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RACE AND FOREIGN POLICY IN REFUGEE LAW: A HISTORICAL PERSPECTIVE OF THE HAITIAN REFUGEE CRISES

INTRODUCTION

Through the Supremacy Clause of the United States Constitution, treaties to which the United States is a party are the supreme laws of the land.¹ This took on new meaning with potentially far-reaching implications in the wake of World War II. The events leading up to the war and the brutality of the Holocaust spawned previously unparalleled international cooperation in establishing protections for basic human rights.² The outrage over wartime atrocities formed the foundation of the United Nations, and the various human rights instruments promulgated under its auspices both articulated and helped shape an international consensus regarding the protection of human rights.³

The United States ostensibly has been one of the leading proponents of international human rights, acceding to many major human rights treaties⁴ and playing a significant role in United Nations peace-keeping operations, such as those in the former Yugoslavia and Haiti. Reality, however, reveals the American government's commitment to the international protection of human rights is somewhat dubious. Illustrating this point is the opinion of George F. Kennan, one of the leading architects of United States foreign policy after World War II:

1. U.S. CONST. art. VI, cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

2. FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 6 (2d ed. 1996).

3. See generally *id.* at 6-13 (discussing the movement towards protecting international human rights, the formation of the United Nations, and the subsequent codification of human rights obligations under its charge).

4. Some notable treaties to which the United States is party include the United Nations Charter, the Protocol Relating to the Status of Refugees, the Organization of American States Charter, the Convention on the Political Rights of Women, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant of Civil and Political Rights, the Abolition of Forced Labour Convention, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and the International Convention on the Elimination of All Forms of Racial Discrimination, among others. See *id.* at 37-39.

We have about 50 percent of the world's wealth, but only 6.3 percent of its population. . . . In this situation, we can not fail to be the object of envy and resentment. Our real task in the coming period is to devise a pattern of relationships which will permit us to maintain this position of disparity . . . We need not deceive ourselves that we can afford today the luxury of altruism and world-benefaction. . . . We should cease to talk about vague and . . . unreal objectives such as human rights, the raising of living standards, and democratization. The day is not far off when we are going to have to deal in straight power concepts. The less we are then hampered by idealistic slogans, the better.⁵

All rhetoric aside, there is little indication that any subsequent administration has deviated from Kennan's fundamental assessment. Indeed, while claiming adherence to formal human rights protections, the United States has, at best, construed its international human rights obligations very narrowly. Nowhere is this more apparent than in American relations with Haiti. The United States government was exploiting the people of Haiti long before the pronouncements of postwar foreign policy pundits. Kennan's advice, however, at least implicitly recommended that the United States ignore the same principles of the postwar human rights treaties that it was ratifying at that time.⁶ The American government has done this with impressive resolve when dealing with Haiti.

The most recent chapter in Haiti's long but little-discussed history of exploitation at the hands of the United States—and the focus of this Comment—primarily involves American asylum laws as they pertain to Haitians. Specifically, when a line of United States supported dictators sent thousands of Haitian refugees to American shores, the superpower responded with the "Haitian Program."⁷ This program, carried out mostly through a series of executive orders and Immigration and Naturalization Service ("INS") procedures,⁸ virtually eliminated for most Haitian refugees the possibility of receiving any kind of asylum hearing for entry into the United States, let alone temporary protection.

In *Sale v. Haitian Centers Council, Inc.*,⁹ the Supreme Court considered one aspect of the Haitian Program that constituted a potential violation of America's international legal obligations, not to mention domestic law. These specific legal obligations are embodied in a

5. NOAM CHOMSKY, *THE CHOMSKY READER* 318 (James Peck ed., 1987) (quoting Policy Planning Staff No. 23, *Review of Current Trends in United States Foreign Policy*, Feb. 1948).

6. This is the author's interpretation of Kennan's advice.

7. See *infra* notes 78-141 and accompanying text.

8. See *infra* notes 78-96 and accompanying text.

9. 509 U.S. 155 (1993).

treaty to which the United States is a party, and are thus the "the supreme Law of the Land."¹⁰ The complaint was brought by the Haitian Centers Council on behalf of unnamed Haitian refugees being intercepted at sea by the United States Coast Guard and returned to the tempestuous situation in Haiti.¹¹ Haitian Centers Council challenged the interdiction program initiated under President Reagan and continued under Presidents Bush and Clinton.¹² The complaint alleged that the interdiction program violated the obligation of non-return under § 243(h) of the Immigration and Nationality Act of 1952 and corresponding obligations under Article 33 of the United Nations Protocol Relating to the Status of Refugees.¹³ Although the Court insisted that the complaint presented strictly legal issues,¹⁴ policy considerations proved difficult to escape. In particular, the Court's decision would favor either "vague" and "unreal" human rights objectives¹⁵ or the pragmatic criteria of United States foreign policy. The Court ultimately upheld the interdiction program, holding that the obligation of non-return embodied in both domestic and international laws did not extend beyond the territorial boundaries of the United States.¹⁶ In reaching this decision, unfortunately, the Court conformed to Kennan's prescription.

The Court's decision in *Sale* did not signal the end of the challenges to the Haitian Program, particularly the interdiction process. The postwar instruments that formed the backbone of the international human rights mandate also provided for various enforcement mechanisms. While the Court considered the *Sale* case, the complainants filed a petition with one such regional international legal forum, the Inter-American Commission on Human Rights ("the Commission").¹⁷ Apparently not constrained by the particular brand of "objectivity" typically employed by American courts,¹⁸ the Commission's recommendation in the 1996 Annual Report¹⁹ found that the United States shirked its obligation of non-return under Article 33 by interdicting the Haitian refugees.²⁰ In coming to this conclusion, the Commission expressly disagreed with the Supreme Court's holding that Article 33

10. U.S. CONST. art. VI, cl. 2.

11. *Sale*, 509 U.S. at 166.

12. *Id.* at 158-59.

13. *Id.* at 167.

14. *Id.* at 165-66.

15. See CHOMSKY, *supra* note 5, at 318.

16. *Sale*, 509 U.S. at 159.

17. Case 10.675, Inter-Am. C.H.R. 550, OEA/ser. L./V./11.84, doc. 51 (1997).

18. See *infra* notes 475-77 and accompanying text.

19. Case 10.675, Inter-Am. C.H.R. 550.

20. *Id.* at 599.

was not intended to apply extraterritorially.²¹ The Commission also considered more general interpretations of the “vague” and “unreal” human rights objectives that so vexed Kennan.²²

The Haitian Program, and the court decisions like *Sale* that approved it, elicited both criticism and praise. The debate over the Haitian Program, however, including the issues as they were framed by the Commission’s re-visitation of *Sale*, failed to address its significance as part of the historical context of Haitian-American relations. By failing to place the Haitian Program within this background, most commentators miss the racial contingencies of American asylum policies towards Haitians.

The history between the United States and Haiti is one that is fraught with racial tensions. An assessment of the refugee and immigration laws as a part of this history makes apparent the continuing nature of this racism. This Comment evaluates the United States’ use of asylum laws as a means of continued exploitation of the Haitian population.

Part I delineates the relevant international and domestic legal protections for refugees.²³ It offers a critical analysis of the policies that comprised the Haitian Program and the extent to which the Program complied with these legal protections. This section also outlines the litigation over the Haitian Program, both in domestic courts and before international forums.

Part II offers a critical analysis of the Supreme Court’s decision in *Sale* and compares its disposition with the decision of the Commission.²⁴ This section also advances a history of Haitian-American relations. This history provides the prism through which any adequate consideration of the Haitian Program must be viewed, and it is thus appropriately located in the analysis portion of this Comment. When viewed against this background, the shortcomings and limited nature of *both* the Court’s and the Inter-American Commission’s analyses are readily apparent. In an attempt to offer an alternative and more complete assessment of the Haitian Program, Part II compares the treatment of Haitian refugees with that of other refugee groups fleeing to the United States. Using the Haitian-American history and asylum statistics, the analysis breaks down the official justifications provided for the Haitian Program, its racial contingencies, and the

21. *Id.*

22. See CHOMSKY, *supra* note 5, at 318.

23. See *infra* Part I.

24. See *infra* Part II.

“position of disparity”²⁵ sought to be achieved by the American government through the application of the Haitian Program.

Finally, Part III briefly analyzes the shortcomings of both domestic and international legal processes and how they ultimately failed the Haitian refugees.²⁶ It also reconsiders the American policy toward the refugees within the international scheme of refugee protection. Specifically, it examines potential solutions to the continued subordination and exploitation of the Haitian population through American asylum policies. This section concludes with a critical assessment of the Eurocentric nature of the international scheme and its implications for refugees of color. The contention that “rich, white” countries were responsible for the postwar human rights instruments is not novel, but the case of Haiti illuminates the extent to which the “international protection of human rights” serves the purposes of the powerful, a characteristic with undeniable racial implications. The pattern is familiar.

I. BACKGROUND: NON-REFOULEMENT AND THE HAITIAN PROGRAM

The overwhelming majority of the Haitian population has long endured severe poverty and its concomitant political turmoil.²⁷ Haiti's tumultuous history reached new depths, however, under the harsh rule of Francois (“Papa Doc”) Duvalier and his son Jean-Claude (“Baby Doc”) Duvalier.²⁸ Their campaign of terror sent tens of thousands of Haitians seeking refuge on foreign shores throughout the 1970s and 1980s.²⁹ After Baby Doc and other interim military dictators were overthrown, Haiti enjoyed a relatively peaceful eight months during the presidency of the democratically elected Jean-Bertrand Aristide.³⁰ In September of 1991, however, Aristide fell victim to a military-led coup, and the poor Haitian masses once again set sail for foreign shores in astounding numbers.³¹

In order to cope with the overflow of Haitian refugees washing up on American beaches throughout the 1970s, 1980s, and 1990s, the United States enacted the so-called Haitian Program. This section will outline the formal international and domestic legal protection for ref-

25. See CHOMSKY, *supra* note 5, at 318.

26. See *infra* Part III.

27. See *infra* notes 287-343 and accompanying text.

28. See *infra* notes 317-31 and accompanying text.

29. See *infra* note 328 and accompanying text.

30. See *infra* notes 333-40 and accompanying text.

31. See *infra* notes 341-43 and accompanying text.

ugees known as "non-refoulement." When the Haitian Program is then explained against the backdrop of these legal obligations, the controversy over American policies is apparent.

A. *General Refugee Law*

Before examining the details of the Haitian Program, it is necessary to review some general principles of international human rights law, specifically treaty law, and their effects on domestic jurisprudence. Perhaps the most effective means of implementing international human rights law is through domestic judicial and legislative systems.³² States³³ can incorporate treaty law into their domestic systems in either or both of two main ways: the monist and dualist approaches. States following the monist approach simply accept international law as their domestic law, directly incorporating international legal obligations into their own legal systems.³⁴ Under the dualist approach, however, international law concerns only a State's relationship with other governments.³⁵ In other words, for international law to have any domestic effect, it must be specifically incorporated by national legislation.³⁶

The United States follows a combination of both approaches.³⁷ The Constitution provides that treaties are considered the supreme law of the land,³⁸ indicating adherence to the monist model by directly incorporating international treaty law as a part of domestic law. The doctrine of self-executing treaties first articulated by Chief Justice Marshall in *Foster v. Neilson*,³⁹ however, renders the United States approach somewhat dualist in practice.⁴⁰ This doctrine provides that a self-executing treaty is to be regarded "as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."⁴¹ Its practical effect is that non-self-executing treaties do not independently create a cause of action in United States

32. NEWMAN & WEISSBRODT, *supra* note 2, at 21.

33. "States" refers to the individual nations that make up the United Nations. *Id.* at 2-3.

34. *Id.*

35. *Id.*

36. *Id.* at 22.

37. *Id.*

38. U.S. CONST. art. VI, cl. 2.

39. 27 U.S. (2 Pet.) 253 (1829).

40. NEWMAN & WEISSBRODT, *supra* note 2, at 22.

41. *Foster*, 27 U.S. (2 Pet.) at 314.

courts.⁴² Thus, Congress must adopt implementing legislation that expressly embodies a particular treaty provision.⁴³

Naturally, conflicts arise between international and domestic laws. Where a treaty conflicts with the Constitution, the Constitution prevails.⁴⁴ When a treaty conflicts with federal legislation, the last in time prevails.⁴⁵ Typically, however, when a federal statute conflicts with pre-existing treaty obligations, courts will presume that Congress did not intend to override treaty provisions and will endeavor to construe them as consistent with each other, absent clear evidence to the contrary.⁴⁶

Using these guidelines, United States legislators and courts attempt to decipher American obligations under international law. These guidelines also provide the context for the following discussion of international and domestic instruments.

1. *The International Protection of Refugees*

The Convention Relating to the Status of Refugees⁴⁷ ("the Convention") was entered into force in 1954.⁴⁸ Although the United States was a signatory to the Convention, it did not ratify the treaty.⁴⁹ The United States did accede, however, to the subsequent Protocol Relating to the Status of Refugees⁵⁰ ("the Protocol"), which incorporated much of the Convention.⁵¹ The Convention protected only those per-

42. *Head Money Cases*, 112 U.S. 580, 598-99 (1884). Newman and Weissbrodt discuss the various standards for determining which treaties are self-executing, noting that Chief Justice Marshall initially emphasized the *language* of a treaty to decide if it was sufficiently definite and compulsory to be self-executing. NEWMAN & WEISSBRODT, *supra* note 2, at 22. Marshall later changed the standard, using instead the intent of the parties as a determining factor. *Head Money Cases*, 112 U.S. at 589. Recently, however, most human rights treaties are accompanied by a declaration pronouncing them non-self-executing. See NEWMAN & WEISSBRODT, *supra* note 2, at 22; see also JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 51-64 (1996) (discussing the various criteria that courts have developed for determining whether or not a treaty is self-executing).

43. See NEWMAN & WEISSBRODT, *supra* note 2, at 22.

44. *Reid v. Covert*, 354 U.S. 1, 16-17 (1956); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES § 115 cmt. a (1987) [hereinafter RESTATEMENT].

45. *Reid*, 354 U.S. at 18 n.34; RESTATEMENT, *supra* note 44, § 115 cmt. a.

46. See, e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); RESTATEMENT, *supra* note 44, § 115 cmt. a.

47. July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Convention].

48. *Id.*

49. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 n.19 (1993).

50. Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 [hereinafter Protocol].

51. *Id.* Although the United States is not a party to the Convention, it acceded to many of its provisions, including those under Article 33, when it ratified the Protocol. *Id.* The Protocol was not ratified by the United States until November 1, 1968, *id.*, and thus was not in effect in the United States until that time. Because the Protocol is the binding instrument, the author will

sons who became refugees as a result of events occurring before January 1, 1951; however, the Protocol covers all refugee situations irrespective of that date.⁵² By acceding to the Protocol, the United States bound itself to many of the Convention's provisions.⁵³

In order to fall under the provisions of the Protocol, one's status must comport with its definition of "refugee" as adopted from the Convention.⁵⁴ Article 1 of the Convention defines refugee as follows:

[A]ny person who . . . (2) 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.⁵⁵

After establishing the individuals protected by the treaty, the Convention spells out the circumstances under which refugees may or may not be returned to their home countries. Article 33 provides in relevant part that "[n]o 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."⁵⁶ The second section of Article 33 carves out the only exception to the general prohibition of return, providing that such protection cannot "be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to that country."⁵⁷ By ratifying the Protocol, the United States agreed to abide by its provisions, including the obligation of non-refoulement.

simply refer to it throughout this Comment in order to be consistent. The Protocol, however, incorporates much of the Convention, including Article 33, the article at issue.

52. *Id.* at preamble.

53. *Sale*, 509 U.S. at 169 n.19 (citing Protocol, *supra* note 50, art. 2, 19 U.S.T. at 6223, 606 U.N.T.S. at 268).

54. Protocol, *supra* note 50, art. 1, 19 U.S.T. at 6223, 606 U.N.T.S. at 268 (referring to and revising the Convention's definition).

55. Convention, *supra* note 47, art. 1, 19 U.S.T. at 6259, 189 U.N.T.S. at 152.

56. Convention, *supra* note 47, art. 33 (1), 19 U.S.T. at 6276, 189 U.N.T.S. at 176. This essay will refer to the obligation spelled out in Article 33 as the obligation of "non-refoulement" or "non-return."

