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THE UNITED STATES' INVOLVEMENT IN HAITI'S TRAGEDY AND THE RESOLVE TO RESTORE DEMOCRACY

I. INTRODUCTION

Haitian boat people have had the misfortune of attempting to immigrate to the United States in the midst of an economic recession and during a time of political pressure stemming from the 1992 presidential campaign. In addition, the immigration of Haitians in such large numbers has aroused fear that the United States would bear the brunt of Haiti's problems from the upheaval of September 1991, just as the United States was compelled to sustain Cuba's problems in 1980 and again in the summer of 1994.¹

According to statistics from the National Coalition for Haitian Refugees, as of November 16, 1994, 63,771 Haitians have been interdicted since the beginning of 1991.²

1. Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2337-39 (1991). The 1980 Mariel boat lift brought 125,000 Cubans to the United States to escape Fidel Castro's dictatorship. In August and September 1992, approximately 1,000 Cubans arrived on Florida's shores seeking asylum. See William Booth, *Flow of Cuban Refugees to Florida Is Increasing: 2,205 Have Made 90-Mile Voyage This Year*, WASH. POST, Nov. 1, 1992, at A3. This influx of Cuban refugees represents almost half of the total number that arrived the year before. It was the largest Cuban migration to Florida since the Mariel boat lift. "Under United States immigration laws Cubans are allowed to apply for and be given legal residence more quickly than any other national group." Larry Rohter, *New Wave of Cubans Sails to Florida Illegally*, N.Y. TIMES, Oct. 7, 1992, at A1, A19. The Bush Administration argued that, unlike the majority of Haitians seeking asylum in the United States, Cubans are political refugees, not merely economic refugees. *Id.*

2. Statistics provided by National Coalition for Haitian Refugees, New York, N.Y., November 16, 1994 [hereinafter Statistics]. After the Haitian boat people are returned to Haiti, they must go to the American Embassy and follow the same procedures to apply for political asylum as those required in other countries. Thomas C. Palmer, Jr., *When Is Asylum Justified? Haiti's Proximity Helps Fuel Emotional Debate*, BOSTON GLOBE, May 31, 1992, at 73. However, many have pointed out that there is such a high standard of proof in order to show qualification for political asylum that very few Haitians may be admitted on such grounds. Those who have no proof of persecution, but only argue that they have well-founded fears of persecution, are routinely denied approval. *In-Country Refugee Processing: Is It a Real Alternative?*, HAITI INSIGHT, Winter 1992, at 4. According to the U.S. State Department, as of September 18, 1992, the total number of

Haiti, a Caribbean nation of approximately seven million inhabitants, has an annual, rural per capita income of less than three hundred dollars.³ Faced with a long history of famine, health problems,⁴ and political upheaval, the tens of thousands of Haitians attempted to migrate to Florida's shores, and many succeeded.

This Note focuses on the strife suffered by the Haitian people as a result of the coup of 1991 that toppled Haiti's first democratically elected president, Father Jean-Bertrand Aristide and the legal turmoil that faced the U.S. government. In so doing, this Note will analyze the legal battles fought between the United States government and the Haitian people and their representatives, Executive Orders promulgated by former Presidents Reagan and Bush, as well as the initial, self-imposed pressures cast upon President Clinton to restore democracy or not return Haitians to their country.

I maintain that the resolve to restore democracy in Haiti, as authorized by the United Nations Security Council Resolution 940, was the best solution to end the suffering in Haiti, safely protect our borders from the surge of illegal immigration, and fulfill the purpose of the interdiction program.

II. THE POLITICAL HISTORY OF THE HAITIAN REGIME

"It is a land of voodoo and abject poverty, where dictators have traditionally held power."⁵ The year 1986 was significant for marking the end of Haiti's Duvalier dictatorship.⁶ After "Papa Doc" Duvalier died in 1971, his son Jean-Claude Duvalier, otherwise known as "Baby Doc", maintained the Duvalier regime for fifteen years.⁷ After aiding the Duvalier family's escape into exile, United States officials tried to compel Haitian authorities to initiate democratic election processes, draft a new

Haitians registered in the Embassy database is 15,133; 9,447 had completed the preliminary questionnaire; 1,968 cases had been adjudicated and only 229 Haitians were approved. Statistics, *supra*.

3. Paul Farmer et al., *Tuberculosis, Poverty, and "Compliance": Lessons from Rural Haiti*, 6 SEMINARS IN RESPIRATORY INFECTIONS 254 (1991).

4. *Id.*

5. Mary Nemeth et al., *A Priest for a President*, MACLEAN's, Dec. 31, 1990, at 40.

6. From 1957 to 1986, the Duvalier family reigned over Haiti with an "iron fist." *Id.*

7. Michael Tarr, *After Papa and Baby Doc Haiti Finds a New Father*, SUNDAY TELEGRAPH (London), Dec. 23, 1990, at 16.

constitution, and revise the "notoriously corrupt military and civilian bureaucracies."⁸

Since the overthrow of President-for-life Jean-Claude Duvalier, Haiti has had three military dictatorships, a brief "civilian puppet regime", and a weak provisional government led by former Supreme Court Justice Ertha Pascal Trouillot.⁹ The United States' efforts to positively influence the Haitian army and political leadership¹⁰ proved disappointingly unsuccessful.

The United States favored several army commanders to no avail.¹¹ Lieutenant General Henri Namphy was overthrown in 1987, shortly after he allowed the destruction of a presidential election by the army.¹² Then, General Prosper Avril took control in 1988 and began to implement reforms in the Haitian government; however, he was banished in six months' time.¹³ Finally, General Herard Abraham, who served in the provisional government under Trouillot's leadership, declared his dedication to reforming Haiti's government and its undisciplined army.¹⁴ General Abraham began where General Avril left off by quietly retiring a multitude of corrupt and ruthless officers and disbanding several pernicious special military units.¹⁵ Most significant to the political reforms in Haiti, however, was General Abraham's commitment to creating a safe, fair arena for holding democratic elections in Haiti.¹⁶

On December 16, 1990, almost five years after the fall of the Duvalier dictatorship, Haitians participated in the first democratic presidential election¹⁷ since Haiti gained its independence from France 186

8. Pamela Constable, *For the U.S., No Choice but Optimism After Haiti Vote*, BOSTON GLOBE, Dec. 23, 1990, at 4.

9. Anne Fuller & Kenneth Roth, *Haiti: The Aristide Government's Human Rights Record*, AMERICAS WATCH, THE NAT'L COALITION FOR HAITIAN REFUGEES AND CARIBBEAN RTS., Nov. 1, 1991, at 1, 7.

10. Constable, *supra* note 8, at 4.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* As the head of an observer delegation, former President Jimmy Carter oversaw the first democratic election in Haiti. He stated, "When I spoke to General Namphy in 1987, it was obvious in five minutes he didn't support the elections. But General Abraham seems convinced his life work and institution will be best served by a successful vote." *Id.*

17. Fuller & Roth, *supra* note 9, at 7.

years ago.¹⁸ In that election, the Haitian people elected Father Jean-Bertrand Aristide president.¹⁹

Father Aristide, a 37-year-old Roman Catholic priest known for his powerful oratories denouncing the Duvalier family,²⁰ had previously survived two attacks on his life by Duvalier supporters.²¹ He declared his candidacy for presidency at the end of October 1990, shortly before the deadline for nominations.²² His announcement brought with it widespread excitement among Haitians everywhere.²³ Aristide, however, was probably not the candidate that the Bush administration would have chosen for Haiti's presidency,²⁴ as his campaign oratory was fervent with anti-American sentiment.²⁵ Nonetheless, despite the revolutionary priest's history of hostility toward the United States, the United States government committed itself to ensuring the legitimacy of Haiti's presidential election. The United States invested significant amounts of money and time to effectively and zealously attain this end,²⁶ thereby marking the beginning of a political democracy for Haiti. Days before the election, United States officials remained publicly neutral when asked about the priestly presidential candidate.²⁷ However when Aristide's landslide victory was obvious, to confirm their commitment to a democratic outcome, United States officials immediately congratulated Aristide as the "clear winner"

