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Sale v. Haitian Centers Council: The Return of Haitian Refugees

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Sale v. Haitian Centers Council: The Return of Haitian Refugees

Andrew G. Pizor

Abstract

This Comment contends that the Supreme Court's holding in *Sale* was erroneous because the 1967 Protocol and customary international human rights law mandate that non-refoulement apply to all refugees regardless of location. Part I describes the historical background of the 1951 Convention, the 1967 Protocol, and the INA as they relate to non-refoulement. Part I also discusses the U.S. government's interdiction program against Haitian migrants and the human rights conditions in Haiti as they existed from the start of the interdiction program in 1982 to the present. Part II examines *Sale* and sets forth the procedural history of the case, the facts, the positions of the parties, and the reasoning of the Supreme Court. Part III analyzes the Supreme Court's decision, proposes additional issues that the Court should have considered, and argues that the Supreme Court should have held that President Bush's order violated both the 1967 Protocol and customary international human rights law. This Comment concludes that *Sale* does not reflect contemporary refugee law, and therefore, should be rejected by other nations facing similar refugee situations.

COMMENTS

SALE v. HAITIAN CENTERS COUNCIL: THE RETURN OF HAITIAN REFUGEES

INTRODUCTION

In 1992, there were nearly twenty million refugees worldwide.¹ These refugees sought safety in countries other than those of their nationality or usual residence in an effort to escape persecution.² Despite the desperate plight of these refugees, neighboring states often considered responsibility for them too burdensome and were therefore reluctant to accept them.³

1. Stanley Meisler, *UN Reports Asylum Crisis for Refugees*, L.A. TIMES, Nov. 10, 1993, at A4. This statistic refers to those fleeing persecution, civil wars and other violence. *Id.* In the following year, 1993, 150,386 people from 154 countries applied to the United States for asylum as refugees. Tim Weiner, *U.S. to Charge Immigrants a Fee When They Seek Political Asylum*, N.Y. TIMES, Feb. 2, 1994, at A1, D22. Of the 18,100 applications processed in 1993, approximately 5,100 were approved out. *Id.* at A1.

Subsequent use of the word "refugee" in this note shall refer to those people who meet the definition provided in the 1951 Convention Relating to the Status of Refugees. See Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 137, 152 (defining "refugee") [hereinafter 1951 Convention]. Those individuals not meeting the definition or groups including refugees and non-refugees will be called "migrants" or "immigrants."

The Convention's definition of "refugee" is found in Article 1, which provides that:

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Id., 19 U.S.T. at 6261, 189 U.N.T.S. at 138.

2. Meisler, *supra* note 1, at A4. The standard used by the United States Immigration Service considers an alien to be a refugee if the alien is outside the country of his nationality due to persecution or due to a well-founded fear of persecution on the basis of race, religion, nationality, membership in particular social groups, or political opinion. 8 U.S.C. § 1101(a)(42)(A) (1988).

3. John Hurst, *EC Cracks Down on Refugees*, AUSTL. FIN. REV., Dec. 2, 1992, at 12; *France to take in 300 Bosnian Prisoners*, Reuter Newswire, Oct. 28, 1992, available in

Since World War II, however, signatories of the 1951 United Nations Convention Relating to the Status of Refugees (the "1951 Convention") have been obligated to accept refugees.⁴ According to Article 33(1) of the 1951 Convention, nations may not "expel or return ('refouler') a refugee" to any territory where he or she would be endangered.⁵ The verb "refouler" and the noun "refoulement" describe the act of returning refugees to a place where they may be persecuted.⁶ "Non-refoulement" is the concept of forbidding refoulement.⁷ Since implementation of the 1951 Convention in 1954, the policy of non-refoulement, or non-return, has been the single most important protection for refugees.⁸

Nearly thirty-five years after the 1951 Convention became effective,⁹ U.S. President George Bush demonstrated the United States' reluctance to comply with the non-refoulement policy after thousands of Haitians fled Haiti for the United States.¹⁰ In 1982, President Bush's predecessor, U.S. President Ronald Reagan, had instituted an interdiction program compelling the U.S. Coast Guard to stop Haitian boats in international waters before they reached U.S. territory.¹¹ This interdiction program com-

WESTLAW, INT-NEWS file; *'Something Must Be Done,' But What? - Helping the Refugees - Attempts to Find a Solution*, DAILY TELEGRAPH, Aug. 5, 1992, available in WESTLAW, INT-NEWS file; *Ship Carrying Somali Refugees Runs Aground Leaving Aden*, MIDDLE E. ECON. DIG., July 3, 1992, at 26, available in WESTLAW, INT-NEWS file; Antoinette de Jong & Juliet Peck, *A Victory Without Any Peace*, WORLD PRESS REV., Aug. 1993, at 18 (stating that "Pakistanis are unhappy about the endless economic burden of the refugees" from Afghanistan).

4. See 1951 Convention, *supra* note 1, 19 U.S.T. 6259, 189 U.N.T.S. 137 (setting forth signatories' obligations toward refugees); GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT 59 (1989) (describing 1951 Convention).

5. 1951 Convention, *supra* note 1, art. 33(1), 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

6. Sophie H. Pirie, Note, *The Need for a Codified Definition of 'Persecution' in United States Refugee Law*, 39 STAN. L. REV. 187, 187 n.3 (1986).

7. *Id.*; see Robert Suro, *Haitians' Plight Illuminates Volatile Nature of U.S. Policy*, N.Y. TIMES, June 29, 1994, at A8 (defining "non-refoulement" as the principle that "[i]t is wrong to return people to places where they are likely to suffer persecution.").

8. See STENBERG, *supra* note 4, at 171 ("[T]he concept constitutes the very heart of international refugee law, since it may be maintained that nothing is more important to a refugee than protection against persecution.").

9. See 1951 Convention, *supra* note 1 (indicating that it would take effect in 1954).

10. See Thomas L. Friedman, *Haitians Returned Under New Policy*, N.Y. TIMES, May 27, 1992, at A1.

11. Exec. Order No. 12,324, 3 C.F.R. 180, 180-81 (1982), reprinted in 8 U.S.C. § 1182 (1988) [hereinafter Exec. Order No. 12,324]. Ironically, during 1981, the United States admitted a total of 139,294 refugees and "displaced persons" from South

plied with the 1951 Convention's non-refoulement provision¹² because the United States arranged to return all of the migrants to Haiti, with the exception of those Haitians determined to be refugees.¹³ In 1992, however, President Bush eliminated the exception for refugees found on the high seas, and thus ignored the government's non-refoulement policy.¹⁴ President Bush argued that the 1951 Convention did not apply to refugees on the high seas because they were outside U.S. territory.¹⁵

In *Sale v. Haitian Centers Council, Inc.*,¹⁶ organizations representing the Haitians challenged President Bush's new policy.¹⁷ These organizations argued that President Bush's policy violated the 1951 Convention, the 1967 Protocol Relating to the Status of Refugees (the "1967 Protocol")¹⁸ by which the United States agreed to abide by the 1951 Convention,¹⁹ and section 243(h)(1) of the Immigration and Nationality Act of 1952 (the "INA") which implements the non-refoulement principle.²⁰ The U.S. Supreme Court upheld President Bush's interdiction pro-

East Asia, and an additional 14,769 from other areas of the world. *Report on UNHCR Assistance Activities in 1981-1982 and Proposed Voluntary Funds Programmes and Budget for 1993*, 33d Sess., U.N. Doc. A/AC.96/606 (1982).

12. 1951 Convention, *supra* note 1, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176. See Exec. Order No. 12,324, *supra* note 11, 3 C.F.R. at 181 (providing that no refugee could be returned without first giving his consent). However, it is notable that between 1981, when the interdiction began, and 1991, only 11 Haitians out of the 24,000 stopped were allowed to pursue asylum claims further. Amy Wilentz, *Deep Voodoo; Bush Administration's Haiti Policy*, NEW REPUBLIC, Mar. 9, 1992, at 18.

13. Agreement Effected by Exchange of Notes Regarding Migrants and Interdiction, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10,241 [hereinafter Interdiction Letters].

14. See Exec. Order No. 12,807, 3 C.F.R. 303 (1993), reprinted in 8 U.S.C. § 1182 (1993) (revising interdiction program); Bernard Diederich, *Send 'Em Back*, TIME, June 8, 1992, at 43.

15. Exec. Order No. 12,807, *supra* note 14, 3 C.F.R. at 303.

16. ___ U.S. ___, 113 S. Ct. 2549 (1993).

17. *Id.* The respondents in *Sale* include the National Coalition for Haitian Refugees, Inc., and the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization of New Haven, Connecticut, which represented interdicted and detained migrants and individual "screened-in," "screened-out" Haitians, and their relatives. See *Haitian Centers Council, Inc. v. McNary*, No. 92 CV 1258, 1992 WL 155853, *1 (E.D.N.Y. Apr. 6, 1992), *aff'd in part, vacated in part*, *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 3028 (1993).

18. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

19. Protocol Relating to the Status of Refugees, Nov. 1, 1968, T.I.A.S. No. 6577, 649 U.N.T.S. 372 (adding United States to Protocol adherents).

20. 8 U.S.C. § 1253 (1988 & Supp. IV 1992); Brief for Respondent, *McNary v. Hai-*

gram, returning the Haitian refugees to their homeland, and noted that it was enforceable because neither the 1951 Convention, the 1967 Protocol, nor section 243(h)(1) of the INA, was intended to apply beyond U.S. territory.²¹

This Comment contends that the Supreme Court's holding in *Sale* was erroneous because the 1967 Protocol and customary international human rights law mandate that non-refoulement apply to all refugees regardless of location. Part I describes the historical background of the 1951 Convention, the 1967 Protocol, and the INA as they relate to non-refoulement. Part I also discusses the U.S. government's interdiction program against Haitian migrants and the human rights conditions in Haiti as they existed from the start of the interdiction program in 1982 to the present. Part II examines *Sale* and sets forth the procedural history of the case, the facts, the positions of the parties, and the reasoning of the Supreme Court. Part III analyzes the Supreme Court's decision, proposes additional issues that the Court should have considered, and argues that the Supreme Court should have held that President Bush's order violated both the 1967 Protocol and customary international human rights law. This Comment concludes that *Sale* does not reflect contemporary refugee law, and therefore, should be rejected by other nations facing similar refugee situations.

I. U.S. REFUGEE LAW AND THE INTERDICTION PROGRAM

The 1951 Convention expressly prohibits the refoulement of refugees.²² Although the United States did not accede to the 1951 Convention, the United States did agree to the 1967 Proto-

tian Centers Council, Inc., — U.S. —, 113 S. Ct. 2549 (1993) (No. 92-344), available in LEXIS, Genfed library, Briefs file.

21. *Sale*, 113 S. Ct. at 2562.

22. 1951 Convention, *supra* note 1, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176. Article 33 provides that:

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 judgement of a particularly serious crime, constitutes a danger to the community of that country. No reservations to Article 33 are allowed.

Id.

col that incorporates the terms of the 1951 Convention by reference and expands the application of the 1951 Convention.²³ Because the 1967 Protocol is not self-executing, the United States Congress subsequently enacted the Refugee Act of 1980 (the "Refugee Act").²⁴ The Refugee Act enables the United States to comply with the 1967 Protocol and to provide expanded protection to refugees fleeing human rights violations in other nations.²⁵ While all nations have a duty to protect human rights under international law,²⁶ citizens of Haiti have been subject to countless human rights violations over the past thirty-five years.²⁷ However, in 1982, two years after the Refugee Act was enacted, President Reagan implemented a program designed to stop the large numbers of Haitians fleeing Haiti for the United States.²⁸ While President Reagan's program protected those Haitians determined to be refugees,²⁹ and thus complied with Article 33 of the 1951 Convention,³⁰ President Bush subsequently changed the interdiction program by ordering that all Haitians be returned to Haiti regardless of their refugee status.³¹ Although President Bill Clinton, President Bush's successor, restored the protection offered refugees, he maintained the United States' position that the 1951 Convention does not apply to refugees on the high seas.³²

23. See 1967 Protocol, *supra* note 18.

24. Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 107(2) (1980) (codified as amended in scattered sections of 8 U.S.C.).

25. See *supra* note 1 and accompanying text (setting forth definition of refugee).

26. See RESTATEMENT (THIRD) OF LAW OF FOREIGN RELATIONS § 701 (1986) ("A state is obligated to respect the human rights of persons subject to its jurisdiction . . ."); *id.* § 701 cmt. e ("The United States is bound by the international customary law of human rights."); *id.* § 206 ("A state's duties are the obligations imposed on it by international law or agreement.").

27. See generally Mark D. Danner, *The Struggle for a Democratic Haiti*, N.Y. TIMES MAG., June 21, 1987, at 39 (presenting history of Haiti).

28. See Exec. Order No. 12,324, *supra* note 11, 3 C.F.R. at 181 (implementing interdiction program).

29. *Id.*; see *supra* note 1 (presenting definition of refugee).

30. 1951 Convention, *supra* note 1, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176; see *supra* note 22 (quoting Article 33 of the 1951 Convention).

31. See Exec. Order No. 12,807, *supra* note 14, 3 C.F.R. at 303 (ordering return of all migrants regardless of asylum claims).

32. U.S. Department of State, Press Release, May 13, 1994, at 3 (on file with *The Fordham International Law Journal*); Gwen Ifill, *Clinton Grants Haitian Exiles Hearings at Sea*, N.Y. TIMES, May 8, 1994, at A1; Telephone Interview with Ellen Engles, Haiti Working Group, U.S. Department of State (May 16, 1994).

A. 1951 Convention Relating to the Status of Refugees
and the 1967 Protocol

The vast displacement of people following World War I and World War II raised awareness of the need to protect refugees and led states to draft the 1951 Convention Relating to the Status of Refugees.³³ The growth of the fascist regimes in Spain, Italy, and Nazi Germany, coupled with the outbreak of World War II, forced many from their home countries.³⁴ By the end of World War II, the number of refugees had increased dramatically.³⁵ As a result, many states throughout Europe were overwhelmed with refugees.³⁶

Prior to the 1951 Convention, no existing international instruments satisfactorily addressed a refugee problem of this magnitude.³⁷ As a result, in 1948, the United Nations Economic and Social Committee requested that a study on refugees be con-

33. NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS, INTERPRETATION 1 (1953); *see, e.g., supra* note 1 (quoting Article 1(A)(2) of the 1951 Convention). Article 1(B) of the Convention states:

For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either

(a) "events occurring in Europe before 1 January 1951"; or

(b) "events occurring in Europe or elsewhere before 1 January 1951";

and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

1951 Convention, *supra* note 1, art. 1(B), 19 U.S.T. at 6262, 189 U.N.T.S. at 154.

34. ROBINSON, *supra* note 33, at 2.

35. *Id.* at 3.

36. *Id.* at 2-3.

37. *Id.* Most of the existing agreements, promulgated between the wars, dealt with providing documents to facilitate refugee travel and did not address how nations were to treat refugees. *Id.* at 1-2. Furthermore, the agreements only applied to specifically named groups of refugees. *Id.* As a result, there were many refugees to whom none of the agreements applied. *Id.* Some of agreements include: the Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 89 L.N.T.S. 47, to which 23 states subscribed; the Arrangement Concerning the extension to other Categories of Refugees of Certain Measures taken in favor of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 63, which added Assyrians, Assyro-Chaldeans and Turks; and the Convention relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 199, which only involved refugees involved in the later treaties and which was only adopted by eight states. The only two post-World War Two agreements were similarly limited. *See* Agreement on Refugees from the U.K. Occupied Area, Feb. 11, 1945 159 S.U.S.T. 173, 174 (restricting application to areas occupied by United Kingdom); Agreement on Refugee Travel Documents, Oct. 15, 1946, 11 U.N.T.S. 73 (providing for issuing of travel papers to refugees).

ducted.³⁸ This study resulted in the appointment of an ad hoc committee of representatives from thirteen nations who worked together to draft the 1951 Convention.³⁹ The committee submitted its draft to a conference of delegates from twenty-six states who ultimately adopted the 1951 Convention.⁴⁰ The preamble to the 1951 Convention indicated how it was more expansive than previous agreements in addressing the issue of refugees.⁴¹ Unlike previous treaty provisions that adopted a non-refoulement policy limited to specific situations,⁴² the 1951 Convention, through Articles 1 and 33(1), expressly provides a broad application. Article 1 states that the Convention shall apply to all refugees of events occurring before 1951.⁴³ Article 33(1) of the 1951 Convention⁴⁴ states that no signatory shall "expel or return ('refouler') a refugee" to the borders of a territory where his life or freedom would be endangered due to religious, ethnic, or political persecution.⁴⁵ Therefore, article 33(1) of the 1951 Convention applies to all persons who have become refugees by

38. ROBINSON, *supra* note 33, at 3-4; E.S.C. Res. 116, U.N. ESCOR, 2d Sess., Supp. No. 4D (1948).

39. ROBINSON, *supra* note 33, at 4.

40. *Id.* at 5.