57. *Id.* art. 33 (2), 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

2. *The Inter-American System*

In addition to its obligations under the Protocol, the United States also maintains more regional human rights responsibilities as a member of the Organization of American States ("OAS"). An express purpose of the Charter of the OAS is to effectuate regional obligations arising under the Charter of the United Nations.⁵⁸

Pursuant to this objective, the OAS created the the Commission in 1959.⁵⁹ The Commission "is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as a consultative organ of the Organization in this matter."⁶⁰ The Commission's mandate consists mostly of making recommendations to member governments regarding appropriate measures to ensure the protection of basic human rights, and submitting an annual report documenting its suggestions to the OAS General Assembly.⁶¹

The Statute of the Commission defines human rights as those rights set forth by the American Convention on Human Rights⁶² and the American Declaration of the Rights and Duties of Man⁶³ ("the American Declaration") in relation to the state parties thereto.⁶⁴ Because the United States has not ratified the American Convention, the American Declaration's definition of human rights prevail in matters before the Commission.⁶⁵

3. *United States Refugee Law*

In accordance with the provisions set out by the Protocol, the United States established its own laws for the protection of refugees.⁶⁶ Prior to 1980, § 243(h) of the Immigration and Nationality Act of 1952 ("INA") provided that:

58. Organization of American States Charter, April 30, 1948, art. 4, 119 U.N.T.S. 3, 52 ("The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes:").

59. See NEWMAN & WEISSBRODT, *supra* note 2, at 20 (discussing the origins of the Commission).

60. Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447, 9th Sess. art. 1(1) (Oct. 1979).

61. *Id.* art. 18, at 5-6.

62. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

63. American Declaration of the Rights and Duties of Man, O.A.S. res. XXX, Bogota (1948) [hereinafter American Declaration].

64. Statute of the Inter-American Commission on Human Rights, art. 1(2).

65. Case 10.675, Inter-Am. C.H.R. 550, 597 OEA/ser. L./V./11.84, doc. 51 (1997).

66. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1986) (discussing the legislative intent behind the Refugee Act of 1980).

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution on account of race, religion, or political opinion and for such period of time as he deem to be necessary for such reason.⁶⁷

The INA defined "alien" as "any person not a citizen or national of the United States."⁶⁸

After the 1968 accession to the Protocol, Congress eventually began entertaining legislation to conform the INA to provisions of the Protocol. Pursuant to this goal, Congress amended the INA through the Refugee Act of 1980.⁶⁹ The Refugee Act made several significant changes. First, it added "refugee" to the list of definitions:⁷⁰

[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of . . . membership in a particular social group, or political opinion.⁷¹

This definition intentionally mirrors its counterpart in the United Nations Protocol.⁷²

Additionally, § 243(h)(1) of the INA, as amended by the Refugee Act, removed the discretionary language of the previous version. Section 243(h)(1) now provides, in relevant part, that "[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 . . . political opinion."⁷³ Not only does the amendment remove the Attorney General's discretion, it also eliminates the words "within the United States" from the original section,⁷⁴ apparently broadening the geographical scope of the provision. The language in § 243(h), was meant to be a virtual reproduction of the "non-refoulement" section of Article 33 of the Protocol.⁷⁵ Indeed, the proposed amendment of § 243(h) originally

67. 8 U.S.C. § 1253(h) (Supp. I 1964).

68. 8 U.S.C. § 1101(a)(3) (1994).

69. Pub. L. No. 96-212, 94 Stat. 107 (1980); see *Cardoza-Fonseca*, 480 U.S. at 436-37.

70. 8 U.S.C. § 1101(a)(3).

71. *Id.*

72. Compare with the Protocol's definition, *supra* text accompanying note 55. See *Cardoza-Fonseca*, 480 U.S. at 436-37 (summarizing congressional intent).

73. 8 U.S.C. § 1253(h)(1) (Supp. III 1988). Compare with the original version, *supra* text accompanying note 67. Throughout this essay, "section 243(h)" refers to the amended form of the section, unless indicated otherwise.

74. See *supra* text accompanying note 67 for comparison with original.

75. See *supra* text accompanying note 56 for comparison. The Court in *INS v. Stevic* conceded that the Refugee Act aimed to conform United States law to its international obligations

provided that forcible repatriation of refugees would be prohibited "unless deportation or return would be permitted under the terms of the United Nations Protocol Relating to the Status of Refugees."⁷⁶

4. Summary

Under the Convention's non-refoulement clause in Article 33, refugees have a near absolute right to seek asylum, which necessarily entails the right to a hearing in order to determine refugee status. The United States, in acceding to the Protocol, agreed to the obligation of non-refoulement. This obligation gained the force of domestic law through the Refugee Act of 1980.⁷⁷ Additionally, the United States is bound to regional compliance with the obligation of non-return via its responsibilities as a State Party to the American Declaration.

B. The Haitian Program and Resulting Litigation

In spite of the formal protections for refugees provided by the Protocol and the INA, the United States typically has not afforded Haitians the same amount of protection as most other refugee groups.⁷⁸ The flood of refugees fleeing the Duvalier regimes throughout the 1970s caused the INS to adopt special procedures to deal exclusively with the Haitian refugees.⁷⁹ Although this Haitian Program was supposedly carried out in accordance with all international and domestic obligations, a brief review of the Program and related policies indicates that basic refugee protections did not apply to Haitians en route to America.

1. Enacting the Haitian Program

The first, and perhaps most important step, in the Haitian Program focused on the type of persecution to which the Haitians were subjected. The INS usually claimed that Haitians were economic refugees fleeing the abysmal economic situation in their homeland,⁸⁰ and thus

under the Protocol. 467 U.S. 407, 421 (1984). The legislative history of the Refugee Act indicates that one of its overarching purposes was to render the INA's provisions "consistent with our international obligations under the United Nations Convention and Protocol." 126 CONG. REC. 4498, 4500 (1980).

76. S. REP. NO. 96-256, at 29 (1979).

77. Pub. L. No. 96-212, 94 Stat. 107 (1980).

78. See *infra* notes 362-81 and accompanying text.

79. See *infra* notes 80-96 and accompanying text.

80. Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1030 (5th Cir. 1982) (modifying Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980)). "One July 1978 report from the Intelligence Division of INS to the Associate Director of Enforcement advised in absolute terms that the Haitians were 'economic' and not political refugees." *Id.*; see 126 CONG. REC. at 29,606.

not entitled to asylum. The characterization of the type of persecution Haitians suffered is of paramount importance. If a Haitian is fleeing for economic reasons, as the INS routinely assumed, then she is not entitled to asylum.⁸¹ Only political refugees can claim a right to seek asylum.⁸²

The INS's assumptions regarding Haitian refugees reflected a broader policy that pervaded its asylum processing programs. In general, the policy provided that those individuals fleeing client regimes of the United States government were assumed to be economic refugees.⁸³ The Duvalier regimes were such regimes,⁸⁴ which almost automatically and without question meant that individuals fleeing the country were considered economic refugees by the INS, regardless of reality. The flip side of this policy established a practice of admitting refugees from communist countries and other enemy regimes at a much higher rate as obvious political refugees.⁸⁵

The INS adjusted this ideology-based program to accommodate the mass exodus of Haitians, thus earning the title of the "Haitian Program."⁸⁶ By June of 1978, almost seven thousand Haitian deportation cases were pending in the INS's Miami office.⁸⁷ The reason for the enormous backlog, the acting District Director admitted, was that INS officials in Miami "were not doing [their] job."⁸⁸

To expedite the Haitian asylum claims, the INS decided to suspend certain regulations.⁸⁹ The process of hearing Haitian asylum claims was accelerated by assigning more judges with instructions to increase "productivity."⁹⁰ The notion that the Haitians were "threatening the community's well-being—socially and economically" served as a con-

81. Note that "refugee" is defined by the INA (as well as the Protocol) in terms of political persecution. 8 U.S.C. § 1101(a)(3) (1994). Persons fleeing for economic reasons cannot seek the protection of § 243(h) under the current definition because such persons are not explicitly included in the definition. *Id.*

82. Political refugees, contrary to economic refugees, are specifically included under the definition of the statute. *Id.*

83. See 126 CONG. REC. at 29,605. Conyers criticizes "the favorable treatment, historically, toward refugees from Communist countries versus the restrictive treatment against refugees from right-wing governments allied to our own" such as Haiti's government was at the time. *Id.*

84. See *infra* notes 317-20 and accompanying text.

85. See 126 CONG. REC. at 29,605.

86. *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1029 (5th Cir. 1982).

87. *Id.*

88. *Id.*

89. *Id.* at 1030.

90. *Id.* "Among the specifics set forth were the assignment of additional immigration judges to Miami, the instructions to immigration judges to effect a three-fold increase in productivity, and orders for the blanket issuance of show cause orders in all pending Haitian deportation cases." *Id.*

stant reminder of the urgency to deport them.⁹¹ Immigration judges held up to eighty deportation hearings per day.⁹² The INS handled asylum interviews at the rate of forty per day, which typically meant only fifteen minutes of substantive dialogue per individual.⁹³ With only twelve attorneys to assist the thousands of Haitians, most refugees proceeded without counsel,⁹⁴ (a fact of which the INS was well aware).⁹⁵ The Haitian Program prompted one judge to declare that the “uniform rejection of their claims demonstrates a profound ignorance, if not an intentional disregard, of the conditions in Haiti.”⁹⁶ Still, Haitians were inevitably labeled economic refugees, and the Haitian Program proceeded without delay.

These INS policies resulted in the *Haitian Refugee Center v. Smith*⁹⁷ litigation. In 1979, the Haitian Refugee Center (“HRC”), on behalf of 4,000 Haitians seeking political asylum in south Florida, filed a complaint challenging the INS program for processing Haitian asylum seekers.⁹⁸ It argued that the program aimed “to achieve expedited mass deportation of Haitian nationals” without regard to the validity of their individual asylum claims.⁹⁹ Through the inadequacies of the program, the HRC argued, the defendants engaged in unlawful discrimination based on national origin and denied due process rights to the Haitian complainants.¹⁰⁰ The district court found that the pro-

91. *Id.*

92. *Smith*, 676 F.2d at 1031. There were only one to ten hearings per day prior to the Haitian Program. *Id.*

93. *Id.* “Prior to the program such interviews had lasted an hour and a half; during the program the officer devoted approximately one-half hour to each Haitian.” *Id.* Given the time for communication through interpreters, one-half hour meant only fifteen minutes of substantive dialogue per individual. *Id.*

94. *Id.* “It was not unusual for an attorney representing Haitians to have three hearings at the same hour in different buildings; this kind of scheduling conflict was a daily occurrence for attorneys throughout the Haitian program.” *Id.* The following is a typical Haitian asylum hearing:

Applicant made a motion for depositions and interrogatories, and that motion was denied. Motion for simultaneous translation – this motion was overruled or denied. Applicant made an oral motion for a continuance. That motion was . . . that motion was also denied. I conclude that the applicant has failed to establish that he will be persecuted if deported to Haiti because of his race, religion, nationality, or membership in a particular social group or political opinion. It is ordered that the application for political asylum and/or withholding of deportation be denied. It is further ordered that he be deported, excluded and deported from the United States to Haiti – on the line for signature, Martin F. (inaudible), immigration judge.

Videotape: Bitter Cane (Haiti Films 1983) (on file with the Chicago Public Library).

95. *Smith*, 676 F.2d at 1029.

96. *Id.* at 1042 (citing *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 457 (S.D. Fla. 1980)).

97. *Id.* at 1023 (modifying *Haitian Refugee Ctr.*, 503 F. Supp. 442).

98. *Id.* at 1026.

99. *Id.*

100. *Id.*

gram "violated the Constitution, the immigration statutes, and international agreements, INS regulations and INS operating procedures."¹⁰¹ Accordingly, the court ordered the defendants to establish a program that would sufficiently protect the Haitians' right to seek refuge in the United States, enjoining the defendants from hearing any more Haitian asylum claims or deporting any Haitians until a program was approved by the court.¹⁰² The appellate court affirmed the district court's judgment.¹⁰³

2. *Reagan's Interdiction Program*

As the flow of Haitian refugees continued into the early 1980s and in light of *Smith*, a new, more direct approach to excluding the refugees from American shores was added to the Haitian Program.¹⁰⁴ In 1981 President Reagan entered into an agreement with the Haitian government authorizing the United States Coast Guard to intercept vessels that were illegally transporting undocumented aliens to American shores.¹⁰⁵ Both sides agreed to prosecute illegal traffickers, but the Haitian government agreed not to prosecute interdicted Haitians for illegal departure.¹⁰⁶

Pursuant to this agreement with the Duvalier dictatorship, President Reagan issued a proclamation classifying the flight of Haitians as "a serious national problem detrimental to the interests of the United States."¹⁰⁷ His Executive Order required the Coast Guard to intercept vessels carrying the illegal aliens and return them to their point of origin.¹⁰⁸ Significantly, however, Reagan's order provided "that no person who is a refugee will be returned without his consent."¹⁰⁹

The treatment of Haitians under the INS procedures carried to the Coast Guard's treatment pursuant to Reagan's interdiction program. Although the order ostensibly comported with international obligations under Article 33, in practice the interdiction program was not so benign. The Coast Guard employed inadequate interviewing proce-

101. *Id.* at 1027.

102. *Smith*, 676 F.2d at 1027.

103. *Id.*

104. Though typically not considered a part of the Haitian Program, the Executive Orders worked in conjunction with INS policies and served much the same purpose. As such, the author includes them under the "Haitian Program" rubric.

105. *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 160 (1993).

106. *Id.*

107. *Id.* (citing Exec. Order No. 12,324, 3 C.F.R. 181 (1981-1983)).

108. *Id.* (citing Exec. Order No. 12,324, 3 C.F.R. 181 (1981-1983)).

109. *Id.* at 160-61 (citing Exec. Order No. 12324, 3 C.F.R. 181 (1981-1983)). The Court also noted that this provision was included in order to conform the order to the obligations under the Protocol. *Id.* at 161 n.9.

dures on its ships to determine the refugee status of those fleeing Haiti,¹¹⁰ invariably concluding that all of them were merely economic refugees. From 1981 to 1991, about 24,600 Haitians were intercepted at sea pursuant to the interdiction program.¹¹¹ Of those, the Coast Guard found that only twenty-eight had credible asylum claims and brought them to the United States for asylum hearings.¹¹² The rest were returned to Port-au-Prince in accordance with the agreement with Baby Doc.¹¹³ It is significant, of course, that the average member of the Haitian citizenry endured political persecution on a daily basis during this time frame.¹¹⁴

Naturally, the new interdiction program met resistance. Once again, the HRC filed a lawsuit challenging the program.¹¹⁵ The complaint attacked the program on the grounds that it violated the rights of Haitians under the INA, deprived interdicted Haitians of rights and liberties guaranteed by the Fifth Amendment of the Constitution, failed to satisfy the non-refoulement obligations under the United Nations Convention, and violated the extradition agreement between Haiti and the United States.¹¹⁶ The district court dismissed the complaint, holding that the plaintiffs stated no cause of action upon which the court could grant relief.¹¹⁷ The decision was affirmed on appeal.¹¹⁸

3. *The Interdiction Program Under Bush*

The fall of Baby Doc in 1986 and the rise of Haiti's first democratically elected president rendered the interdiction program unnecessary for a few short months.¹¹⁹ The 1991 ouster of the democratically elected Aristide, however, ushered in a reign of terror that was sadistic even by Haitian standards,¹²⁰ thus resulting in a deluge of Haitians seeking refuge overseas.¹²¹ In the wake of the mass exodus, the Coast

110. *Id.* at 161-62.

111. *U.S. Human Rights Policy Toward Haiti: Hearing Before the Legislation and Nat'l Sec. Subcomm. of the Comm. on Gov't Operations H.R.*, 102d Cong. 7 (1992) (statement of Harold J. Johnson) [hereinafter *House Subcomm.*].

112. *Id.*

113. *Id.*

114. See *infra* notes 320-29 and accompanying text.

115. *Haitian Refugee Ctr. v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985).

116. *Id.* at 1401.

117. *Id.* at 1406.

118. *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987).

119. See *infra* notes 333-40 and accompanying text.

120. See *infra* notes 341-43 and accompanying text.

121. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993) (noting that the Coast Guard intercepted over 34,000 Haitians during the first six months after the coup).

Guard announced that it would resume the interdiction program under the Bush administration.¹²²

The day after the Coast Guard's announcement, the HRC filed another complaint challenging the program in *Haitian Refugee Center v. Baker*.¹²³ The plaintiffs argued that the interdiction program violated the Protocol as well as the protections set forth in the INA.¹²⁴ The district court enjoined the program,¹²⁵ but the Eleventh Circuit dissolved the injunction and remanded the case with instructions to dismiss the claims that were based on the Protocol.¹²⁶ On remand, the plaintiffs obtained a temporary restraining order,¹²⁷ and the defendants appealed.¹²⁸ The Eleventh Circuit again disagreed and ultimately held that the INA, even as amended, only applied to aliens within the United States or at United States borders or ports of entry.¹²⁹ Thus, the interdiction program was found to be valid.