18. Nemeth et al., *supra* note 5, at 40.

19. Fuller & Roth, *supra* note 9, at 7. The nine-member Provisional Electoral Council appointed by President Trouillot, the United Nations, and the Organization of the American States (OAS), oversaw the election processes to ensure that the elections were conducted freely, fairly and successfully. *Id.*

20. Nemeth et al., *supra* note 5, at 40.

21. Fuller & Roth, *supra* note 9, at 7.

22. *Id.*

23. *Id.*

24. Constable, *supra* note 8, at 4.

25. Nemeth et al., *supra* note 5, at 40.

26. Constable, *supra* note 8, at 4.

27. *Id.* It was clear that the United States favored the pro-American candidate, Marc Bazin. *Id.*

and pledged to support his government.²⁸ A democratic outcome was exactly what the United States government had worked to achieve.²⁹

III. SHORT-LIVED DEMOCRACY IN HAITI

On February 7, 1991, Haiti inaugurated Father Jean-Bertrand Aristide.³⁰ In the first months of his presidency, Aristide, who had previously denounced capitalism as sinful,³¹ surprised many of his critics. They feared he would implement socialist government policies indicative of the 1970s,³² but instead he formulated moderate macro-economic

28. *Id.* United States officials certainly tried to sound positive about the election of a "stated opponent of American foreign policy and aid" by emphasizing the United States commitment to the democratic vote of two million Haitians. *Id.* Many believe, however, that U.S. support would be somewhat contingent upon Aristide's willingness to renounce his most extremist positions and adopt more moderate ones. *Id.* Ultimately, Aristide did prove to be a much more moderate candidate than "Aristide the militant Liberation Theology priest who lambasted 'US imperialism' . . . and said shanty-town vigilantes had a right to lynch Macoutes as long as the judiciary's bias continued." Tarr, *supra* note 7, at 16.

29. Tarr, *supra* note 7, at 16. The United States government is Haiti's biggest foreign aid donor. *Id.*

30. Fuller & Roth, *supra* note 9, at 8. The Electoral Council's final tallies, made public on January 14, 1991, showed that Aristide had won 67.48% of the vote. Clearly, he was the overwhelming winner of the 12 candidates. Marc Bazin, Aristide's closest rival, received 14.22% of the votes. *Id.* at 7. On January 6 and 7, before his February inauguration, Aristide withstood an attempted *coup d'état* led by former Tontons Macoutes Chief Roger Lafontant. *Id.* For some optimists, Aristide's endurance through this political upheaval may have momentarily dispelled any ominous indications that a successful coup could occur. The attempted coup should not have come as a surprise. Nor should Aristide's endurance have quelled fears of another coup by the Duvaliers' infamous Tontons Macoutes militia and from military officers who had mounted three coups in the five years preceding Aristide's election. One of the more pessimistic authors correctly predicted that "even the priest-president may not be able to work miracles." Nemeth et al., *supra* note 5, at 40. Furthermore, the remnants of the feared Tontons Macoutes militia had every motive to assassinate Aristide, who was the arch adversary of Duvalierism. In addition, since the regime's fall in 1986, the Tontons Macoutes militia was responsible for the execution of political murders and coups. Aristide has "campaigning more than anyone for political blood crimes to be brought to trial." Tarr, *supra* note 7, at 16.

31. J.P. Slavin, *Global Donors Pledge Haiti \$ 442 Million*, HAITI INSIGHT, Sept. 1991, at 2 [hereinafter Slavin, *Global Donors*]. During a July 12, 1991 interview, Aristide firmly stated: "I have the same idea about capitalism, I still continue to believe capitalism is a mortal sin." *Id.* Aristide is also an ardent critic of foreign investment and foreign aid. *Id.* at 1.

32. *Id.*

policies reflecting capitalism typical of the 1990s.³³ Many analysts grew confident that Aristide's five year term would provide Haiti with long-needed political stability.³⁴

During Aristide's first six months in office, tension mounted between the executive branch and its elite *Lavalas*³⁵ supporters on one side and the parliamentarians and the National Front for Change and Democracy on the other, the latter being the coalition for whom Aristide was the presidential candidate.³⁶ As a result of this conflict, little attention was given to Aristide's accomplishments during his first six months in office.³⁷ Aristide's reforms included his attempt to assemble a Haitian army that respected human rights.³⁸ As another step toward achieving his goal, Aristide announced his intention to set up a commission that would address current human rights concerns and seek justice for past crimes.³⁹ Although Aristide had not yet implemented the commission when the coup ended his tenure, he did take action against a number of people believed to be responsible for heinous crimes of the past.⁴⁰

33. *Id.*

34. Haiti, listed among the twenty-five least developed countries, is the poorest republic in the Western Hemisphere. The "lack of political stability" is the single most contributory factor, to Haiti's political and economic environment, claim Haitian economists. *Id.*

35. "Lavalas" refers to the popular movement responsible for Aristide's election. Fuller & Roth, *supra* note 9, at 24.

36. Slavin, *Global Donors*, *supra* note 31, at 3.

37. *Id.*

38. Fuller & Roth, *supra* note 9, at 8. Aristide focused much of his attention on reforming the structure of the institutions most responsible for the oppression and victimization of Haitians, namely, the army, the section chief system, and the Haitian National Penitentiary administration. *Id.* at 3. "Since 1986, the military has been the chief barrier to democracy in Haiti . . . Duvalierist forces, including former members of the Tontons Macoutes militia, have been able to block democratic progress only when they were able to secure the army's collaboration." *Id.* at 4.

39. *Id.* at 14.

40. *Id.* "Nikol Poitevien, a major landowner implicated in the July 23, 1987, massacre of hundreds of peasants in Jean-Rabel in Haiti's Northwest, was arrested in March 1991." *Id.* The Jean-Rabel massacre was the largest in Haiti's recent history. In April, five additional suspects were arrested and released soon after for alleged lack of evidence. Many believe that political pressure from influential individuals was the reason for their quick release. Nikol Poitevien had still not gone to trial when Aristide was overthrown in September 1992. *Id.*

IV. THE COUP THAT TOPPLED HAITI'S FIRST DEMOCRACY

On September 30, 1991, Aristide's government faced its second attempted military *coup d'état*.⁴¹ This one proved successful. The coup was, in part, a response to Aristide's attempts to reform and control Haiti's rebel army.⁴² To a larger extent, however, Haiti's *coup d'état* was a response to Aristide's aggressive attacks on "the exploitative status quo in his country."⁴³ Traditionally, Haiti's economic elite, known for its ardent abhorrence of democracy, maintained political and economic control over the people. The coup was the elite's violent response to Aristide's firm commitment to democratic reform, and the military action taken only confirmed the elite's anti-democratic stance.⁴⁴

Less than a day after the coup, its organizers and promoters began to justify the overthrow of Aristide by claiming that his government perpetuated human rights abuses.⁴⁵ Military troops, who killed more than three hundred civilians in the process of toppling Haiti's first popularly-elected government, hypocritically criticized Aristide's government for alleged human rights abuses.⁴⁶ Nevertheless, because these allegations were so serious, they warranted some investigation as to their validity. In addition, the military's appointment of Jean-Jacques Honorat, a leading human rights advocate, as prime minister of their provisional government, raised suspicion that these charges had some merit.⁴⁷

41. *Id.* at 1.

42. Amy Wilentz, *Coup d'État in Haiti*, HAITI INSIGHT, Oct. 1991, at 1.

43. *Id.*

44. *Id.* In the October 1991 issue of *Haiti Insight*, Amy Wilentz was still optimistic that the *coup d'état* would not be successful in ousting Aristide from his popularly elected office because of popular pressure from Haitians everywhere and Aristide's "incontestable legitimacy." *Id.* at 6. Wilentz wrote, "Aristide may become the third world's first deposed democratic leader ever to be reinstated Certainly Haitians are virtually unanimous in their rejection of this regime. Sometimes history repeats itself only as a last gasp of an old, dying world." *Id.* Wilentz probably did not expect, however, that Aristide's reinstatement would occur three years later.