41. 1951 Convention, *supra* note 1, pmb., 19 U.S.T. at 6260, 189 U.N.T.S. at 154. According to the preamble, "it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement." *Id.*

42. See, e.g., Provisional Arrangement Concerning the Status of Refugees coming from Germany, July 4, 1936, 171 L.N.T.S. 75 (addressing only refugees from Nazi Germany). This treaty says:

Article 4(2): Without prejudice to the measures which may be taken within the country, refugees who have been authorized to reside in a country may not be subjected by the authorities of that country to measures of expulsion or be sent back across the frontier unless such measures are dictated by reasons of national security or public order.

(3) Even in this last-mentioned case the Governments undertake that refugees shall not be sent back across the frontier of the Reich unless they have been warned and have refused to make the necessary arrangements to proceed to another country or to take advantage of the arrangements made for them with that object.

Id.; see also Convention concerning the Status of Refugees coming from Germany, Feb. 10, 1938, art. 5(2), 192 L.N.T.S. 59, 67 (providing essentially same protection but using term "reconduction" instead of "send back").

43. 1951 Convention, *supra* note 1, art. 1, 19 U.S.T. at 6261, 189 U.N.T.S. at 138; see *supra* note 1 (quoting Article 1(A)); see also *supra* note 33 (quoting Article 1(B)).

44. See *supra* note 8 and accompanying text (emphasizing importance of Article 33).

45. 1951 Convention, *supra* note 1, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176. See *supra* note 22 (quoting Article 33 of 1951 Convention).

virtue of events occurring prior to 1951.⁴⁶ In addition, unlike previous refugee treaties that had been adopted by very few states,⁴⁷ the 1951 Convention has been adopted by over 145 nations.⁴⁸

The United States was involved in the drafting of the 1951 Convention, but did not accede to it until 1968 when it became a party to the 1967 Protocol.⁴⁹ The Protocol modified the scope and purpose of the 1951 Convention.⁵⁰ While Article 1 of the 1951 Convention limited the treaty's scope to persons who became refugees as a result of events occurring prior to 1951 in Europe,⁵¹ the 1967 Protocol cited the development of new refugee problems worldwide and removed the limitations of Article 1.⁵² The 1967 Protocol thus expanded the 1951 Convention to apply to all refugees regardless of where or when they fled.⁵³ The 1967 Protocol, however, did not alter the text of Article 33 governing refoulement.⁵⁴

B. *Interpreting the 1967 Protocol and the 1957 Convention*

U.S. courts have utilized various methods of interpretation

46. See *supra* note 22 (presenting text of Article 33(1)).

47. ROBINSON, *supra* note 33, at 4.

48. PETER H. ROHN, 3 *WORLD TREATY INDEX* 635-36, 1394-95 (2d ed. 1983) (listing accession of nations to either Convention or Protocol).

49. See *supra* note 19 (setting forth treaty that added United States to Protocol adherents).

50. See 1967 Protocol, *supra* note 18, art. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268-70; see also *supra* note 48 (describing wide accession to Protocol and Convention).

51. See 1951 Convention, *supra* note 1, art. 1, 19 U.S.T. at 6261, 189 U.N.T.S. at 138.

52. 1967 Protocol, *supra* 18, pmb., 19 U.S.T. at 6225, 606 U.N.T.S. at 268. According to the Preamble:

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951

Id.; see *supra* note 1 (quoting Article 1(A)(2)).

53. See 1967 Protocol, *supra* note 18, art. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268, 270.

54. *Id.*

to examine the 1967 Protocol and the 1951 Convention.⁵⁵ When interpreting the 1967 Protocol and the 1951 Convention, U.S. courts have sought to construe both in a manner consistent with the signatories' intent.⁵⁶ Several U.S. courts have noted that when a court analyzes an international agreement, it should first examine the text and the context in which the words at issue are used.⁵⁷ Though no standard procedure for interpreting a treaty exists,⁵⁸ the Restatement of the Law of Foreign Relations (the "Restatement"),⁵⁹ the Vienna Convention on the Law of Treaties, (the "Vienna Convention"),⁶⁰ commentators, and U.S.

55. See *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 437-38 (1987) (using history of 1967 Protocol); *Fatin v. Immigration and Naturalization Service*, 12 F.3d 1233, 1238-39 (3d Cir. 1993) (using negotiating history of 1951 Convention to interpret 1967 Protocol); *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1360-62 (2d Cir. 1992) (considering plain language of text of Article 33 of 1951 Convention and "preparatory and conclusory circumstances"), *rev'd sub nom.* *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549 (1993); *Dwomoh v. Sava*, 695 F. Supp. 970, 975 (S.D.N.Y. 1988) (using history of definition of "refugee" as used in 1951 Convention and 1967 Protocol).

56. See *Air France v. Saks*, 470 U.S. 392, 396 (1985) (observing duty to construe treaty in a manner consistent with drafters' intent); *Reed v. Wisner*, 555 F.2d 1079, 1090 (2d Cir. 1977) (observing duty to construe treaty in a manner consistent with drafters' intent); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975) (observing duty to construe treaty in a manner consistent with drafters' intent), *cert. denied*, 429 U.S. 890 (1976); see *supra* note 55 (indicating previous methods used to interpret 1967 Protocol and 1951 Convention).

57. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-700 (1988); *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 534 (1987); *Saks*, 470 U.S. at 397. The International Court of Justice (the "ICJ") has also emphasized first examining the text of an agreement when attempting to interpret it. As the ICJ has observed:

The cardinal rule of interpretation that this court has stated should be applied is that words are to be read. . . in their ordinary and natural sense. If so read they make sense, that is the end of the matter. If, however, so read they are ambiguous or lead to an unreasonable result, then and then only must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really meant when they used the words under consideration.

Certain Expenses of the United Nations, 1962 I.C.J. 151, 184 (July 20) (separate opinion of Judge Spender).

58. EDWARD SLAVKO YAMBRUSIC, *TREATY INTERPRETATION: THEORY AND REALITY* 26-27 (1987) ("American courts have rejected the notion of the 'rules' of interpretation as obligatory legal norms . . . [but] United States courts use the text of a treaty as a point of departure in the interpretative process."); GYORGY HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* 80 (1973) ("No hierarchical order can be established for the various methods of treaty interpretation.").

59. RESTATEMENT (THIRD), *supra* note 26.

60. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31-32, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 691-92.

case law indicate that U.S. courts should first analyze a treaty's text in an effort to discern a treaty's meaning.⁶¹ The Vienna Convention further provides that a court may only adopt a special interpretation of a text, different from the plain meaning, if the court can establish that the parties so intended.⁶²

These four sources state that where the plain language of a treaty is ambiguous, a court should resort to other methods of determining the drafters' intent.⁶³ The Vienna Convention, for instance, makes clear that a court must refer to the agreement's negotiating history or preparatory documents if the plain meaning of the text is not clear.⁶⁴ It is also necessary to consider the historical context of a treaty, the treaty's general purpose, the parties' intention,⁶⁵ the general tenor and atmosphere of the treaty, and the circumstances under which it was concluded.⁶⁶ All of these factors illuminate the character of a treaty and indicate whether it should be interpreted strictly or liberally.⁶⁷ The Restatement, the Vienna Convention, commentary, and Ameri-

61. YAMBRUSIC, *supra* note 58, at 19-27. See *Eastern*, 499 U.S. 530, 534 ("When interpreting a treaty, we 'begin with the text of the treaty . . .'" (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (observing that Court "must . . . be governed by the text" where it does not lead to absurd results); *In Re The Amiable Isabella*, 19 U.S. 1, 72-73 (1821) (observing importance of following terms as written by contracting parties); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967) (relying on "binding meaning of the terms"); *Clark v. Pigeon River Improvement Slide and Boom Co.*, 52 F.2d 550 (8th Cir. 1931) (indicating by example use of text as foundation for analysis).

62. Vienna Convention, *supra* note 60, art. 31(4), 1155 U.N.T.S. at 340, 8 I.L.M. at 692. Although the United States has not ratified the Vienna Convention, U.S. courts have relied upon it and the U.S. Department of State has recognized that the Vienna Convention represents customary international law. *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1361 (2d Cir. 1992), *rev'd sub nom. Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549 (1993); JOSEPH SWEENEY ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 993-94 (3d ed. 1988).

63. See *Eastern*, 499 U.S. at 530 (using historical context in which Warsaw Convention was drafted); see *supra* note 57 (quoting International Court of Justice on treaty interpretation); *Volkswagenwerk*, 486 U.S. at 699-700; *Societe Nationale*, 482 U.S. at 534; *Saks* 470 U.S. at 397; Vienna Convention, *supra* note 60, art. 32, 1155 U.N.T.S. at 340, 8 I.L.M. at 692; P.K. MENON, *THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS*, 71-72 (1992); YAMBRUSIC, *supra* note 58, at 20.

64. Vienna Convention, *supra* note 60, art 32, 1155 U.N.T.S. at 340, 8 I.L.M. at 692.

65. MENON, *supra* note 63, at 71-72.

66. *Id.* at 76; YAMBRUSIC, *supra* note 58, at 19.

67. YAMBRUSIC, *supra* note 58, at 20. See *Certain Expenses of the U.N.*, 1962 I.C.J. at 44 (separate opinion of Judge Spender) (finding that Charter of United Nations has "organic character" after interpretation using plain language, history, intent, and other factors).

can case law provide a framework in which the 1951 Convention and the 1967 Protocol can be interpreted.⁶⁸ Both treaties have been interpreted in light of these factors.⁶⁹

C. *U.S. Statutory Provisions for Implementing the 1967 Protocol*

Application of the 1951 Convention and the 1967 Protocol in the United States is accomplished through the Immigration and Nationality Act.⁷⁰ The INA, enacted in 1951, governs treatment of aliens in the United States.⁷¹ However, the INA precedes the United States' accession to the 1967 Protocol, and therefore, does not comply with the obligations imposed by the 1967 Protocol and the 1951 Convention, which the 1967 Protocol incorporates.⁷² Because the 1967 Protocol was not self-executing,⁷³ the U.S. Congress enacted the Refugee Act of 1980 to amend the INA and to conform U.S. law to the 1967 Protocol.⁷⁴

The Refugee Act amended the INA by making two changes to section 243(h)(1) of the INA.⁷⁵ Prior to amendment, section 243(h)(1) of the INA gave the U.S. Attorney General the power to protect refugees who were "within the United States" by preventing their deportation, and thereby allowing them to re-

68. *See supra* note 63 (citing Restatement, Vienna Convention, commentary, and case law).

69. *See supra* note 55 and accompanying text (indicating use of factors to interpret 1967 Convention and 1951 Protocol).

70. *See* 8 U.S.C. § 1253 (1988 & Supp. IV 1992) (setting forth section 243 of INA).

71. 8 U.S.C. (1988).

72. *See* Immigration and Nationality Act, Pub. L. No. 82-412, 66 Stat. 166 (1952) (setting forth Immigration and Nationality Act prior to 1980 amendments).

73. *See* *Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982) (holding that 1967 Protocol's "provisions were not themselves a source of rights under [U.S.] law unless and until Congress implemented them by appropriate legislation."). A self-executing treaty provides individuals with judicially enforceable rights and is considered to be fully implemented without requiring any additional legislation by Congress. Russell G. Donaldson, Annotation, *United Nations Resolution as Judicially Enforceable in United States Domestic Courts*, 42 A.L.R. FED. 577, 578 (1993) (discussing self-executing treaties).

74. *Sava*, 684 F.2d at 218.

75. Refugee Act, *supra* note 24. Prior to the amendments, § 243(h)(1) provided that:

[t]he 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 physical persecution and for such period of time as he deems to be necessary for such reason.

Pub. L. No. 414, § 243, 66 Stat. 214 (1952) (prior to 1980 amendment of 8 U.S.C. § 1253(h)(1)); *see supra* note 22 (quoting Article 33 of 1951 Convention).

main in the United States.⁷⁶ The amendments made protection mandatory and expanded the category of refugees who could be protected, first, by removing the phrase "within the United States," and second, by adding a new prohibition on "return" to the existing reference to "deportation."⁷⁷ The changes were necessary because the INA traditionally distinguishes between two categories of aliens:⁷⁸ (1) excludable aliens,⁷⁹ and (2) expellable or deportable aliens.⁸⁰ The difference between aliens subject to exclusion and those subject to expulsion or deportation exists in their immigration status and in the due process rights accorded aliens in administrative proceedings.⁸¹ Those aliens seeking admission at the U.S. border and those paroled⁸² into the United States while their applications are evaluated are subject to exclusion from the United States, if they are subsequently

76. *Id.* The Attorney General is responsible for enforcing U.S. immigration laws. 8 U.S.C. § 1103(a) (1988). This section states that "[t]he Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens" *Id.*

77. 8 U.S.C. § 1253(h)(1) (1988 & Supp. IV 1992). According to the amended § 243(h)(1):

[t]he 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.

Id.

78. See generally Gerard M. Kouri, Jr., Comment, *Getting Back In: The Plasencia Decision and the Permanent Resident Alien's Right to Procedural Due Process*, 36 U. MIAMI L. REV. 969 (1982) (discussing differences between deportation hearings and exclusion proceedings).

79. See 8 U.S.C. § 1182 (1988) (presenting general classes of excludable aliens)

80. See 8 U.S.C. § 1251 (1988) (presenting general classes of deportable aliens). The Supreme Court has defined "exclusion" as "preventing someone from entering the United States who is actually outside of the United States or is treated as being so." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.4 (1953). The Court defined "expulsion" as the act of "forcing someone out of the United States who is actually within the United States or is treated as being so." *Id.*

81. *Kwong*, 344 U.S. at 596-98; Kouri, *supra* note 78, at 977-99. Both exclusion and expulsion can result in "deportation." *Id.* at 977; *Kwong*, 344 U.S. at 596, n.4 (defining generic act of deportation as "the moving of someone away from the United States, after his exclusion or expulsion."). However, in practice, the hearing by which an alien is excluded is known as an "exclusion proceeding," and only the hearing for expulsion is called a "deportation hearing." *Id.*; 8 U.S.C. § 1226 (1988) ("Exclusion of aliens—Proceedings"); 8 U.S.C. § 1252(b) (1988) ("proceedings to determine deportability").

82. Nancy A. Norfolk, Comment, *Immigration Law - Exclusion of Aliens*, 14 SUFFOLK TRANSNAT'L L. J. 300 n.1 (1990). Parole entry enables an alien at the border to physically enter the United States while being officially treated as if the alien was still at the border. *Id.*

denied refugee status.⁸³ In contrast, those aliens who have been admitted into the United States, or who have illegally entered, are subject to expulsion or deportation.⁸⁴

Aliens subject to expulsion or deportation are entitled to a deportation hearing before the Board of Immigration because, under the INA, they are "within the United States."⁸⁵ In a deportation hearing, the government bears the burden of proof,⁸⁶ and the alien may appeal to a federal court of appeals.⁸⁷ In an exclusion proceeding, however, the alien is not officially "within the United States" regardless of physical location.⁸⁸ In an exclusion proceeding, the alien bears the burden of proof⁸⁹ and may only seek review by writ of habeas corpus.⁹⁰ Prior to the Refugee Act of 1980, the Attorney General did not have the authority to protect those excludable aliens determined to be refugees because section 243(h)(1) of the INA only applied to those "within the United States."⁹¹ By removing the phrase "within the United States," Congress enabled U.S. law to protect those aliens who are seeking admission as well as those who have already entered.⁹² Since amendment, section 243(h)(1) of the INA has been interpreted to embody the terms of the 1967 Protocol and

83. Kouri, *supra* note 78, at 977; Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 *STAN. L. REV.* 687, 699 n.91 (1993). Under 8 U.S.C. § 1182(d)(5)(A) (1988), section 212(d)(5)(A) of the INA, the Attorney General has authority to "parol" an alien into the United States. Norfolk, *supra* note 82, at 303 n.14.