While the *Baker* decision was still pending, the Haitian Centers Council ("HCC") filed another complaint, initially arguing that the interdiction program and the refugee processing on Guantanamo Naval Base did not adequately protect the Haitians' statutory and treaty rights.¹³⁰ In *Haitian Centers Council, Inc. v. McNary*, the court granted the plaintiffs a preliminary injunction requiring the defendants to supply Haitians with counsel during the screening process on Guantanamo.¹³¹ The Supreme Court stayed that order.¹³² After the final result in *Baker*, and while the defendants' appeal was pending in *McNary*, President Bush issued a new Executive Order.¹³³ His Order differed slightly, but significantly, from President Reagan's Order. The Bush Order expressly declared that Article 33 did not extend to persons located outside United States territory.¹³⁴ Additionally, his Order provided that "the Attorney General, in his unreviewable discretion, *may* decide that a person who is a refugee will not be returned

122. *Id.* at 162.

123. 789 F. Supp. 1552 (S.D. Fla. 1991).

124. *Id.* at 1553.

125. *Id.* at 1578.

126. *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109, 1111 (1991).

127. *Haitian Refugee Ctr. v. Baker*, 789 F. Supp. 1579, 1580 (1991).

128. *Haitian Refugee Ctr. v. Baker*, 950 F.2d 685 (11th Cir. 1991).

129. *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1510 (11th Cir. 1992).

130. *Haitian Ctrs. Council, Inc. v. McNary*, 807 F. Supp. 928, 929-30 (E.D.N.Y. 1992).

131. *Id.* at 930-31.

132. *Haitian Ctrs. Council, Inc. v. McNary*, 503 U.S. 1000 (1992).

133. Exec. Order No. 12,807, 3 C.F.R. 303 (1993).

134. *Id.* "Article 33 of the United Nations Convention Relating to the Status of Refugees does[not] extend to persons located outside the territory of the United States." *Id.*

without his consent,"¹³⁵ whereas Reagan's program *required* the Coast Guard to refrain from returning a refugee without first obtaining her consent.¹³⁶ Finally, the Bush Order did not allow for even cursory refugee hearings on Coast Guard cutters, thus eliminating the opportunity for refugee status determinations.¹³⁷

Bush's interdiction program proved as effective as his predecessor's. Between September 30, 1991, (the date of the coup), and April 7, 1992, an estimated 18,095 Haitians were interdicted.¹³⁸ Of these, about 10,149 were sent back to Haiti without an interview of any kind.¹³⁹ The remaining Haitians were either brought to the United States for more asylum interviews, taken to Guantanamo Bay, or deposited in another country.¹⁴⁰ Of those who underwent screening procedures on Guantanamo Bay, an estimated 40% were found to have credible claims.¹⁴¹

The HCC immediately amended its complaint to challenge Bush's Order, but the district court denied its request for a temporary restraining order.¹⁴² The court of appeals reversed that decision, holding that the interdiction program violated § 243(h) of the INA,¹⁴³ and defendants appealed.

4. *Sale v. Haitian Centers Council, Inc.*

In *Sale v. Haitian Centers Council, Inc.*,¹⁴⁴ the plaintiffs, Haitian Centers Council, first argued that the interdiction program violated § 243(h) of the INA, which explicitly provides that the Attorney General shall not deport or return any alien to a country where such alien will be the victim of political persecution.¹⁴⁵ By removing the words "within the United States" from the original section, plaintiffs argued, Congress meant to broaden the scope of § 243(h)(1) to protect *all* aliens fleeing persecution, thus giving it extraterritorial effect.¹⁴⁶ The

135. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 204 (emphasis added). Bush's order revoked and replaced Reagan's order. *Id.* at 171. It also provided that the program should not be "construed to require any procedures to determine whether a person is a refugee." Exec. Order No. 12,807, 3 C.F.R. at 304.

136. *See supra* notes 108-09 and accompanying text.

137. Exec. Order No. 12,807, 3 C.F.R. at 304; *see supra* note 135.

138. *House Subcomm.*, *supra* note 111, at 7.

139. *Id.*

140. *Id.* at 7-8.

141. *Id.* at 8. These Haitians were screened in, but not "accepted." *Id.*

142. *Haitian Ctrs. Council, Inc. v. McNary*, 807 F. Supp. 928, 933-34 (E.D.N.Y. 1992).

143. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1367-68 (2d Cir. 1992).

144. 509 U.S. 155 (1993).

145. *Id.* at 170-71.

146. *Id.*

plaintiffs argued that the plain language of § 243(h)(1) prohibited the implementation of Bush's interdiction program.¹⁴⁷

The plaintiffs further contended that Article 33 applied extraterritorially.¹⁴⁸ Although the Protocol had previously been determined not self-executing, they argued that the history of the Refugee Act of 1980 clearly indicated Congress' intention to conform the INA to the provisions of the Protocol.¹⁴⁹ Because Article 33 applies extraterritorially, the plaintiffs argued, § 243(h)(1) also applies extraterritorially.¹⁵⁰

The Court also reviewed the lower court's holding that the term "Attorney General" was meant to apply to the President as well, thereby prohibiting the issuance of his Executive Order.¹⁵¹ The court of appeals held that the Attorney General almost always acts as an agent of the President and exercises her powers at the behest of the President in matters regarding immigration.¹⁵² As such, it determined, prohibiting the Attorney General from forcibly repatriating refugees with credible asylum claims also prohibits the President from doing so.¹⁵³

The defendants reasserted their argument that the plain language of § 243(h) dictates that it applies only to the Attorney General; thus, only the Attorney General is prohibited from returning the aliens, not the President.¹⁵⁴ Additionally, they argued that the entire INA, when read with the legislative history of the 1980 amendments, reveals that § 243(h) was not intended to apply outside of United States territory.¹⁵⁵ The defendants also argued that the negotiating history of the Protocol clearly indicates that Article 33 does not apply extraterritorially either.¹⁵⁶

In finding for the defendants, the Court determined that the INA's non-return provision applied only to the Attorney General.¹⁵⁷ It reasoned that, because other sections of the INA mention the President, the INA would have expressly prohibited the President from returning refugees, rather than just the Attorney General, if it meant to extend the prohibition to him.¹⁵⁸

147. *Id.*

148. *Id.*

149. *Id.*

150. *Sale*, 509 U.S. at 170-71.

151. *Id.* at 171.

152. *Id.*

153. *Id.*

154. *Id.* at 168-69.

155. *Id.* at 171.

156. *Sale*, 509 U.S. at 171.

157. *Id.* at 171-72.

158. *Id.* at 173-74.

It also found persuasive the defendants' argument regarding the interpretation of the 1980 amendment to the INA that removed the words "within the United States."¹⁵⁹ The Court noted that it presumes that acts of Congress only apply within the United States.¹⁶⁰ The Court relied on the *Leng May Ma v. Barber*¹⁶¹ decision to decipher the significance of removing the territorial limitation from the original section.¹⁶²

The *Leng May Ma* Court explained that an alien who is legally in the United States is "within the United States," while one who is physically, but not legally, present in the country is *not* "within the United States."¹⁶³ The latter is an "excludable" alien, and the former is a "deportable" alien.¹⁶⁴ The Court in *Leng May Ma* noted that "deportable" aliens traditionally have been afforded more protection by United States law, while "excludable" aliens did not receive such protection.¹⁶⁵

Relying on the distinction between "deportable" and "excludable" aliens articulated in *Leng May Ma*, the *Sale* Court held that, by removing "within the United States" from the original version of § 243(h), Congress merely extended to "excludable" aliens the same protections afforded to "deportable" aliens under the INA.¹⁶⁶ Thus, the removal of the words was not intended to extend protection beyond United States borders.¹⁶⁷

Further, the Court held that the negotiating history and language of Article 33 indicates that it does not apply extraterritorially either.¹⁶⁸ Thus, the Court determined that the statute and the treaty are wholly consistent with each other in their territorial limitations.¹⁶⁹

Justice Blackmun dissented, arguing that both the INA and Article 33 apply extraterritorially.¹⁷⁰ He found the majority's reliance on the presumption against extraterritoriality inappropriate.¹⁷¹ Additionally, he noted that, in light of the territorial restriction throughout other sections of the INA, the removal of "within the United States" was

159. *Id.*

160. *Id.*

161. 357 U.S. 185 (1958).

162. *Sale*, 509 U.S. at 172.

163. *Leng May Ma*, 357 U.S. at 187-90.

164. *Id.*

165. *Id.*

166. *Sale*, 509 U.S. at 175-76.

167. *Id.* at 177.

168. *Id.* at 179-87.

169. *Id.* at 188.

170. *Id.* at 188-208 (Blackmun, J., dissenting).

171. *Id.* at 205-07.

clearly meant to remove the territorial restriction of § 243(h).¹⁷² He rejected the majority's *Leng May Ma* argument.¹⁷³

Justice Blackmun discovered no references to *Leng May Ma* in the negotiating history of the Refugee Act of 1980.¹⁷⁴ He also noted that references to the Protocol permeated the history of the amendments.¹⁷⁵ He relied on these references in determining that the Refugee Act conformed the INA to the provisions of the Protocol.¹⁷⁶ He contended that, had the majority employed the standard rules of treaty construction, it would have necessarily reached the conclusion that Article 33 did in fact apply extraterritorially.¹⁷⁷

5. *Proceedings Before the Commission*

Although the *Sale* decision effectively ended litigation over Haitian interdiction in United States courts, it did not terminate the inquiry into the extraterritorial nature of Article 33. After the final decision in *Sale*, the Commission agreed to hear a similar petition brought by many of the same complainants.¹⁷⁸ Although the Commission is a regional body that usually deals with regional human rights instruments, such as the American Declaration, it found it necessary to address the extraterritorial applicability of Article 33 of the Convention.¹⁷⁹

The Commission conducted its deliberations by inviting both parties to submit their understandings of the relevant provisions of the American Declaration.¹⁸⁰ Specifically, the Commission accepted interpretations of Article XXVII,¹⁸¹ which provides that "[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements."¹⁸² The pertinent international provision, of course, is Article 33.¹⁸³ The United States government, the defendant, contended that the Supreme Court's

172. *Sale*, 509 U.S. at 204-05.

173. *Id.* at 203-05.

174. *Id.* at 203.

175. *Id.*

176. *Id.*

177. *Id.* at 190-98.

178. Case 10.675, Inter-Am. C.H.R. 550, 556 OEA/ser. L./V./11.84, doc. 51 (1997).

179. *Id.* at 599. It is important to note that any decision of the Commission has no obligatory power in international law. NEWMAN & WEISSBRODT, *supra* note 2, at 142. It is not within the Commission's mandate to pass on domestic laws of nations in and of themselves. *Id.* Rather, the Commission only articulates international obligations and recommends that nations comply with those obligations. *Id.*

180. Case 10.675, Inter-Am C.H.R. at 565.

181. American Declaration, *supra* note 63, at art. XXVII.

182. *Id.*

183. Case 10.675, Inter-Am. C.H.R. at 599.

opinion in *Sale* already determined that the interdiction program was consistent with both domestic and international law.¹⁸⁴

The Commission ultimately found that the United States was in violation of several articles of the American Declaration.¹⁸⁵ Significantly, it concluded that the United States violated Article XXVII.¹⁸⁶ Expressly rejecting the Supreme Court's determination that Article 33 does not apply extraterritorially, the Commission held that the interdiction program violated the obligation of non-refoulement and, thus, Article XXVII.¹⁸⁷ The Commission determined that its decision be published in the Commission's Annual Report and it recommended that the United States pay adequate compensation to the victims.¹⁸⁸

6. Summary

The Haitian Program elicited substantial litigation. Most complaints challenging the interdiction aspect of the program were unsuccessful. In *Sale v. Haitian Centers Council, Inc.*,¹⁸⁹ the Supreme Court made the final decision that the interdiction programs violated neither the INA nor Article 33.¹⁹⁰ In reaching this conclusion, the Court held that neither provision meant to extend protection to refugees outside of American territorial waters.¹⁹¹ In an opinion handed down three years later, the Commission on expressly disagreed with the Supreme Court's holding finding the interdiction program a violation of the United States' obligation of non-refoulement.¹⁹²

II. THE ROLE OF RACE IN HAITIAN-AMERICAN RELATIONS

The controversy over the decision in *Sale* focused mostly on the American government's potential violation of international and domestic law. Although the Commission took a broader approach in determining the American government's compliance with its international obligations, its decision was strictly limited in scope. Not as widely recognized, let alone criticized, was the advantage gained by

184. *Id.*

185. *Id.* at 609.

186. *Id.*

187. *Id.* at 599.

188. *Id.* at 609.

189. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

190. *Id.* at 171.

191. *Id.* at 171-76. This conclusion was determined in spite of the removal of "within the United States" by the Refugee Act of 1980. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107 (1980).

192. *Sale*, 509 U.S. at 171.

the United States through the forcible repatriation of Haitian refugees. When viewed in light of the history of Haitian-American relations, the racist thrust of Haitian Program is revealed. Only after considering the role of race in the program can one accurately assess the objectives and impact of American treatment of Haitian refugees.

A. *A Critical Analysis of the Sale Decision*

Because the *Sale* case represents the culmination of litigation over the Haitian Program—specifically the interdiction program—in United States courts, it provides the starting point for the following analysis. This subsection will first focus on the Court's argument against the extraterritorial applicability of the INA and the Protocol. It will then examine the Commission's assessment of the interdiction programs' legality.

1. *Non-return and the INA*

The first important step in this analysis requires a look at the scope of the INA as amended by the Refugee Act of 1980. In *Sale*, the Court held that the amended version of the INA does not extend beyond United States territory to cover refugees on the high seas.¹⁹³ In ruling against its extraterritorial application, the Court relied heavily on the presumption that acts of Congress ordinarily do not apply outside the borders of the United States.¹⁹⁴ As the Court conceded, however, the presumption is applied primarily to avoid conflicts between the laws of the United States and those of foreign nations.¹⁹⁵ No such risk was involved under these circumstances. Refusing to return Haitian nationals to their tumultuous homeland, as is required by § 243(h), would not have conflicted with the laws of other nations.

The Court rejected this argument, however, relying on a footnote in *Smith v. United States*.¹⁹⁶ This "well-established" precedent, articulated only a few months before the decision in *Sale*, concluded that "the presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind."¹⁹⁷ While the Court's reliance on a footnote of a recent opinion might seem a somewhat dubious foundation for invoking the presumption against extraterritoriality, one need not be overly concerned about the Court's rationale on this

193. *Id.* at 173-77.

194. *Id.* at 173.

195. *Id.* at 173-74.

196. *Id.* at 174 (citing *Smith v. United States*, 507 U.S. 197, 206-07 n.5 (1993)).

197. *Smith*, 507 U.S. at 204 n.5.

point. Perhaps even more remarkable is the Court's disregard for the "commonsense notion" that the very nature of refugee law is international.¹⁹⁸ Additionally, the presumption applies only where congressional intent is unexpressed.¹⁹⁹ Here, Congress removed the territorial restriction from § 243(h), leaving little doubt about its intentions. A further look behind the history of the Refugee Act of 1980 is instructive.

The Refugee Act deleted the words "within the United States" from § 243(h) of the INA.²⁰⁰ It also removed the discretionary language in this section, expressly prohibiting the forcible return of any alien to a country where the alien would be subject to persecution for the enumerated reasons, including political persecution.²⁰¹ On its face, the amendment flatly prohibits, without territorial restriction, the precise activity that the interdiction program required. The Court, however, remained unconvinced by this argument. Relying on the *Leng May Ma* decision, the Court determined that the amended version of § 243(h) extended to "excludable" aliens the same protections afforded to "deportable" aliens under the INA.²⁰² It pointed to language in the legislative history which provided that the amendment required the Attorney General to withhold deportation of aliens in both exclusion *and* deportation hearings.²⁰³ More precisely, the Court used the *Leng May Ma* distinction to narrow the meaning of the word "return" in § 243(h). It reasoned that by adding "return" and removing "within the United States," Congress extended protection to both types of aliens.²⁰⁴

The Court rightly pointed out that Congress was aware that the amendment erased the distinction between "deportable" and "excludable" aliens, extending its protection to both.²⁰⁵ It is peculiar, however, that the *Leng May Ma* decision shows up nowhere in the legislative history of the Refugee Act,²⁰⁶ though references to the Protocol permeate these documents.²⁰⁷ Indeed, the provisions of the Protocol, specifically Article 33, inspired the 1980 amendments.²⁰⁸ Not only did Congress intend to define "refugee" in conformity with the

198. *Sale*, 509 U.S. at 206 (Blackmun, J., dissenting).