45. Fuller & Roth, *supra* note 9, at 1.

46. *Id.*

47. *Id.* On August 13, 1991, Jean-Jacques Honorat was one of three recipients of the American Bar Association's International Human Rights award. The award honors lawyers and judges whose work and dedication promote the advancement and enforcement of human rights and justice in foreign countries. J.P. Slavin, *Human Rights Activist Honored*, HAITI INSIGHT, Sept. 1991, at 1, 5. Honorat's contribution to human rights efforts for Haitians is extensive. An agronomist and lawyer, Honorat co-founded and is executive director of the Institute for Technology and Organizing ("ITECA"), "an agency

Aristide received criticism for his failure to discourage the rise in Haiti's popular violence.⁴⁸ Many Haitians, indeed Aristide supporters, took it upon themselves to compensate for Haiti's dysfunctional legal system.⁴⁹ Some of Aristide's supporters threatened to lynch those in opposition to Aristide and his government.⁵⁰ Aristide made little or no attempt to curb these "summary justice" practices.⁵¹ In fact, "in a disturbing deviation from his stated commitment to human rights, President Aristide voiced a certain tolerance for this popular violence as a substitute for the profound reforms of the legal system that were needed."⁵² Ironically, this tolerance perpetuated lawlessness by deterring lawyers from taking unpopular clients, thereby impeding access to the courts.⁵³

Although Aristide should not necessarily be blamed for inciting the violent practices performed by his followers, he deserves the blame for not

that supports empowerment of Haitian peasants by providing training in literacy, agricultural techniques, community health and human rights." Exiled in New York in 1983, after being arrested and banished from Haiti by Jean-Claude Duvalier's government, Honorat founded the Haitian Center for Human Rights ("CHADEL"). In 1986, Honorat finally established CHADEL in Haiti after the Duvalier dictatorship fell. CHADEL is nationally known for "documenting human rights abuses and promoting human rights education." CHADEL has also assisted in prison reform in the Haitian National Penitentiary, a prisoner assistance organization that provides legal counsel, and offers annual human rights seminars for interested lawyers, students and government officials. CHADEL also takes an active intervention role for abuse victims by promoting public awareness and by sending letters directly to government officials. *Id.*

48. Fuller & Roth, *supra* note 9, at 18.

49. *Id.* "Since the fall of the Duvalier dynasty, 'dechoukage,' or uprooting, in which people take the law into their own hands, has been a recurrent form of alternative 'justice,' and until recently, it was the only kind of 'justice' [Haitian] people ever experienced on their behalf." *Id.* at 19.

50. *Id.* at 18.

51. *Id.* "Lynching of suspected criminals continued to occur at approximately the same pace as it had under most of the Trouillot government's tenure." *Id.*

52. *Id.* at 3. Rarely did Aristide's government intervene to stop instances of popular violence, several of which included the burning down of trade union offices, looting the offices of a popular organization, and severely beating a deputy from Port-de-Paix. *Id.* at 18, 20. "A survey of human rights violations during the Aristide government's first seven months in office . . . turns up twenty-five instances of people killed in mob lynching." *Id.* at 22.

53. *Id.* at 19. "Haiti's long history of entrenched lawlessness—dominated by corrupt dictators, presidents-for-life, and military strongmen, backed by a cowed and ineffectual judicial system, and sustained by police forces that answered only to the army—has bred resort to 'popular justice' as the only form of redress for the overwhelming majority of the population without access to or confidence in the courts." *Id.*

using his persuasive moral authority⁵⁴ to speak out forcefully against such practices.⁵⁵ Instead, several of Aristide's public speeches actually endorsed "summary justice" practices.⁵⁶

Jean-Jacques Honorat, Haiti's *de facto* prime minister, attempted to justify the *coup d'état*.⁵⁷ He blamed Aristide and his government for its demise.⁵⁸ Honorat characterized Aristide's overthrow not as a *coup d'état*, but rather, as "an accident due to the infancy of Haiti's democratic structures."⁵⁹ He claimed that Aristide and his government officials were not democrats⁶⁰ and alleged that "there was a systematic disrespect of human rights"⁶¹ under their leadership. Honorat claimed that "the coup was provoked by the comportment of those in power. It was a reaction by the social body politic, and force had to be exerted by the only part of the social body with arms: the army."⁶²

54. *Id.* at 24.

55. *Id.* Many believe that Aristide could have prevented much of the violence and bloodshed by publicly condemning such behavior. *Id.*

56. *Id.* at 25. In a September 27, 1991 speech, just days before the coup that ousted him, Aristide said "[t]hroughout the four corners of the country, we are watching, we are praying, we are watching, we are praying, when we catch one of them, don't neglect to give him what he deserves." *Id.*

57. Anne Fuller & Amy Wilentz, *Return to the Darkest Days: Human Rights in Haiti Since the Coup*, AMERICAS WATCH, NAT'L COALITION FOR HAITIAN REFUGEES, PHYSICIANS FOR HUMAN RTS., Dec. 1991, at 1, 16.

58. *Id.* at 17.

59. *Id.*

60. *Id.* Honorat claims that "there is no relationship between elections and democracy." *Id.*

61. *Id.*

62. *Id.* Furthermore, Honorat asserted that the government now in power is constitutional. He refuted allegations that Aristide's prime minister, Rene Pre'val, was threatened and claimed that Pre'val gave up his office by not showing up at the parliament. Honorat explained that he became prime minister of Haiti by claiming that he was simply asked to fill the vacancy. Honorat stated: "It was perfectly legal and in strict conformity with the constitution. I felt I had to defend my nation against injustice, and therefore I accepted a position [the office of prime minister] that is totally against my concept of my life. I have never wanted to be in politics. But because of the [Organization of American States] illegal intervention, my country was exposed to civil war; indeed, it is still exposed to civil war. After all, I am a patriot . . ." *Id.* Honorat also insists that there is no connection between the post-coup government and the *coup d'état*. *Id.*

V. THE U.S. RESPONSE: CONTINUED SUPPORT FOR ARISTIDE

Immediately after the coup, the Bush Administration announced its support for and maintained its recognition of Aristide as the "sole legitimate Haitian head of state,"⁶³ despite some of its concerns about human rights abuses during Aristide's governance. On September 30, 1991, the United States Embassy and the State Department wasted no time in issuing statements condemning the coup and its perpetrators.⁶⁴ A White House statement read, "[w]e condemn those who have attacked the legally constituted democratically elected government of Haiti, and call for an immediate halt to violence, and the restoration of democracy in Haiti. We will be working closely with the OAS (Organization of American States) to bring that about."⁶⁵ On October 29, 1991, the Bush Administration suspended all trade with Haiti, excluding food, medical supplies, and commercial flights.⁶⁶

The trade embargo, however, had little success. The majority of Haitian people suffered, while the military and the elites were skilled at

63. *Id.* at 18.

64. *Id.*

65. *Id.* at 19.