84. Kouri, *supra* note 78, at 977; Lennox, *supra* note 83, at 699.

85. 8 U.S.C. § 1105a(a) (1988); Kouri, *supra* note 78, at 977. See *supra* note 80 (providing U.S. Supreme Court's definition of expulsion and exclusion). For example, in an exclusion proceeding the alien has the burden of proving that he is entitled to admission. Kouri, *supra* note 78, at 977 n.45. In contrast, in a deportation hearing, the alien is presumed to have a right to stay in the United States and the government bears the burden of rebutting that presumption. *Id.* Furthermore, an alien who is to be deported may appeal a Board of Immigration decision to a federal court of appeals, whereas an excludable alien may only seek review by seeking a writ of habeas corpus. *Id.*

86. 8 C.F.R. § 242.14(a) (1981)

87. 8 U.S.C. § 1105a(a) (1988).

88. *Id.*; see *supra* note 80 (defining exclusion).

89. 8 U.S.C. § 1361 (1988).

90. 8 U.S.C. § 1105a(b) (1988).

91. 66 Stat. 214, 8 U.S.C. § 1253(h)(1) (1952), *amended 1980*.

92. See H.R. REP. NO. 608, 96th Cong., 2d Sess. at 30 (1979) (indicating that amendment will "require . . . the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion as well as deportation, proceedings").

Article 33 of the 1951 Convention.⁹³

D. *International Law and Haitian Human Rights*

Under treaties like the 1967 Protocol and the 1951 Convention, as well as under customary international law, human rights are internationally protected.⁹⁴ Yet, despite international efforts to protect human rights, Haitian citizens have long been subject to human rights violations by Haiti's government and military.⁹⁵ The human rights situation in Haiti has led to mass migrations over the past fifteen years.⁹⁶

1. *The Protection of Human Rights and Customary International Law*

Nations have acknowledged many human rights and assumed the duty to respect them in numerous treaties, conventions, and agreements as well as under customary international law.⁹⁷ Among the rights now protected by treaty are the right to

93. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2562 (1993); *Haitian Refugee Centers, Inc. v. Gracey*, 809 F.2d 794, 832 (D.C. Cir. 1987) (Buckley, J., concurring) (observing that Refugee Act of 1980 incorporated obligation of non-refoulement provided in 1967 protocol); H.R. REP. NO. 608, 96th Cong., 2d Sess. at 17-18 (1979);

94. *See, e.g.*, 1951 Convention, *supra* note 1, 19 U.S.T. 6259, 189 U.N.T.S. 137; 1967 Protocol, *supra* note 18, 19 U.S.T. 6223, 606 U.N.T.S. 267; MENON, *supra* note 63, at 121 (indicating customary international law forbidding slavery); *see also supra* note 26 (indicating acknowledgement of international law of human rights); A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD* 286-87 (1989); North Sea Continental Shelf Cases, 1969 I.C.J. at 44 (explaining development of customary international law). A principle attains customary international law status when it achieves general international acceptance and nations adhere to the principle due to a sense of legal compulsion. *Id.*

95. Joseph P. Treaster, *Human Rights in Haiti: A Promise Unfulfilled*, N.Y. TIMES, Sept. 29, 1984, at A1.

96. Don Bohning, *Haitians Flee Poverty, Echo of Soldiers' Boots, Flood of Refugees Unlikely to End Soon*, DETROIT FREE PRESS, Nov. 26, 1991, at A11 ("Desperation and fear are leading poor Haitians out to sea in leaky and overloaded boats as the political crisis in their homeland remains unresolved and an appalling economic situation worsens.")

97. RESTATEMENT (THIRD), *supra* note 26, § 701 cmt. b; *see id.* § 102 rep's note 7, ("There is now substantial international law on human rights."). The United States also has many statutory provisions requiring the government to respect and observe human rights. *See, e.g.*, 22 U.S.C. §§ 2304(a), 262d-1, 2151n(a) (1988 & Supp. IV 1992) (requiring abstention from behavior that would assist nations violating human rights); 7 U.S.C. § 1733(j) (1988 & Supp. IV 1992) (prohibiting nations engaging in torture and other human rights violations from receiving agricultural and other forms of foreign aid); 12 U.S.C. §§ 635(b)(1)(B), 635i-8(c)(4) (1988 & Supp. IV 1992) (requiring abstention from behavior that would assist nations violating human rights); 19 U.S.C. §§ 2432(a),

be free from torture⁹⁸ and slavery,⁹⁹ to be protected from genocide,¹⁰⁰ to be free from racial discrimination,¹⁰¹ as well as religious or political persecution.¹⁰² International treaties including the 1951 Convention,¹⁰³ the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰⁴ (the "Convention Against Torture"), and numerous extradition treaties¹⁰⁵ protect specific rights and enshrine the belief that human rights and freedoms must be protected.¹⁰⁶

The Convention Against Torture and extradition treaties, for example, demonstrate how human rights have been protected by international agreement. Both the Convention Against Torture and extradition treaties include provisions that protect several human rights including protection from political persecution, torture, and other forms of punishment. As part of the Convention Against Torture's prohibition on inhuman acts, Article 3(1) of this Convention provides that no signatory nation may "expel, return ('refouler') or extradite" an individual to an

2439(a) (1988 & Supp. IV 1992) (requiring abstention from behavior that would assist nations violating human rights). *See also* 22 U.S.C. § 2304(a) (1988 & Supp. IV 1992) (prohibiting United States from providing "security assistance . . . to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."); 22 U.S.C. 2304(a)(3) (1988 & Supp. IV 1992) (directing U.S. President to "formulate and conduct international security assistance programs . . . in a manner which will promote and advance human rights . . .").

98. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 23 I.L.M. 1027 (1984), U.N. GAOR, 39th Sess., 3d Comm., Agenda Item 99, at 1, U.N. Doc. A/C.3/39/L.40 (1984) [hereinafter *Convention Against Torture*].

99. Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

100. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. I, 78 U.N.T.S. 277.

101. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966).

102. 1951 Convention, *supra* note 1, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

103. *See id.* (indicating Article 33 protection for refugees).

104. Convention Against Torture, *supra* note 98.

105. Extradition Treaty between Republic of Philippines and Republic of Indonesia, Feb. 10, 1976, arts. 5, 10, 1031 U.N.T.S. 225, 241-42; Supplement to 1909 Extradition Convention, Apr. 3, 1971, art. 4, U.S.-Fr., 791 U.N.T.S. 273, 276, 278; Treaty on Extradition and Mutual Assistance in Criminal Matters, June, 27, 1962, art.3(1), Belg.-Lux.-Neth., 616 U.N.T.S. 79, 82; Convention for Extradition and Judicial Assistance in Criminal Matters, Feb. 27, 1959, art. 3, Belg.-Morocco, 390 U.N.T.S. 275, 283; Agreement for the Extradition of fugitive criminals, Feb. 23, 1960, art 14, 385 U.N.T.S. 39, 44.

106. *Marion's Case*, 175 C.L.R. 218, 266 & n.69 (Austl. 1992); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1127-28 (1982).

other country where there is a substantial risk that the individual will be tortured.¹⁰⁷ Extradition treaties also contain provisions that protect human rights and often prohibit extradition for political offenses or offenses for which the extraditee could be subject to capital punishment.¹⁰⁸

Furthermore, customary international law also requires nations, without regard to their treaty obligations, to respect human rights.¹⁰⁹ Many of the rights first protected by treaty are now also protected under customary international law.¹¹⁰ Cus-

107. Convention Against Torture, *supra* note 98, art. 3, 23 I.L.M. at 1028, U.N. Doc. A/C.3/39/L.40 at 4. Article 3 of the Convention Against Torture states

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Id.

108. *See supra* note 105 (listing extradition treaties which contain prohibitions on extradition for political and capital punishment offenses). Article 7 of the Agreement for the Reciprocal Extradition of Criminals between Sweden and Israel states:

1. A person claimed shall not be extradited if the offence in respect of which his extradition is requested is regarded by the requested Party as one of a political character or if he proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offence of a political character.

2. Extradition shall likewise not be granted if the requested Party has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing the person claimed because of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of the said reasons.

Agreement for the Reciprocal Extradition of Criminals between Sweden and Israel, Sept. 10, 1963, art. 7, 516 U.N.T.S. 3, 19, 21. Santo F. Russo, Comment, *In Re Extradition of Khaled Mohammed El Jassem: The Demise of the Political Offense Provision in U.S.-Italian Relations*, 16 *FORDHAM INT'L L.J.* 1253, 1264 (1993) ("The political offense exception is a standard clause in extradition treaties . . .").

109. *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168, 218-20 (Austl. 1982) (Stephen, J., dissenting); Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 *YALE L.J.* 2335, 2336 ("While sometimes idealistic, the existence of international customary legal norms relating the rights of individuals, as well as treaties according such rights, have increasingly given rise to the prospect of judicially enforceable international human rights law."); *see D'Amato, supra* note 106, at 1128-29 (rebutting a proposition that "the international legal status of human rights" is exaggerated and presenting argument "that an international law of human rights actually exists").

110. *See, e.g., Filartiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (observing that torture is forbidden under customary international law).

tomary international law now protects individuals from torture¹¹¹ and racial discrimination¹¹² as well as from arbitrary detention,¹¹³ arbitrary deprivation,¹¹⁴ and international abduction.¹¹⁵

A human rights provision or practice from any source becomes customary international law when it meets two requirements: (1) general acceptance and observance by most states,¹¹⁶ and (2) *opinio juris* in the states directly confronting the issue addressed by the practice.¹¹⁷ The prohibition on torture, for example, satisfies the first principle if it is observed as a common state practice, has been implemented as part of national legislation, or is incorporated in international agreements.¹¹⁸ A provision constitutes an *opinio juris* if it represents a judicial or governmental recognition that the practice is required by law.¹¹⁹

International and national courts have also addressed human rights issues.¹²⁰ In *Velasquez Rodriguez Case*,¹²¹ the Inter-American Court of Human Rights¹²² ruled in favor of the plain-

111. *Id.*

112. *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168 (Austl. 1982).

113. *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

114. THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 193 (1989).

115. *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201-02 n.13 (9th Cir. 1975); *U.S. v. Toscanino*, 500 F.2d 267, 277-78 (2d Cir. 1974).

116. STENBERG, *supra* note 4, at 272-73.

117. *Id.* at 278. A practice is considered "*opinio juris sive necessitatis*" when acts are "carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it The States concerned must . . . feel that they are conforming to what amounts to a legal obligation." *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3, 44 (Feb. 20).

118. STENBERG, *supra* note 4, at 272.

119. *Id.* at 278 (citing *North Sea Continental Shelf Cases*, 1969 I.C.J. at 44.); *see supra* note 117 (quoting *North Sea Continental Shelf Cases*).

120. *See, e.g.*, Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees?: Social Rights in a South African Constitution*, 141 U. PA. L. REV. 1, 55 n.169 (1992) (discussing judicial attention to human rights issues); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989) (exemplifying international court concern for human rights).

121. *Velasquez Rodriguez Case*, Judgement of July 29, Inter-Am. C.H.R. 91, OAS/ser.C No.4 (1988).

122. ORGANIZATION OF AMERICAN STATES, 1992 ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (1993). The Inter-American Court of Human Rights (the "Inter-American Court") is an organ of the Organization of American States, (the "OAS") an association of South, Central, and North American States. *Id.* at 1. The Inter-American Court was created in 1978 by the American Convention on Human

tiff in a wrongful death action, finding that the Honduran government failed to meet the duty to safeguard individuals from human rights violations.¹²³ The court in *Velasquez* also linked a country's obligation to respect human rights with the idea of placing limits on the exercise of state power.¹²⁴ The court noted that a country's act or omission that infringes on an individual's rights is imputable to the state even where the conduct is not officially sanctioned by the government.¹²⁵

In *Soering v. United Kingdom*,¹²⁶ the European Court of Human Rights¹²⁷ addressed the issue of human rights in the context of an extradition order.¹²⁸ In *Soering*, the court prevented the extradition of the plaintiff because the court felt that an immediate consequence of his extradition would have been to expose him to ill-treatment.¹²⁹ The United Kingdom sought to extradite the plaintiff to the United States, where he would have been tried for murder and subject to the death penalty if found guilty.¹³⁰ This punishment is not recognized in Europe.¹³¹

In *Kindler v. Canada (Minister of Justice)*, the Supreme Court of Canada also addressed a case involving identical facts.¹³² However, in contrast to *Soering*, the court in *Kindler* allowed the plaintiff to be extradited despite the likelihood that he would be subject to the death penalty.¹³³ The court noted that in Canada there is no consensus that capital punishment is unacceptable

Rights. *Id.* The seven judges must all be qualified to sit on the highest court of their home country and are elected to six year terms by an absolute majority of the OAS General Assembly. *Id.* The United States has signed but not ratified the American Convention on Human Rights. MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES, TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 459 (1982).

123. *Rodriguez*, Inter-Am. C.H.R. at 155.

124. *Id.* at 151-52.

125. *Id.* at 153.

126. 161 Eur. Ct. H.R. (ser. A) (1989).

127. J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 1-2 (1988). The European Court of Human Rights ("the Court") was created in 1959 by the European Convention on Human Rights which was implemented nine years earlier. *Id.* It is an organ of the Council of Europe. *Id.* at 3. The number of judges is equal to the number of member states which is currently twenty-one. *Id.* at 6. Nominees to the Court are elected by the Council of Europe's Consultative Assembly and must be qualified to hold high judicial office. *Id.*

128. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

129. *Id.* at 44-45.

130. *Id.* at 12-14.

131. *Id.* at 40.

132. *Kindler v. Canada (Minister of Justice)*, 2 S.C.R. 779, 840-42 (Can. 1991).

133. *Id.* at 840.

and that capital punishment as practiced in the United States does not offend the Canadian conscience.¹³⁴ In addition, the court held that extradition, in this case, would not violate the Canadian Charter of Rights and Freedoms.¹³⁵ However, the court did observe that some cases of extradition, which expose fugitives to "morally abhorrent" or "unacceptable" treatment, would rise to the level of a human rights violation.¹³⁶

The Supreme Constitutional Court of Germany, the Bundesverfassungsgericht, has also recognized that the customary international law of human rights may forbid extradition in some situations.¹³⁷ In a 1987 case, the court, while granting an extradition request from Turkey where the individual sought had already completed a prison sentence in Greece for the same offense, determined that neither customary international law nor treaty law prohibited a second incarceration of a defendant based on the same offense.¹³⁸ The court required, however, that the prosecution be done in a *different* state.¹³⁹

2. *Human Rights Conditions in Haiti*

In Haiti, human rights violations were common under the dictatorships of Francois Duvalier, who ruled Haiti from 1957 to 1971,¹⁴⁰ his son, Jean-Claude Duvalier, who ruled until 1986,¹⁴¹

134. *Id.* at 851-52.

135. *Id.* at 840. The court explained in several ways the test it used:

The test for whether an extradition law or action offends § 7 of the *Charter* on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state "sufficiently shocks" the Canadian conscience. The fugitive must establish that he or she faces "a situation which is simply unacceptable". . . . At the end of the day, the question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offence and the penalty, the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations."

Id. (citations omitted).

136. *Id.* at 851.

137. See Judgement of Mar. 31, 1987, BVerfG, 1987 Neue Juristische Wochenschrift [NJW] 2155 (F.D.R.) (examining customary international law of human rights in context of challenged extradition proceeding); see also MERON, *supra* note 114, at 133-34 (discussing judgement of Mar. 31, 1987).

138. MERON, *supra* note 114, at 133-34.

139. *Id.*

140. Bella Stumbo, *Sharing Wealth, Power; Haiti: How the 2 Elites Take Turns*, L.A. TIMES, Dec. 16, 1985, at 1 [hereinafter *Elites*]; Bella Stumbo, *Powerful, Chic First Lady Generous to Poor, Herself; Haiti's 'Baby Doc' Governs in Isolation*, L.A. TIMES, Dec. 17, 1985,

and the numerous military-backed governments that followed them.¹⁴² Many of the human rights violations committed by these regimes were carried out by the Tontons Macoutes, a loosely organized militia of over 15,000 men founded by Francois Duvalier in 1958.¹⁴³ During the course of Francois Duvalier's fifteen year "political revolution," over 100,000 Haitian's were exiled and nearly 30,000 more killed.¹⁴⁴ While many in Haiti and the United States considered Jean-Claude Duvalier to be milder than his father, random murders and beatings were still common.¹⁴⁵ Political opponents and journalists were often targets because they criticized Duvalier.¹⁴⁶ They were beaten, exiled, or jailed for expressing their views.¹⁴⁷

In 1991, Haiti chose its first democratically elected president in 187 years of independence, Father Jean-Bertrand Aristide.¹⁴⁸ Despite his popular support, the Haitian military ousted President Aristide during his first year.¹⁴⁹ Since the coup, large numbers of Haitians, including those believed to have supported Father Aristide, have been killed,¹⁵⁰ tortured, arrested without warrant, or have witnessed the destruction of their belongings.¹⁵¹

at 1 [hereinafter *First Lady*]. Francois Duvalier was more commonly known as "Papa Doc" Duvalier. *First Lady*, *supra*, at 1.