199. *Id.* at 205-06.

200. *See supra* note 73 and accompanying text.

201. *See supra* note 72 and accompanying text.

202. *Sale*, 509 U.S. at 176.

203. *Id.*

204. *Id.* at 177.

205. *Leng May Ma v. Barber*, 357 U.S. 185 (1958).

206. *Sale*, 509 U.S. at 202-03 (Blackmun, J., dissenting).

207. *Id.*

208. *Id.*; *see supra* note 69 and accompanying text.

definition contained in the Protocol,²⁰⁹ but it also aimed to harmonize American law regarding the deportation of refugees with the obligation of non-refoulement arising under the Protocol.²¹⁰ Although pursuing this goal ultimately eliminated the archaic distinction between “deportable” and “excludable” aliens, the overriding purpose of the Refugee Act was to render the INA’s provisions “consistent with our international obligations under the United Nations Convention and Protocol.”²¹¹

It is important to note the proposed version of § 243(h) in the Senate conference report on the Refugee Act,²¹² the report on which the Court so heavily relied in asserting the amended form of § 243(h), functioned primarily to remove the “deportable”/“excludable” alien distinction. This proposed version contained all of the changes that would eventually form the final amended version of § 243(h). At the end of the section, however, it added the words “unless deportation or return would be permitted under the terms of the United Nations Protocol Relating to the Status of Refugees.”²¹³ Although the language was not kept in the final version, it serves as a rather convincing indication that Congress intended to conform § 243(h) to the provisions of the Protocol. Indeed, because congressional intent *was* clearly expressed, the Court’s reliance on the presumption against extraterritoriality was misplaced.

2. *Article 33 and Extraterritoriality*

The Court recognized that bringing “excludable” aliens within the protection of the INA was not the sole purpose of the changes made by the Refugee Act.²¹⁴ If it determined that the amended form of § 243(h) merely extended protection to previously excluded groups of aliens, rather than conform United States law to obligations arising under the Protocol, then there would have been no occasion to pass on the extraterritorial nature of Article 33.²¹⁵ Indeed, at least one court has indicated that the provisions of the Protocol are not self-executing.²¹⁶ As such, it does not give rise to a cause of action in a

209. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1986).

210. *INS v. Stevic*, 467 U.S. 418, 421 (1984); *see* 126 CONG. REC. 4498, 4450 (1980).

211. 126 CONG. REC. at 4450.

212. S. REP. NO. 96-256, at 29 (1979).

213. *Id.*

214. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177-78 (1993) (“Nevertheless, because the history of the 1980 Act does disclose a general intent to conform our law to Article 33 of the Convention.”). *Id.*

215. *Id.* at 178.

216. *Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir. 1982).

United States court. Nevertheless, because the Refugee Act sought to effectuate the treaty's obligations, specifically that of non-refoulement, it was necessary for the Court to determine the extraterritorial application of Article 33. If Article 33 applies extraterritorially, then so does § 243(h).²¹⁷

At the start, the Court mostly engaged in wordplay in its analysis of Article 33. It first argued that, taken as a whole, the Article could not have been intended to apply extraterritorially.²¹⁸ Paragraph 1 of the Article provides, in relevant part, that no contracting State shall return a refugee in any manner whatsoever to a territory where that refugee's life or freedom would be threatened for the enumerated reasons, subject only to the exception spelled out in Paragraph 2.²¹⁹ Paragraph 2 excepts from the obligations of Paragraph 1 situations where a refugee constitutes "a danger to the security of the country *in which he is*" or where the refugee poses a threat to the community of a country.²²⁰ The Court found that if Paragraph 1 applied to the high seas, then countries could not invoke the second paragraph's exception because an alien on the high seas is in no country at all.²²¹ In the Court's view, this would create "an absurd anomaly: Dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not."²²² Rather than falling victim to such flawed rationale, the Court found it "more reasonable to assume" that Paragraph 2 was limited to those already present within a country because it was understood that Paragraph 1 implied no extraterritorial obligations.²²³

Justice Blackmun deftly dismantled the majority's argument in his dissenting opinion. He maintained that a reasonable decision to allow nations to deport criminal aliens in no way betrayed an intent on the part of the signatories "to permit the apprehension and return of non-criminal aliens who have not entered their territories, and who may have no desire ever to enter it."²²⁴ On its face, the goal of Article 33 is to prohibit the return of refugees seized *anywhere* while permitting the expulsion or return of a small class of refugees within a country's

217. *Sale*, 509 U.S. at 178.

218. *Id.* at 179.

219. Convention, *supra* note 47, art. 33 (2), 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

220. Convention, *supra* note 47, art. 33 (1), 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (emphasis added); see *supra* text accompanying note 57.

221. *Sale*, 509 U.S. at 179.

222. *Id.* at 179-80.

223. *Id.* at 180.

224. *Id.* at 193 (Blackmun, J., dissenting).

territory. As Justice Blackmun reasoned, non-return is the rule, and Paragraph 2 provides the only exception.²²⁵

Rather than creating an absurd anomaly, the territorial restriction in Paragraph 2 indicates the intention that Article 33 applies extraterritorially. Just as "Congress knows how to place the high seas within the jurisdictional reach of a statute" if it so desires,²²⁶ the drafters of the Convention presumably knew how to limit the territorial application of the protection offered by Article 33. Not surprisingly, Paragraph 2 does in fact provide a territorial limitation, demonstrating that such a capability was indeed within the realm of skills of the drafters.²²⁷ Had the drafters intended to limit the geographic applicability of Paragraph 1, they would have expressed it in the provision. Far from constituting affirmative evidence, the majority's argument merely offered an elaborate diversion from the plain language of Article 33.

The Court also pondered the meaning of the word "return" within the context of Paragraph 1 of Article 33. The majority once again relied on the distinction spelled out in the *Leng May Ma* decision and determined that "return" (refouler) merely extended protection to the previously excluded class of aliens at the threshold of entry to a country.²²⁸ The Court's rationale here is fantastic. When interpreting "return" in § 243(h), the Court ignored Article 33.²²⁹ Instead, it relied on the *Leng May Ma* decision,²³⁰ even though the legislative history clearly indicated an intent to conform the section to the provisions of the Protocol.²³¹ The Court then used this interpretation as evidence that "return" in Article 33 has a meaning narrower than the standard definition.

The validity of the Court's contention is questionable. The determination that the word "return" in a multilateral treaty does not really mean "return" in the standard sense because it was intended to be consistent with a decision by the United States Supreme Court is an untenable proposition. By starting with a narrow and somewhat tortured interpretation of "return" in lieu of the *Leng May Ma* decision, the Court began its construction on shaky ground. It also violated the first rule of treaty construction, namely that a treaty be construed ac-

225. *Id.* at 194.

226. *Id.* at 173 (quoting *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440 (1989)).

227. Convention, *supra* note 47, art. 33 (2), 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

228. *Sale*, 509 U.S. at 180.

229. *Id.* at 173-77; *see supra* notes 145-58 and accompanying text.

230. *Leng May Ma v. Barber*, 357 U.S. 185 (1958); *see supra* text accompanying notes 161-65.

231. *Sale*, 509 U.S. at 180 n.36.

ording to its ordinary meaning.²³² It is unlikely that the drafters of Article 33 intended the ordinary meaning of the word “return” to conform to the meaning articulated in *Leng May Ma*.

The Court did not rely solely on the holding in the *Leng May Ma* decision, of course. It buttressed its assertion that “return” has a legal meaning narrower than its ordinary meaning by emphasizing the parenthetical inclusion of the French word “refouler.”²³³ The Court’s argument was an intricate and somewhat confusing one. It was troubled by the fact that neither of two respected English-French dictionaries include “refouler” as one of the definitions of “return.”²³⁴ Moreover, it noted that the dictionaries’ English translations of “refouler” do not include the word “return.”²³⁵ The Court then listed some of the other definitions of “refouler,” such as “repulse,” “repel,” “drive back,” and “expel.”²³⁶ Using these definitions, the Court determined that “return” actually means “to ‘repulse’ rather than to ‘reinstate.’”²³⁷

Nevertheless, even these definitions fail to support the Coast Guards’ actions. Using some of the most common translations of “refouler,” one might have proposed a more plausible version of Article 33. Substituting the standard synonyms for “refouler,” Article 33 reads: “No contracting state shall expel or [repulse, drive back, or repel] a refugee in any manner whatsoever.”²³⁸ These translations accurately describe what the Coast Guard was doing. In fact, as Justice Blackmun noted, the French press used the word “refouler” to describe the interdiction program.²³⁹ The majority, however, determined that “[t]o the extent that they are relevant, these translations imply that ‘return’ means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination.”²⁴⁰ Of course, the text of Article 33—to the extent that it is relevant anyway—speaks of no such “border” or threshold that would activate the obligation of non-refoulement.

232. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (noting that when treaty “interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.”); Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 (1969) [hereinafter Vienna Convention]; RESTATEMENT, *supra* note 44, § 325(1).

233. *Sale*, 509 U.S. at 180-82.

234. *Id.*

235. *Id.*

236. *Id.* at 181.

237. *Id.* at 182.

238. *Id.* at 192 (Blackmun, J., dissenting).

239. *Sale*, 509 U.S. at 192.

240. *Id.* at 181-82.

Finally, the majority rested its analysis on some comments included in the negotiating history of the Convention, specifically those made by the Dutch delegate.²⁴¹ The delegate expressed concern over the scope of Article 33, and requested that his view that mass migrations across borders were not protected by the Convention be placed in the record.²⁴² It was recorded without objection.²⁴³ The Court determined that the comments made by the Dutch delegate demonstrated a consensus among the contracting parties.²⁴⁴

Here, too, the rules of construction employed by the Court were flawed. The first principle, already discussed above, provides that a treaty provision be construed consistent with its ordinary meaning.²⁴⁵ As such, the negotiations behind the treaty cannot supercede its language. Reliance on a treaty's *travaux preparatoires* is disfavored in international law.²⁴⁶ Reliance is only appropriate where the terms of the treaty are "manifestly absurd or unreasonable."²⁴⁷ By emphasizing the negotiating history, the Court elevated it above the plain language of Article 33.

Even accepting the Court's method of treaty construction, its conclusion that the Dutch delegate's concerns represented a consensus because no party objected to the comment's entry into the record is not convincing. Failing to object to the documentation of a minority viewpoint does not imply one's acceptance of that view. The Court used the few comments²⁴⁸ that *arguably* could be interpreted as expressing a desire to limit the scope of Article 33 as proof that it did not apply extraterritorially.²⁴⁹ In doing so, the Court elevated the negotiating history above the language of the provision itself. Instead, the

241. See *id.* at 184-87 (relying on the comments of Baron van Boetzelaer the delegate from the Netherlands).

242. *Id.* at 185-86.

243. *Id.* at 186.

244. *Id.* at 186-87.

245. See RESTATEMENT, *supra* note 44, at 229.

246. *Sale*, 509 U.S. at 195 (Blackmun, J., dissenting)(relying on Vienna Convention, *supra* note 232, art. 32, 1155 U.N.T.S. at 340).

247. Vienna Convention, *supra* note 232, art. 32 1155 U.N.T.S. at 340; *Sale*, 509 U.S. at 195 (Blackmun, J., dissenting).

[E]ven the general rule of treaty construction allowing limited resort to *travaux preparatoires* "has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body". . . .

Id. (quoting *Arizona v. California*, 292 U.S. 341, 360 (1934)).

248. The court erroneously relied upon the unofficial comments of a few countries to assert that Article 33 was meant to have extraterritorial effect. See *Sale*, 509 U.S. at 184-87 (relying on the concerns expressed by the Dutch, Swiss and English delegates).

249. It is important to note that the United States was among the countries that did not object. *Sale*, 509 U.S. at 195 (Blackmun, J., dissenting).

Court should have interpreted Article 33 according to the ordinary meaning of its terms. The plain language of the treaty prohibits forced repatriation *in any manner whatsoever*.²⁵⁰

3. *The Interdiction Program and the Object and Purpose of the Protocol*

At the outset of *Sale*, the Court noted that “[t]he wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration.”²⁵¹ Surely the majority did not believe that laws exist in a vacuum, affecting no one and leaving no room for policy considerations. In fact, had the Court adhered to more traditional rules of treaty construction, it likely would have considered the interdiction program’s impact on the Haitians a necessary step in determining the extraterritorial applicability of Article 33.

Though international rules of treaty construction differ from those used in United States courts, both methods have significant similarities. Both the international and American approaches ultimately endeavor to ascertain the meaning intended by the parties.²⁵² Under traditional rules of construction, the ordinary meaning of the terms of the agreement is the starting point for such a determination.²⁵³ The terms are to be considered in light of the object and purpose of the treaty.²⁵⁴ Although American courts are more willing than international bodies, such as the Commission, to resort to the negotiating history of an agreement in determining its object and purpose,²⁵⁵ both ultimately examine the action at issue within the object and purpose of the agreement. As explained at length above, the Court misconstrued the ordinary meaning of the text of Article 33. Even if one concedes that the language is ambiguous, however, the history of the interdiction program illustrates that it was not consistent with Article 33’s overriding object and purpose.

250. Convention, *supra* note 47, art. 33 (1), 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

251. *Sale*, 509 U.S. at 165.

252. See RESTATEMENT, *supra* note 44, § 325 n.4 (“On the other hand, both the Vienna Convention and the United States approach seek to determine the intention of the parties.”).

253. *Id.*

254. *Id.* § 325(1) (“An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”).

255. *Id.* § 325 n.4.

Moreover, since the “ordinary meaning” of terms is to be determined in context and in the light of the object and purpose of the agreement, both “context” and “the object and the purpose” may have to be identified and often cannot be determined without recourse to the preparatory materials and to other “extraneous” evidence.

Id.

In upholding the interdiction program, the *Sale* Court summarily dismissed these policies as irrelevant to its inquiry.²⁵⁶ Even passing contemplation of the Haitian Program and its adverse effects on the Haitian refugees reveals that the program was not consistent with Article 33 as understood within the context of the object and purpose of the Protocol. As the Supreme Court has previously stated, “[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”²⁵⁷ This principle of treaty construction is particularly relevant to the Protocol, “the overriding purpose of which was to safeguard the rights of a special, vulnerable group in need of protection. Indeed, the preamble to the [Protocol] notes that it was adopted in order ‘to assure refugees the *widest possible* exercise of these *fundamental* rights and freedoms.’”²⁵⁸ When read as the Court interpreted it, Article 33 would extend to refugees the fundamental right of non-return and then extinguish that very right through the extraterritorial loophole.²⁵⁹ Such an interpretation is hardly consistent with the object and purpose of Article 33, which seeks to prevent the *return* of refugees to frontiers where their life or freedom might be threatened.²⁶⁰

4. *The Commission's Decision*

The flawed method of treaty construction used by the Court throughout its analysis resulted in an interpretation of Article 33 that ignored the ordinary meaning of its terms within the object and purpose of the treaty. Though it effectively ended litigation over the matter in United States courts, the *Sale* decision did not completely halt the inquiry into the extraterritorial nature of Article 33. After the Court handed down its opinion, the Commission agreed to hear a similar petition brought by many of the same complainants.²⁶¹ The Commission ultimately concluded that the interdiction program violated, among other things, the right to seek and receive asylum guaranteed by Article XXVII of the American Declaration.²⁶² In reaching this

256. See *Sale*, 509 U.S. at 249 (Blackmun, J., dissenting) (refusing to address the policies behind the program).

257. *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

258. Brief of the Office of the United Nations High Commissioner for Refugees as *Amicus Curiae*, at 12 (1992) [hereinafter UNHCR] (quoting Protocol, *supra* note 50, preamble 19 U.S.T. at 6223, 606 U.N.T.S. at 267).

259. *Id.* at 12-13.

260. Convention, *supra* note 47, art. 33 (1), 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

261. Case 10.675, Inter-Am. C.H.R. 550, OEA/ser. L./V/11.84, doc. 51 (1997).

262. *Id.*

conclusion, however, the Commission necessarily considered the extraterritorial applicability of Article 33. In order to more thoroughly consider the international obligations entailed by Article 33, the Commission felt it was necessary to examine the impact of the interdiction program on the returned Haitians within the context of the object and purpose of the Protocol—a much broader inquiry than that of the Supreme Court.