66. *Id.* Many hoped that the "international condemnation and economic sanctions would overwhelm the perpetrators of the coup, swiftly restoring democracy to Haiti." *Embargo, Negotiations Fail to Dislodge Coup*, HAITI INSIGHT, Winter 1992, at 1, 3 [hereinafter *Negotiations Fail*]. When the United States suspended economic assistance to Haiti on October 2, 1991, it announced that its objective was to wage a pressure campaign in cooperation with other Latin American and Caribbean nations in order to restore to office Haiti's democratically-elected president, Aristide. The United States made clear its refusal to recognize the military junta that ousted Aristide. "The United States had appropriated \$84 million in economic and food aid for Haiti, and \$1.5 million in military aid, for the 1991 fiscal year. State Department officials, however, could not say how much of this had already been paid out and how much would be affected by [the October 2, 1991] suspension in aid." Thomas L. Friedman, *U.S. Suspends Assistance to Haiti and Refuses to Recognize Junta*, N.Y. TIMES, Oct. 1, 1991, at A1. The 1991 fiscal year ended Monday, September 30. *Id.* France and Canada also responded to the coup by suspending all their aid programs and refusing to recognize the junta. French aid amounted to about \$36 million and Canada's assistance to \$8.8 million. It was also expected that aid programs instituted after Haiti's democratic elections by the Organization of American States, the European Community and the World Bank—which last July [1991] raised \$350 million in pledges for Haiti . . . would be suspended. *Id.*

circumventing the embargo.⁶⁷ Most surprisingly, the embargo did not restore democracy in Haiti.⁶⁸

VI. THE HAITIAN EXODUS

Since the coup, the most visible indication to Americans (especially Floridians) of political unrest and poor economic conditions in Haiti has been the flood of more than 63,700 Haitians⁶⁹ to American shores; they arrive on unseaworthy vessels in search of better living conditions.⁷⁰ Not since 1980 have so many "boat people" fled their homes in desperation.⁷¹ The departure of thousands of Haitians from their homeland to Florida's shores is related to an even larger movement within Haiti itself.⁷² About two weeks after the coup, the hopes of the Haitian people for Aristide's reinstatement were dampened. Beginning in mid-October, hundreds of thousands of Haitians migrated from Port-au-Prince to the provinces and countryside in an effort to flee from the military's overtly violent practices.⁷³

Economic hardship from the loss of jobs was undoubtedly a significant factor contributing to the mass exodus.⁷⁴ By December 1991, an estimated 250,000 Haitians had left Port-au-Prince.⁷⁵ In comparison to this large number of people who migrated from the city, a smaller but still significant number of grassroots peasant and church organization leaders moved into Port-au-Prince to camouflage themselves.⁷⁶

Many of the Haitians who brave the seas in their rickety boats do not make it to Florida's shores. They are interdicted before they arrive. The United States has interdicted boats of Haitian asylum-seekers, since former President Ronald Reagan established the Haitian Migrant Interdiction Program by an executive order issued on September 29, 1981.⁷⁷ President

67. *Negotiations Fail*, *supra* note 66, at 3. The majority of Haitians have supported the embargo-induced rise in food and transportation prices only to promote the reinstatement of Aristide as president of Haiti. *Id.*

68. *Id.*

69. Statistics, *supra* note 2.

70. *Negotiations Fail*, *supra* note 66, at 3.

71. *Id.* at 4.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Helton, *supra* note 1, at 2341 (citing Exec. Order No. 12,324, 3 C.F.R. 181

Reagan established the Haitian Migrant Interdiction Program pursuant to his determination that illegal immigration posed a "serious national problem detrimental to the interests of the United States."⁷⁸ The 1981 executive order authorized the United States Coast Guard to "stop and board suspicious Haitian or unflagged vessels on the high seas, determine if their passengers are undocumented aliens bound for the United States, and if so, return them to Haiti."⁷⁹ The executive order stipulated, however, that "no person who is a refugee [is to] be returned without his consent."⁸⁰

The 1967 Protocol relating to the Status of Refugees (the "Protocol")⁸¹ defines "refugee" as one who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.⁸²

Most importantly, the *non-refoulement* policy, established by and articulated in Article 33(1) of the 1951 United Nations Convention Relating to the Status of Refugees, prohibits the return of a refugee to his or her place of persecution.⁸³

There is a striking difference between the Bush Administration's perception of the reasons for the Haitian exodus to the United States and the perception of international advocates for refugees.⁸⁴ The Bush

(1981-1983 Comp.)).

78. Proclamation No. 4865, 3 C.F.R. 50-51 (1981-1983 Comp.).

79. Helton, *supra* note 1, at 2345.

80. Exec. Order No. 12,324, 3 C.F.R. § 2 (c)(3) p. 181 (1981-1983 Comp.) "The first interdiction took place on October 12, 1981. According to the INS (Immigration and Naturalization Service), as of 1990, 361 boats carrying 21,461 Haitians had been intercepted. Of these, the Coast Guard permitted only six of these interdicted Haitians to seek asylum in the United States." Helton, *supra* note 1, at 2341.

81. *Id.*

82. *Id.*

83. Bill Frelick, *Haiti: No Room at the Inn*, UNITED NATIONS HIGH COMMISSION FOR REFUGEES, Sept. 1992, at 34, 35. Article 33(1) provides that no contracting state "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion." *Id.*

84. Howard W. French, *90 Haitians Drown as Boat Capsizes*, N.Y. TIMES, July 22,

Administration claimed that most Haitians fleeing their homeland were doing so for economic reasons.⁸⁵ In contrast, international advocates for Haitian refugees assert that the majority of Haitian refugees were flocking to the United States to escape political persecution.⁸⁶ Each reasoning effectuates a different legal result since the 1967 Protocol relating to the Status of Refugees does not accord refugee status to those fleeing for economic reasons.

After Aristide's overthrow, United States officials did not immediately repatriate Haitian refugees, as had been the practice during the 1980s pursuant to the 1981 agreement between Haiti and the United States.⁸⁷ On October 28, 1992, the United States embassy in Port-au-Prince noted that there were "credible reports of indiscriminate killings, police harassment, illegal searches and looting of private homes and of radio stations, arrests without warrants, and detention of persons without charges and mistreatment of persons in the custody of Haiti's *de facto* authorities."⁸⁸ This report influenced the United States authorities' decision not to immediately repatriate Haitian refugees.⁸⁹

United States policies have since wavered. "The Bush Administration's policies toward the Haitian refugees evolved in fits and starts, influenced by election-year politics, court challenges, and the growing numbers of asylum seekers."⁹⁰ On October 28, 1991, the United States Coast Guard intercepted the first boat of Haitian refugees since the coup⁹¹ and on November 20, 1991, after conducting their interviews, the Coast Guard "screened out"⁹² and forcibly repatriated this first boatload of Haitian refugees for lack of a "credible fear of return."⁹³ The State

1992, at A9.

85. *Id.*

86. *Id.*

87. *Thousands Flee Haiti's Terror, Fill Refugee Camps at Guantanamo*, HAITI INSIGHT, Winter 1992, at 4. The 1981 agreement authorized the United States Coast Guard to interdict Haitian "vessels [which] may be involved in the irregular carriage of passengers outbound from Haiti." *Id.* "For much of the past three decades, U.S. governments tacitly condoned the repression of the anti-communist Duvalier regime. Thousands of Haitians fleeing misery and oppression in rickety fishing boats were arrested by U.S. authorities, then sent home or imprisoned in detention camps." Constable, *supra* note 8, at 4.

88. *Negotiations Fail*, *supra* note 66, at 4.

89. *Id.*

90. Frelick, *supra* note 83, at 34.

91. *Negotiations Fail*, *supra* note 66, at 4.

92. Frelick, *supra* note 83, at 34.

93. *Id.* In response to criticisms by Haitian refugee advocates, President George Bush

Department stated that the decision to repatriate Haitian refugees intercepted at sea by the Coast Guard was based on the "fear that any action by the United States to bring large numbers of Haitians without claim to asylum to the United States would create a massive outflow, resulting in large numbers of deaths on the high seas."⁹⁴

VI. THE BUSH ADMINISTRATION AND THE LEGAL BATTLES ON BEHALF OF HAITIAN REFUGEES

After the coup, the Bush Administration engaged in many legal battles regarding the fairness or unfairness of the screening procedures⁹⁵ used to determine whether refugees are political or economic refugees. Haitian refugee advocates have expressed their concern that many Haitians who were screened out as economic migrants might have qualified for political refugee status.⁹⁶

defended the interdiction and repatriation policy as "fair" and as one that "does make a distinction between economic refugees and political refugees." *Id.*

94. *Negotiations Fail*, *supra* note 66, at 5. On November 19, 1992, at least 120 people drowned at sea after their boat capsized in a storm off of Punta Maisi in eastern Cuba. *Id.* at 4. On July 19, 1992, the day before the United States began repatriating Haitian refugees, about 90 Haitian refugees were reported to have drowned when their small boat capsized twenty miles north of Port-au-Prince. French, *supra* note 84, at A9.

