong to no one, the potential for such conflicts of law is nonexistent.¹⁷⁶

Justice Blackmun, the lone dissenter in *Sale*, summarized the arguments against the application of the presumption against extraterritoriality:

172. *Sale*, 113 S. Ct. at 2561-63.

173. *Id.* at 2561.

174. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). See Brief for Nicholas Katzenbach, Benjamin R. Civiletti, and Griffin Bell, Former Attorneys General of the United States of America in Support of Respondents, *amicus curiae*, at 11, *McNary v. Haitian Ctrs. Council, Inc.*, 969 F.2d 1350 (2d Cir.) (No. 92-344), *cert. granted*, 113 S. Ct. 52 (1992) [hereinafter Brief of Attorneys General].

175. *EEOC v. Arabian Oil Co.*, 111 S. Ct. 1227, 1230 (1991); Brief of Attorneys General, *supra* note 174, at 14.

176. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); Brief of Attorneys General, *supra* note 174, at 14.

The judicially created canon of statutory construction against extraterritorial application of United States law has no role here It applies only where congressional intent is 'unexpressed' (citation omitted). Here there is no room for doubt: a territorial restriction has been deliberately deleted from the statute.

Even where congressional intent is unexpressed, . . . a statute must be assessed according to its intended scope. The primary basis for the application of the presumption (besides the desire . . . to avoid conflicts with the laws of other nations) is 'the common-sense notion that Congress generally legislates with domestic concerns in mind.' Where that notion seems unjustified or unenlightening, . . . generally-worded laws covering varying subject matters are routinely applied extraterritorially.

In this case we deal with a statute that regulates a distinctively international subject matter: immigration, nationalities, and refugees. Whatever force the presumption may have with regard to a primarily domestic statute evaporates in this context. There is no danger that the Congress that enacted the Refugee Act was blind to the fact that the laws it was crafting had implications beyond the Nation's borders.¹⁷⁷

Justice Blackmun then cited *Murray v. The Charming Betsy*¹⁷⁸ for the canon of statutory construction which states that congressional legislation should never be interpreted so as to violate international law where another possible interpretation is available.¹⁷⁹

Fourth, in its interpretation of section 243(h)(1) of the INA and the reasons for the change in the language effected by the Refugee Act of 1980, the Court ignored its own teachings concerning the plain meaning doctrine.¹⁸⁰ Instead, the Court proceeded to construe the language of the statute by reference to its legislative history as a method of determining congressional intent and meaning. The Court held that the words "within the United States" were deleted from the statute and the word "return" added so that the benefit or protection of section 243(h)(1) would apply to deportation proceedings and exclusion proceedings.¹⁸¹ The Court stated that prior to the 1980 amendment, section 243(h)(1) protection

177. *Sale*, 113 S. Ct. at 2549, 2576-77.

178. 6 U.S. 137, 143 (1804), cited in *Sale*, 113 S. Ct. at 2577.

179. *Sale*, 113 S. Ct. at 2557.

180. *United States v. Stuart*, 489 U.S. 353, 371 (1989); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (holding that where language or words in a statute are clear and unambiguous, "the judicial inquiry is complete") (citations omitted).

181. *Sale*, 113 S. Ct. at 2560.

was only available in deportation hearings. The Court supported its conclusion by invoking the legislative history of the Act.¹⁸² The majority of the Court found no evidence in the legislative history to indicate the intention of Congress to apply section 243(h)(1) extraterritorially.¹⁸³

However, the Court in its own case law has held that the meaning of any statute must be initially determined by reference to the ordinary or plain meaning of the words in the statute. If the text of a statute is clear and unambiguous on its face, there is no need for further interpretation.¹⁸⁴ The court may not go outside of the statute by using extrinsic aids to provide a different interpretation of the statute.¹⁸⁵ It is assumed that the legislature understood the plain, literal, or ordinary meaning of the words it chose to use in the statute.¹⁸⁶ In the instant case, the Supreme Court ignored the plain meaning doctrine even though the language of section 243(h)(1) is both syntactically and grammatically unambiguous on its face. The Court immediately resorted to the use of an extrinsic aid of statutory construction, the legislative history, to justify its interpretation of the statute. Even though Congress chose to delete the territorial limitation "within the United States" and added the word "return," the Supreme Court held that Congress did not mean what it clearly stated in the statute. Although the language of the statute is unambiguous, the Court denied that the word "return" refers to the location or place to which refugees are to be transported, as argued by the respondents. The fact that there are no specific statements concerning the extraterritorial application of section 243(h)(1) in the legislative history is understandable given Congress' deliberate act of deleting the geographically restrictive language — "within the United States." As Justice Blackmun rightly contended:

To read into section 243(h)'s mandate a territorial restriction is to restore the very language that Congress removed. 'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that has earlier been discarded in favor of other language.'¹⁸⁷

If Congress had intended a territorial limitation in the statute, it would not have excised the language "within the United States" from the

182. *Id.*

183. *Id.*

184. SUTHERLAND STAT. CONST. § 46 (Norman J. Singer ed., 5th ed. 1992) (Supp. 1993).

185. *See id.* § 46.01.

186. *Id.*

187. *Sale*, 113 S. Ct. at 2574 (Blackmun, J., dissenting) (citation omitted).

statute. Congress could have placed language in section 243(h)(1) which made it clear that the provision did not apply on the high seas.

Congress' intent to have section 243(h)(1) apply extraterritorially is reflected by Congress' excision of the geographically specific language "within the United States." In addition, the international nature of section 243(h)(1) of the INA makes extraterritorial application wholly logical. Often refugees must utilize the high seas as a means of escape from their jurisdictions. This is evident not only by the Haitian refugee crises, but by the recent traffic in illegal aliens arriving in the United States from China.¹⁸⁸

Finally, the Court's holding that article 33 did not apply extraterritorially on the high seas — so that the United States had not breached an international obligation — is problematic for three specific reasons: (1) the Court's failure to acknowledge the express absence of any limitation on the territorial application of article 33; (2) the Court's curious definition of "return" or "refouler"; and (3) the Court's improper reliance on article 33's ambiguous legislative history. First, the Court argued that a dangerous alien under article 33(2) who poses a threat to the *country in which he is located* does not receive the benefits of article 33(1) which categorically prohibits the expulsion or return of aliens to the country of their persecutors. The Court stated that if article 33(1) applied on the high seas, no country could apply article 33(2) on the high seas to an alien found there because the dangerous alien on the high seas would not be in a country. Thus, dangerous aliens in international waters could invoke the benefits of 33(1), but dangerous aliens in a country which sought to expel them could not do so.¹⁸⁹ The Court then concluded that "it is more reasonable to assume" that the coverage of article 33(2) is restricted to dangerous aliens already within a country because article 33(1) applied only to those aliens within a signatory's country.¹⁹⁰

The strained and tortured analysis of articles 33(1) and 33(2) is glaringly evident. If the drafters of the 1967 Refugee Protocol and 1951 Refugee Convention had intended article 33(1) to apply only within the territory of a signatory state, the drafters could have specifically used geographically restrictive language as they did in article 33(2). Justice Blackmun observed: "The signatories' understandable decision to allow nations to deport criminal aliens who have entered their territory hardly suggests an intent to permit the apprehension and return of noncriminal

188. See *infra* note 218 and accompanying text.

189. *Sale*, 113 S. Ct. at 2563.

190. *Id.*

aliens who have not entered their territory, and who may have no desire ever to enter."¹⁹¹ The U.N. High Commissioner for Refugees (High Commissioner) in both the *Baker* and *Sale* cases submitted *amicus curiae* briefs contending that article 33 applies extraterritorially. In the *Baker* case, the High Commissioner stated:

It is significant that the principle of *non-refoulement* — perhaps the foremost principle of international law protecting refugees — is stated in mandatory terms as an absolute obligation, and that no territorial limitation appears in the language of Article 33. When the drafters of the 1951 Convention as a whole wished to condition the rights of refugees on their physical location or residence, they did so expressly in the language of the treaty. Thus, in the article on the separate matter of 'expulsion' immediately preceding Article 33, the 1951 Convention expressly limits the scope of the right to 'a refugee' 'lawfully in the territory' Article 4 on freedom of religion and 27 on the issuance of travel documents state, also expressly, that States' obligations under these articles are limited to refugees who are present in the territory of the State. Article 18 on rights to self-employment and 26 on freedom of movement clearly state that their scope is limited to refugees lawfully on [sic] the territory of the Contracting State. Similarly, Articles 15, 17(1), 19, 21, 23, 24, and 28 (regarding, respectively, rights related to association, employment, exercise of the liberal professions, housing, public relief, labor conditions, and travel documents) all are expressly conditioned on the refugee's legal status on [sic] the territory of the State. In stark contrast to all of these provisions, Article 33 contains no such restrictions. To the contrary, Article 33 prohibits the return of refugees 'in any manner whatsoever.'¹⁹²

It is therefore incontrovertible that when the drafters intended to place geographical limitations on provisions in the 1951 Refugee Convention, they did so unequivocally.