141. *First Lady*, *supra* note 141, at 1. Jean-Claude Duvalier, like his father, was also commonly known by his nickname, "Baby Doc." *Id.*

142. *Id.*; Danner, *supra* note 27, at 39; Karen DeYoung, *Baby Doc's Haiti is Less Bloody But Still Bowed; Face of Haiti Remains the Same*, WASH. POST, Sept. 10, 1978, at A23; *Elites*, *supra* note 141, at 1; Bella Stumbo, *From Horror to Hope*, L.A. TIMES MAG., Apr. 21, 1991, at 8 [hereinafter *Hope*]; Treaster, *supra* note 95, at A1.

143. *Area: 10,714 Square Miles, Capitol: Port-au-Prince, President: Ertha Pascal-Trouillot*, UPI, Dec. 17, 1990, available in LEXIS, Nexis library, UPI file [hereinafter *Area*]; *Hope*, *supra* note 143 at 1.

144. Danner, *supra* note 27, at 39.

145. Treaster, *supra* note 95, at A1; *Area*, *supra* note 144; *First Lady*, *supra* note 141, at 1.

146. Treaster, *supra* note 95, at A1.

147. *Id.*

148. See *Haiti's Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1; Howard W. French, *Haiti's First President*, N.Y. TIMES, Feb. 2, 1991 at A2; Hilary Mackenzie, *A Cycle of Despair*, MACLEAN'S, Oct. 21, 1991, at 76.

149. Mackenzie, *supra* note 148, at 76.

150. See *Haitian Centers Council, Inc. v. McNary*, No. 92 CV 1258, 1992 WL 155853, at *1, (E.D.N.Y. Apr. 6, 1992), *aff'd in part, vacated in part*, *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom, Sale v. Haitian Centers Council, Inc., ___ U.S. ___, 113 S. Ct. 3028 (1993)*; see also 138 CONG. REC. S13,095-96 (daily ed. Sept. 9, 1992) (statement of Sen. DeConcini) (discussing conditions in Haiti) [hereinafter DeConcini Statement].

151. *McNary*, 1992 WL 155853, at *1.

Thousands more have been forced to go into hiding.¹⁵² People continue to disappear without a trace, free speech has been restricted, assassinations are common, and people are jailed for having pro-Aristide materials, such as photographs of President Aristide, in their home.¹⁵³ Fearing for their safety, numerous Haitians have fled Haiti for the United States throughout these years.¹⁵⁴

While many Haitians have fled for personal safety, others have fled the impoverished conditions in Haiti.¹⁵⁵ Haiti is considered the poorest nation in the Western Hemisphere.¹⁵⁶ The political structure of the past three decades and the more recent turmoil have exacerbated the poor conditions long present in Haiti.¹⁵⁷ Many of the Haitians returned under the interdiction program were sent back to Haiti on the grounds that they were fleeing for economic reasons and not due to persecution.¹⁵⁸

Despite claims and reports of human rights abuses in Haiti, the U.S. Bureau for Refugee Programs in the State Department reported to Congress that the repatriated Haitians, those who had fled Haiti and were subsequently returned by the Coast Guard, have not been ill-treated and that there is no evidence of

152. *Id.*; see William Shawcross, *Mass Migration and the Global Village*, REFUGEES, Jan. 1992, at 26 ("In the vast majority of cases, refugees would prefer to go home. They have been forced out."); Garry Pierre-Pierre, *Anxious Haitians Start Building Boats Again*, N.Y. TIMES, Oct. 22, 1993, at A1, A10. Luc Selmot, a Haitian resident of Petit-Goave in Haiti, described his situation in October 1993 saying that "[w]hen I leave, nobody is going to send me back here. . . . The United States knows what's going on here, so when I leave they can't send me back. They might as well kill me on the spot. That's what the military will do to us." *Id.*

153. DeConcini Statement, *supra* note 151, at S13,095 (quoting joint report by Americas Watch, the National Coalition for Haitian Refugees and Physicians for Human Rights, Dec. 31, 1991).

154. See Pierre-Pierre, *supra* note 153 (quoting a Haitian who expects to flee Haiti because he fears for his life).

155. Bohning, *supra* note 96, at A11.

156. *Area*, *supra* note 144. While consumer prices are similar to prices in the United States, the per capita income is only U.S.\$380 per year with 80% of Haitians earning less than U.S.\$150 per year. *Area*, *supra* note 144, at 2; *Elites*, *supra* note 141, at —; *First Lady*, *supra* note 141, at 1. Another group comprising 0.5% of Haitians are believed to earn approximately one billion dollars per year which amounts to nearly 50% of the nation's annual budget. Danner, *supra* note 27, at 39. Infant mortality is approximately 25% and for adults and children, malnutrition is the leading cause of death. *First Lady*, *supra* note 141, at 1.

157. *Elites*, *supra* note 141.

158. Press Release, *supra* note 32.

reprisals.¹⁵⁹ Human rights groups, however, say that there is no way to monitor how the returnees are treated once they return to their villages where there is little international supervision.¹⁶⁰ One group of repatriated migrants, who ultimately escaped Haiti, reported that members of their group were attacked by soldiers upon the groups' repatriation.¹⁶¹ According to foreign observers in Haiti, returnees are often put through re-admission formalities in public, in front of the police and military, thus increasing the risk of subsequent attack.¹⁶² Additionally, in October 1993, the Haitian government sought to indict four recent returnees for organizing the departure of a group of migrants.¹⁶³

E. *The Interdiction Program*

In 1981, while Jean-Claude Duvalier was still in power, President Reagan responded to the great number of Haitians fleeing human rights violations and economic depression in Haiti by implementing an interdiction program.¹⁶⁴ The Haitian interdiction program began when the United States and the Haitian governments exchanged letters on September 23, 1981.¹⁶⁵ The let-

159. UNITED STATES DEPARTMENT OF STATE, BUREAU OF REFUGEE PROGRAMS, WORLD REFUGEE REPORT 10 (1992).

160. Michael Tarr, *No One Knows What Happens To Refugees, Haiti Rights Groups Say*, Reuter Newswire, Feb. 12, 1992, available in WESTLAW, INT-NEWS file.

161. *Id.*

162. Linda Diebel, *Canadian Ships to Return Haitian Refugees*, Oct. 27, 1993, TORONTO STAR, at A21.

163. Howard W. French, *Boat People Face Prosecution*, N.Y. TIMES, Oct. 30, 1993, at A5.

164. Interdiction Letters, *supra* note 13, 33 U.S.T. 3559, T.I.A.S. No. 10,241.

165. *Id.* The text of the letter from the American Ambassador to the Haitian Secretary of State for Foreign Affairs reads:

Excellency:

I have the honor to refer to the mutual concern of the Governments of the United States and of the Republic of Haiti to stop the clandestine migration of numerous residents of Haiti to the United States and to the mutual desire of our two countries to cooperate to stop such illegal migration.

The United States Government confirms . . . the establishment of a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti.

Having regard to the need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees . . . , the United States Government confirms . . . the following points of agreement:

Upon boarding a Haitian flag vessel . . . the authorities of the United

ters authorized the U.S. Coast Guard to intercept any Haitian vessels¹⁶⁶ and detain those individuals suspected of attempting to

States Government may address inquiries, examine documents and . . . establish the . . . destination of the vessel . . . When these measures suggest that an offense against United States immigration laws or . . . Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas . . . of the vessels and persons found on board.

The Government of Haiti agrees to permit . . . the return of detained vessels and persons to a Haitian port . . .

The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.

It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

In furtherance of this cooperative undertaking the United States Government formally requests the Government of the Republic of Haiti's consent to the boarding by the authorities of the United States Government of private Haitian flag vessels [in any case] in which such authorities have reason to believe that the vessels may be involved in the irregular carriage of passengers outbound from Haiti.

. . . Accept, Excellency, the renewed assurances of my highest consideration.

Ernest H. Preeg

Interdiction Letters, *supra* note 13, 33 U.S.T. at 3559-61, T.I.A.S. No. 10,241, at 1-3. The Haitian Secretary of State for Foreign Affairs, Edouard Francisque, replied acknowledging the text of American Ambassador's letter and added:

I have the honor of informing you that the Haitian Government gives its agreement to the propositions reproduced herein. Consequently, your letter and the present response constitute an agreement by exchange of letters between the United States of America and the Government of the Republic of Haiti.

Id., 33 U.S.T. at 3562-65, T.I.A.S. No. 10,241, at 4-7 (translation by author). The agreement will remain in force until six months after either government announces its intent to terminate it. *Id.*, 33 U.S.T. at 3560-61, T.I.A.S. No. 10,241 at 2-3.

166. Interdiction Letters, *supra* note 13, 33 U.S.T. 3559, T.I.A.S. No. 10,241; *see supra* note 166 (quoting Interdiction Letters). On April 8, 1994, exiled Haitian President Aristide notified U.S. President Bill Clinton that President Aristide would end the interdiction agreement in October, 1994. Steven Greenhouse, *Aristide to End Accord That Allows U.S. to Seize Refugee Boats*, N.Y. TIMES, Apr. 8, 1994, at A6. U.S. officials said they would continue to stop Haitian boats after the agreement ends. *Id.*

Technically, international law forbids a state from intercepting ships flying the flag of another state without the flag state's consent. *See* U.S. v. Green, 671 F.2d 46 (denying claim that foreign vessel was illegally boarded), *cert. denied*, 457 U.S. 1135 (1982). That is why the United States sought Haiti's permission before beginning the interdiction program. *See* Interdiction Letters, *supra* note 13 (granting permission to interdict). However, in practice, this requirement rarely prevents interceptions. *Green*, 671 F.2d at 50. Fleeing refugees may not have any markings on their boat, which would make it a ship without nationality and hence unprotected. *Id.* Yet, even when a vessel flies its flag, intercepting ships can obtain permission from the flag state by radio, as the United

illegally immigrate to the U.S.¹⁶⁷ Further, the United States was authorized to subsequently return to Haiti those illegal immigrants who did not qualify for refugee status, with the proviso that the Haitian government would not prosecute them for illegal departure.¹⁶⁸

On September 29, 1981, President Reagan issued a proclamation calling the vast numbers of illegal aliens arriving by sea a detriment to American interests.¹⁶⁹ President Reagan then issued Executive Order No. 12,324 directing the Coast Guard to exercise the power granted in the U.S. agreement with Haiti.¹⁷⁰ A significant caveat, however, was that those Haitians who fell within the definition of a "refugee" were not to be returned without their consent.¹⁷¹ The definition of a refugee under the 1951 Convention¹⁷² does not include those who flee for economic reasons.¹⁷³ Therefore, the interdiction program was intended to return those fleeing Haiti solely on the basis of poor economic conditions.¹⁷⁴

On the basis of interviews conducted on board the interdicted vessels and Coast Guard cutters, Immigration and Natu-

States Coast Guard often does when searching for illegal drugs. *Id.* ("The practice of obtaining prior consent of the foreign flag state is apparently a fairly common one[.]").

167. Interdiction Letters, *supra* note 13, 33 U.S.T. at 3560, T.I.A.S. No. 10,241, at 2-3.

168. *Id.*

169. Proclamation No. 4865, 3 C.F.R. 50 (1982) [hereinafter Proclamation] ("illegal migration by sea of large numbers of undocumented aliens into the southeastern United States").

170. Exec. Order No. 12,324, *supra* note 11, 3 C.F.R. at 181.

171. *Id.*

172. *See supra* note 1 (defining "refugee").

173. *Id.* The American administration and others have dismissed the Haitian immigrants as mere economic refugees. Diederich, *supra* note 14, at 43. However, immigrants such as Selmot and others often have mixed motives in leaving Haiti. As one U.N. commentator observed:

[T]here is a tendency amongst Western governments to denounce all refugees as mere economic migrants, and therefore an underclass of people with absolutely no privileges. This is intolerable for two reasons. It encourages governments to deny the human rights of such people. And it encourages us to believe that there is a hard and fast distinction between refugees and mere economic migrants. There is not always. Consider, for example, Jewish merchants who fled from Central Europe in the early and mid-30's when their businesses were clearly threatened but often before their lives were endangered.

Shawcross, *supra* note 153, at 28.

174. Diederich, *supra* note 14.

ralization Service ("INS") field officers "screened-in" those making a credible showing of political refugee status.¹⁷⁵ Those "screened-out" as leaving for reasons other than persecution were immediately returned to Haiti.¹⁷⁶ Over 25,000 immigrants were returned to Haiti between the start of the program and September 1991.¹⁷⁷

Ten years and a week after the exchange of letters, which enabled the interdiction program to begin on September 30, 1991, the Haitian military seized power, overthrowing President Aristide.¹⁷⁸ In response, the United States imposed a strict embargo on Haiti.¹⁷⁹ As a result of the increased violence and deteriorating economy, emigration increased to a level even higher than in 1981.¹⁸⁰ Between October 1991 and June 1992, the Coast Guard stopped nearly 37,000 immigrants.¹⁸¹ The volume of immigrants forced the screening process to be moved from on board the Coast Guard vessels to Guantanamo Naval Base, in Cuba, where longer interviews were possible due to better conditions.¹⁸²

Mr. Gene McNary, appointed by President Bush in October, 1992, modified the screening process by adding specially trained asylum corp officers, who were more experienced in conducting

175. Brief for Petitioner at 2, *McNary v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549 (1993) (No. 92-344) available in LEXIS, Genfed library, Briefs file. See *supra* notes 75, 77 (quoting § 243 of INA before and after amendment).

176. Brief for Petitioner, *supra* note 176, at 2.

177. *Id.*; see Suro, *supra* note 7, at A8 (presenting overview of U.S. interdiction program).

178. See *Haiti's Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1; Howard W. French, *Haiti's First President*, N.Y. TIMES, Feb. 2, 1991, at A2.

179. John M. Goshko, *Bush Strengthens Curb on Haiti Trade Embargo*, WASH. POST, Oct. 30, 1991, at A6; Oswald Johnston, *U.S. Puts Squeeze on Haiti with Embargo, Sanctions*, L.A. TIMES, Oct. 30, 1991, at A4.

180. Kenneth Freed, *Haiti Embargo Brings Misery to All But Rich*, L.A. TIMES, Nov. 17, 1991, at A1; Lee Hockstader, *U.S. Memo on Haiti Embargo Says Widespread Hunger Looms*, WASH. POST, Dec. 14, 1991, at A17; Lee Hockstader, *Haitians Struggling Under Trade Embargo as Talks Begin, Hardships Worsen for Poor*, WASH. POST, Nov. 23, 1991, at A21; WORLD REFUGEE REPORT, *supra* note 160, at 10.

181. Brief for Petitioner, *supra* note 176, at 2.

182. Michael S. Teitelbaum, *Political Tides, Haitian Waves; An Exodus was Risky*, N.Y. TIMES, Feb. 2, 1993, at A19. Susan Beck, *Casting Away: How the INS Tried to Save the Haitians and How Bush Administration Hard Line Policy Prevailed*, AM. LAW., Oct 1992, at 51. As one asylum officer observed, the ships were "no place to do an interview. The sun is a killer, and the wind makes it impossible to write. Papers are curling up under twenty to thirty-knot winds." *Id.*

asylum interviews and were given regular updates on the conditions in Haiti.¹⁸³ Gregg Beyer, a former official with the United Nations High Commissioner for Refugees and the director of the asylum corp, also instituted a more lenient standard for the first phase of the screening process.¹⁸⁴ Under the new standard, Haitians only needed to demonstrate a "credible fear" of persecution rather than a "well-founded fear" as normally required to receive asylum.¹⁸⁵ As a result, the number of immigrants qualified to enter the United States and further pursue their asylum claims jumped from one percent¹⁸⁶ to nearly thirty percent.¹⁸⁷

On May 22, 1992, the U.S. Navy declared that "there is no room at the inn,"¹⁸⁸ and announced that the temporary facilities at Guantanamo had reached their maximum capacity.¹⁸⁹ The following day, President Bush issued Executive Order No. 12,807. This order declared that Article 33 of the 1951 Convention did not extend to individuals located beyond U.S. territory.¹⁹⁰ Executive Order No. 12,807, therefore, directed the Coast Guard to stop Haitian vessels and return passengers lacking sufficient immigration documents, regardless of their refugee claims.¹⁹¹ According to the United Nations High Commissioner for Refugees, the United States became the first country to ever implement such a policy.¹⁹²

An exception to President Bush's order allowed the Attor-

183. Beck, *supra* note 182, at 55-56.

184. *Id.*; see *supra* note 1 (presenting definition of refugee). Beyer's standard was unofficial and is not a part of INS regulations. Beck, *supra* note 182, at 55.