Rep. Charles Rangel (D-NY) accused the State Department of implementing a "racist and vicious policy" and claimed that "this would not have happened if the refugees were European." *Negotiations Fail*, *supra* note 66, at 5. However, three of the top five source nations for sending immigrants to the United States have "principally black populations." Palmer, Jr., *supra* note 2, at 73. In response to the statistics and to those who claim that the policy was implemented for racist purposes, Duke Austin, a spokesman for the Immigration and Naturalization Service, said, "So this black versus white immigrant thing is kind of a sham." *Id.* "Of the 180 source nations in the world, only 13 have sent more immigrants to the U.S. shores. More than 400,000 Haitian-born persons live in New York City alone. Nearly 2 percent of the 7.3 million immigrants legally admitted to the United States in the last decade are Haitians." *Id.*

Of the 142,000 refugees permitted to enter the United States in 1992, the allotment breakdown is as follows: "Former Soviet Union, 61,000; East Asia, 52,000; Near East/South Asia, 6,000; Eastern Europe, 3,000; Latin America, 3,000; Unallocated, 1,000." *Understanding the Bias in U.S. Refugee Policy*, HAITI INSIGHT, July-Aug. 1992, at 5 [hereinafter *Understanding the Bias*]. However, "based on the percentage of the originating country's population, Haiti ranks fifth over the last decade among countries whose citizens have immigrated to the United States." Palmer, Jr., *supra* note 2, at 73.

95. Frelick, *supra* note 83, at 35.

96. *Id.*

In the first of the legal battles that began in November 1991, in *Haitian Refugee Center v. Baker*,⁹⁷ United States District Court Judge Donald L. Graham issued a temporary restraining order that prevented the United States government from repatriating Haitians until it could show that it would "implement and follow procedures . . . to ensure that Haitians with bona fide political asylum claims are not forced to return to Haiti."⁹⁸ In *Baker*, the plaintiffs asserted that the government's screening processes were inadequate and that the government was violating the *non-refoulement* principle by forcing Haitians to return to Haiti, the place where they might suffer persecution upon return.⁹⁹

Shortly thereafter, however, the issues shifted. "What had been the central issue—the adequacy and legitimacy of pre-asylum screening—became a side issue."¹⁰⁰ The government asserted that the adequacy of screening procedures was irrelevant. On appeal,¹⁰¹ the United States government argued that Article 33(1) was "simply inapplicable."¹⁰² The government asserted that Article 33(1) did not bar it from forcibly

97. *Haitian Refugee Center, Inc. v. Baker*, No. 91-2635-CIV-ATKINS, 1991 WL 330942, at *1 (S.D. Fla., Nov. 19, 1991).

98. *Id.* The Court of Appeals then dissolved the injunction and remanded the case. *Haitian Refugee Center, Inc. v. Baker*, 949 F.2d 1109 (11th Cir. 1991). On remand, the District Court reissued the injunction. *Haitian Refugee Center v. Baker*, 789 F. Supp. 1579 (S.D. Fla. 1991). The government appealed. The Court of Appeals vacated both injunctions and again remanded the case to the district court to dismiss the action for failure to state a claim upon which relief could be granted. *Haitian Refugee Center v. Baker*, 953 F.2d 1498 (11th Cir. 1992), *cert. denied*, 112 S. Ct. 1245 (1992).

99. Frelick, *supra* note 83, at 35. Depositions taken by the Haitian Refugee Center's lawyers revealed that the screening processes were cursory and in no way adequate for determining whether the Haitian boat people were fleeing from credible fears of persecution with legitimate claims to political asylum. Ira Kurzban, the leading attorney for the Haitian Refugee Center, called the screening procedures "shocking and arbitrary."

Id. In a Congressional hearing, Kurzban testified:

INS officers readily admitted that they had interviewed hundreds of Haitians without receiving any information about the political conditions in Haiti. They also candidly acknowledged that they had received no training on interviewing Haitian asylum applicants This lack of knowledge extended to such issues as not knowing who the President and Prime Minister of Haiti were Immigration officers were also applying incorrect standards. One officer could not even name all the grounds necessary to obtain asylum.

Id.

100. Frelick, *supra* note 83, at 35.

101. 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 1245 (1992).

102. Frelick, *supra* note 83, at 35.

repatriating Haitians, even if they were determined to be refugees with credible fears for their lives and liberty.¹⁰³ The government's argument was two-fold. First, the government claimed that the protocol was not self-executing;¹⁰⁴ hence, the government maintained that only if Congress integrated the Protocol's provisions into domestic law would the Protocol provide a source of rights upon which the Haitians could rely. Second, the government asserted that Article 33(1) applied only to refugees "within the territory of the contracting State."¹⁰⁵ The government relied upon *Cassell's French Dictionary's* definition of "*refouler*," which is "to expel (aliens)," and argued that the government was not violating the *refoulement* principle, because in order "to expel" aliens, they must first be present in the contracting state.¹⁰⁶ Because the Haitians were interdicted in international waters, they were not being expelled or returned from the United States.¹⁰⁷

The Court of Appeals for the Eleventh Circuit accepted the government's "outside the U.S. territory" argument with only a cursory glance at Article 33(1) and promptly instructed the lower court to dismiss on the merits those claims predicated on Article 33.¹⁰⁸ In so ruling, the court best served the government's interests. The United States government can thus avoid following immigration laws by refusing to admit thousands of Haitians into the United States, where they would, by right, be able to insist on a proper screening according to Immigration and Naturalization Service guidelines.¹⁰⁹

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* This, however is a faulty argument because Article 33(1) does not specify that the location from which a refugee may not be returned has any significance. Instead, Article 33(1) prohibits returning a refugee to the place where his life and freedom are jeopardized. Article 33(1) states, in pertinent part, that no contracting States "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened." Hence, Article 33(1) forbids any contracting State from returning Haitian refugees to Haiti if it is determined that their lives or liberty would be threatened upon return to Haiti. Where the refugees are being returned from has no relevance to serving the purpose of the Article, its objective being to prevent one from being returned to the persecution he has purposely left. *Id.*

108. *Id.*

109. *Id.* at 35-36. Pursuant to President Reagan's proclamation and executive order of September, 1981, the following is a list of INS officer responsibilities and directives to be followed when interdicting vessels at sea:

In contrast, Judge Joseph W. Hatchett's keen insight provoked some

The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership within a particular social group or political opinion .

...

A. To the extent that it is, within the opinion of the Commanding Officer of the United States Coast Guard vessel, safe and practicable, each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained on each such person, based on their responses to the following inquiries:

1. Name;
2. Date of Birth;
3. Nationality;
4. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);
5. All documents or Evidence Presented;
6. Why did you leave Haiti;
7. Why do you wish to go to the United States;
8. Is there any reason why you cannot return to Haiti?

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

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

D. If there is any indication of possible qualification for refugee status by a person or persons on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicants concerning the claim.).

thoughtful reasoning and spurred his dissent. Judge Hatchett reasoned that the majority's decision rested on "the government's decision to intercept Haitian refugees on the high seas, in international waters, to prevent them from reaching United States territory."¹¹⁰ In effect, preventing Haitians from setting foot on United States territory technically enables the government to keep its promise to the community of nations not to refuse refugees at the border.¹¹¹

The Supreme Court chose not to hear the case on the merits, in effect upholding the Bush Administration's decision to repatriate Haitian refugees interdicted at sea.¹¹² Justice Blackmun, the sole dissenter from the denial of *certiorari*, wrote:

Each of the issues presented—whether the United States Government is violating the First Amendment by denying lawyers from the Haitian Refugee Center a right of access to the Haitians held at Guantanamo Bay; whether international or domestic law affords the Haitians a substantive right not to be returned to a country where they face possible persecution; and whether the Haitians may challenge the adequacy of procedures employed by the United States Government to identify those facing political persecution—is difficult and susceptible to competing interpretations.