Second, the majority of the Court's conclusion that the words "expel" and "return" have the same meanings as "deport" and "return" found in section 243(h)(1) of the INA rests on a peculiar definition of those words.¹⁹³ Specifically, the Court asserted that "return" or "refouler" did not have the meaning ascribed to it by the HCC. Referring to two French dictionaries, *New Cassell's* and *Larousse*, the Court

191. *Id.* at 2570 (Blackmun, J., dissenting).

192. Quoted in Jones, *supra* note 15, at 32.

193. *Sale*, 113 S. Ct. at 2563.

concluded that "return" or "*refouler*" means an act of exclusion at the border of a country, not an act involving transporting a person to a particular location.¹⁹⁴ Yet, the Court did concede that the English translation of the term "*refouler*" includes terms such as "drive back," "repulse," or "repel."¹⁹⁵ It is interesting that the Court chose the *New Cassell's French Dictionary* and the *Larousse Modern French-English Dictionary*.¹⁹⁶ Whereas the above two dictionaries are standard collegiate dictionaries, it is widely acknowledged that *Le Petit Robert* is considered one of the most authoritative dictionaries of the French language. In contrast to *New Cassell's* and *Larousse's* definition, *Le Petit Robert* defines "*refouler*" as: "Faire reculer, refluer (des personnes) *Refouler des immigrants, des indésirables, à la frontière.*"¹⁹⁷ Schoenholtz translates this definition as: "To drive back or to repel. To drive back immigrants, undesirables, at the border (italics in original)."¹⁹⁸ *Le Petit Robert's* definition indicates that "*refouler*" or "return" entails an affirmative act of physically "driving back" or transporting persons. The majority's definition of "return" or "*refouler*" as exclusion at the border simply does not bear to reason.

Finally, the Supreme Court referred extensively to the *travaux préparatoires* or preparatory works to justify its conclusion that article 33 does not apply extraterritorially. The Court discussed, in detail, statements made by the Swiss and Netherlands delegates. Both of the delegates expressed concern that article 33 should not be interpreted so as to require their countries to admit refugees in the case of mass migration across frontiers.¹⁹⁹ The Swiss delegate suggested that the term "*refoulement*" could not be applied to a refugee who had not entered the territory of a nation.²⁰⁰

No better rebuttal of these statements or opinions can be presented than the rebuttal of the dissenter, Justice Blackmun. Justice Blackmun forcefully argued that a statement or opinion of a delegate to the 1951 Refugee Convention's conference cannot be used to change the plain meaning of the text of a treaty; the language of the treaty controls.²⁰¹

194. *Id.* at 2564.

195. *Id.*

196. *Id.* n.37.

197. Quoted in Andrew I. Schoenholtz, *Aiding and Abetting Persecution: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol*, 7 GEO. IMMIGR. L.J. 67, 77 (1993).

198. *Id.* at 77 n.37.

199. *Sale*, 113 S. Ct. at 2565-67.

200. *Id.* at 2565-66.

201. *Id.* at 2572-73 (Blackmun, J., dissenting).

Justice Blackmun stated that the Court's reliance on the *travaux preparatoires* was misplaced. Article 31 of the Vienna Convention on the Law of Treaties provides:

(General rule of interpretation). A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.²⁰²

Article 32 of the Vienna Convention allows reference to the *travaux preparatoires* as a last resort when there is ambiguity in the language. Article 32 of the Vienna Convention states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.²⁰³

Also, the request by the Netherlands delegate that his understanding be "placed on the record" was the delegate's method of memorializing his government's position or interpretation of article 33. The phrase is remarkably similar with the phrase "for the record" used by U.S. lawyers for the purpose of ensuring the lawyer's legal position has been duly recorded by a court. As Justice Blackmun argued, the language "placed on the record" is not the means by which the conference adopts amendments to a treaty.²⁰⁴ When conference delegates amend or change a provision of a treaty the terms "adopted" or "agreed to" are used. The failure of the other delegates to object to the Netherlands delegate's request to place his position on the record cannot be construed to mean that there was a general consensus among the delegates.²⁰⁵ There is seemingly no evidence in the *travaux preparatoires* which indicates that the opinions of the Swiss and Netherlands delegates were adopted or agreed to by the Conference delegates. More importantly, nothing in the Swiss or Netherlands delegates' statements indicate that article 33 was interpreted so as to permit governments to interdict aliens on the high

202. Vienna Convention on the Law of Treaties, adopted May 22, 1969, art. 31, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980).