185. Beck, *supra* note 182, at 55.

186. *Id.* at 55-56; Suzanne Gluck, Note, *Intercepting Refugees at Sea: An Analysis of the United States' Legal and Moral Obligations*, 61 *FORDHAM L. REV.* 865, 871 n.37 (1993).

187. Beck, *supra* note 182 at 55-56; see DAVID MARTIN, *THE NEW ASYLUM SEEKERS*, 6 (1986). At one point, in January 1990, the screen-in rate briefly reached 85%. Beck, *supra* note 182, at 52. In *Haitian Refugee Center, Inc. v. Baker*, the Haitian Refugee Center, Inc., unsuccessfully sought to enjoin the repatriation of screened out migrants who were waiting at Guantanamo on the grounds that the screening procedure was still inadequate. *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir., 1992). The Eleventh Circuit ruled that aliens interdicted on the high seas had no right to judicial review of an INS decision rejecting their applications. *Id.*

188. Bill Frelick, *Haiti: No Room at the Inn*, *REFUGEES*, July 1992, at 34, 37.

189. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2555 (1993).

190. Exec. Order No. 12,807, *supra* note 14, 3 C.R.F. at 303.

191. *Id.*

192. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, *McNary v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549 (1993) (No. 92-344), at 3, available in LEXIS, Genfed library, Briefs file. The Office of the United Nations High Commissioner for Refugees is the

ney General, with discretion, to decide that a person would not be returned without that person's consent.¹⁹³ The Attorney General, however, never exercised this power.¹⁹⁴ President Bush's executive order did not refer to the Haitian immigrants specifically, but only to aliens coming by sea.¹⁹⁵ However, a press release dated the day after the executive order clearly expressed President Bush's intent to return to Haiti all Haitians picked up at sea.¹⁹⁶

Executive Order 12,807 was enforced for two years. On May 7, 1994, however, President Clinton rejected it, announcing a new plan to grant all interdicted Haitians asylum interviews.¹⁹⁷ Although asylum interviews had been offered at U.S. facilities in Haiti since 1992, President Clinton's administration observed that increased violence and repression in Haiti had rendered such methods inadequate.¹⁹⁸ While maintaining that most of the Haitian migrants were fleeing for economic and not political reasons, and would therefore be returned to Haiti, the U.S. government agreed that it was necessary to conduct comprehensive interviews at sites in other nations and on board U.S. ships in order to ensure that refugees were protected.¹⁹⁹

II. SALE v. HAITIAN CENTERS COUNCIL, INC.

Haitian Centers Council, Inc. ("Haitian Centers"), the respondent, filed suit against the petitioner, the U.S. Government,

United Nations' organization responsible for assisting refugees worldwide and for developing solutions for refugee problems in general. *Id.* at 11.

193. Exec. Order No. 12,807, *supra* note 14, 3 C.F.R. at 303. According to Executive Order 12,807: "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." Exec. Order No. 12,807, *supra* note 14, 3 C.F.R. at 303.

194. Thomas L. Friedman, *Haitians Returned Under New Policy*, N.Y. TIMES, May 27, 1992, at A1.

195. Exec. Order No. 12,807, *supra* note 14, 3 C.F.R. at 303.

196. White House Statement on Haitian Migrants, 28 WEEKLY COMP. PRES. DOC. 924 (May 24, 1992). The press release also discouraged Haitians from embarking for the U.S., stating that it would be safer to remain in Haiti. *Id.* ("Under current circumstances, the safety of Haitians is best assured by remaining in their country.")

197. Ifill, *supra* note 32, at A1.

198. Ifill, *supra* note 32, at A1, A14; Position Paper, *supra* note 32, at 3.

199. Position Paper, *supra* note 32, at 3; Ifill, *supra* note 32, at A1, A14; Steven Greenhouse, *U.S. Is Urged to Allow In More Haitians*, N.Y. TIMES, May 11, 1994, at A9; *see Haitians Interviewed on Ship*, TIME, June 27, 1994, at 24 (noting completion of first interviews aboard U.S. ship in Jamaican waters).

on March 18, 1992.²⁰⁰ On appeal, Haitian Centers urged the U.S. Supreme Court to hold that the 1980 amendments to the INA applied to aliens on the high seas in accordance with the 1951 Convention.²⁰¹ The government, however, argued that neither was intended to apply beyond U.S. territory.²⁰² Finding for the petitioner, the Court utilized legislative and negotiating histories, along with dictionary translations of the 1951 Convention's terms, to hold that neither the INA nor the 1951 Convention was intended to apply extraterritorially.²⁰³

A. Procedural History

Respondents, Haitian Centers, first filed their suit in New York on March 18, 1992, on behalf of a class of Haitians interdicted and detained at Guantanamo Naval Base in Cuba.²⁰⁴ The original suit, *Haitian Centers Council, Inc. v. McNary*, was filed before President Bush's Executive Order No. 12,807 was issued.²⁰⁵

While this initial case was being appealed, the President issued Executive Order No. 12,807, which ordered the Coast Guard to return the interdicted migrants without identifying refugees.²⁰⁶ Haitian Centers subsequently requested a temporary order to restrain the order's implementation, arguing that the

200. *McNary v. Haitian Centers Council, Inc.*, No. 92 CV 1258, 1992 WL 155853 (E.D.N.Y. Apr. 6, 1992), *aff'd in part, vacated in part*, *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom*, *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 3028 (1993).

201. See Brief for Respondent, *supra* note 20, at 7-8.

202. See Brief for Petitioner, *supra* note 176, at 16, 21.

203. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549 (1993)

204. *McNary*, 1992 WL 155853, at *1-3; *Sale*, 113 S. Ct. at 2556.

205. *McNary*, 1992 WL 155853, at *1. This suit alleged that the Immigration and Naturalization Service, the Secretary of State, the Coast Guard and the Commander of Guantanamo Naval Base were improperly denying the detained Haitians access to legal counsel for interviews during which INS officers screened for those having a "well founded fear" of persecution in Haiti. *Id.* The "well founded fear" standard was identical to that used for hearings on the mainland where migrants are entitled to counsel. *Id.* at *5. The organizations representing the Haitians further alleged that such conduct violated their First Amendment right to free speech and freedom of association. *Id.* The District Court agreed and enjoined the defendants from denying access to counsel and from repatriating Haitians who had not been allowed to speak with an attorney. *Id.* at *9-10. The injunction was subsequently stayed by the Supreme Court in April 1992. *McNary*, 113 S. Ct. at 2556 (citing *McNary v. Haitian Centers Council, Inc.*, ___ U.S. ___, 112 S. Ct. 1714 (1992)).

206. *McNary*, 112 S. Ct. at 2556.

doctrine of non-refoulement prohibited the return of all Haitians to Haiti.²⁰⁷ The U.S. District Court for the Eastern District of New York, however, denied the request.²⁰⁸ The district court claimed that while the 1967 Protocol's non-refoulement provision may in fact prohibit the action called for in President Bush's order, the 1967 Protocol was not self-executing and section 243(h) of the INA, as amended by the Refugee Act of 1980, did not provide relief for those interdicted on the high seas.²⁰⁹

The U.S. Court of Appeals for the Second Circuit reversed, finding that the plain language of the 1951 Convention and of section 243(h) indicated that both applied to international waters.²¹⁰ This holding conflicted with an Eleventh Circuit ruling on the same issue in which the Eleventh Circuit ruled that Haitians interdicted on the high seas were not protected under the INA.²¹¹ Observing the split in the circuits and the importance of the issue,²¹² the Supreme Court granted the government's writ for certiorari and issued its final decision in June, 1993, eleven months before President Clinton reversed President Bush's no-interview policy.²¹³

207. *McNary*, 1992 WL 155853, at *11.

208. *Id.* at *12. In District Court Judge Johnson's decision in *McNary* he emphasized that:

It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it As it stands now, Article 33 is a cruel hoax and not worth the paper it is printed on unless Congress enacts legislation implementing its provisions or a higher court reconsiders *Bertrand [v. Sava]*. Until that time, however, this court feels constrained by the rationale of *Bertrand* and cannot grant the Plaintiffs relief on this claim.

Id. (citing *Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir. 1982) (holding that neither 1951 Convention nor 1967 Protocol are self-executing) (footnote omitted)).

209. *McNary*, 1992 WL 155853, at *12.

210. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___ 113 S.Ct 2549, 2558 (1993); *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1360-62 (2d Cir., 1992), *rev'd sub nom.*, *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549 (1993). The Second Circuit held that:

[t]he plain language of Article 33.1 of the [1951] Convention leads us to conclude that, just as with § 243(h)(1), the word "return" means "return", without regard to where the refugee is to be returned from, and, just as with § 243(h)(1), what is important under Article 33.1 is where the refugee is to be returned to.

Id. at 1362.

211. See *supra* note 188 and accompanying text (discussing *Haitian Refugee Center, Inc. v. Baker*).

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

213. *McNary v. Haitian Centers Council, Inc.*, 113 S.Ct 52 (1992); *Sale v. Haitian Centers Council*, ___ U.S. ___ (1993); 113 S. Ct. 2549; Ifill, *supra* note 32, at A1.

B. *The Parties' Positions*

Haitian Centers Council, urging affirmation of the Second Circuit's holding, argued that the 1951 Convention, as applied by the 1967 Protocol, applies extraterritorially, and thus protected the Haitians.²¹⁴ They further argued that, under the INA as modified by the Refugee Act of 1980, the United States cannot deport or return Haitian refugees.²¹⁵ The government, in contrast, argued that the Refugee Act did not make the INA apply to refugees beyond U.S. territory.²¹⁶ The government also argued that the terms of the 1951 Convention preclude it from applying extraterritorially.²¹⁷

1. Haitian Centers Council's Argument for Affirming the Second Circuit's Decision

Haitian Centers, the respondent, argued that the Second Circuit's decision should be affirmed.²¹⁸ They reasoned that President Bush's order to return the migrants without screening for refugees violated Article 33 of the 1951 Convention, the 1967 Protocol, and section 243(h)(1) of the INA.²¹⁹ Describing Article 33 of the 1951 Convention as "self-executing," the respondents argued that the text, structure, purpose, legislative history, negotiating history, and the Executive Branch's interpretation of the INA and the 1951 Convention protects all refugees regardless of where they are found.²²⁰

To demonstrate that the INA provides relief for the Haitians, the respondent relied upon the INA amendments made by the Refugee Act of 1980.²²¹ These amendments added the word "return" and removed the words "within the United States" from section 243(h)(1).²²² Respondents argued that these changes removed the geographical limitation on section 243(h)(1)'s application.²²³ They further argued that the re-worded section

214. Brief for Respondent, *supra* note 20, at 7.

215. *Id.* at 9.

216. Brief for Petitioner, *supra* note 176, at 18.

217. *Id.* at 21-23.

218. Brief for Petitioner, *supra* note 176, at 14.

219. Brief for Respondent, *supra* note 20, at 7-8.

220. *Id.* at 7.

221. *Id.*

222. *Id.* at 9; see *supra* notes 75, 77 and accompanying text (describing amendments to Immigration and Naturalization Act).

223. Brief for Respondent, *supra* note 20, at 7.

243(h) made its application mandatory.²²⁴ The non-refoulement protection, therefore, should have extended to Haitians beyond U.S. territory.²²⁵

2. Government's Argument for Overturning the Second Circuit's Decision

The Executive branch contended that neither the INA nor the 1951 Convention applied beyond U.S. territorial waters.²²⁶ In support of their argument, the government relied upon the traditional presumption against applying legislation extraterritorially where Congress has not explicitly provided for such application.²²⁷ Additionally, the government argued that section 243(h)(1) did not apply to the interdicted Haitians for two other reasons. First, section 243(h)(1) is located in Part V of the INA, which addresses expelling aliens from U.S. territory.²²⁸ According to the government, this section is directed at the Attorney General, who is specifically responsible for expelling aliens.²²⁹ The government concluded that section 243(h)(1)'s non-refoulement policy, therefore, did not apply to the President.²³⁰ Second, the interdiction program was carried out by the Coast Guard beyond U.S. territorial waters.²³¹ According to the government, section 243(h)(1) could not have limited the interdiction program because the Attorney General's immigration duties under section 243(h)(1) only apply within U.S. territory.²³²

Further, the government emphasized that the Refugee Act of 1980 was intended merely to reverse an earlier Supreme Court ruling in *Leng May Ma v. Barber*.²³³ In *Leng May Ma*, the Court addressed whether the phrase "within the United States," as used in the unamended section 243(h)(1), referred to an ex-

224. *Id.*

225. *Id.*

226. See Brief for Petitioner, *supra* note 176, at 16, 21.

227. *Id.* at 16 (citing *EEOC v. Arabian American Oil Co.*, ___ U.S. ___, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) and *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

228. *Id.* at 17-18.

229. See *supra* note 76 (explaining Attorney General's powers).

230. Brief for Petitioner, *supra* note 176, at 7.

231. *Id.* at 17-18; see *supra* notes 165-98 and accompanying text (describing interdiction program and agreement with Haiti allowing it).

232. Brief for Petitioner, *supra* note 176, at 17-18.

233. See Brief for Respondent, *supra* note 20, at 18 (citing *Leng May Ma v. Barber*, 357 U.S. 185 (1958)).

cludable alien as well as expellable aliens.²³⁴ The Court concluded that it did not, and therefore, only expellable aliens, those “within the United States,” were entitled to the protection available in section 243.²³⁵ Therefore, the government argued that the Refugee Act did not affect the geographical area to which the INA applied and that the amendment removing the phrase could not have altered the INA’s exclusively territorial application.²³⁶ According to the government, because the INA’s legislative history never referred to extraterritorial application, Congress did not remove “within the United States” with the intent of extending the INA’s reach.²³⁷

Finally, arguing that the 1951 Convention also applied only to aliens physically within U.S. territory, the government relied on the plain meaning of the 1951 Convention’s text.²³⁸ The government argued that the word “expel” in Article 33(1) referred to aliens in the territory of a contracting state,²³⁹ and that “expel” is one translation of “refouler.” The government concluded that the phrase “return (‘refouler’)” merely refers to its territorial use.²⁴⁰

C. *The Court’s Decision to Overturn the Second Circuit*

The Supreme Court, in *Sale*, held that neither section 243(h)(1) of the INA nor Article 33(1) of the 1951 Convention applied to refugees located in international waters, and therefore, President Bush’s Executive Order 12,807 did not violate the United States’ obligations under the 1967 Protocol.²⁴¹ The majority reasoned that section 243(h)(1) of the INA reflected the terms of the 1951 Convention, and that the drafters of the 1951 Convention intended to limit its application to within state territory.²⁴² Justice Harry A. Blackmun, in his dissent, however, argued that the majority ignored the plain meaning of the 1951

234. *Id.*

235. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2560 (1993).

236. *Id.*; see *supra* notes 70-93 and accompanying text (explaining INA and Refugee Act amendments).

237. See Brief for Petitioner, *supra* note 176, at 8.

238. *Id.* at 7, 21-23.

239. *Id.* at 7, 23 (“The prohibition against ‘expelling’ plainly has in mind a refugee who is within the territory of the Contracting State.”).

240. *Id.*

241. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2551 (1993).

242. *Id.*

Convention's text, and thus, failed to correctly interpret Article 33(1).²⁴³

1. The Majority Ruling

Justice John Paul Stevens, writing for the eight member majority, held that neither the INA nor the 1951 Convention protected aliens on the high seas.²⁴⁴ First, the Court addressed the INA, noting that both President Reagan's Executive Order No. 12,324 and President Bush's Executive Order No. 12,807 were based upon sections 1103(a) and 1182(f) of the INA.²⁴⁵ These sections confer powers and obligations specifically upon the U.S. President.²⁴⁶ The Court also observed that the Attorney General's role, however, is detailed in a separate section.²⁴⁷ The Court noted that Part V of the INA addresses the Attorney General's role and only refers to the Attorney General's "normal" immigration duties.²⁴⁸ As the Court recognized, "normal" immigration duties are conducted within the United States, not on the high seas.²⁴⁹ The Court concluded, therefore, that while section 243(h)(1), which is within Part V, in fact restricts the Attorney General's actions within the United States, the section does not restrict the President's extraterritorial actions.²⁵⁰

Second, the Court examined Article 33 of the 1951 Conven-

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

244. *Id.* at 2549.

245. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2559 (1993).

246. *Id.* (citing 8 U.S.C. §§ 1103(a) and 1182(f)).