A quick glance at this Court's docket reveals not only that we have room to consider these issues, but that they are at least as significant as any we have chosen to review today. If indeed the Haitians are to be returned to an uncertain future in their strife-torn homeland, that ruling should come from this Court, after full and careful consideration of the merits of their claims.¹¹³

After *certiorari* was denied, the United States government continued its screening process by re-interviewing Haitians at Guantanamo Bay, Cuba.

110. Frelick, *supra* note 83, at 35.

111. *Id.* at 36. This is a manipulative adulteration of Article 33(1) on the part of the government, because, as Judge Hatchett points out, "agencies of the United States captured the refugees and are holding them on United States vessels and leased territory." *Baker*, 953 F.2d at 1515.

112. *Haitian Refugee Center v. Baker*, 112 S.Ct. 1245 (1992).

113. *Id.*

Consequently, many of those who had already passed the initial screening were repatriated to Haiti for lack of claim to political asylum.¹¹⁴

The Haitian Centers Council ("HCC") brought an action, in *Haitian Centers Council v. McNary*,¹¹⁵ on behalf of all Haitians who have credible fears of persecution upon return to Haiti and "who have been or will be screened-in"¹¹⁶ and subsequently repatriated. The HCC claimed that the government had breached its duty to process asylum claims fairly.¹¹⁷ The District Court agreed and issued injunctive relief.¹¹⁸ The Supreme Court stayed the order.¹¹⁹

On May 24, 1992, President George Bush issued an executive order that ended Haitian asylum screening aboard Coast Guard cutters¹²⁰ and authorized the return of all Haitians interdicted at sea.¹²¹ President Bush's executive order, also known as the Kennebunkport Order, directed the Coast Guard to stop vessels sailing illegally to the United States and authorized repatriation of aliens without screening for credible asylum claims.¹²² In effect, the Kennebunkport Order annulled President Reagan's 1981 order, which prohibited the return of any refugee who had a credible asylum claim.¹²³

114. Michael G. Heyman, *Is It Lawful for the United States to Interdict Haitian Vessels on the High Seas and Summarily Repatriate Their Occupants?*, in PREVIEW OF UNITED STATES SUPREME COURT CASES, Issue No. 6 (1993). Many claim that the government perpetrated additional human rights violations by conducting hearings on Guantanamo where the refugees did not have access to legal counsel. Frelick, *supra* note 83, at 36.

115. *Haitian Centers Council, Inc. v. McNary*, 789 F. Supp. 541 (E.D.N.Y. 1992) and Memorandum and Order, No. 92 CV 1258 (E.D.N.Y. April 6, 1992).

116. *Id.* Because *Haitian Refugee Center v. Baker* was a class action on behalf of screened-out Haitians, the Eastern District of New York held in *Haitian Centers Council v. McNary* that the HCC was not collaterally estopped from bringing its injunction action. It held that the parties and the claims in the two cases were different and granted a preliminary injunction. *Id.*

117. Heyman, *supra* note 114.

118. *Id.*

119. *McNary v. Haitian Centers Council, Inc.*, 113 S.Ct. 3 (1992).

120. *Bush to Coast Guard: Send Them All Back*, HAITI INSIGHT, May/June 1992, at 1.

121. Exec. Order No. 12,807, 57 Fed. Reg. 21133-23134 (1992).

122. Heyman, *supra* note 114.

123. *Id.* Judge Sterling Johnson maintained:

It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government's

Immediately after President Bush issued the Kennebunkport Order, the HCC challenged the legality of the government's new interdiction policy and sought a temporary restraining order,¹²⁴ again on behalf of the Haitians who have been or will be screened-in.¹²⁵ The District Court denied a preliminary injunction, but in an expedited appeal decided July 29, 1992, the Second Circuit reversed.¹²⁶

Judge Pratt, writing for the Court of Appeals for the Second Circuit, rejected the government's argument that neither 8 U.S.C. 1253(h)(1) of the Immigration and Nationality Act, nor Article 33 of the Refugee Convention applies to aliens outside the United States.¹²⁷ The Court held that the plain language of both § 243(h)(1) and Article 33.1 indicate that "what is important is the place 'to' which, not 'from' which, the refugee is returned."¹²⁸ Judge Pratt concluded that "the executive's action of reaching out into international waters, intercepting Haitian refugees, and returning them without determining whether the return is to their persecutors, violates § 243(h)(1) of the Immigration and Nationality Act," which prohibits the return of all aliens to a country where they would likely face persecution.¹²⁹ Likewise, returning refugees to a place where their life or liberty is threatened violates Article 33.1.¹³⁰ Thus, the Court held that the government's reading of Article 33.1 is "fundamentally contrary to the Protocol's and to the Refugee Convention's 'object and purpose' as expressed by the plain language."¹³¹

The Second Circuit remanded the case to the District Court, and instructed the court to grant an injunction prohibiting the government from

conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of *non-refoulement*. As it stands now, Article 33 is a cruel hoax and not worth the paper it is printed on unless Congress enacts legislation implementing its provisions or a higher court reconsiders Bertrand [the precedential case holding that the Protocol is not self-executing].

Id. at 36-37 (quoting Haitian Centers Council, Inc. v. McNary, No. 92-CV-1258, 1992 WL 155853, at *11 (E.D.N.Y. Apr. 6, 1992).

124. *Id.*

125. *Haitian Centers Council v. McNary*, 969 F.2d 1350, 1354 (1992).

126. *Id.* at 1350.

127. *Id.*

128. *Id.* "Article 33.1 applies to all refugees, just as § 243(h)(1) of the INA applies to all aliens, no matter where found." *Id.* at 1366.

129. *Id.* at 1361.

130. *Id.* at 1363.

131. *Id.*

returning to Haiti "any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion."¹³² On August 1, 1992, the Supreme Court stayed the Second Circuit's rulings¹³³ and granted the government's petition for a writ of *certiorari* on October 5, 1992.¹³⁴

The Supreme Court properly reversed the Court of Appeals and held that the President violated neither § 243(h) nor Article 33 in ordering the Coast Guard to interdict and repatriate undocumented aliens on the high seas.¹³⁵ In delivering his opinion, Justice Stevens analyzed the INA's text and structure, and in so doing, he concluded that the statutory protections of § 243(h) of the INA apply *only* to aliens who reside in or have entered across the border of the United States.¹³⁶ Aliens who reside illegally in the United States may be deported pursuant to an order of a formal hearing, while aliens who have arrived at our border or who are temporarily paroled into the United States may also be removed from our country following an exclusion hearing.¹³⁷ In the case that an alien proves that his life or liberty would be threatened due to his religious or political beliefs upon return to the country from which he came, in accordance with § 243(h), the Attorney General must not return him to that country.¹³⁸

The Petitioners maintained and the Court agreed that § 243(h) is not likewise applicable to actions taken by the President or the Coast Guard outside the borders of the United States.¹³⁹ "Part V of the INA contains no reference to a possible extraterritorial application."¹⁴⁰ Furthermore, the Court notes that the general presumption that acts of Congress are not given extraterritorial application lends support to the interpretation of § 243(h) as applying only within territory of the United States.¹⁴¹ The Court also states that it would have been "extraordinary" for Congress to have given the statute extraterritorial application in the 1980 amendment of the Refugee Act in which the word "return" was added and the words "within

132. *Id.* at 1367- 68.

133. *McNary v. Haitian Centers Council, Inc.*, 113 S.Ct. 3 (1992).

134. *McNary v. Haitian Centers Council, Inc.*, 113 S.Ct. 52 (1992).

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

136. *Id.* at 2553.