203. *Id.* art. 32.

204. *Sale*, 113 S. Ct. at 2571-72 (Blackmun, J., dissenting).

205. *Id.* at 2572 (Blackmun, J., dissenting).

seas and return them to the country of their persecutors. Having decided that article 33 did not apply extraterritorially, the Court shrewdly avoided the issue of the self-executing nature of the 1967 Refugee Protocol. The self-execution issue was rendered irrelevant and academic.

In sum, a careful analysis of the *Sale* decision reveals that the Court's reasoning is seriously flawed and does monumental injury to the human rights norm of *nonrefoulement*. Even the majority of the Court admitted that interdicting refugees on the high seas and returning them to their persecutors might violate the spirit of article 33. The Court acknowledged: "The drafters of the Convention and the parties to the Protocol — like the drafters of 243(h) — may not have contemplated that any action would gather fleeing refugees and return them to one country they had desperately sought to escape; such actions may even violate the spirit of article 33."²⁰⁶ The tragedy of *Sale* is perhaps best described by Justice Blackmun who wrote:

I believe that the duty of nonreturn expressed in both the Protocol and statute is clear. The majority finds it 'extraordinary' . . . that Congress would have intended the ban on returning 'any alien' to apply to aliens at sea. That Congress would have meant what it said is not remarkable. What is extraordinary in this case is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors — and that the Court would strain to sanction that conduct.²⁰⁷

CONCLUSION: HAITIAN REFUGEES — A QUEST FOR HUMAN RIGHTS

During congressional hearings on the Refugee Act of 1980, the promotion of humanitarian goals and concerns was emphasized by the Department of State. One witness from the Department of State testified:

[W]e should remember that the United States is a land of immigrants, and since the founding of the Republic we have had a special national heritage of concern for the uprooted and persecuted . . . [B]eyond our national ethos of humanitarian concern for the uprooted and persecuted, there are solid foreign policy reasons why we should involve ourselves substantially and regularly in resolving refugee problems . . . [I]t is decidedly in our foreign policy interest to project in countries around the world the image of U.S.

206. *Id.* at 2565.

207. *Id.* at 2568 (Blackmun, J., dissenting).

humanitarian assistance for refugees. Such humanitarian assistance is a glowing example of the purposes and processes of the free democracy which we are, and of the free society which makes such assistance possible.²⁰⁸

This concern for human rights was denigrated by the *Sale* decision. The human rights norm of *nonrefoulement* is not simply a rule of conventional international law; it is a principle of customary international law which has been characterized as *jus cogens*.²⁰⁹ Haitian refugees have not demanded that they be admitted to the United States. Article 33 of the 1967 Refugee Protocol does not require such admission. However, article 33 and the customary human rights norm of *nonrefoulement* prohibit interdiction on the high seas and repatriation of refugees to a country where they will suffer persecution or death. The conduct of the United States has been described by one writer as "aiding and abetting persecutors."²¹⁰ The Haitian refugees who fled the politically oppressive and illegal Cédras regime were involved in a quest for fundamental human rights — human rights which have been consistently and grossly violated by the Cédras junta and preceding governments.

The action of the United States in "aiding and abetting persecutors" of Haitian refugees contravenes a veritable laundry list of international legal principles. Article 5 of the Universal Declaration of Human Rights provides that no one should be the subject of torture, cruel, inhuman, or degrading punishment.²¹¹ Article 14 establishes the right of each person

208. *Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and Int'l Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 16 (1977).

209. See Jones, *supra* note 15, at 34; see also *Report of the United Nations High Commission for Refugees*, ¶ 22-23 U.N. Doc. E/1985/62 (1985); Brief of the Office of the United Nations High Commissioner for Refugees in Support of Respondents, *amicus curiae*, at 17-18, *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109 (11th Cir. 1991) (No. 91-6060). See generally JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES* (1974); CHRISTOS L. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* (1976); Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988); A. Gómez Robledo, *Le jus cogens international: sa genèse, sa nature, ses fonctions*, 172 RECUEIL DES COURS 167, 183-84 (1981).