Article XXVII provides that “[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.”²⁶³ The Article sets forth two criteria, both of which must be satisfied in order for the right to seek asylum to exist. First, the right must be consistent with the laws of the country in which asylum is sought.²⁶⁴ Second, the right must be in accordance with international agreements.²⁶⁵

The Commission addressed the second criterion first, pointing out that the Protocol was the international agreement relevant to the analysis.²⁶⁶ It explained that the Protocol established the criteria for being a “refugee.”²⁶⁷ The Commission held that international law recognizes the right of a person seeking refuge to a hearing to determine his or her status as a refugee.²⁶⁸ It cited the obligation of non-refoulement provided by Article 33 as evidence of the right of Haitians to seek asylum free from interference.²⁶⁹ Contrary to the Supreme Court’s view, the Commission concurred with “the view advanced by the United Nations High Commissioner for Refugees in its *Amicus Curiae* brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.”²⁷⁰

The Commission then examined the first criterion of Article XXVII. According to the Commission, the fact that the United States violated the duty of non-refoulement does not mean that it violated Article XXVII of the American Declaration.²⁷¹ The right to seek and receive asylum must also be consistent with the laws of the United States. The American government argued that the *Sale* decision provided that Haitians “are not entitled to enter the United States or to

263. American Declaration, *supra* note 63, art. XXVI.

264. Convention, *supra* note 47, art. 33 (1), 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

265. *Id.*

266. Case 10.675, Inter-Am. C.H.R. at 599.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

avoid repatriation to Haiti, even if they are refugees under the standards of the 1951 Convention or the standards of U.S. law."²⁷²

In contrast, the Commission noted that the United States recognizes the right of aliens who have arrived at American shores to "seek" asylum under United States law, though there is no mandatory "grant" of asylum.²⁷³ Indeed, asylum is only granted to those who meet the criteria of "refugee" provided in American law. Therefore, the Commission concluded, United States law recognizes the general right of aliens to seek asylum without restriction.²⁷⁴ Additionally, it explained that, contrary to the assertion by the *Sale* Court, the United States has consistently recognized the right of Haitians, even those intercepted at sea, to seek and receive asylum.²⁷⁵ It pointed to the language in Reagan's Executive Order which provided that "no person who is a refugee will be returned without his consent."²⁷⁶

The practical difference between the right to "seek" asylum and the "grant" of asylum is also crucial. By interdicting Haitians on the high seas without the opportunity for hearings to determine refugee status, the United States deprived the refugees of their right to seek asylum.²⁷⁷ At this point, American domestic laws do not even come into play with respect to this right. The right to seek asylum attaches upon the refugee's departure from the territory where she is persecuted, not upon her entry into the territory where she seeks asylum.²⁷⁸ Indeed, the actions taken by the United States outside of its territory violated the right to *seek* asylum, a right generally regarded as fundamental. The interdiction program also prevented Haitians from seeking asylum in *other* countries, such as Jamaica, Cuba, Mexico, or any other country in the area.²⁷⁹ The Coast Guard failed to make any factual determination with respect to the destination of the Haitians. In fact, one third of Haitian refugees sought asylum in countries other than the United States.²⁸⁰

The Commission also concluded that the United States denied Haitian refugees equality before the law.²⁸¹ It cited the long time Ameri-

272. Case 10.675, Inter-Am. C.H.R. at 600.

273. *Id.*

274. *Id.*

275. *Id.* at 600-01.

276. *Id.* at 600 n.36 (citing Exec. Order No. 12,324, 3 C.F.R. 181 (1981-83)).

277. Bush's Executive Order completely eliminated interviews aboard Coast Guard cutters. Exec. Order No. 12,807, 3 C.F.R. 303 (1993).

278. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. at 155, 193 (Blackmun, J., dissenting).

279. Case 10.675, Inter-Am. C.H.R. at 601.

280. *Id.*

281. *Id.* at 591.

can policy that provides for more favorable treatment of refugees from Communist or enemy countries.²⁸² This discrimination clearly violates the object and purpose of the Protocol.²⁸³ The Protocol established rights for *refugees*, irrespective of their nation of origin.²⁸⁴

B. *A History of Haitian-American Relations*

Although the Commission's inquiry was much broader than that of the United States Supreme Court, it still failed to consider the significance of the Haitian Program within the context of Haitian-American relations. Thus, even the Commission's analysis did not address the racial contingencies of American policies toward Haitian refugees. As such, it overlooked the extent to which the United States used refugee law as a tool of foreign policy, something which the Commission expressly decried in its decision.²⁸⁵ This subsection provides a basic history of Haitian-American relations. Using this history, the analysis seeks to offer a more complete account of the Haitian Program, an account which both the Court and the Commission failed to address.²⁸⁶ When viewed in light of this history, this analysis reveals that the Haitian Program involves exactly the kind of policies that the Refugee Act of 1980 sought to eliminate.

1. *The "Exploration" of Haiti*

The Haitian population has long endured persecution, often in the form of political violence. Columbus' arrival on the small Caribbean island in 1492 brought with it the virtual annihilation of the native inhabitants,²⁸⁷ a familiar practice among "explorers" of the day.²⁸⁸ He claimed the island for Spain, naming it Hispaniola, and used the native

282. *Id.*; see *infra* notes 364-72 and accompanying text.

283. Protocol, *supra* note 50, preamble, 19 U.S.T. at 6223, 606 U.N.T.S. at 267; see *supra* text accompanying note 258.

284. Protocol, *supra* note 50, art. 1, 19 U.S.T. at 6223, 606 U.N.T.S. at 268.

285. Case 10.675, Inter-Am. C.H.R. at 606-07.

286. It is important to point out that, in considering the object and purpose of the Protocol, the Commission did assess what happened to Haitians returned to Port-au-Prince pursuant to the interdiction program. *Id.* Furthermore, the Commission pointed out that the United States has favored the extraterritorial applicability of Article 33 in other contexts. *Id.* at 569. It is the position of this Comment, however, that the Commission's neglect of even broader American policies, past and present, resulted in an insufficient account of the role of racism and foreign policy considerations in the Haitian Program, thereby downplaying the extent of American disregard for international law.

287. EMILY GREENE BALCH, OCCUPIED HAITI 2 (1927); see PAUL FARMER, THE USES OF HAITI 60 (estimating the number of natives at 50,000 in 1510, down from nearly eight million at the close of the fifteenth century).

288. See, e.g., HOWARD ZINN, *Columbus, the Indians, and Human Progress, in A PEOPLE'S HISTORY OF THE UNITED STATES* 1, 1-22 (1985).

population as a no-wage labor pool working to benefit the motherland.²⁸⁹ After decimating the native population, the Spanish masters began importing Africans to replenish the dwindling labor supply in 1505.²⁹⁰ The brutality continued without mercy.²⁹¹

The 1600s marked increased piracy in the Caribbean, and many French buccaneers settled on the western end of Hispaniola.²⁹² The western third of the island, named by the pirates "Saint Domingue," was eventually ceded to France in 1697 through the Treaty of Ryswick.²⁹³ By the mid-1700s a solid class system had already developed, with three main groups populating the island: French (born either in France or on the colony), mulattos,²⁹⁴ and African slaves (by far the majority of the population).²⁹⁵ Ownership of the territory mattered little; the French rulers were as brutal as their Spanish predecessors.

Inspired by the French Revolution and, to a much lesser extent, the American war for independence, the African population on St. Domingue began to stir.²⁹⁶ What followed was a bloody slave-led revolution that saw the last of Napoleon's forces routed in 1803 and resulted in independence for the new slave-led nation on January 1, 1804.²⁹⁷ The new state renamed itself Haiti for the island's native Arawak name.²⁹⁸ Haiti was the first free nation in Latin America, and the second oldest free nation in the western hemisphere, behind only the United States.²⁹⁹

2. *The United States in Haiti*

The United States watched with great interest as events unfolded in Haiti. Of particular concern for the young nation to the north was the possible example that the war in Haiti provided for its own slave pop-

289. BALCH, *supra* note 287, at 2.

290. *Id.*

291. FARMER, *supra* note 287, at 60-63.

292. BALCH, *supra* note 287, at 2.

293. *Id.*

294. Note that "mulatto" is a term currently used in Haiti to denote social status and class as well as mixed blood. Jean Jean-Pierre, *The Tenth Department*, in HAITI: DANGEROUS CROSSROADS 195, 197-98 (North American Congress on Latin America ed., 1995).

295. See BALCH, *supra* note 287, at 2-3 (estimating the population breakdown at 40,000 French persons, 40,000 mixed-blood Haitians born to African or mulatto mothers and white fathers, and 700,000 African slaves).

296. See *id.* at 3 (noting that about 800 Haitians, slaves and mulattos, participated in the American Revolution); see also FARMER, *supra* note 287, at 66-67 (discussing the impact of the French Revolution on Haitian slaves).

297. FARMER, *supra* note 287, at 71.

298. *Id.* at 60, 71. The Arawak name was "Ayiti." *Id.*

299. *Id.* at 71.

ulation.³⁰⁰ During the later stages of the Haitian Revolution, the United States contributed at least \$750,000 and some troops to aid the French effort.³⁰¹ The American contribution added to an already significant number of foreigners fighting the slaves, including English, Dutch, Polish, German, and Swiss troops.³⁰² When the slave colony finally won its independence, the United States withheld official recognition of the republic until 1862.³⁰³ As Senator Robert Hayne of South Carolina explained in 1824, "We never can acknowledge her independence . . . [t]he peace and safety of a large portion of our union forbids us even to discuss [it]."³⁰⁴

Although the United States initially refused official recognition of Haiti, increased American involvement in Haitian affairs from the mid-1800s betrayed its interest in the island country. Between 1849 and 1913, American Navy ships entered Haitian waters at least twenty-four times, purportedly to protect American property and lives.³⁰⁵ Perhaps more interesting to the United States than protecting American lives, however, were the strategic advantages of the Môle St. Nicolas, a safe harbor across the Winward Passage from Cuba.³⁰⁶ Given this persistent presence in and around the island, the American invasion and subsequent occupation of Haiti in July of 1915 seemed to surprise few observers:

In retrospect, it was merely surprising that the US had held back so long from military intervention. Between 1849 and 1915 American warships had been almost continually present in Haitian waters, ostensibly protecting the lives and property of US citizens. Now, with the final disintegration of Haitian constitutional politics, what had hitherto been seen as a 'public nuisance' by US governments had become an unacceptable security risk . . . What mattered was the US perception of Haiti's strategic importance and its view that European, and particularly German, expansionism in the Caribbean could not be tolerated.³⁰⁷

300. NOAM CHOMSKY, *YEAR 501: THE CONQUEST CONTINUES* 199 (1993).

301. FARMER, *supra* note 287, at 68.

302. CHOMSKY, *supra* note 300, at 199.

303. *Id.* at 200. Chomsky argues that the timing of recognition was no coincidence:

With the American Civil War underway, Haiti's liberation of slaves no longer posed a barrier to recognition; on the contrary, President Lincoln and others saw Haiti as a place that might absorb blacks induced to leave the United States (Liberia was recognized in the same year, in part for the same reason).

Id.

304. FARMER, *supra* note 287, at 78-79.

305. CHOMSKY, *supra* note 300, at 200.

306. FARMER, *supra* note 287, at 82-83.

307. JAMES FERGUSON, *PAPA DOC, BABY DOC: HAITI AND THE DUVALIERS* 23-24 (1987). Ferguson also describes the use of Haiti for strategic advantages against Germany in World War I and the increase in American investment in Haiti during the occupation. *Id.* at 24-25.

Many commentators portray the occupation as a benign effort to restore order to Haiti after its president was lynched.³⁰⁸ Reality contradicts this assertion. More than 3,000 Haitians died fighting the American occupants from 1918 to 1920.³⁰⁹ Moreover, attitudes among important members of the United States government demonstrated little beneficence. President Woodrow Wilson's Secretary of State Robert Lansing bluntly summed up the prevailing view at the time of the occupation:

The experience of Liberia and Haiti show that the African race are devoid of any capacity for political organization and lack genius for government. Unquestionably there is an inherent tendency to revert to savagery and to cast aside the shackles of civilization, which are irksome to their physical nature. Of course, there are many exceptions to this racial weakness, but it is true of the mass, as we know from experience in this country. It is that which makes the negro problem practically unsolvable.³¹⁰

His opinion was not uncommon.³¹¹ Regardless of past or present interpretations of the occupation in American history books, many Haitians viewed the United States presence as yet another chapter in an ever-lengthening saga of strained relations with the hemispheric superpower.

The United States continued its occupation through 1930, initially governing Haiti directly, but later establishing a puppet regime after

308. See Noam Chomsky, *Democracy Enhancement II: The Case of Haiti*, Z MAGAZINE, July/Aug. 1994 (visited Jan. 25, 1999) <<http://www.2mag.org/chomsky/index.cfm>> (disputing some standard historical accounts of the occupation which assert American beneficence); see also FARMER, *supra* note 287, at 95-103 (discussing historical accounts portraying Haitians as resisting of the occupation).

309. Greg Chamberlain, *Up by the Roots: Haitian History through 1987*, in HAITI: DANGEROUS CROSSROADS, *supra* note 294, at 14. Chamberlain describes the brutality:

The *caco* leader Charlemagne Peralte was shot dead in his camp in October 1919 by a U.S. Marine disguised as a Black who had been led there by a Haitian mercenary. The North Americans lashed his half-naked body to a door. The resulting Christ-like image has been a powerful symbol of Haitian national identity and resistance ever since.

Id.

310. See CHOMSKY, *supra* note 300, at 224 (quoting then Secretary of State Robert Lansing).

311. Secretary of State William Jennings Bryan once exclaimed, "Dear me, think of it, Niggers speaking French." *Id.* at 201. On a trip to Haiti in 1917, then Assistant Secretary of the Navy Franklin Delano Roosevelt recorded in his diary a conversation he had with a traveling companion who was to become one of the occupation's leading civilian officials. *Id.* His companion marveled at the Haitian Minister of Agriculture, commenting that "that man would have brought \$1,500 at auction in New Orleans in 1860 for stud purposes." *Id.* Colonel Waller from Virginia described the Haitian elite, stating, "they are real niggers and no mistake - there are some very fine looking, well educated polished men here, but they are real nigs beneath the surface." *Id.* Ferguson indicated that "[t]here is no reason to assume that Waller's view was an isolated one." FERGUSON, *supra* note 307, at 27.

increased Haitian resistance.³¹² American control of the island nation continued in spite of its obvious violation of international law.³¹³ With opposition to the occupation mounting, however, the United States government realized that the puppet regime would not last.³¹⁴ The American military began its withdrawal from the island in 1934 with a treaty recognizing full Haitian sovereignty.³¹⁵ The occupation impacted the subsequent political stability in Haiti in two significant ways: it greatly weakened the civil society and it entrenched the state apparatus in the form of the newly created gendarmerie, "an army to fight the people."³¹⁶

These two developments made the climate right for the "election" of Francois "Papa Doc" Duvalier on a black nationalism platform.³¹⁷ In a 1957 election that was riddled with fraud, Papa Doc secured the presidency, thus inaugurating another tempestuous chapter in Haitian history.³¹⁸ Papa Doc proved especially adept at the art of brutal population control, and with the aid of the newly organized Tontons Macoutes,³¹⁹ he terrorized the poor masses more vigorously than any previous Haitian leader.³²⁰

Although Papa Doc's despotic tendencies were well-known in the United States, American support for the dictator was substantial. For example, the Kennedy administration agreed to increase monetary aid to Haiti, much of which provided Papa Doc's vast wealth, in exchange for the nation's crucial vote to keep Cuba out of the Organization of

312. FARMER, *supra* note 287, at 93.

313. For a brief analysis of the occupation's illegality, see BALCH, *supra* note 287, at 163-65 app. A. Among the "generous" acts of the occupying forces, Balch explains, are the seizure of Haitian national funds, the imposition and enforcement of martial law, and the establishment of a puppet government, "chosen in 1915, [and] unsupported by any elected representatives since 1917," all illegal by the prevailing norms of international law. *Id.*

314. See FARMER, *supra* note 287, at 90-103 (discussing Haitian resistance to the occupation).

315. FERGUSON, *supra* note 307, at 27-28.

316. Michel-Rolph Trouillot, *Haiti's Nightmare and the Lessons of History*, in HAITI: DANGEROUS CROSSROADS, *supra* note 294, at 121, 127.

317. The first two Haitian regimes after the American withdrawal proved nothing more than light-skinned puppets of the United States. See FERGUSON, *supra* note 307, at 30-37. The still powerful resentment of the occupation ultimately doomed these regimes and made the black nationalist movement popular. *Id.* Papa Doc took advantage of this popular sentiment, articulating a platform that framed Haiti's troubles as a function of race (the mulatto elite versus the black masses), not class. See *id.* (describing Papa Doc's rise to the presidency).