247. *Id.*

248. *Id.* at 2559-60. "The reference to the Attorney General in the statutory text . . . suggests that it applies only to the Attorney General's normal responsibilities under the INA. The most relevant of those responsibilities for our purposes is her conduct of the deportation and exclusion hearings." *Id.* See *supra* note 76 (indicating that Attorney General is responsible for enforcing laws relating to immigration and naturalization of aliens).

249. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2559-60 (1993).

250. *Id.* The Court also found that the use of both "deport" and "return" in section 243(h) "implies an exclusively territorial application . . . [and] reflects the traditional division between" deportation and exclusion proceedings. *Id.* at 2560. The original INA only referred to deportation of aliens "within the United States". *Id.* at 2560-61. In *Leng May Ma v. Barber*, the Court held that the original statute did not apply to an alien "seeking 'admission' and trying to avoid 'exclusion'" because she was not "within the United States" in terms of admission. *Id.* at 2561. As a result, the Court found that the 1980 amendments, removing "within the United States" and adding "return" were to remedy the *Barber* holding and not to eliminate the statute's territorial restriction. *Id.*

tion.²⁵¹ The Court found that the Refugee Act's legislative history proved Congress' intent to conform U.S. immigration law to Article 33 of the 1951 Convention.²⁵² In evaluating the 1951 Convention the Court recognized that it could have created an extraterritorial obligation that the INA does not codify.²⁵³ The Court, however, found that the terms of Article 33(1) of the 1951 Convention held the same meaning as section 243(h)(1) of the INA and, consequently, only applied to refugees physically in the territory of a signatory state.²⁵⁴ The Court examined the plain meaning of "return" in Article 33(1).²⁵⁵ Relying on a number of French-English dictionary translations, the court determined that the plain meaning was not appropriate for the 1951 Convention.²⁵⁶ Noting that "return" is explained by "refouler," the Court instead determined that "return ('refouler')" meant "a defensive act of resistance or exclusion at a border," and thus, did not apply to refugees in international waters.²⁵⁷ The Court also examined the text of Article 33(2).²⁵⁸

251. *Id.* at 2562 (1993).

252. *See supra* notes 70-93 and accompanying notes (describing Refugee Act and INA).

253. *See Sale*, 113 S. Ct. at 2562. The Court noted:

because the history of the 1980 Act does disclose a general intent to conform our law to Article 33 of the Convention, it might be argued that the extraterritorial obligations imposed by Article 33 were so clear that Congress, in acceding to the Protocol, and then in amending the statute to harmonize the two, meant to give the latter a correspondingly extraterritorial effect. Or, just as the statute might have imposed an extraterritorial obligation that the Convention does not . . . the Convention might have established an extraterritorial obligation which the statute does not; under the Supremacy Clause, that broader treaty obligation might then provide the controlling rule of law.

Id. (footnote omitted).

254. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2563 (1993). In doing so, the Court held that the 1951 Convention's use of the words "expel" and "return" was parallel to the INA's use of "deport" and "return". Consequently, they found that both the 1951 Convention and the INA were referring to the differences between exclusion and deportation. *See supra* note 80 (explaining difference between exclusion and deportation).

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

256. *Id.* The Court noted that "refouler" is not among the many French translations of "return." *Id.* at 2563-64. Translations of "return" cited by the Court include "revenir," "retourner," "rentrer," "repondre," "repliquez," "renvoyer," and numerous others. *Id.* at 2564 n.37 (citing THE NEW CASSELL'S FRENCH DICTIONARY 440 (1973), LAROUSSE MODERNE FRENCH ENGLISH DICTIONARY 545 (1978)). The English translations of "refouler" that the Court used are "repulse," "repel," "drive back," and "expel." *Id.* at 2564 n.38 (citing CASSELL at 627, LAROUSSE at 607). Neither dictionary listed "return" as a translation of "refouler." *Id.*

257. *Sale*, 113 S. Ct. at 2564.

Article 33(2) provides an exception to Article 33(1) under which a signatory state may withhold protection from a dangerous refugee who is within the signatory state's territory.²⁵⁹ The Court held that because Article 33(2) only applies within state territory, Article 33(1) must also be restricted to state territory.²⁶⁰

In examining the history of the 1951 Convention, the Court acknowledged that the records of the drafting committee were ambiguous.²⁶¹ The Court, however, concluded that the ad hoc committee, which wrote the 1951 Convention, only intended a territorial application of the treaty.²⁶² The Court relied on several delegates' statements regarding the term "refoulement."²⁶³ Specifically, according to the conference records, the Swiss delegate expressed the opinion that "the word 'return' ('refoulement') related to a refugee already within the territory, but not yet resident there."²⁶⁴ The Court further relied on the Dutch delegate, Baron van Boetzelaer's, personal impression that there was a "general consensus" on such an interpretation.²⁶⁵ While the Court observed that the negotiating history was not dispositive, the Court found that it supported the majority's predilection toward a non-extraterritorial interpretation.²⁶⁶ Thus, the

258. *Id.* at 2563.

259. *See supra* note 22 and accompanying text (quoting Article 33 of 1951 Convention).

260. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2563 (1993).

261. *Id.* at 2567.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2566-67 (1993) (referring to Baron van Boetzelaer) (citing Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-fifth Meeting, U.N. Doc. A/CONF.2/SR.35, at 21-22 (July 25, 1951) [hereinafter Conference Records]). The Baron subsequently requested that the record reflect the Conference's agreement with the 'interpretations that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.' *Id.* at 2566 (citing Conference Records, *supra* at 21-22). According to the Conference transcript which the Court quoted extensively: 'There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be placed on record.' *Id.* (citing Conference Records, *supra* at 21-22).

266. *Id.* at 2567. As the Court noted,

[t]he negotiating history, which suggests that the Convention's limited reach resulted from a deliberate bargain, is not dispositive, but it solidly supports our reluctance to interpret Article 33 to impose obligations on the contracting parties that are broader than the text commands. We do not read that text to apply to aliens interdicted on the high seas.

Id.

Court reversed the Court of Appeal's decision and upheld President Bush's interdiction program.

2. The Dissent

Justice Blackmun, dissenting, criticized the majority's "tortured reading" of the 1951 Convention's Article 33.²⁶⁷ Justice Blackmun argued that the majority's failure to apply the Convention's plain meaning resulted in a misinterpretation of the use of the word "return" as used in section 243 of the INA.²⁶⁸ Justice Blackmun felt that the majority improperly relied on the American division between deportation and exclusion.²⁶⁹

Relying upon the Vienna Convention and previous Supreme Court decisions, Justice Blackmun attacked the majority's reliance on the 1951 Convention's history.²⁷⁰ According to Justice Blackmun, not only were Baron van Boetzelaer's remarks too weak to serve as a reliable indication,²⁷¹ but the American delegate had held a contrary view.²⁷² Justice Blackmun con-

267. *Id.* at 2569 (Blackmun, J., dissenting). Justice Blackmun mocked the majority's interpretation writing:

Today's majority . . . decides that the forced repatriation of the Haitian refugees is perfectly legal, because the word "return" does not mean return because the opposite of "within the United States" is not outside the United States and because the official charged with controlling immigration has no role in enforcing an order to control immigration."

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

268. *Id.* (Blackmun, J., dissenting).

The ordinary meaning of 'return' is 'to bring, send, or put (a person or thing) back to or in a former position' That describes precisely what petitioners are doing to the Haitians. By dispensing with ordinary meaning at the outset, and by taking instead as its starting point the assumption that 'return,' as used in the Treaty, 'has a legal meaning narrower than its common meaning,' the majority leads itself astray.

Id. (Blackmun, J., dissenting) (citations omitted).

269. *Id.*; see *supra* notes 245-67 and accompanying notes (describing majority's analysis). In support of his interpretation, Justice Blackmun cites *Le Monde*, a French newspaper, which in a current article used "refouler" to describe the American actions. *Id.* (citing *Le bourbier haïtien*, LE MONDE, May 31-June 1, 1992.)

270. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2570-71 (Blackmun, J., dissenting (1993)) (citing *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), *Arizona v. California*, 292 U.S. 341 (1934), Vienna Convention, *supra* note 60, art. 32 1155 U.N.T.S. at 340, 8 I.L.M. at 692).

271. See *supra* note 266 (describing Baron's remarks).

272. *Sale*, 113 S. Ct. 2570-71 (Blackmun, J., dissenting). As Justice Blackmun noted:

[T]he United States delegate to the Committee . . . [stated] 'Whether it was a question of closing the frontier to a refugee who asked admittance, or of

cluded that the remarks on which the majority relied were not considered official interpretations because they were not "agreed to" or "adopted," as were the official amendments to the 1951 Convention.²⁷³

The dissent also found section 243(h) to be "unambiguous."²⁷⁴ Justice Blackmun believed that the INA's restriction on the Attorney General's conduct also applied to the President and the Coast Guard.²⁷⁵ According to Justice Blackmun, the majority ignored a portion of the INA that confers upon the Attorney General the authority and duty to protect U.S. borders.²⁷⁶ Because the interdiction program was implemented to protect U.S. borders, this provision indicates that the interdiction policy was within the Attorney General's jurisdiction, therefore mandating screening of the Haitians for potential refugees under section 243 of the INA.²⁷⁷

Justice Blackmun claimed the majority understated the significance of the INA amendments, removing "within the United States" to create a unique meaning for "return."²⁷⁸ The dissent argued that "within the United States" referred only to individuals physically present in the United States.²⁷⁹ Justice Blackmun did not agree with the majority's holding that the phrase referred to exclusion proceedings and the decision in *Leng Ma Ma*.²⁸⁰ According to Justice Blackmun's analysis, the Refugee

turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be . . . he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.'

Id. at 2572 n.6. (Blackmun, J., dissenting) (citing Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Twentieth Meeting, U.N.Doc. E/AC.32/SR.20 PP54, 55, 11-12 (1950)).

273. *Id.* at 2572 (footnote omitted) (Blackmun, J., dissenting).

274. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2573 (1993) (Blackmun, J., dissenting).

275. *Id.* (Blackmun, J., dissenting).

276. *Id.* (quoting 8 U.S.C. § 1103(a)) (Blackmun, J., dissenting).

277. *Id.*

278. *Id.* at 2575.

279. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2575 (1993) (Blackmun, J., dissenting).

280. *Id.*; see *supra* notes 234-36 (discussing *Leng Ma Ma*); see also *supra* notes 80-89 and accompanying text (describing exclusion proceedings).

Act of 1980 confirmed that section 243(h)(1) of the INA applies to the high seas.²⁸¹ The Justice further pointed out that the INA clearly designates geographical locations in other sections when a limited geographic designation was intended.²⁸² The absence of such a reference in section 243(1)(h), therefore, indicates that the section applies both in and outside of the United States.²⁸³

Overall, Justice Blackmun found the majority's theory implausible and overly reliant on the presumption against extraterritorial construction.²⁸⁴ He concluded that the majority misused the presumption in this case because Congress intended to provide for extraterritorial application.²⁸⁵ Furthermore, Justice Blackmun believed that the legislation was expressly international, rather than exclusively directed to events occurring within the United States alone.²⁸⁶

III. THE U.S. SUPREME COURT'S MYOPIC HOLDING IN SALE IGNORES THE 1967 PROTOCOL & INTERNATIONAL HUMAN RIGHTS LAW

The 1951 Convention is ambiguous on the issue of extraterritorial effect. Due to the limited nature of the 1951 Convention, this ambiguity should be construed against extraterritorial application.²⁸⁷ The 1967 Protocol, however, altered the character of the 1951 Convention and created a more universal and flexible instrument for protecting refugees.²⁸⁸ While the 1967

281. *Sale*, 113 S. Ct. at 2574 (Blackmun, J., dissenting).

282. *Id.*

283. *Id.* (referring to 8 U.S.C. §§ 207-08 containing designations "overseas and "physically present in the United States, or at a land border or entry port."). As Justice Blackmun stated: Such designations indicate that "[w]hen Congress wanted a provision to apply only to aliens 'physically present in the United States . . . ' it said so." *Id.* at 2575 (Blackmun, J., dissenting) (citation and footnote omitted).

284. *Sale v. Haitian Centers Council, Inc.*, — U.S. —, 113 S. Ct. 2549, 2576 (Blackmun, J., dissenting).

285. *Id.*

286. *Id.* at 2576-77 (Blackmun, J., dissenting).

287. See *supra* notes 33-48 and accompanying text (describing Convention's history). When the 1951 Convention was promulgated, the drafters did not intend its non-refoulement provision to be applied extraterritorially. See *supra* note 22 (quoting Article 33 with non-refoulement provision). Furthermore, the 1951 Convention's limited purpose and scope precluded such a construction. See *supra* note 41 (quoting preamble of 1951 Convention).

288. See *supra* notes 49-54 and accompanying text (explaining 1967 Protocol).

Protocol created the option of extraterritorial application, it does not require it.²⁸⁹ That uncertainty can be resolved by applying the customary international law of human rights, which evinces a duty to avoid aiding or abetting human rights violators.²⁹⁰ The U.S. program to repatriate all Haitians, regardless of their refugee claims, violates this duty because it sends refugees back to face the same persecution they initially sought to escape.²⁹¹ Furthermore, the United States' conduct and the U.S. Supreme Court's decision set a dangerous international precedent.

A. *The 1951 Convention Does Not Apply Extraterritorially*

When interpreting the 1951 Convention, the Supreme Court, in *Sale v. Haitian Centers Council, Inc.*, relied heavily on the negotiating history of the 1951 Convention.²⁹² The Court's reliance on the ad hoc committee's records, however, was misplaced because the records were equally ambiguous.²⁹³ Extraterritorial application is not discussed at any point in the negotiating history.²⁹⁴ As the majority noted, with understatement, "[t]he nego-

289. *Id.*

290. *See supra* notes 97-115 and accompanying text (describing customary international law of human rights).

291. *See supra* notes 141-64 and accompanying text (detailing human rights conditions in Haiti).

292. *See supra* notes 262-67 (discussing Court's reliance on negotiating history).

293. *See* Andrew I. Schoenholtz, *Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol*, 7 *Geo. IMMIGR. L.J.* 67, 82-83 (1993) (indicating that conduct and form of minutes raise more questions than they answer).

294. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2562-63, 65 (1993). *See Eastern* 111 S. Ct. at 1498 (declining to adopt an interpretation of "lesion corporelle" in Warsaw Convention because there was "no evidence that the drafters or signatories . . . specifically considered" such an application). The Swiss and Dutch representatives, on whom the government and the majority relied, only objected to an obligation to "allow large groups of persons . . . to cross [their] frontiers." *Sale*, 113 S. Ct. at 2566. That does not relate to extraterritorial application. While the majority chose to construe as creating a 'general consensus' the statements of van Boetzelar and his report of conversations with an unknown number of other delegates, his statements were merely "placed on the record" without objection whereas others were "agreed to" or "adopted." *See supra* notes 262-67 (explaining majority's use of negotiating history); *Sale*, 113 S. Ct. at 2572 (Blackmun, J., dissenting). As Justice Blackmun observed,

It should not be assumed that other delegates agreed with the comment simply because they did not object to their colleague's request to memorialize it All that can be said is that at one time Baron van Boetzelar remarked

tiating history . . . is not dispositive.”²⁹⁵

If the Court had relied more heavily on the historical context in which the 1951 Convention was drafted,²⁹⁶ the Court would not have reached the inadequately supported conclusion that the drafters expressly considered and rejected extraterritorial application.²⁹⁷ The history of the 1951 Convention and the

that ‘he had gathered’ that there was a general consensus, and that his interpretation was placed on record.

Id.

295. *Sale*, 113 S. Ct. at 2567 (Blackmun, J., dissenting).

296. *See Eastern*, 111 S. Ct. at 1502 (using historical context in which Warsaw Convention was drafted.)

297. *See supra* notes 245-67 and accompanying text (presenting Court’s holding). While the Court’s decision was partially correctly in holding that the 1951 Convention did not apply extraterritorially, the reasoning by which the Court reached that conclusion was flawed. First, the Court ignored the traditional method of analyzing the text of a treaty. The Court, instead, looked to Article 33(2), the INA, and an old immigration case to give the 1951 Convention meaning. *See Sale*, 113 S. Ct. at 2563 (“Article 33.1 uses the words ‘expel or return (‘refouler’)’ as an obvious parallel to the words ‘deport or return’ in § 243(h)(1).”).