137. *Id.* at 2552.

138. *Id.* at 2553.

139. *Id.* at 2558.

140. *Id.* at 2560.

141. *Id.*

the United States" were removed, without any discussion of that possible effect.¹⁴²

Article 33 of the United Nations Convention, like § 243(h) of the INA, is silent as to its application to actions taken extraterritorially. The words "expel or return ('refouler')" used in Article 33.1 parallel the words "deport or return" in § 243(h)(1).¹⁴³ The word "return", as read in Article 33, means "repulse" rather than to "reinstate"¹⁴⁴ or "exclude" rather than "send back."¹⁴⁵

The drafters of the Convention and the parties to the Protocol—like the drafters of § 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the *spirit* of Article 33; but a treaty cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does *not* prohibit such actions.¹⁴⁶

Thus, the Court clearly holds that the President is not in violation of § 243(h) of the INA or Article 33 of the Convention in ordering the Coast Guard to establish a naval blockade to intercept Haitian boat people in their attempt to reach U.S. shores.¹⁴⁷ The President in so doing exercises the power vested in him by Title 8 U.S.C. § 1182(f) which provides:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants,

142. *Id.* at 2561.

143. *Id.* at 2563.

144. *Id.* at 2564.

145. *Id.*

146. *Id.* (emphasis added).

147. *Id.* at 2567.

or impose on the entry of aliens any restrictions he may deem to be appropriate.¹⁴⁸

VIII. THE CLINTON ADMINISTRATION BROUGHT WITH IT ADDITIONAL LEGAL, HEALTH AND ECONOMIC CONCERNS

President Bill Clinton's earlier campaign promise was to ensure that Haitian asylum seekers would not be returned to Haiti "until some shred of democracy is restored there."¹⁴⁹ Yet, on March 2, 1993, the Clinton Administration argued before the Supreme Court for the right to continue interdicting Haitians at sea and returning them to Haiti without first conducting asylum hearings.¹⁵⁰ It is no wonder that President Clinton has received much criticism for this action. Indeed, it is merely a continuation of a Bush Administration policy that Clinton denounced as "cruel" during his candidacy.¹⁵¹ In an attempt to retract his foolish promises, Clinton said, "[M]aybe I was too harsh in my criticism" of Bush.¹⁵² His political stance had radically shifted. Clinton justifies his post-election forced-repatriation policy by claiming that processing the asylum seekers' applications in Haiti "is the safest thing for them."¹⁵³ Haitian asylum seekers must now apply for refugee status with United States consulates in Haiti.

148. *Id.* at 2559 n.27.

149. Michael Kramer, *The Political Interest; Putting People Second*, TIME, Nov. 1, 1993, at 29

150. Linda Greenhouse, *Court Is Asked to Back Haitians' Return*, N.Y. TIMES, Mar. 3, 1993, at A16.

151. *Id.* On June 9, 1992, Presidential candidate Clinton stated: "I wouldn't return the Haitian boat people, the immigrants, until some shred of democracy was restored there." *The MacNeil/Lehrer News Hour: Cult of Violence; Persona Non Grata; Rights and Wrongs* (PBS television broadcast, Mar. 2, 1993) [hereinafter *News Hour*]. Because of campaign promises such as this one, Mr. Clinton feared that Haitian boat people would invade Florida by the thousands on Inauguration Day and thereafter. *Id.* Hence, he changed his tune and cited humanitarian concerns about lives being lost at sea as the reason for his decision to continue the Bush Administration interdiction policy. *Id.*

Haitian Refugees' lawyer and Yale University law professor, Harold Koh, commenting on Mr. Clinton's "humanitarian" shift in policy, stated that "[r]escuing them is one thing but returning them to their persecutors is not rescue." *Id.* Koh said that what is called the "floating Berlin Wall around Haiti was put in place just before the inauguration." *Id.*

152. Greenhouse, *supra* note 150, at A16.

153. Kramer, *supra* note 149, at 29.

As discussed above, the Supreme Court sustained the legality of the United States interdiction policy and accepted the government's "outside the territory" argument.¹⁵⁴ It held that neither § 243(h) nor the plain language of Article 33.1 of the United Nations Refugee Convention is applicable to Haitians interdicted at sea.¹⁵⁵

During his candidacy Clinton also promised to end the immigration ban on HIV-positive foreigners.¹⁵⁶ However, Guantanamo Bay, Cuba remains a "latter-day leprosarium"¹⁵⁷ for 267 people who are HIV positive.

In February 1993, the Senate voted to make the ban federal law.¹⁵⁸ "This was not homophobia or xenophobia, some members insisted: it was fiscal prudence. Letting potential AIDS patients into the United States could result in increased health care costs."¹⁵⁹

On March 11, 1993, House Democrats also voted against President Clinton's efforts to end the HIV immigration ban.¹⁶⁰ Congressman Cliff Stearns expressed concern about the soundness of the policy that President Clinton advocated.¹⁶¹ He said, "Before we open up the doors of our country to just anyone, wouldn't it be a matter of sound public policy to take care of our own citizens afflicted with AIDS?"¹⁶²

United States Immigration and Public Health Laws deny admittance to immigrants who have a "dangerous, contagious disease" such as

154. *Sale v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549 (1993); Harold H. Koh, *Closed-Door Policy for Refugees*, N.J. L. J., Aug. 23, 1993, available in LEXIS, Legnews Library, NJLAWJ File.

155. *Sale*, 113 S.Ct. at 2562-63; Koh, *supra* note 154, at 33. "The four swing justices—John Paul Stevens, Anthony Kennedy, David Souter, and Sandra Day O'Connor—probably concluded that if Bill Clinton could live with the forced return, so could they." *Id.*

156. Anna Quindlen, *Lost in Limbo*, N.Y. TIMES, Feb. 24, 1993, at A19.

157. *Id.*

158. *Id.*

159. *Id.* "The ban's supporters estimate that caring for an infected immigrant costs taxpayers 100,000 dollars a year." *World News Tonight with Peter Jennings* (ABC News television broadcast, Mar. 11, 1993) [hereinafter *World News*].

160. *World News*, *supra* note 159. "Democrats didn't want to appear to be adding to the health care burden at a time when cost cutting is the rage." *Id.*

161. *Id.*

162. *Id.*

tuberculosis ("TB"), leprosy or syphilis, as well as HIV or AIDS.¹⁶³ Until now, political asylum applicants were not subject to medical exclusion.¹⁶⁴

On March 26, 1993, United States District Judge Sterling Johnson, Jr., of the Eastern District of New York issued an interim order which directed the United States government to provide medical care for the HIV-positive Haitians detained in Guantanamo Bay.¹⁶⁵ The first group of HIV-positive detainees arrived in Miami on April 5, 1993. Of the twenty refugees admitted, sixteen are HIV-positive.¹⁶⁶ Twelve of the refugees were to live in South Florida and eight in New York City,¹⁶⁷ with all twenty refugees receiving medical treatment.¹⁶⁸ On June 8, 1993, Judge Johnson ordered that the Haitians being held in Guantanamo Bay, due to the immigration ban of HIV-positive immigrants, be immediately released.¹⁶⁹ President Clinton did not seek a stay of Johnson's order.¹⁷⁰ On June 21, 1993, the last of the Haitians, held for as long as 20 months¹⁷¹ in Guantanamo Bay, were released into the United States.¹⁷²

For decades, Haiti has had the highest incidence of tuberculosis in the Western hemisphere.¹⁷³ Studies conducted in urban and suburban Haiti, the United States, and sub-Saharan Africa show that a significant percentage of people with TB are HIV-positive or have full-blown AIDS.¹⁷⁴ The studies also suggest that if the spread of HIV was

163. AIDS was categorized as a "dangerous contagious disease," making aliens with AIDS inadmissible for entry into the United States. 52 Fed. Reg. 21,532 (1987) (to be codified at 42 C.F.R. § 34.2(b)). A revision to this rule broadened the category to the human immunodeficiency virus (HIV) infection. 42 C.F.R. § 34.2(b)(4) (1994).