318. See FARMER, *supra* note 287, at 107 (explaining some of the election's "anomalies," such as the 7,500 ballots returned from small island with only 900 registered voters).

319. Duvalier created his own personal security force, the Volunteers for National Security ("VSN"). *Id.* at 107. The VSN was dubbed Tontons Macoutes, mythical "bogeymen with sacks," into which children were stuffed. *Id.* at 108.

320. See *id.* at 107-08 (discussing the formation of the Tontons Macoutes and their initial reign of terror); see also FERGUSON, *supra* note 307, at 40-41 (discussing the formation and functions of the Tontons Macoutes).

American States ("OAS").³²¹ The United States primarily justified the support as necessary to "contain the spread of communism" in the region.³²² One commentator noted,

The US dilemma was obvious: to support an unsavory regime which would remain anti-communist if paid to do so, or to withdraw aid and run the risk of 'losing' another formerly dependable fiefdom. The dilemma became all the more acute when Duvalier finally abandoned all pretence of democratic rule.³²³

When Papa Doc became ill in 1970 his control of the country declined noticeably.³²⁴ Papa Doc, however, quickly dashed any hope among the Haitian citizenry of escaping another dictatorship when he appointed his son Jean-Claude to the presidency.³²⁵ The minimum age for the presidency was accordingly lowered from forty to eighteen, and "Baby Doc" took control of Haiti as its "president for life" the day his father died in April of 1971.³²⁶

Baby Doc's reign of terror was tyrannical at best, and it rolled along with the tacit approval, and surreptitious support, of the United States.³²⁷ Thousands of Haitians attempted to escape Baby Doc's wrath, taking to the seas in rafts in an attempt to make it to foreign shores.³²⁸ The American government, for its part, continued to sup-

321. The money supplied by the United States built the international airport in Port-au-Prince, among other things (such as lining the pockets of Papa Doc and his entourage). FERGUSON, *supra* note 307, at 44.

322. *See id.* at 43 (describing America's concern over Papa Doc's apparent ambivalence towards communism, a fear that he often used to blackmail the United States for more financial support); *see also* FARMER, *supra* note 287, at 109 (outlining the American policy objectives regarding Haiti).

323. FERGUSON, *supra* note 307, at 43.

324. *Id.* at 55.

325. *Id.* at 56. Papa Doc made special constitutional arrangements in order to appoint his son. *Id.*

326. *Id.*

327. FERGUSON, *supra* note 307, at 57.

U.S. warships were standing by between Haiti and Miami, preventing the return of any exiles who might find the moment appropriate for an uprising. On the Dominican border, too, troops and tanks were prepared to stop unusual movements into Haiti. True to their word, the U.S. administration and its Dominican ally, Balaguer, were determined to ensure the uneventful and uncomplicated succession of Jean-Claude Duvalier.

Id.

328. CHOMSKY, *supra* note 300, at 206. Ferguson sums up the Duvaliers' rule as:

[T]he social and economic ruin of Haiti. Between 30,000 and 60,000 people were killed by state terrorism during this period, and many others were exiled and otherwise brutalized. The country had become the poorest in the western hemisphere . . . Aid, the mainstay of the economy under Duvalier, had been squandered and pilfered at the approximate rate of 80 per cent . . . Papa Doc was relieving the treasury of some \$10 million per year. The US government and other national and international agencies had thus paid dearly to preserve "stability" in Haiti, as had the Haitian people for Washington's toleration of their dictator.

port the dictatorship despite its full knowledge of the extent of its corruption and violence.³²⁹ Baby Doc failed to inspire the same fear as his father in the Haitian population. Consequently, his overthrow became imminent.³³⁰ Rather than face the angry masses, he and his family fled to France in February of 1986,³³¹ taking with them much of the wealth that they had accumulated at the expense of the Haitian population.

After Baby Doc's departure, Haiti's political situation saw more bloodshed and chaos, at one point having three national leaders in as many months.³³² In 1990 the United Nations-monitored elections in Haiti provided the first democratically elected leader in the country's history.³³³ Jean-Bertrand Aristide garnered nearly 67% of the vote in an election with a 70% voter participation rate.³³⁴ Significantly, the closest candidate was Marc Bazin, the choice of the American government, with only 14% of the vote.³³⁵

As a Catholic priest and an adherent to liberation theology, Aristide gained popularity among poor Haitians with anti-capitalism and anti-American rhetoric.³³⁶ During the first few months of his tenure, Haiti saw a sharp decline in human rights violations and extrajudicial killings, something that should have won him at least a little support from the American government.³³⁷ Aristide's reforms also endeav-

FERGUSON, *supra* note 307, at 57-58.

329. *Frontline: Showdown in Haiti* (PBS television broadcast, June 14, 1994). The U.S. State Department referred lovingly to Baby Doc and his entourage as "the morally repugnant elite." *Id.*

330. See FARMER, *supra* note 287, at 115-25 (discussing the popular opposition to Baby Doc, led in part by Jean-Bertrand Aristide, during the last year of his reign); see also Chamberlain, *supra* note 309, at 16-18 (discussing the origins of resistance to Baby Doc).

331. FERGUSON, *supra* note 307, at 119. An unmarked American transport plane from the United States base at Guantanamo in Cuba flew Baby Doc to safety. *Id.*

332. *Id.* at 146.

333. See, e.g., *id.*

334. INS RESOURCE INFORMATION CTR., PR/HTI/93.00, PROFILE SERIES HAITI 11 (Aug. 1993).

335. CHOMSKY, *supra* note 300, at 209.

336. See JEAN-BERTRAND ARISTIDE, *IN THE PARISH OF THE POOR* (1990). Aristide frequently used the pulpit to preach against American involvement in Haiti: "The great contrast between the U.S. and Haiti is not because—theologically speaking—God has abandoned us and looks after the U.S., but because our wealth has been, is, and will be stolen by the U.S. It's clear that God has not abandoned us." *Frontline*, *supra* note 329.

337. Of course, no such support was forthcoming. See FARMER, *supra* note 287, at 161-71 (noting the reforms under Aristide). Human rights abuses decreased by 75% under Aristide. See CHOMSKY, *supra* note 300, at 210-12 (citing several human rights reports). Not surprisingly, Aristide's presidency marked the first time since the fall of Baby Doc that the United States concerned itself with human rights abuses in Haiti. *Id.* The American government hurriedly compiled records of alleged human rights violations committed under Aristide in an attempt to undermine popular support for him in the United States and abroad. *Id.* at 210-11. No prior

ored to root out government corruption, an especially formidable task in Haiti.³³⁸ The mass migration that began in the late 1970s and early 1980s slowed to nothing more than a trickle,³³⁹ and many Haitians living legally in the United States returned to their homeland.³⁴⁰

The hiatus from the violence lasted only a few months for the Haitian people. The military,³⁴¹ led by General Raoul Cedras, overthrew Aristide in September of 1991.³⁴² The resulting terror proved familiar to the Haitian population, over 1,000 citizens of which were killed in the months after the coup.³⁴³ The renewed attack on the citizenry resulted in yet another mass migration. Once again, Haitians tried to escape the junta-sponsored violence via the seas.

3. *Summary: Analyzing American Involvement in Haiti*

The role of the United States in Haitian history is often viewed in either of two ways. The domination of Haiti can be seen as motivated by American strategic concerns. Given the American government's fairly recent obsession with communism,³⁴⁴ this approach is the most attractive and natural choice. As the brief history above indicates, strategic concerns often dominated Haitian-American affairs.³⁴⁵ Another perspective, however, provides that the treatment of Haiti is a function of race. The blatant racism that permeated Haitian occupation effectively demonstrates the significance of race in the American-Haitian relationship.³⁴⁶ Perhaps, however, the best way of looking at American-Haitian relations requires both perspectives as inextricably intertwined.

administration had compiled such records during the Duvalier years. *Id.* The mainstream American press echoed Washington's concerns about Aristide's dedication to democracy, reality notwithstanding. *Id.*

338. FARMER, *supra* note 287, at 163-71.

339. *Id.* at 169.

340. *Id.* at 167.

341. The military as it presently exists was organized by the United States during the occupation to act as a domestic police force. See Trouillot, *supra* note 316, at 127.

342. See FARMER, *supra* note 287, at 180-83 (describing the coup).

343. Compare HUMAN RIGHTS WATCH, WORLD REPORT 119 (1993) (estimating that well over 1,000 people had been executed in the months after the coup) with FARMER, *supra* note 287, at 183 (quoting Bishop Willy Romélus' estimate that 1,500 people were killed in the first few days after the coup). The Commission also reported in 1993 that 1,500 Haitians had been killed by state-sponsored violence, *House Subcomm.*, *supra* note 111, at 8, though many observers argued that this number is a conservative estimate. See Murray Kempton, *Haiti Blockade Works Two Ways*, NEWSDAY, Oct. 24, 1993, at 31.

344. This is the author's opinion.

345. See *supra* notes 300-23 and accompanying text.

346. See *supra* notes 309-11 and accompanying text.

The United States became involved in Haitian affairs for strategic purposes. Its efforts in support of the French during Haiti's war for independence³⁴⁷ sought to protect its substantial investments in the colony.³⁴⁸ Primarily out of fear over the example the slave nation might set for American slaves,³⁴⁹ the United States government withheld recognition of the new republic for almost sixty years. It finally recognized Haiti in the midst its own civil war, at least in part to use the nation as a dumping ground for its now "free" slave population.³⁵⁰

Since the mid-nineteenth century, American warships frequently patrolled Haitian waters,³⁵¹ primarily to stem the tide of European expansionism. The occupation served much the same purpose.³⁵² Post-World War II involvement in Haitian affairs, typically through either puppet regimes or friendly dictators,³⁵³ was mostly justified as necessary to contain communism,³⁵⁴ an "obvious" national security issue.

Foreign policy, by definition, involves strategic considerations. Explaining away the domination of Haitian politics as motivated only by such concerns, however, sterilizes the nature of American involvement. Given the prevailing attitudes of United States officials during the occupation, one must conclude that racism has always guided the implementation of United States foreign policy in Haiti. Though admissions of racist tendencies on the part of American policy wonks are much harder to come by in recent times, inferences can reasonably be made when contemplating advice such as Kennan's.³⁵⁵

At the short end of Kennan's "position of disparity" are the developing nations, predominately nations of color. "Vague" and "unreal" objectives such as human rights, of course, offer at least bare protections to those nations that have been drained by their colonizers.³⁵⁶ But to support a system that protects these rights would eliminate the "disparity" that so benefits countries such as the United States. The dominant nation must therefore eschew such policies and manipulate

347. See *supra* notes 296-99 and accompanying text.

348. See FARMER, *supra* note 287, at 68 (noting that, by the time of the French Revolution, 500 ships sailed to St. Domingue ports each year – a "booming business").

349. See *supra* notes 300-01 and accompanying text.

350. See *supra* note 303 and accompanying text.

351. See *supra* notes 305-16 and accompanying text.

352. See *supra* notes 305-16 and accompanying text.

353. The dictators were friendly to American interests, though by no means friendly in the traditional sense.

354. See *supra* notes 322-23 and accompanying text.

355. See CHOMSKY, *supra* note 5, at 318.

356. *Id.*

to the greatest extent possible the domestic politics of developing nations.

History seems to demonstrate that, the more spite the American government has for the population that it is exploiting, the greater its level of involvement.³⁵⁷ The “otherness” of “foreign” populations as perceived by American officials makes them ripe for conquest. The United States has frequently interfered in the affairs of our “little brown brothers” throughout the hemisphere,³⁵⁸ but none as much as the Haitian population.³⁵⁹ Indeed, the “Niggers” might speak French,³⁶⁰ but the entire race clearly “lack[s] genius for government,”³⁶¹ and thus deserve no voice in their own affairs. Such is the vile maxim of the masters—not applicable in American relations with, say, France.

C. *Comparing Refugee Groups*

American manipulation of Haitian domestic affairs through its support of the Duvalier regimes and other unsavory dictators eventually forced Haitian citizens to flee to foreign shores.³⁶² The Haitian Program was adopted to deal with the deluge of refugees.³⁶³ In contrast, other substantial refugee movements did not elicit similar programs from American policy makers. One might contend that the “special treatment” prescribed by the Haitian Program reflected typical American hypocrisy. After all, the United States was denying relief to the victims of the very conditions that it was responsible for creating. When viewed within the context of the foregoing history, however, the

357. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (documenting the sources of legal justification for conquest of normatively divergent peoples in the western hemisphere). Although Williams' history sought to reveal the legal foundations of the United States' conquest and continued subordination of American Indians, his sweeping account of the “discourse of conquest” applies equally to American subordination of other populations. *Id.* Although Williams argues that the discourses of conquest are based less on pigmentation of “foreign” populations than on their normative divergence, he presumably understands pigmentation as one form of normative divergence. *Id.* at 149 n.116.

358. See generally NOAM CHOMSKY, *TURNING THE TIDE: U.S. INTERVENTION IN CENTRAL AMERICA AND THE STRUGGLE FOR PEACE* (1985) (documenting U.S. involvement in the politics of Central American nations).

359. Haiti is one of the only and longest occupations by the United States in this hemisphere. FARMER, *supra* note 287, at 47.

360. CHOMSKY, *supra* note 300, at 201; see *supra* note 311 and accompanying text (quoting then Secretary of State William Jennings Bryan in 1917).

361. CHOMSKY, *supra* note 300, at 201; see *supra* note 310 and accompanying text (quoting then Secretary of State Robert Lansing on his visit to Haiti between 1918 and 1920).

362. See *supra* notes 328-43 and accompanying text.

363. See *supra* notes 80-96 and accompanying text.

Haitian Program fits nicely into a well-established pattern of discrimination against the people of Haiti.

The extent of discrimination against Haitian refugees is indeed shocking. As noted earlier, only twenty-eight of 24,600 Haitians were granted asylum under Reagan's interdiction program from 1981 to 1991.³⁶⁴ Under Bush's order about 18,095 refugees were interdicted in a six month period, 10,149 of whom were sent back to Port-au-Prince without any kind of status interview.³⁶⁵ Most of the remaining Haitians were subsequently deported.³⁶⁶

While Haitian refugees were summarily excluded from American shores during the Haitian Program, refugees from the Soviet Union during roughly the same time period received asylum at a rate of 72.6%.³⁶⁷ Romanian refugees were admitted at a rate of 70.3%,³⁶⁸ while 61.5% of Iranian refugees were granted asylum.³⁶⁹ More astonishing still is the fact that only one week after the *Salé* decision the INS granted automatic eligibility for permanent United States residency to 80,000 Chinese dissidents who fled to the United States after the Tianamen Square massacre.³⁷⁰

The disparity between Haitians and other classes of refugees is most striking in the case of Cuba. Between 1966 and 1980, the United States accepted over 800,000 Cuban nationals.³⁷¹ Indeed, Cubans have enjoyed virtual celebrity status in the United States, as evidenced by the failure of the American government to prosecute forty-eight Cubans who hijacked an airliner and steered it to Florida.³⁷² Criminal acts apparently are not sufficient reason to exclude persons fleeing from such harsh political situations, unless they are Haitian.

Of course, these refugees fled enemy or communist regimes, and were thus, according to the American ideology-based policies, political refugees.³⁷³ It would be absurd to downplay the extent of political

364. See *supra* notes 111-12 and accompanying text.

365. *House Subcomm.*, *supra* note 111, at 7-8; see text accompanying notes 141-43.

366. *House Subcomm.*, *supra* note 111, at 8. Of course, these numbers reflect only rough estimates, due primarily to the fact that the INS database contained "numerous inaccuracies." *Id.* Other mistakes riddled the INS's procedures, such as the "numerous" Haitians found to have credible asylum claims who were "accidentally" sent back to Haiti. *Id.* at 8-9.

367. Malissia Lennox, Note, *Refugees, Racism, and Repatriation: A Critique of United States' Haitian Immigration Policy*, 45 *STAN. L. REV.* 687, 711 (1993).

368. *Id.*

369. *Id.*

370. *Starting Today, U.S. Welcomes 80,000 Chinese*, *SEATTLE TIMES*, July 1, 1993, at A1.