210. See generally Schoenholtz, *supra* note 197, at 67. See Bruce Fein, *Where the Haitian Issue Lands Now*, WASH. TIMES, June 25, 1993, at F1 (asserting that temporary protected status ought be offered to Haitians by the Attorney General); *USA Must Do More Than Just Send Haitians Back*, USA TODAY, June 22, 1993, at 10A ("Washington continues to treat Haitians as second-class claimants to rights of asylum"); *The Haitian Asylum Ruling*, WASH. POST, June 23, 1993, at A16. See also Max Boot, *Haitian Refugee Decision Will Limit Asylum Seekers*, CHRISTIAN SCI. MONITOR, June 23, 1993, at 6; Frances Murphy, *Rangel 'Saddened' by Court Decision*, WASH. AFRO-AM., June 26, 1993, at A1.

211. *Universal Declaration of Human Rights*, *supra* note 10, at 71.

to seek and enjoy asylum in other countries.²¹² Article 6 of the International Covenant on Civil and Political Rights declares that every human being has the inherent right to life. Article 6 further states that the death penalty should be imposed only for the most serious crimes.²¹³ Article 7 prohibits torture and cruel or degrading treatment.²¹⁴ Article 12 gives every person the right to leave his or her country.²¹⁵ Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment proscribes the expulsion, return (*refouler*), or extradition of a person to a state where there are substantial grounds to believe that he would be subject to torture. Substantial grounds exist when the state concerned is guilty of a consistent pattern of gross, flagrant, and mass violation of human rights.²¹⁶ The foregoing international legal rules support the author's contention that an act of "aiding and abetting" the persecutors of refugees violates international law. The United States, by intercepting Haitians on the high seas and repatriating them to their persecutors, knowingly facilitated the torture and death of refugees. The United States thereby became a co-conspirator, unwittingly or not, in the criminal persecution of these refugees. The intercepted Haitians were not free to go to the Bahamas, the Dominican Republic, the Cayman Islands, or South America. They were captured at sea and repatriated by the Coast Guard to the present illegal regime governing Haiti. Although the Coast Guard has stemmed the flow of these refugees, the Haitian refugee crisis is a situation that is capable of repetition. The political branch of government must now act to correct the error of the judiciary.

This author must further mention that the HCC failed to raise the issue of racial discrimination before the Supreme Court. The case of *Jean v. Nelson*²¹⁷ stands for the proposition that the subordinates of the

212. *Id.* art. 14.

213. *International Covenant on Civil and Political Rights, opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

214. *Id.* art. 7.

215. *Id.* art. 12.

216. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1985).

217. 472 U.S. 846 (1985).

The issue of discrimination against Haitians based on race or nationality was first raised in the *Baker* litigation by Judge Hatchett, the dissenter. In *Baker I*, he noted that Haitian refugees were the only refugees interdicted on the high seas and prevented from reaching the territorial waters or shores of the United States and repatriated to their country of origin. *Baker I*, 949 F.2d 1109, 1111 (11th Cir. 1991). Judge Hatchett claimed that the primary goal of the United States government's interdiction program was and is to prevent Haitians from entering the United States. *Id.* at 1112. In *Baker III*, Judge Hatchett observed that there was

no evidence of an interdiction agreement between the United States and any other nation in the world. *Baker III*, 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992). Although the dissenting Judge Hatchett cited *Jean v. Nelson*, originally an appellate decision of the Eleventh Circuit, he did not rely upon it for the proposition that discrimination against Haitian refugees might exist based on grounds of race or nationality. *Baker I*, 949 F.2d at 1116; *Baker III*, 953 F.2d at 1516-17, 1522; *see Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc).