The Court cannot accurately interpret the drafters’ intent by using a U.S. statute and a U.S. case which post-date the 1951 Convention. *See Eastern*, 111 S. Ct. at 1495 (declining to interpret French term in the Warsaw Convention using cases decided after Convention was drafted). *Leng May Ma* was decided in 1958 and 8 U.S.C. § 1253(h), 66 Stat. 214 (“Withholding of deportation or return”) was enacted in 1952. It is highly unlikely that the policies on which these sources were based were the same as those used by the drafters of the 1951 Convention. *Eastern*, 111 S. Ct. at 1495. As Justice Blackmun observed in dissent, the majority was “reasoning backwards” by looking to the American scheme to illuminate the Treaty. *Sale*, 113 S. Ct. at 2575 n.13 (Blackmun, J., dissenting).

Second, the Court failed to fully consider the plain meaning of the text before seeking to create another meaning. Such an examination would have provided a stronger basis for the Court’s subsequent steps. *Id.* at 2563-64; *supra* notes 245-67 and accompanying text. As the Supreme Court noted, “return” is modified by “the parenthetical reference to “refouler,” a French word that is not an exact synonym for the English word “return.” *Sale*, 113 S. Ct. at 2563-64. Although the Vienna Convention indicates that the Court could find a special interpretation of a term where they can establish that the drafters so intended, the Court over-relied on dictionary translations of the text which merely highlighted the 1951 Convention’s ambiguity rather than resolving it. Vienna Convention, *supra* note 60, art. 31(4), 1155 U.N.T.S. at 340, 8 I.L.M. at 692.

Further, the phrase “at a border,” as used in the Court’s definition, does not necessarily follow from the translations selected. *See supra* note 258 and accompanying text (explaining Court’s definition of “refouler”); *Sale*, 113 S. Ct. at 2564; *see also supra* note 257 and accompanying text (explaining the dictionary translations on which the Court relied). One can be repulsed, repelled or driven back from any point, including on the high seas, not necessarily at a border. *See Sale*, 113 S. Ct. at 2569-70 (Blackmun, J., dissenting). The dictionary translations do not resolve the ambiguity of the text nor do they merit the reliance that the majority placed in them.

However, despite this lapse, the Court correctly found that the parties intended to

context in which it was concluded show that the drafters simply never addressed the extraterritorial application of the 1951 Convention.²⁹⁸ The ad hoc committee did not address such an application, because the refugee movements to which the committee was reacting were products of World War II, and thus, within Europe, across land borders, and did not involve any extraterritorial areas.²⁹⁹

The treaty's references to "events occurring in Europe" highlight the focus of the committee's intentions.³⁰⁰ The preamble of the 1951 Convention also indicates the Convention's limited purpose.³⁰¹ The statement of intent in the preamble indicates that the agreement was to be merely an incremental improvement over previous agreements.³⁰² While the inter-war agreements detailed in Article 1(A)(1) protected a small group

give "return" a special meaning and that "refouler" was included expressly to "clarify the non-legal term 'return.'" Stenberg, *supra* note 4, at 200 (footnote omitted); see Gluck, *supra* note 187, at 880 ("('refouler') clouds the plain meaning of the provision"). According to article 33 of the Vienna Convention, "[w]hen a treaty has been authorized in two or more languages, the text is equally authoritative in each language The terms of a treaty are presumed to have the same meaning in each authentic text." Vienna Convention, *supra* note 60, art. 33, 1155 U.N.T.S. at 341, 8 I.L.M. at 691-92. Notably, while the English text of the 1951 Convention, containing the French word "refouler," is authentic, the French version does not include an equivalent English language parenthetical modifier. See 1951 Convention, *supra* note 1, art. 33, 46, 19 U.S.T. at 6276, 6281, 189 U.N.T.S. at 177, 184; see also Sale, 113 S. Ct. at 2570 n.5 (Blackmun, J., dissenting). This difference indicates that the phrase "return ('refouler')" was "not susceptible to a plain language analysis" and the Court was correct in using other tools of interpretation to resolve the ambiguity. *McNary*, 969 F.2d at 1362 (Walker, J., dissenting).

298. See *supra* notes 33-48 and accompanying text (presenting history of Convention indicating failure to address extraterritorial application)

299. *Id.* "As the terms of the [1951 Convention] indicate, the drafters assumed that the refugees would be either within the country of refuge or at [its] border." Schoenholtz, *supra* note 294, at 75. A noteworthy exception occurred in 1939 when the United States and Cuba refused to allow the St. Louis, a ship carrying over 930 Jews fleeing Germany, to dock. Myra MacPherson, *The Excluded; Supreme Court Exclusion of Haitian Refugees*, *NATION*, Apr. 6, 1992, at 436. However, the 1951 Convention, even under the Supreme Court's limited interpretation, would have prevented the return of the refugees on board the St. Louis because they were initially rejected from Cuban territorial waters and were not on the high seas as were the Haitian refugees. *Id.*

300. See *supra* note 33 (quoting Article 1(B)(1) of 1951 Convention).

301. See 1951 Convention, *supra* note 1, pmb., 19 U.S.T. at 6260, 189 U.N.T.S. at 150; see also *supra* note 41 and accompanying text (quoting preamble of 1951 Convention); Vienna Convention, *supra* note 60, art. 31(2), 1155 U.N.T.S. at 340, 8 I.L.M. at 691-92 ("The context for the purpose of the interpretation of a treaty shall . . . includ[e] its preamble.").

302. See *supra* note 52 (quoting Preamble of 1967 Protocol).

of specifically named European refugees,³⁰³ the drafters of the 1951 Convention intended to expand protection to all refugees from pre-1951 events.³⁰⁴

The 1951 Convention was a narrow, remedial agreement intended to deal with the “result[s] of events occurring before 1 January 1951” in Europe.³⁰⁵ The terms of the 1951 Convention demonstrate that the signatory states were not prepared to accept open-ended obligations for the indefinite future.³⁰⁶ Overall, the political tensions of the late 1940’s and early 1950’s were not conducive to an agreement of any greater scope.³⁰⁷ Therefore, interdiction of refugees on the high seas was not within the purpose contemplated by the contracting parties.³⁰⁸ Applying the terms of the 1951 Convention to the Haitians would endow

303. See *supra* note 37 (showing limitations written into inter-war agreements).

304. See 1951 Convention, *supra* note 1, art. 1(A)(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

305. 1951 Convention, *supra* note 1, art. 1(A)(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

306. Martin, *supra* note 188, at 16 n.3. See ROBINSON, *supra* note 33, at 8 (“The restrictive nature of [the] stipulations was due mainly to the desire of the framers of the Convention to reach unanimity in the Conference and not to write a document which may be ideal in its wording but would not be acceptable to many governments.”); see also 23 INT’L MIGRATION REV. 567 (1989) (“To have a fair chance for effective implementation, [a] norm must not depart too radically from what key political actors are prepared to accept.”) (footnote omitted).

307. See *supra* note 307 (discussing atmosphere of 1940-1950). The statements made by the Dutch delegate to the Conference clearly reflect a concern for the Netherlands’ sovereignty and the integrity of its borders. See *supra* note 266 (presenting Baron’s statement).

The 1951 Convention was drafted during a period when national sovereignty was a significant force. David A. Martin, *Kurds and Haitians: From Refugee Legalisms to Humanitarian Intervention?*, 86 AM. SOC. INT’L. PROC. 623, 629 (1992). Explaining the constrained political atmosphere prevalent in 1951 Martin stated:

Moreover — and this is crucial — [the Convention] was adopted at a time when national sovereignty loomed large As a result, in 1951 it seemed that if the world community were going to act concretely to assist people threatened . . . it would simply have to wait for individuals to cross a national boundary on their own initiative By that point, of course, their treatment was in the hands of the haven states.

Id.

308. Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325, 329 (1993) (“An exodus by sea was clearly not within [the Dutch delegate’s] or the other delegates’ contemplation.”); Schoenholtz, *supra* note 294, at 6 (“The notion that a contracting state would reach beyond its territory to seize and return refugees to authorities who would persecute them was unimaginable.”); Sale v. Haitian Centers Council, Inc., — U.S. —, 113 S. Ct. 2549, 2565 (1993) (observing that “[t]he drafters of the Convention and the parties to the Protocol . . . may not have

the 1951 Convention with a new purpose and a more flexible character than originally intended.³⁰⁹

B. *The United States Is Obligated to Protect the Haitian Refugees Under the 1967 Protocol and International Human Rights Law*

While the Court drew the correct conclusions regarding the 1951 Convention,³¹⁰ the Court erroneously ignored the U.S. obligation under the 1967 Protocol and international human rights law.³¹¹ The 1967 Protocol and current international human rights law dictate that refoulement is prohibited on the high seas.³¹² The 1967 Protocol alone makes it possible to extend Article 33 of the 1951 Convention to the high seas, but does not mandate its extension. This uncertainty can be settled by applying customary international human rights law, which evinces a duty to avoid aiding or abetting human rights violators.³¹³

1. *The 1967 Protocol*

The 1967 Protocol altered the basic character of the 1951

contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape”).

309. *See supra* note 67 and accompanying text (discussing method of determining character of treaties).

310. *See supra* notes 259-67 and accompanying text (setting forth majority's analysis of 1951 Convention); *see also* notes 293-300 and accompanying text (discussing Court's conclusion that 1951 Convention, when considered alone, does not apply extra-territorially).

311. *See* ROBERTSON, *supra* note 94, at 1 (“One of the most striking developments in international law since the end of the Second World War has been a concern with the protection of human rights.”). Additionally, Robertson and Merrills observed that

[b]etween the first edition of [their] book in 1972 and the second, ten years later, the importance of human rights in international affairs increased immeasurably. The United Nations Covenants of 1966 came into force; the Helsinki Agreement on Security and Cooperation in Europe was concluded; the American Court of Human Rights was set up and the case law of the European Commission and Court of Human Rights underwent a rapid and dramatic development. In the period since 1982 these advances have been consolidated and extended and progress had been made on a number of other fronts.

Id. at v. *See supra* notes 245-67 and accompanying text (presenting court's analysis).

312. *See supra* notes 48-54 and accompanying text (describing 1967 Protocol); *see also supra* notes 97-115 and accompanying text (describing international human rights law).

313. *See supra* notes 97-115 and accompanying text (explaining international human rights law).

Convention.³¹⁴ Just as the 1951 Convention was an incremental step forward from the inter-war agreements, the 1967 Protocol was a step forward from the 1951 Convention.³¹⁵ In expanding the application of the 1951 Convention, the 1967 Protocol's preamble points to the development of new refugee problems since the 1951 Convention was drafted, and the intent to accord equal status to all migrants fitting the 1951 Convention's definition of a refugee.³¹⁶ The United States obligated itself to abide by the 1951 Convention through the 1967 Protocol.³¹⁷

The drafters of the 1967 Protocol manifested an intent to broaden the scope of the 1951 Convention sufficiently to encompass future needs.³¹⁸ The 1967 Protocol's non-specific reference to new situations and the elimination of the January 1951 limitation indicate that the treaty sought to extend the protections set forth in the 1951 Convention.³¹⁹ In addition, the 1967 Protocol's wording suggests that the protections asserted in the 1951 Convention should no longer be considered in their original context.³²⁰ Though the 1967 Protocol broadens the ambit of where Article 33 may be applied, it does not answer the question of whether Article 33 extends to the high seas. While the 1967 Protocol created the option of extraterritorial application, it does not require it.³²¹ The flexible character of the 1967 Protocol, however, when given a good faith interpretation in the con-

314. See *supra* notes 49-54 and accompanying text (explaining how 1967 Protocol altered 1951 Convention).

315. *Id.*; see *supra* note 18 (quoting 1967 Protocol).

316. *Id.*, 19 U.S.T. at 6225, 606 U.N.T.S. at 268; see *supra* note 52 (quoting Preamble to 1967 Protocol).

317. 1968 Protocol, *supra* note 19, T.I.A.S. No. 6577, 649 U.N.T.S. 372.

318. MARTIN, *supra* note 188, at 16 n.3. Under the 1951 Convention, the definition of refugee was limited

to those who were outside their home countries owing to a well-founded fear of persecution as a result of events occurring before January 1, 1951 - a strong sign that the participating governments were not prepared to take on open-ended obligations for the indefinite future. By 1967, this concern had diminished, and a Protocol to the Convention was drafted removing the dateline limitation and thus converting the treaty to one with more universal scope.

Id. (citations omitted).

319. See *supra* note 52 (quoting Preamble of 1967 Protocol); see also *supra* notes 49-54 and accompanying text (describing effect of 1967 Protocol on 1951 Convention).

320. See *Coriolan v. Immigration and Naturalization Service*, 559 F.2d 993, 996-97 (5th Cir. 1977) (noting that 1967 Protocol represented departure from attitudes prevalent in 1950's); *supra* notes 32-48 and accompanying text (describing 1951 Convention's protections and original context).

321. See *supra* notes 49-54 and accompanying text (describing 1967 Protocol).

text of international human rights law, suggests that the treaty should apply on the high seas.³²²

The Supreme Court should have interpreted the 1967 Protocol in light of the changes from the 1951 Convention.³²³ According to the Vienna Convention, a treaty should be interpreted in good faith and in accordance with the plain meaning of its terms.³²⁴ The terms must be considered in their context and in light of the treaty's object and purpose.³²⁵ The object and purpose of the 1967 Protocol was to widen the ambit of the 1951 Convention.

2. International Law of Human Rights Protection and Non-refoulement

The Court should have resolved the ambiguity in the 1951 Convention by taking into account customary international human rights law.³²⁶ According to the Vienna Convention, the Court should have taken into account the customary international law of human rights when interpreting an agreement.³²⁷ The modern state of human rights law dictates that non-refoulement extend to refugees on the high seas.³²⁸

Refoulement contributes to human rights violations because it entails delivering refugees into the hands of those committing the violations.³²⁹ Under customary international law, states have a duty to avoid aiding and abetting human rights violations.³³⁰ Therefore, because the Haitians' human rights are

322. See *supra* notes 55-69, 108-19 and accompanying text (discussing interpretation of international treaty and international human rights law).

323. See *Coriolan*, 559 F.2d at 996-97 (observing that 1967 Protocol changed how refoulement and section 243(h)(1) of the INA were to be considered); *supra* notes 49-54 and accompanying text (describing how 1967 Protocol affected 1951 Convention).

324. Vienna Convention, *supra* note 60, art. 31, 1155 U.N.T.S. at 340, 8 I.L.M. 691-92.

325. *Id.*

326. See *supra* notes 116-19 and accompanying text (describing customary international law).

327. Vienna Convention, *supra* note 60, art. 31(3)(c), 1155 U.N.T.S. at 340, 8 I.L.M. at 691-92.

328. See *supra* notes 97-115 and accompanying text (explaining international law of human rights).

329. See *supra* notes 1-3 and accompanying text (discussing problems refugees face).

330. Schoenholtz, *supra* note 294, at 11.

often violated when they are returned to Haiti,³³¹ the United States is barred, pursuant to the customary international law of human rights,³³² from returning the interdicted refugees to Haiti. The Court's decision permits the United States to violate its international obligations under international human rights law.³³³

3. *Obligation to Avoid Aiding and Abetting Human Rights Violations*

Under customary international law, the United States is obligated to avoid actions supporting or enabling violations of recognized human rights.³³⁴ The contemporary international law of human rights evinces general acceptance of the idea that all individuals have rights that the state must recognize, respect, and ensure.³³⁵ The duty to avoid measures that enable third parties to violate human rights is generally accepted and is *opinio juris* as required for the duty to be customary international law.³³⁶

a. General Acceptance

The widespread acknowledgement of a duty to avoid assisting human rights violations is manifest by U.S. national legislation,³³⁷ international agreements, including the Convention

331. See *supra* notes 141-64 and accompanying text (describing human rights conditions in Haiti).

332. See *supra* notes 97-115 and accompanying text (presenting international human rights law).

333. See *supra* notes 242-67 and accompanying text (discussing Court's decision).

334. See, e.g., Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 3, 24 (Interim Protection Order of Apr. 8) (ordering Yugoslavia to ensure that its military does not commit genocide as well as ordering both party-governments to avoid acts enabling commission of genocide or extension of dispute at issue). See also *supra* notes 97-115 (discussing protected rights).

335. RESTATEMENT (THIRD), *supra* note 26, Introduction to ch. 3, prt. VII; see *supra* note 26 and accompanying text (presenting general acceptance of individuals' rights).

336. See *supra* notes 116-19 (discussing how a duty becomes customary international law).

337. See 22 U.S.C. §§ 2304(a), 262d-1, 2151n(a) (requiring abstention from behavior that would assist nations violating human rights); 7 U.S.C. § 1733(f) (requiring abstention from behavior that would assist nations violating human rights); 12 U.S.C. §§ 635(b)(1)(B), 635i-8(c)(4) (requiring abstention from behavior that would assist nations violating human rights); 19 U.S.C. §§ 2432(a), 2439(a) (requiring abstention from behavior that would assist nations violating human rights).