371. Lennox, *supra* note 367, at 712.

372. *U.S. Seeks Legal Ground to Free Group Who Diverted Plane from Cuba*, *L.A. DAILY NEWS*, Dec. 31, 1992, at N15. "Diverted" is a euphemism for "hijacked," which is precisely what the individuals did. *Id.*

373. See *supra* note 56 and accompanying text.

persecution in these countries at the time. The Haitian population, however, experienced more than just political persecution. The realistic possibility of murder and torture at the hands of the state presented itself to almost every poor Haitian with every sunrise.³⁷⁴

The discrimination that drove the Haitian Program reveals another facet of Washington's prevailing attitudes toward Haiti. The ideology-based refugee policies reflect a belief that resistance to communist or enemy regimes was widespread in those particular countries. This belies the seemingly substantial domestic support for certain enemy leaders, for example the Ayatollah or Soviet leaders.³⁷⁵ Such leaders' domestic "popularity" could largely be attributed to strong nationalist tendencies and anti-American stances. Regardless of the reality of their domestic support, the American government often looked upon these favored populations as peoples steeped in the struggle for democracy, needing only help from lax American refugee policies.

In contrast, none of the Haitian leaders, from Papa Doc until Aristide, enjoyed any kind of popular domestic support. Resistance to these regimes was frequent and massive and often rewarded with state-sponsored violence.³⁷⁶ The extent of dissidence in Haiti was demonstrated by the election of Aristide,³⁷⁷ an event that grass roots organization worked on for over a decade.³⁷⁸ Yet Haitians historically have been treated by the INS as if they lack any political convictions. The INS assumed that persons fleeing Haiti, having no political concerns, could only be leaving for economic reasons.³⁷⁹ The "Niggers" might be able to speak French,³⁸⁰ but they still lack "any capacity for political organization,"³⁸¹ and thus could never be fleeing for political reasons.

D. *Justifying the Haitian Program*

The American government and other "impartial" observers posited several reasons for treating Haitian refugees differently. The first justification, already discussed above,³⁸² provided that the Haitians'

374. See *supra* notes 325-41 and accompanying text.

375. Note the strength of post-Soviet communists in Russia. *World Report*, L.A. TIMES, Jan. 4, 1994, at 4.

376. See *supra* notes 328-43 and accompanying text.

377. See *supra* notes 333-34 and accompanying text.

378. See *supra* notes 336-42 and accompanying text.

379. See *supra* notes 110-11 and accompanying text.

380. CHOMSKY, *supra* note 300, at 201; see *supra* note 311 and accompanying text (quoting then Secretary of State William Jennings Bryan in 1917).

381. CHOMSKY, *supra* note 300, at 201; see *supra* note 310 and accompanying text, (quoting then Secretary of State Robert Lansing on his visit to Haiti between 1918 and 1920).

382. See *supra* notes 110-11 and accompanying text.

flight was prompted by the country's lugubrious economic state. As such, they were not even "refugees" by any formal legal definition,³⁸³ and thus not entitled to protection. Some other official reasons offered to justify the Haitian Program—all as disingenuous as the economic refugee rationale—attempted to mask its racial contingencies.

1. *Some Official Justifications*

The American government successfully avoided its legal responsibilities to the Haitians by asserting that the obligation of non-refoulement did not extend to refugees on the high seas because they were in no territory at all.³⁸⁴ But contrary to the government's position in the *Sale* case, the argument accepted by the Court, the United States unquestionably has understood Article 33 to prohibit the forced repatriation of refugees. Reagan's original interdiction program provided that "no person who is a refugee will be returned without his consent."³⁸⁵ The agreement between the United States and Haiti was bound by "international obligations mandated in the Protocol Relating to the Status of Refugees."³⁸⁶

Similarly, in response to an agreement among Britain, Hong Kong, and Vietnam that provided for the forcible return of Vietnamese refugees, a State Department spokeswoman stated that "[w]e oppose forced or mandatory repatriation."³⁸⁷ As demonstrated by this statement, the United States has always opposed forced repatriation of refugees; with the exclusion of Haitians, of course.³⁸⁸ In voicing its opposition, the United States previously has indicated its understanding that the obligation of non-refoulement focused on the persecution to which a refugee might be subjected *in the territory to which she is returned*, not the refugee's location at the time of interdiction. In other words, the availability of the most fundamental protection afforded a refugee turns on the refugee's need for protection, *not* on the refugee's location when she needs that protection. Essentially, the

383. See *supra* notes 54-55 and accompanying text.

384. See *supra* notes 155-57 and accompanying text.

385. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160-61 (1993); see *supra* text accompanying note 109.

386. UNHCR, *supra* note 258, at 14.

387. *U.S. Opposes Forcible Return of Boat People*, ORANGE COUNTY REG., Oct. 30, 1991, at A17.

388. *Des milliers d'Haitiens manifestent a Miami en soutien au president Aristide*, AGENCE FRANCE-PRESSE, Oct. 3, 1991, available in LEXIS, News Library, Non-english File; Angela Lau, *Asians Here Troubled By Threat to Refugees*, SAN DIEGO UNION-TRIB., Oct. 4, 1991 at B1. "The refugees' pleas have been heard by the U.S. government, which is 'talking to both British government and the United Nations High Commission for Refugees,' said State Department spokeswoman Margaret Tutwiler. 'Our position on repatriation is well known.'" *Id.*

Court's decision in *Sale* eviscerated the express purpose of the INA and the Protocol by allowing the United States government to shirk its legal obligations on the basis of a questionable interpretation of Article 33.³⁸⁹

Others might justify the Court's decision in *Sale* by pointing out that refugee matters properly fall within plenary power doctrine, and thus were properly subject to judicial deference. As such, issues concerning asylum claims can be checked only through congressional legislation:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one If there be any just ground of complaint . . . it must be made to the political department of our government, which is alone competent to act upon the subject.³⁹⁰

Congress sought to check this power, of course, through the Refugee Act of 1980.³⁹¹ Its express purpose was to end the Executive's use of asylum as a foreign policy tool aimed at solidifying opposition to communist regimes.³⁹² Congress properly reigned in Executive abuses in asylum matters, Executive Orders contrary to the Refugee Act such as those comprising the Haitian Program do not enjoy judicial deference.³⁹³

The American government further justified the interdiction program as a necessary means of deterring Haitians from making the deadly voyage across the seas to American shores.³⁹⁴ The government asserted that the Haitian Program actually saved Haitians who would have otherwise drowned en route to the United States.³⁹⁵ Of course, most proponents of this argument fail to mention the Haitians that were drowned as the Coast Guard boarded their vessels for purposes of repatriation.³⁹⁶ This rationale also fails to account for widespread Coast Guard abuses.³⁹⁷

389. The Inter-American Commission on Human Rights disagreed with the Court. Case 10.675, Inter-Am. C.H.R. 550, 559 OEA/ser. L./V./11.84, doc. 51 (1997).

390. Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 25 UTAH L. REV. 279, 305 (1991) (quoting Chinese Exclusion Case, 130 U.S. 581, 606 (1889)).

391. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107 (1980).

392. Chinese Exclusion Case, 130 U.S. at 283.

393. *Id.* at 305-06.

394. Case 10.675, Inter-Am C.H.R. at 567.

395. *Id.*

396. *Id.* at 603.

397. FARMER, *supra* note 287, at 263-96 (recounting Coast Guard abuses at sea and on Guantanamo Bay).

In addition to dangers presented by Coast Guard interdiction, Haitians returned to Port-au-Prince in accordance with the Haitian Program were required to report their names and addresses to the Haitian soldiers greeting them at the docks.³⁹⁸ Many of these interdicted refugees were later arrested at home, some were beaten in public, and others were shot outright.³⁹⁹

The United States contended that the interdiction program saved Haitian lives.⁴⁰⁰ Returning Haitians to their homeland, however, where human rights violations were a part of quotidian life, in fact subjected many of the interdictees to severe reprisal.⁴⁰¹ Indeed, if a Haitian was not a legitimate refugee under international law upon her initial flight from the country, she certainly would have had a reasonable and particularized fear of persecution upon her return, thus qualifying her as a refugee. Despite the United States government's assurances otherwise, the Haitian Program violated domestic and international legal obligations. Furthermore, the idea that the program actually saved Haitian lives contradicts reality.

2. *More Likely Reasons Behind the Haitian Program*

In spite of American assertions to the contrary, the United States government did not discriminate against Haitian refugees "for their own good." A closer look at other events occurring contemporaneously with the Bush interdiction program helps illuminate the racial contingencies of the Haitian Program in general.

As an immediate matter, advisors sought to assuage domestic concerns over the overwhelming number of Haitians arriving on American shores. While Reagan saw the Haitians as "a serious national problem detrimental to the interests of the United States,"⁴⁰² others were less evasive about the real threat that the refugees posed. Former presidential candidate Patrick Buchanan explained, "If we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them up in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?"⁴⁰³ Affording the refugees temporary protection would burden the people of Flor-

398. Case 10.675, Inter-Am. C.H.R. at 602-03.

399. *Id.*

400. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 172 (1993).

401. Case 10.675, Inter-Am. C.H.R. at 601.

402. *Sale*, 509 U.S. at 160.

403. *Patrick Buchanan – In His Own Words*, FAIR, Feb. 26, 1996 (quoting *This Week With David Brinkley* (ABC television broadcast, Jan. 8, 1991)).

ida, who, according to Buchanan's logic, would be unable to cope with the massive increase in their black population.

Still, one might point to the wholesale acceptance of Cuban asylum claims as evidence that United States asylum policies are not racially based. After all, Cubans, persons of dubious whiteness, have benefited from relaxed asylum policies far more than any other refugee group.⁴⁰⁴ In contrast, the favored treatment of Cubans can be easily explained under an interest convergence analysis, which generally provides that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."⁴⁰⁵ Granting Cubans free passage to American shores served to strengthen the United States government's crusade against communism, very much in accordance with the express purpose of the ideology based asylum policies.⁴⁰⁶ The only reason to accept these undesirables is to effectively demonstrate to the American public the ills of communism, and thus justify a massive military budget and other forms of corporate welfare. Haitians, unfortunately, lack the "benefits" of living under communist rule and are therefore properly subject to exclusion on an unprecedented level.

Even viewing American policies toward Cuban refugees under an interest convergence analysis, however, does not mean that race has played no role in Cuban asylum claims. Prior to 1994, many, if not most, of the Cubans fleeing to the United States were light-skinned, affluent professionals.⁴⁰⁷ But when the Cuban economy was on the verge of collapse in 1994, sending thousands of *poor, black* Cubans fleeing to American shores,⁴⁰⁸ the Clinton administration responded by extending the interdiction program to counteract the flood, thus ending over three decades of favored treatment of Cuban refugees.⁴⁰⁹ Perhaps if the refugees were lighter-skinned, richer, or more adept at baseball, then the United States would not have been so quick to deny

404. See *supra* notes 367-72 and accompanying text.

405. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 20, 22 (1995). As Bell explains, "Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle- and upper-class whites." *Id.*

406. See *supra* notes 69-70 and accompanying text.

407. JON LEE ANDERSON, *CHE GUEVARA: A REVOLUTIONARY LIFE* 409 (1997) (pointing out that the affluent and middle class were the first to flee the Cuban Revolution, forming a well-off exile colony of sorts in Miami).

408. Linda Robinson et al., *Holding Back the Tide: Clinton's Policy Shift Toward Cuban Refugees Finesses a Bigger Problem*, *U.S. NEWS & WORLD REP.*, Aug. 29, 1994, at 32, 35-36.

409. *Id.*

their admittance. As they were, however, their lot fell quickly with that of the Haitians.

Allowing Haitian refugees to present asylum claims offered little benefit to the American government, and thus was not a policy pursued in response to the deluge of refugees. Even if accepting the Haitians served the purposes of American policy makers, as did the acceptance of Cuban refugees, it probably would not have improved their treatment. Clinton's 1994 Cuban interdiction program demonstrated that any benefits gained by the admission of poor blacks fleeing from enemy regimes are easily outweighed when their numbers reach significant levels.⁴¹⁰

E. *Maintaining the Position of Disparity*

Both the Court and the Commission failed to address many of these issues. When viewing the Haitian Program in conjunction with the foregoing history, however, one can reasonably infer the probable American objectives behind the program. A particularly sanguinary version of power politics was American policymakers' driving force as they attempted to ensure a submissive Haitian population that would have no choice but to cater to the whims of United States foreign policy. These inferences are strengthened by the fact that the refugees' exclusion proved an essential link in a chain of contemporaneous events that broke the back of Haiti's nascent democratic movement. Properly fit into this context, the Haitian Program signifies yet another chapter in the history of exploitation.

The first factor contributing to the demise of Aristide's popular movement⁴¹¹ was the complete failure of the sanctions imposed on the *de facto* government.⁴¹² It was clear from the start that the OAS embargo imposed immediately after the coup would be toothless. The blockade never managed to stop the free flow of contraband, especially oil, across the porous Haitian-Dominican border.⁴¹³ Surprisingly, the United States was unable to detect this embargo evasion,

410. See *supra* notes 406-07 and accompanying text.

411. See *supra* notes 337-40 and accompanying text.

412. The first such embargo, imposed immediately after the military coup, was initiated by the OAS. See Chomsky, *supra* note 308. Another embargo was subsequently imposed by the United Nations. Kim Ives, *The Unmaking of a President, in HAITI: DANGEROUS CROSSROADS, supra* note 294, at 65, 80.

413. Deidre McFadyen et al., *Introduction to HAITI: DANGEROUS CROSSROADS, supra* note 294, at 1, 4-6.

probably because it had busied its forces with stopping the flow of Haitian refugees.⁴¹⁴

Enforcement became even less likely in February of 1992, as the Bush administration announced that it would lift the embargo for assembly plants doing business for American companies.⁴¹⁵ This "exemption" was continued under the Clinton administration, as trade increased by 50%.⁴¹⁶ These facilities were "exempted" because "the Bush and Clinton administrations believed these [U.S.-owned] companies were so vital to Haiti that they allowed them to continue operating during the embargo."⁴¹⁷ Of course, this shift mostly benefited Haiti's business elite who continued to profit from the import/export business generated by the "exemption."⁴¹⁸ In turn, the elite, who initially financed Aristide's overthrow, helped sustain the vitality of the putschists.⁴¹⁹

As the embargo continued in 1993, American trade with Haiti increased by more than half.⁴²⁰ In June of 1993, the United Nations Security Council attempted to increase the pressure on the junta through Resolution 841, a mandatory global embargo on oil and arms supplies to Haiti.⁴²¹ The new United Nation's embargo did little to destabilize the regime, however, as contraband continued to flow into Haiti from the Dominican Republic.⁴²²

Finally, the United States announced in May of 1994 that it would tighten the embargo by lifting the exemption for American businesses.⁴²³ The plan also banned all commercial flights and financial transactions with Haiti.⁴²⁴ The American government, however, failed to sever the illegal regime's substantial support from the Haitian elite. The ban on financial transactions with Haiti did not include the assets of the business elite. Thus, the elite were allowed to safely transfer their money out of American accounts and into other foreign

414. Noam Chomsky, *Democracy Restored*, Z MAGAZINE, Nov. 1994 (visited Jan. 25, 1999) <<http://www.zmag.org/chomsky/index.cfm>>.

415. *Id.*

416. *Id.*

417. *Id.* (quoting from the *Christian Science Monitor*). Chomsky wondered, "While the vision of our benevolence brings tears to the eyes, nevertheless duller minds might wonder why only U.S.-owned enterprises have the curious property of being so beneficial to the suffering people of Haiti." *Id.*

418. Paul Farmer, *The Significance of Haiti*, in HAITI: DANGEROUS CROSSROADS, *supra* note 294, at 205, 221.

419. *Id.* at 222.

420. Chomsky, *supra* note 414.

421. Ives, *supra* note 412, at 80.

422. *Id.*

423. Chomsky, *supra* note 414 and accompanying text.

424. *Id.*

banks where it could be used to sustain the junta.⁴²⁵ Additionally, although the United States paid lip service to the enforcement of the oil embargo, American oil companies regularly subverted it under Washington's blind eye.⁴²⁶ By the time the American government finally reprimanded the American companies, the Haitian elite had already stockpiled their oil depots for use by the military.⁴²⁷ Thus, the coup regime remained steadfast, constantly looking to thrash any peasant that dared raise her head.

The sanctions, however, were not completely ineffective. One Haitian observed that "the people the embargo was supposed to help are being hurt. They have to pay for things with a 300% increase. They aren't really hurting any of the big guys. The big guys in the country are making more money than ever for the past two years."⁴²⁸ While the Haitian poor and middle class lived under the embargo without electricity and oil products, the elite and the military regime enjoyed all of the usual amenities.⁴²⁹ "There was, in effect, no embargo against the coup supporters — at the same time the long standing embargo against the Haitian poor was strengthened,"⁴³⁰ one commentator observed. Indeed, the embargoes crushed the poor, while simultaneously solidifying the junta's control over the country.