In its *amicus curiae* brief supporting the Respondents, the National Association for the Advancement of Colored People (NAACP), TransAfrica, and the Congressional Black Caucus agreed that the interception of Haitians on the high seas constituted impermissible national origin discrimination in violation of the Fourteenth Amendment's Equal Protection Clause. *See* Brief of NAACP, TransAfrica, and the Congressional Black Caucus in Support of Respondents, *amici curiae*, at 4, *McNary v. Haitian Ctrs. Council, Inc.*, 969 F.2d 1350 (2d Cir. 1992), *cert. granted*, 113 S. Ct. 52 (1993) [hereinafter Brief of NAACP]. These *amici curiae* asserted that one of the purposes for enacting the Refugee Act of 1980 was:

[T]o regularize the admission of aliens fleeing persecution and to limit executive discretion to dispense political asylum. To this end, Congress expressly removed from the United States' refugee program all ideological and geographical prejudices, and mandated that *all aliens*, regardless of race, religion or national origin, shall have an equal opportunity to petition the United States government for asylum. The Act thus explicitly *requires* the Executive to implement the asylum program in a non-discriminatory manner.

The Kennebunkport Order does just the opposite: it establishes a two-track system that treats aliens fleeing their countries radically different based on *nothing more than* their national origins. Thus, non-Haitians are afforded all the protection guaranteed by the Congress in the Refugee Act. . . . In addition, non-Haitians who qualify as refugees have an absolute right not to be returned to their persecutors.

By contrast, Haitian applicants, like respondents, are denied *all* such protections. They are summarily interdicted at sea and repatriated to Haiti, where many 'face political prosecution and even death,' without being given an opportunity whatsoever to present their asylum claims. . . .

This separate and unequal asylum program for Haitians violates not only Section 243(h)(1) of the Refugee Act of 1980, but also the Equal Protection Clause of the United States Constitution. Respondents have a constitutionally protected interest, conferred upon them by Congress, to make a meaningful application for political asylum. The Executive's denial of this right to Respondents *merely because they are Haitians* creates a constitutionally impermissible distinction based on national origin. . . . Once petitioners reach out and take Haitians into their custody — whether on United States soil or at sea — such aliens are within the jurisdiction of the United States even if outside its territory. Petitioners have a duty to offer aliens in such circumstances minimal constitutional protections.

Id. at 4-6. The *amici curiae* relied upon *Jean v. Nelson* for the legal principle that due process and equal protection are guaranteed to all individuals who are within the reach of the sovereignty of the United States. *Id.* at 17.

The *amici curiae* further contended that the "flag doctrine" should be applied in the case of Haitian interdictees. The flag doctrine requires the application of the law of the flag-state to the conduct or acts of agents of the United States which occur on ships operating under the U.S. flag. By virtue of a legal fiction, the ships become an extension of the territory of the country whose flag it flies. Consequently, under the flag doctrine, Coast Guard cutters would be floating territorial extensions of the United States. Therefore, the constitutional and statutory law of the United States should be enforced on these cutters for the benefit of Haitians. *Id.* at 18.

Discrimination based on national origin or race appears to continue in the admission of refugees. President Clinton has reserved most refugee slots for individuals coming from the Soviet Union, Eastern Europe, and East Asia. President Clinton has ordered the following refugee allocation for admittance to the United States: (1) 55,000 from the former Soviet Union and Eastern Europe; (2) 45,000 from East Asia; (3) 7,000 from Africa; (4) 6,000 from

President, such as INS officials, are proscribed from applying the President's immigration policy in a discriminatory manner. The immigration laws are neutral on their face and should be applied without regard to race or national origin.²¹⁸ In *Sale*, it appears that Haitian refugees have been subject to discrimination based on their race or nationality. Neither Chinese refugees²¹⁹ nor Cuban refugees,²²⁰ though similarly situated, are interdicted on the high seas and automatically returned to their homeland without some minimal form of due process.

Near East or South Asia; (5) 4,000 from both Latin America and the Caribbean; and (6) 3,000 from other countries. *Refugee Allocation Favors Former Soviets*, *ADVOC.* (Baton Rouge, LA), Oct. 2, 1993, at 2A.

218. *Jean v. Nelson*, 472 U.S. at 855. A recent report by the United Nations High Commissioner for Refugees (Sadako Ogato is the current High Commissioner for Refugees) reveals that there is growing public hostility toward immigrants. Refugees have become the subjects or principal victims of racial persecution and violence, even after they have been granted asylum. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION* 58 (1993).

The problem of racial violence against refugees is particularly acute in Europe. *Id.* at 58-59. The following statement found on a wall poster in Central Europe expresses the vehement hostility towards refugees:

There are only 90,000 of them here but they are a disgusting and painful abscess on the body of our nation. An ethnic group without any culture, moral, or religious ideals, a nomad mob only robbing and stealing. Dirty, full of lice, they occupy the streets and railway stations. Let them pack their dirty tatters and leave forever.