Against Torture,³³⁸ and numerous international extradition treaties.³³⁹ The United States government already acknowledges an obligation to avoid actions supporting or aiding a nation with a poor human rights record. Such acknowledgement is manifest in numerous U.S. statutes, requiring that the U.S. government take into account human rights considerations.³⁴⁰ For example, Title 22, Subchapter II, entitled "Military Assistance and Sales," requires that the United States observe human rights as a principle goal of external policy.³⁴¹ Chapter 7, "International Bureaus, Congresses, Etc." of the same title, and Title 7, Chapter 41, "Agricultural Trade Development and Assistance," also demonstrate the same obligation by prohibiting the United States from aiding countries known to violate human rights.³⁴²

In addition to U.S. domestic law, extradition treaties and the Convention Against Torture also demonstrate general acceptance of the duty to avoid acts that enable third parties to violate human rights.³⁴³ International observance of human rights is specifically demonstrated in extradition treaties.³⁴⁴ Most bilateral extradition agreements prohibit extradition for political offenses³⁴⁵ or offenses for which the extraditee would be subject to capital punishment in the requesting State but not in the requested State.³⁴⁶ Such provisions demonstrate accept-

338. Convention Against Torture, *supra* note 98.

339. *See supra* notes 104-05 and accompanying text (explaining extradition treaties).

340. *See supra* note 97 (citing sections of United States Code requiring abstention from behavior that would assist nations violating human rights).

341. 22 U.S.C. § 2304(a) (1993); *see supra* note 97 (explaining section 2304(a)).

342. *See supra* note 97 (describing provisions of United States Code barring United States from aiding countries that violate human rights).

343. *See supra* notes 104-05 and accompanying text (discussing extradition treaties and Convention Against Torture).

344. *See supra* note 105 (discussing extradition treaties). Although the Supreme Court in *Sale* distinguished aliens within U.S. territory from those who, like the Haitians, are beyond it, for the purpose of demonstrating international law, the two are analogous. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2560-61 (1993). An individual facing extradition is within U.S. territory where extradition treaties apply but is also, like a refugee, under the control and jurisdiction of a government and is facing return to a foreign territory. *See BLACK'S LAW DICTIONARY* 526 (6th ed. 1990). Extradition is defined as "[t]he surrender by one . . . country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other." *Id.*

345. *See supra* note 108 (indicating frequent use of political offense exception).

346. *See supra* note 108 and accompanying text (providing examples of extradition treaties that include political and capital punishment exceptions). The term "request-

ance of the duty to avoid delivering an individual to a potential persecutor.

The Convention Against Torture also contains a non-refoulement provision in Article 3(1).³⁴⁷ Notably, the inclusion of non-refoulement in the Convention Against Torture³⁴⁸ is another indication of how the duty has been generally accepted. The use of non-refoulement in the Convention Against Torture also specifically demonstrates how the Supreme Court's interpretation of Article 33 of the 1951 Convention is not in accordance with how non-refoulement is now used to protect refugees from human rights violations.³⁴⁹ Article 3(1) of the Convention Against Torture uses the phrase "return ('refouler')" and is very similar to Article 33(1) of the 1951 Convention,³⁵⁰ thus presenting a useful parallel to illustrate the inadequacy of the Supreme Court's interpretation.

Because the 1951 Convention and the Convention Against Torture use the phrase "return ('refouler')" in the same way, the phrase should have the same definition in the context of both treaties. The Supreme Court defined "return ('refouler')" as "a defensive act of resistance or exclusion at a border."³⁵¹ Using the Court's definition from *Sale*, "return ('refouler')" in Article 3 of the Convention Against Torture should be construed to protect only refugees within state territory.³⁵² Other articles of the Convention Against Torture, however, indicate that it also applies beyond state territory and suggest that the Supreme Court's definition is incorrect. Article 3(2) of the Convention Against Torture is different from its analog, Article 33(2) of the 1951 Convention. The Supreme Court, in part, based its interpretation of "return ('refouler')" on Article 33(2)'s reference to in-country refugees.³⁵³ Article 3(2) of the Convention Against Tor-

ing State" refers to country making the extradition request. SWEENEY, *supra* note 62, at 146. The term "requested State" refers to the country receiving the extradition request. *Id.*

347. See *supra* note 107 and accompanying text (setting forth non-refoulement provision of Convention Against Torture).

348. *Id.*

349. Convention Against Torture, *supra* note 98.

350. See *supra* note 107 (quoting Article 3 of Convention Against Torture).

351. *Sale v. Haitian Centers Council, Inc.*, — U.S. —, 113 S. Ct. 2549, 2564 (1993)

352. *Id.*

353. See *supra* notes 22, 259-61 and accompanying text (presenting text and Court's analysis of Article 33(2) of the 1951 Convention).

ture does not include the language on which the Court relied.³⁵⁴ In light of the identical use of “return (‘refouler’) in the Convention Against Torture, the lack of a similar reference removes some of the basis for using the Court’s definition, because the reference could not have been relevant to the phrase’s meaning in the Convention Against Torture.

Furthermore, while the Court in *Sale* based its findings on the lack of textual reference to extraterritorial application,³⁵⁵ Article 5(1)(a) of the Convention Against Torture specifically commands that State Parties establish jurisdiction over acts committed in any territory under its jurisdiction or on board any vessel registered in that country.³⁵⁶ The general reference to vessels, in addition to “territory under its jurisdiction,” indicates that signatories are bound by the treaty no matter where a proscribed act occurs, including the high seas.³⁵⁷ Such a construction is appropriate given that torture and other human rights violations are no more permissible if conducted outside national territory.³⁵⁸ Furthermore, an interpretation of the Convention Against Torture and “return (‘refouler’)” that grants jurisdiction over acts on the high seas, but does not prohibit refoulement on the high seas, would be “absurd.”³⁵⁹

Because the Convention Against Torture clearly contemplates that State responsibility extend to the high seas, and because the text does not otherwise expressly limit Article 3(1) to state territory, the Supreme Court’s territorial definition of refoulement violates Article 3(1) of the Convention Against Tor-

354. See Convention Against Torture, *supra* note 98, art. 3, 23 I.L.M. at 151, U.N. Doc. A/C.3/39/L.40, at 4.

355. See *supra* notes 262, 263-67 and accompanying text (discussing Court’s interpretation of 1951 Convention).

356. Convention Against Torture, *supra* note 98, art. 5, 23 I.L.M. at 150, U.N. Doc. A/C.3/39/L.40 at 4 (“offenses which are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State.”).

357. *Id.* The Article 2 duty to “prevent acts of torture in any territory under its jurisdiction” presumably binds states in regard to ships and aircraft as well. See *id.*, art. 2, 23 I.L.M. at 150-51, U.N. Doc. A/C.3/39/L.40, at 4. To restrict the duty to prevent to land only while mandating establishment of jurisdiction on the seas and in the air after the act is committed would be inconsistent.

358. See ROBERT BLACKBURN & JOHN TAYLOR, HUMAN RIGHTS FOR THE 1990’S 25-26 (1991).

359. See Vienna Convention, *supra* note 60, art. 32, 1155 U.N.T.S. at 340, 8 I.L.M. at 692 (recommending “supplementary means of interpretation” to avoid an “absurd or unreasonable” result).

ture.³⁶⁰ Consequently, the identical use of “return (‘refouler’)” in Article 3(1) and Article 33(1) of the 1951 Convention poses a distinct problem for which the most likely explanation is that the Supreme Court’s interpretation of “return (‘refouler’)” and the 1967 Protocol were incomplete.³⁶¹

The Court in *Sale* found that the 1951 Convention’s text demonstrates that the 1951 Convention was not intended to have extraterritorial effect.³⁶² The negotiating history and the point in time during which the 1951 Convention was promulgated, however, indicate that, instead, the parties merely did not contemplate extraterritorial effect.³⁶³ Prior to the 1967 Protocol, the Court’s interpretation of the 1951 Convention would have been sufficient to reach a decision.³⁶⁴ The United States’ accession to the 1967 Protocol, the development of the modern human rights regime, and the world’s increased experience with refugees, however, suggest that the Court should have looked beyond the 1951 Convention.

b. *Opinio Juris*

Nations have a “legal obligation”³⁶⁵ to avoid assisting human rights violations. This duty is reflected by the judgments rendered by the Inter-American Court of Human Rights in *Velasquez Rodriguez*³⁶⁶ and the European Court of Human Rights in *Soering v. United Kingdom*,³⁶⁷ as well as the holdings in a 1987 extradition case from the Supreme Constitutional Court of Germany³⁶⁸ and in *Kindler v. Canada* from the Supreme Court of Canada. In all four cases, the courts recognized that governments have a

360. See *supra* note 258 and accompanying text (setting forth Supreme Court’s definition).

361. See *supra* notes 268-87 and accompanying text (discussing Justice Blackmun’s dissent and criticism of majority’s interpretation of 1951 Convention).

362. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2563 (1993).

363. See *supra* notes 33-48, 293-310 and accompanying text (discussing negotiating history of 1951 Convention).

364. See *supra* notes 262-67 and accompanying text (presenting Court’s interpretation).

365. See *supra* note 117 (describing *opinio juris*).

366. Arthur Helton, *The Malaysian Policy to Redirect Vietnamese Boat People: Non-refoulement as a Human Rights Remedy*, 24 N.Y.U. J. INT’L L. & POL. 1203, 1212 (1992) [hereinafter *Malaysian Policy*].

367. See *supra* notes 126-31 and accompanying text (setting forth facts in *Soering*).

368. Judgement of Mar. 31, 1987, BVerfG, 1987 Neue Juristische Wochenschrift [NJW] 2155 (F.D.R.).

duty to refrain from otherwise non-culpable conduct where such acts would enable someone else to violate human rights. In *Velasquez*, the Inter-American Court noted that state conduct can infringe upon human rights without being the direct cause of the violation.³⁶⁹ Though *Soering*, the German case, and *Kindler* involved extradition, rather than the interdiction and return of a refugee, the cases are nevertheless analogous. In all four cases the courts demonstrated that conditions in the receiving country are relevant to whether an individual should be returned.³⁷⁰

The controlling factor in *Velasquez*, *Soering*, the German case, and *Kindler* is the principle forbidding nations from deliberately exposing an individual to a risk of a human rights violation.³⁷¹ This principle is already acknowledged and accepted when applied to the non-refoulement of individuals within state territory.³⁷² Given that the focus of non-refoulement is on keeping the refugee out of a perilous situation, the necessary conclusion is that the general principles of human rights would “enhance the ambit of protection provided under [the principle of] non-refoulement.”³⁷³

369. See *supra* notes 121-25 (presenting *Velasquez* Judgement).

370. See *supra* notes 126-31 and accompanying text (setting forth facts of *Soering*). Although U.S. courts defer such determinations to the Secretary of State, such conditions are taken into account, albeit at the extradition treaty making phase. See *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990). Although the decisions from international courts such as the International Court of Justice, Inter-American Court of Human Rights and the European Court of Human Rights are clearly indicative of customary international law, their decisions are not binding on all nations. See *supra* note 335 (presenting example of an International Court of Justice order reflecting duty to avoid acts contributing to human rights violations). The United States, specifically, has signed but not ratified the American Convention on Human Rights which established the Inter-American Court, therefore the United States is not legally bound by the court's judgements. Mary C. Parker, 'Other Treaties: The Inter-American Court of Human Rights Defines its Advisory Jurisdiction', 33 AM. U.L. REV. 211, 213 (1983); see *supra* note 122 (discussing structure of Inter-American Court). The United States has also been reluctant to abide by decisions of the International Court of Justice. See, e.g., Richard B. Bilder, *The Brendan Brown Lecture: The U.S. & the World Court in the Post-"Cold War" Era*, 40 CATH. U. L. REV. 251 (1991) (discussing U.S. position toward International Court of Justice). However, among other nations, opinions from international courts are accorded considerable respect. Parker, *supra* note 370, at 217.

371. *Malaysian Policy*, *supra* note 366, at 1213.

372. 1951 Convention, *supra* note 1, art. 33, 189 U.N.T.S. at 176, 8 I.L.M. at 6276.

373. *Malaysian Policy*, *supra* note 366, at 1217; see Arthur Helton, REFUGEES, July 1992, at 40 (“Repatriation should be promoted only if there is no longer a likelihood of recurrence of the human rights abuses that precipitated flight.”); see also RESTATEMENT (THIRD), *supra* note 26, § 701 cmt. c. (observing that human rights “agreements are for the benefit of individuals . . . subject to the jurisdiction of the promisor state.”).

As shown by the aforementioned cases, U.S. statutory provisions, and contemporary human rights agreements, states consider it their duty under customary international law to safeguard human rights.³⁷⁴ This duty applies without regard to geographical location.³⁷⁵ The ambit of non-refoulement, therefore, must include refugees found on the high seas. Refoulement from international waters constitutes as great a violation of acknowledged norms as would refoulement from within Europe.³⁷⁶

C. A Powerful International Precedent

While the current level of emigration from Haiti may be a temporary phenomenon primarily affecting the U.S., the Supreme Court's decision in *Sale v. Haitian Centers Council, Inc.* could have broader ramifications.³⁷⁷ State practice is a vital component in the development of customary international law and in the interpretation of international agreements.³⁷⁸ Therefore, the two years during which the policy was in effect will influence other nations analyzing the customary international law of human rights.

According to the Office of the United Nations High Commissioner for Refugees, the United States is the only nation ever to reach beyond its territorial waters and seize possible refugees for the sole purpose of returning them to the state from which they fled.³⁷⁹ Furthermore, the Supreme Court's holding in *Sale* is the sole judicial opinion on the issue of whether refugees on the high seas may be returned to their persecutors. Thus, this decision has the appearance of being dispositive. Finally, the United States' political power is quite significant internationally.³⁸⁰ Therefore, the Supreme Court's decision may serve as an

374. See *supra* notes 108-19 and accompanying text (presenting customary international law of human rights).

375. See BLACKBURN, *supra* note 359, at 25-26.

376. See *supra* note 22 (presenting text of Article 33 of 1951 Convention which expressly prohibits refoulement of refugees within Europe).

377. See *supra* notes 182, 243-65 and accompanying text (describing emigration and majority's decision).

378. See *Filartiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (citing *United States v. Smith*, 18 U.S. 153, 160-61 (1820); *The Paquete Habana* 175 U.S. 677, 700 (1900)).

379. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2459 (92-344) 11, available in LEXIS, Genfed library, Briefs file.

380. *Indonesia Signs Agreement to Return Boat People*, Nov. 8, 1993, Reuters, available

influential international precedent. This opinion may hold greater significance for foreign courts and governments examining the issue than will the United States' current policy, because it more directly addresses the question of whether the 1951 Convention applies on the high seas. In the future, this may lead other countries, facing a mass migration to their shores, to emulate the Haitian interdiction program.³⁸¹

CONCLUSION

By refouling all Haitian immigrants without identifying those immigrants who are refugees, the United States is exposing persecuted Haitians to continued torture, arbitrary detention, and other forms of persecution.³⁸² As a mechanism to ensure compliance with the 1967 Protocol, the INA, and the peremptory norm of human rights protection, the Supreme Court should have recognized that non-refoulement is now mandated on the high seas just as it has been on land. Both the United States' behavior and the Supreme Court's holding make a significant statement to other nations in similar situations. However, other nations should recognize that neither statement reflects the proper treatment of refugees. Consequently, they can not be a basis for replicating U.S. actions. No refugees, regardless of where they are found, may be returned to the land they have fled.

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in LEXIS, Nexis library, INT-NEWS file [hereinafter *Indonesia*]. Ironically, the strength of the United States' opinion in refugee matters was made clear in the late 1980's when the United States condemned Hong Kong for its plan to forcibly repatriate Vietnamese boat people. *Id.* In response to U.S. criticism, the program was significantly curtailed. *Id.*

381. See, e.g., *Malaysian Policy*, *supra* note 366, at 1203-07 (discussing refugee problems facing Malaysia). Malaysia already has a notorious record for towing Vietnamese refugees out of its territorial waters. Malaysia, however, does not return the immigrants to Vietnam; instead it usually resupplies and repairs the vessels then lets them proceed to another country. *Id.* at 1207; *Indonesia*, *supra* note 380, at 1.

382. *Sale v. Haitian Centers Council, Inc.*, ___ U.S. ___, 113 S. Ct. 2549, 2554 (1993). See *supra* notes 110-15 and accompanying text (observing that torture, arbitrary detention and other forms of persecution are violations of customary international law of human rights).

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