A second series of events that contributed to the subversion of the Haitian popular movement involved the negotiations over Aristide's return to power. Immediately after the coup, the OAS convened a rare emergency session in order to condemn the action and plan a course for Aristide's return, resolutions that were explicitly supported by the United States.⁴³¹

During the following months, an OAS delegation worked with the coup leaders while the elected president remained in exile.⁴³² It was clear from the start of the process, however, that OAS and American diplomats would require significant concessions by Aristide. The first proposed agreement, for example, would have lifted the embargo in exchange for more negotiations, although it mentioned nothing about restoring Aristide.⁴³³ Not surprisingly, Aristide rejected the proposal

425. *Id.*

426. Farmer, *supra* note 418, at 221.

427. *Id.*

428. *Frontline*, *supra* note 329.

429. Farmer, *supra* note 418, at 221.

430. *Id.* at 223.

431. Ives, *supra* note 412, at 65.

432. *Id.*

433. *Id.* at 71.

and was quickly labeled "intransigent" by coup parliamentarians and American officials for refusing to be "flexible."⁴³⁴

Aristide learned the lesson quickly; if he was to regain his seat as president, he would have to play along with the very people responsible for his overthrow. His first concession in the negotiation process was his popular prime minister, René Prével.⁴³⁵ Aristide was pressured by American ambassador Alvin Adams and OAS special envoy Augusto Ocampo to replace Prével with either Marc Bazin or René Théodore, both choices of the junta.⁴³⁶ When Aristide refused, the American press once again lambasted him for being "intransigent."⁴³⁷ He eventually acceded to the demands and named Théodore as Prével's replacement.⁴³⁸ Théodore was removed by the military shortly thereafter.⁴³⁹

The first major agreement to come out of the negotiations was the "Protocol of Accord," signed in Washington in February 1992.⁴⁴⁰ The agreement provided for:

- 1) an amnesty for the army and other authors of the coup; 2) respect of parliamentary legislation ratified after the coup, which included Cédras' appointment as head of the army through 1994; and 3) the lifting of the embargo 'immediately after the ratification of the prime minister and the inauguration of the government of national consensus.'⁴⁴¹

Significantly, there was no specific date set for Aristide's return.⁴⁴² Aristide later backed out of the agreement, asserting that he did not agree to amnesty for Cédras since "common criminals" were excluded from the amnesty.⁴⁴³ Once again, the American press disparaged him.⁴⁴⁴

After the failure of the Washington Protocol, the junta attempted to win the approval of the international community by naming a new prime minister to head the reorganized civilian government.⁴⁴⁵ The junta appointed Marc Bazin, an obvious attempt to win approval from

434. *Id.*

435. *Id.*

436. *Id.* Note that Bazin was the American-supported opponent of Aristide in the 1990 elections. See *supra* note 335 and accompanying text.

437. Ives, *supra* note 412, at 71.

438. *Id.* at 72.

439. *Id.*

440. *Id.* at 74.

441. *Id.*

442. *Id.*

443. Ives, *supra* note 412, at 74.

444. *Id.* at 74-75.

445. *Id.* at 75.

the United States government.⁴⁴⁶ With this appointment, the junta had successfully consolidated its rule, and Aristide was forced to negotiate directly with Bazin.⁴⁴⁷

As the negotiations continued, the American government circulated a pamphlet documenting human rights abuses under Aristide's brief tenure, although none of the reports alleged state-sponsored violence.⁴⁴⁸ The CIA reported the contents of Aristide's medicine cabinet as proof of his mental instability.⁴⁴⁹ The press echoed disgust over the exiled president's perceived ungratefulness, and members of Congress began shifting on their support for Aristide's reinstatement.⁴⁵⁰

The tepid American support for the democratically elected government of Haiti left Aristide with little bargaining power as he entered into a new set of negotiations in June 1993.⁴⁵¹ It was appropriate that, as the Coast Guard was returning refugees to Haiti, the negotiations took place on Governor's Island, New York, a Coast Guard base.⁴⁵² The final agreement set the schedule for Aristide's return:

Aristide would name a new prime minister, the UN would lift sanctions, the parliament would undertake a series of reforms of the police and Armed Forces under the supervision of a UN force, Aristide would decree a blanket amnesty for those involved in the coup and then Cédras would voluntarily retire at some point before Aristide's return, which was set for October 30, 1993.⁴⁵³

The United Nations/United States-brokered Accord was a disaster for the Haitian people. The newly appointed prime minister provided the junta with the legitimacy of the Aristide government, while the end of the embargo allowed it to further consolidate its grip on the country. As the negotiations were closing, the coup leaders in Haiti renewed their attack on the peasant movement.⁴⁵⁴ It should have surprised few observers when the October 30 restoration date came and went with no hint that the military planned to relinquish control.⁴⁵⁵

Although the United States initially appeared adamant about Aristide's return, American negotiators dragged their feet throughout the negotiations. Officials at Governor's Island continued to make difficult demands, knowing well that Aristide would not accede to many of

446. *Id.*

447. *Id.*

448. *See supra* note 337 and accompanying text.

449. *Frontline*, *supra* note 329.

450. *See, e.g.*, Ives, *supra* note 412.

451. *Id.* at 80.

452. *Frontline*, *supra* note 329.

453. Ives, *supra* note 412, at 81.

454. Chomsky, *supra* note 414.

455. *Id.*

their stipulations.⁴⁵⁶ When Aristide repeatedly refused to accept an amnesty clause for the coup leaders, American negotiators such as Lawrence Pezzullo accused him of being "obstructionist," apparently confounded by Aristide's reluctance to let murderers go with impunity.⁴⁵⁷ It is interesting to note that Aristide was labeled "intransigent" throughout the negotiation process for his refusal to negotiate with an illegal regime, one composed of bona fide terrorists.⁴⁵⁸ Furthermore, when the restoration date passed with no change of power, the American government showed little in the way of response, asserting that democracy in Haiti was not worth one American life.⁴⁵⁹ The message to the poor Haitian masses was clear: there would be no help from the United States.

Aristide did not return as president of Haiti until early 1995.⁴⁶⁰ American delay tactics had worked to perfection, as the democratically elected president was nearing the end of his five-year constitutional term having actually served only twenty months.⁴⁶¹ He was barred from running again.⁴⁶² The lengthy negotiations served to legitimize the junta and extend their stay in power. Additionally, the sieve-like embargo further strengthened the military's grip on Haiti's poor. The final piece of the puzzle, the Haitian Program, effectively broke any resistance to the illegal regime, and life for the Haitian poor continued in tragedy . . . as usual.

Aristide once said, "I cannot accept that Haiti should be whatever the United States wants it to be."⁴⁶³ This attitude obviated the need for his prompt removal. The Haitian military, in the familiar position of doing American bidding, did not let American officials down. While the junta was consolidating its strength during the negotiations and international embargo, the United States made sure that the people responsible for Aristide's success, namely the Haitian peasantry, were sufficiently punished for their mistake.⁴⁶⁴ Accordingly, Haitians fleeing the widespread violence were immediately returned by Coast Guard cutters.⁴⁶⁵

456. Ives, *supra* note 412, at 81-83.

457. *Id.* at 82.

458. It is reminiscent, of course, of past American and Israeli refusal to negotiate with the PLO for much the same reason. See ЧОМСКИЙ, *supra* note 5, at 373 (discussing reasons behind U.S./Israeli rejectionism). American hypocrisy has seldom reached such depths.

459. Ives, *supra* note 412, at 85.

460. Farmer, *supra* note 418, at 224.

461. Chomsky, *supra* note 308.

462. *Id.*

463. ЧОМСКИЙ, *supra* note 300, at 209.

464. *Id.* at 210-11.

465. See *supra* notes 110-22 & 138-39 and accompanying text.

The Haitian masses understood the message well. In the 1990 elections, 70% of the voting population went to the polls to vote for Aristide compared to just 29% turn-out rate in the 1995 elections.⁴⁶⁶ Though former Aristide prime minister René Préval succeeded him as president, the series of neoliberal economic reforms thrust upon Aristide by American negotiators as a part of the restoration agreements thwarted his popular agenda.⁴⁶⁷ Aristide's proposed increase in the minimum wage to \$3.20 a day was scrapped, leveling the minimum at about \$2.00 a day.⁴⁶⁸ American companies assembling clothing in Haiti no doubt breathed a sigh of relief, by 1984 Haiti was the ninth largest assembler of American goods in the world.⁴⁶⁹ Post-coup Haiti also proved an excellent market for American goods such as rice, which currently accounts for over half of the country's consumption.⁴⁷⁰ This in spite of the fact that over 60% of the population attempts to make its living by growing crops like rice.⁴⁷¹ Meanwhile, modest social programs such as the literacy project initiated under Aristide have been eliminated in accordance with IMF austerity measures.⁴⁷² Indeed, the Haitian Program worked exceedingly well in reinforcing the traditional position of disparity, relegating the Haitian population to its "rightful place" with other nations of color.

III. RECONSIDERING REFUGEE LAW: THE IMPACT OF JUDICIAL "OBJECTIVITY"

The *Sale* decision is perhaps most significant for the things that it failed to do rather than the law that it created. The most apparent impact of the Court's decision was the continued vitality of the Haitian Program, this time under the aegis of legality.⁴⁷³ More importantly, by ignoring the effects of the Haitian Program and the historical context in which it took place, the Court narrowed the scope of its inquiry. In doing so, it passed on the opportunity to at least draw attention to the long-time discrimination against Haitian refugees, a practice that fits nicely into an overall pattern of abuse and

466. Clara James, *Haiti: The Roof Is Leaking*, Z MAGAZINE, June 1997, at 36.

467. See *supra* notes 435-39 and accompanying text.

468. Farmer, *supra* note 418, at 221.

469. James, *supra* note 466, at 33-34.

470. *Id.*

471. *Id.*

472. *Id.* For additional information on the effects of IMF and World Bank programs in Haiti, see Farmer, *supra* note 418, at 226-27. Farmer's essay also describes Haiti's status after Aristide's return. *Id.*

473. President Clinton eventually ended the interdiction aspect of the Haitian Program after being pressured by Randall Robinson's hunger strike. Colman McCarthy, *Classic 27-day Hunger Strike Convinces Clinton*, NAT'L CATH. REP., May 27, 1994, at 10.

subordination of the Caribbean nation at the hands of the United States. The Court eschewed "vague" and "unreal" objectives such as human rights,⁴⁷⁴ favoring instead the political expediency of the Haitian Program.

Although the Court's analysis fails on its own terms, it is likely a more favorable disposition for the Haitians would still lack sufficient scope to reveal the extent of American violations of international law. In an attempt to give an "objective" hearing to the legal issues involved in *Sale*, the Court ignored things such as historical context and the impact of the of the interdiction program on Haitian refugees, focusing instead on merely "legal" questions. As already outlined above, however, in order to fully consider America's international obligations within the object and purpose of the Protocol, the Court should have found it necessary to address precisely these broader issues.

Additionally, it is nearly impossible to give a completely objective hearing of a legal issue that has such profound implications for United States foreign policy. Indeed, the Court's decision reflected an institutional "agenda" very much in accordance with its function as a branch of the government. Laws and treaty provisions are often vague (although probably not in this case), and it is the judiciary's job to interpret them. In trying to do so, judges

have to draw on their understanding of politics, economics, social organization, and the like to arrive at their interpretation of the law. It promotes our understanding of how the courts work to see that those understandings are "political," in a useful sense that doesn't impute crass motivations to the judges.⁴⁷⁵

Although the Court claimed that the issues presented in *Sale* were strictly legal issues,⁴⁷⁶ the Court's opinion was in fact "political" in its conspicuous silence on significant aspects of the Haitian refugee crises.

Although the Commission's disposition of the *Sale* case involved a much broader inquiry than that of the *Sale* Court, it too failed to adequately address all sources of the Haitian Program, namely American foreign policy designs. Furthermore, the Commission's consideration of the legal questions presented in the Haitian refugee case was constrained by the racial contingencies of the very international instruments that it was seeking to enforce. Eliminating future "Haitian

474. See CHOMSKY, *supra* note 5, at 318.

475. MARK TUSHNET, *CENTRAL AMERICA AND THE LAW: THE CONSTITUTION, CIVIL LIBERTIES, AND THE COURTS* 8 (1988).

476. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 165 (1993).

Programs” will prove exceedingly difficult as long as the United States continues to seek and maintain its position of disparity. At an initial glance, it would seem easy to eliminate American manipulation of refugee law for foreign policy purposes by simply convincing the United States government to remain true to the spirit, if not the letter, of international and domestic law. Aside from being an unlikely solution, this approach—the path chosen by the Commission—fails to account for racial contingencies inherent in the formal legal “protections” for refugees.

As James Hathaway has argued, the very definition of “refugee” in international refugee law was intentionally drawn up to be somewhat malleable.⁴⁷⁷ By defining refugee in terms of social and political rights, the drafters of the Convention singled out the difficulties of the Soviet Bloc countries.⁴⁷⁸ By excluding socioeconomic persecution and the like, the drafters eliminated the realm of problems in the rest of the Western world, thus virtually eliminating “western refugees” by definition.⁴⁷⁹ The foundation of the formal international refugee protections, therefore, was laid in order to conform to Western political objectives.

The original definition of a refugee in the Convention included only those individuals whose flight was prompted by any pre-1951 event within Europe.⁴⁸⁰ This definition, promulgated under the auspices of the United Nations, effectively doled out the burden of absorbing *European* refugee movements to member-states without requiring reciprocity by European countries for non-European refugees.⁴⁸¹ The definition was not amended until the drafting of the Protocol more than fifteen years later.⁴⁸² Furthermore, the competency of the UN High Commissioner for Refugees (“UNCHR”) office extended protection to include those displaced persons falling outside of the formal protections.⁴⁸³ Thus, the UNCHR could coordinate regional resettlement for displaced persons from Third World countries while denying them relief under the (Eurocentric) formal instruments.⁴⁸⁴ Assistance to Third World “refugees,” therefore, is merely voluntary, whereas in-

477. James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 136 (1990).

478. *Id.* at 149-50.

479. *Id.* at 150.

480. *Id.* at 152-53.

481. *Id.* at 156.

482. Protocol, *supra* note 50, art. 1, 19 U.S.T. at 6223, 606 U.N.T.S. at 268.

483. Hathaway, *supra* note 477, at 158.

484. *Id.* at 159.

ternational obligations, such as non-refoulement, are mandatory for European refugees under the formal regime.

Finally, although the refugee definition was changed by the Protocol, most Third World refugees remain de facto excluded from formal protections.⁴⁸⁵ "Persecution" as it is defined by the formal system reflects a European understanding of the term. Most Third World refugee movements are prompted by broadly-based political and economic turmoil rather than individualized "persecution" as it is understood in the European context.⁴⁸⁶ By clearly denying protection for those fleeing dismal economic situations, the drafters of the formal protections effectively precluded individuals fleeing from Third World countries. These persons, inevitably people of color, will always be fleeing the economic conditions inherent in their political turmoil.

In the case of the Haitians, the formal regime for refugee protection failed because it was built on a foundation of Eurocentric ideological preferences. The refugee movement from Haiti was precisely the kind of exodus that the drafters of the Convention feared. State parties to the Protocol and/or Convention will continue to shirk their formal responsibilities unless the definition of refugee is broadened to account for economic factors. Furthermore, the understanding of "persecution" must be more generalized.⁴⁸⁷ Finally, the Protocol and Convention must be enforced in a manner that does not allow a nation to override its international obligations for domestic concerns.

IV. CONCLUSION

When *Sale* was decided, it was easy for most commentators to criticize judicial approval of the Haitian Program. To them, it was a set of policies that needed to be changed in order to handle all refugees in an equitable fashion. When placed against the background of past Haitian-American relations, however, one understands that the inequities go far beyond refugee politics. Rather than an isolated instance of injustice perpetrated by a government that typically acts within the dictates of fairness and equality, the Haitian Program reflects another chapter in Haiti's history of subordination and exploitation at the hands of American foreign policy. The extent of American manipulation of Haiti's internal politics, history demonstrates, is easily allowa-

485. *Id.* at 162.

486. *Id.*

487. The current definition of persecution requires an individualized and particularized fear of persecution. It is the argument of this Comment that this definition should be expanded to include other factors such as economic fears. See *supra* text accompanying note 55 for the current definition of refugee.

ble because of its population's blackness.⁴⁸⁸ Indeed, it is not hard to imagine the color of which Kennan's position of disparity is generally composed: peoples not worthy of "vague" and "unreal" objectives such as "human rights" and "world benefaction" because of the darkness of their skin.⁴⁸⁹ Without this backdrop for discussing the Haitian Program, its significance will be forever consigned to the ashcan of history: forever buried deep within the American conscience.

James R. Zink

488. See *supra* text accompanying note 309.

489. See CHOMSKY, *supra* note 5, at 318.