Id. at 58; see Juan L. Waite, *U.N. Report: Refugees Struggle Amid Racism*, *USA TODAY*, Nov. 10, 1993, at 6A.

219. See generally Policy Implementation With Respect to Nationals of the People's Republic of China, Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (1990) (reporting that Chinese immigrants are almost automatically granted asylum if they claim that they are persecuted because of the country's family control policy — forced abortion or sterilization); George J. Church, *Send Back Your Tired, Your Poor*, *TIME*, June 21, 1993, at 26 (commentators criticizing the overly generous asylum rules applied to Chinese; under Bush order, Chinese need only claim they are victims of Beijing's strict one-child population rule); Brian Duffy, *Coming to America*, *U.S. NEWS & WORLD REPORT*, June 21, 1993, at 26, 29 (reporting that Bush executive order grants asylum to all who leave China for the purpose of escaping strict family-planning policies).

See also *Boat Refugees from China Held in Winchester*, *WASH. TIMES*, June 10, 1993, at B3; John Dillin, *Illegal are on Capital Fast Track*, *CHRISTIAN SCI. MONITOR*, June 14, 1993, at 6 (reporting that under Bush order "[m]ost of China's 1-billion plus people would qualify [for asylum]"); Matt Forney, *China Blames Asylum Law for Wave of Emigration*, *CHRISTIAN SCI. MONITOR*, June 16, 1993, at 3; Malcolm Gladwell & Rachel E. Stassen-Berger, *Courts Log Tragic Seagoing Saga*, *WASH. POST*, June 8, 1993, at A3 (reporting that "[u]nder an executive order dating to the last days of the Reagan administration, immigrants from China are allowed to cite that country's prohibition on a family having more than one child as the basis for seeking political asylum. That policy has resulted in many more Chinese immigrants being granted asylum than those from other countries."). But see Seth Faison, *U.S. Cutting Back on Generosity in Granting of Asylum for Chinese Refugees*, *N.Y. TIMES*, Sept. 5, 1993, at 7.

220. Jones, *supra* note 15, at 46. See generally Cuban Refugees Adjustment Act, 8 U.S.C. § 1255 (1966) (legislating that Cuban refugees who arrive in United States may be released to relatives without applying for asylum and Cuban refugees may qualify for permanent residency in one year).

Consideration of the wisdom of Judge Hatchett, the sole dissenter in *Baker*, is merited. Judge Hatchett in crystallizing the essence of *Baker* has captured the essence of *Sale*. Judge Hatchett wrote:

The majority cites many cases for many legal propositions, but when all is said and done, the majority simply accepts the government's contention that these refugees have no enforceable rights in an American court because they have not reached the continental United States [a]lthough everyone in this case agrees that agencies of the United States captured the refugees and are holding them on United States vessels and leased territory. Moreover, the majority accepts this argument although everyone in the case agrees that the refugees are being prevented from reaching the shores of the continental United States.²²¹

* * *

Under existing law, any refugee may reach the shores of the United States and thereby acquire the right to enforce the United States immigration laws in the United States courts, except Haitian refugees. Only Haitian refugees are interrupted in international waters and repatriated to their country of origin²²²

* * *

The government seeks to convince this court that its interdiction program was instituted as an effort to save the lives of Haitian refugees travelling in unseaworthy vessels. But the government's own brief shows that the program was instituted in 1981, long before the current immigration wave The primary purpose of the program was, and has continued to be, to keep Haitians out of the United States.²²³

* * *

[T]he capture of Haitian refugees in international waters is authorized under a 1981 agreement between the Reagan administration and the totalitarian government of Jean-Claude "Baby Doc" Duvalier. The record does not disclose such an agreement with any other country.²²⁴

* * *

221. *Baker III*, 953 F.2d 1498, 1515 (11th Cir.), cert. denied, 112 S. Ct. 1245 (1992).

222. *Baker I*, 949 F.2d 1109, 1111 (11th Cir. 1991).

223. *Id.* at 1112.

224. *Baker III*, 953 F.2d at 1515-16 n.2.

Haitians unlike other aliens from anywhere in the world, are prevented from freely reaching the continental United States.²²⁵

The Dred Scott case of immigration law lives on in the form of *Salé v. Haitian Centers Council*.

225. *Id.* at 1516.