164. *HIV Positive Refugees: Separate and Unequal Treatment*, HAITI INSIGHT, Mar./Apr. 1992, at 10.

165. *Sale v. Haitian Centers Council, Inc.*, 817 F. Supp. 336 (1993).

166. *Florida, N.Y. New Homes for HIV-Infected Refugees*, FT. MYERS NEWS PRESS, Apr. 6, 1993, at A1.

167. *Id.*

168. *Id.*

169. *Sale v. Haitian Centers Council, Inc.*, 823 F. Supp. 1028; Mary B.W. Tabor, *Judge Orders Release of Haitians*, N.Y. TIMES, June 9, 1993, at B4.

170. Koh, *supra* note 154.

171. Tabor, *supra* note 167, at B4.

172. Koh, *supra*, note 154.

173. Paul Farmer et al., *Tuberculosis, Poverty, and "Compliance": Lessons from Rural Haiti*, 6 SEMINARS IN RESPIRATORY INFECTIONS 254 (1991).

174. *Id.* at 259. Forty-five percent of all TB patients were HIV positive in sanitarium in urban Haiti. In rural areas, 24% of TB patients had complications attributable to being HIV-positive. In adults 20-39 years of age, 31% of the TB cases were determined

controlled, at least one-fourth of the TB cases among young adult Haitians could be prevented.¹⁷⁵

Haitians who have AIDS and are admitted into the United States to receive the costly medical care, present a significant health risk to the United States' population. Haitian people have a history of poor compliance with treatment.¹⁷⁶ Poor compliance is attributed, in part, to the widespread cultural belief among Haiti's largely illiterate population that TB is inflicted through sorcery.¹⁷⁷ Other reasons for poor compliance include loss of interest in continuing treatment after symptoms disappear and economic barriers.¹⁷⁸ Regardless of the reason, this poor compliance with medical treatment poses a grave health threat to the United States.

In an effort to end the current crisis in Haiti, President Clinton sent six U.S. warships to surround Haiti to enforce the reimposed United Nations trade embargo,¹⁷⁹ which went into effect on October 18, 1993.¹⁸⁰ President Clinton's display of military power was also an effort to force Haiti's military to comply with the July 3, 1993, United Nations-mediated accord.¹⁸¹ Pursuant to this agreement between ousted President Aristide and Armed Forces Chief General Cedras, Cedras and other members of the Haitian High Command were to cede their political control of Haiti shortly before Aristide's October 30, 1993 scheduled return.¹⁸² In return for their cooperation, Cedras and his men were to be given amnesty.¹⁸³ October 30th passed, and Cedras refused to step down.

The United Nations imposed a fuel and arms embargo against Haiti on October 18, 1993.¹⁸⁴ The so-called "four friends," namely the United

"attributable to HIV." *Id.* at 255.

175. *Id.*

176. *Id.* at 256.

177. *Id.*

178. *Id.* at 256, 258. One of the chief reasons for the success of some treatment programs is that financial aid, nutritional supplements, travel expenses, and a five dollar bonus were given to the patients who complied with treatment procedures. *Id.* at 256.

179. Pamela Constable, *Haiti Rulers Firm in Face of Sanctions*, BOSTON GLOBE, Oct. 19, 1993, at 1.

180. Michael Norton, *Haiti Leader Sets Terms to Step Down*, BERGEN REC., July 14, 1994, at A1.

181. *Aristide Wants Total Blockade of Haiti*, ORLANDO SENTINEL, Oct. 29, 1993, at A3.

182. Leo Rennert, *U.S. Orders Troop Ship Away from Haiti Coast*, SACRAMENTO BEE, Oct. 13, 1993, at A1.

183. *Id.*

184. Norton, *supra* note 178, at A1.

States, France, Canada, and Venezuela, disagreed as to the extent to which the sanctions should be imposed.¹⁸⁵ France, Canada, and Venezuela demanded a total trade embargo, but the United States would not join because doing so would suspend the shipment of supplies to United States companies in Haiti.¹⁸⁶ Contrary to the demands of the three other friends, the United States "extended for 60 days the embargo-exempt status of United States companies that operate in and around Port-au-Prince."¹⁸⁷ At the same time, the United States participated in signing a joint statement with the other three friends that declared the "need for new comprehensive trade sanctions aimed at the military authorities in Haiti and their supporters."¹⁸⁸ On January 27, 1994, the United States Treasury declared that it would freeze the assets of 523 Haitian military officials. This freeze was an effort on the part of the United States to appease the other three friends and settle the dispute about expanding the embargo and the exemptions granted by the United States.¹⁸⁹

In addition to the expected negative impacts upon United States companies in Haiti and the Haitians who are victimized daily by the leaders of the High Command, there are unexpected negative impacts such as those upon the commercial and independent media in Haiti.¹⁹⁰ Despite this unfortunate impairment to the innocent, a total embargo should have been imposed in order to attempt to achieve the level of tension necessary to force Cedras and the other members of the High Command to step down.

IX. RESOLUTION 940: OPERATION RESTORE DEMOCRACY

On July 31, 1994, the United Nations Security Council passed Resolution 940 condemning Haiti's illegal regime, reaffirming the international community's goal to restore democracy in Haiti, and authorizing:

185. *Aristide Waits and Washington Won't Budge*, HAITI INSIGHT, Mar. 1994, at 3.

186. *Id.*

187. *Id.*

188. *Id.*

189. *U.S. Blocks Military Cash*, HAITI INSIGHT, Mar. 1994, at 5.

190. *Fuel Embargo Crushing Media*, HAITI INSIGHT, Mar. 1994, at 3. Radio and television broadcasters rely upon fuel to run their generators and are consequently being forced to reduce their broadcasting hours and even curtail broadcasting. Newspapers, too, are being forced to reduce their publication due to the increased costs of raw materials needed. *Id.*

Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member states.¹⁹¹

United States military forces began moving into Haiti on September 19, 1994—their goal to restore democracy and create a stable environment. General Raoul Cedras resigned on October 10, 1994¹⁹² in response to the visible threats of force by the United Nations mission in Haiti whose troops had been increased to six thousand¹⁹³ and pursuant to the “compromise worked out by former President Jimmy Carter that left neither the existing government nor the U.S. military in charge.”¹⁹⁴ Three years after the coup that toppled his presidency, Father Jean-Bertrand Aristide has returned to Haiti from exile and has been restored to office. General Cedras and other leaders of the military junta have left the country.¹⁹⁵

X. CONCLUSION

One need not question the severity of suffering endured by the Haitian people. It is this suffering that has brought about the surge of immigration that became the focus of countless legal battles waged in our courts. The adequacy of pre-asylum screening, at first the central issue, became a side issue secondary to the legality of interdicting Haitians at sea.

191. Madeleine K. Albright, *Shared Resolve in Restoring Democracy in Haiti*, 5 U.S. DEP'T ST. DISPATCH 554, 556 (1994).

192. T. J. Milling, *The Haiti Crisis; Cedras Ends His Bloody Reign; Ceremony in Port-au-Prince Is Marred by Taunting Crowd*, HOUS. CHRON., Oct. 11, 1994, at A1.

193. Albright, *supra* note 191.

194. David Wood, *Reserve Unit Hopes to Build a New Nation*, PLAIN DEALER, Sept. 29, 1994, at A16.

195. *Return of Aristide*, DAILY TELEGRAPH, Oct. 17, 1994, at 18.

In the spirit of immigration law, Haitian rights advocates brought to light the human suffering and argued vigorously for the U.S. government not to interdict Haitians at sea and to open its doors to the Haitians waiting at the flood gates. The U.S. government argued that the letter of the law clearly does not encompass those who had not yet reached our borders. While recognizing that the Haitian people were suffering economically, politically, and physically, the U.S. government, feeling its own economic strain, could not feasibly house the Haitian nation within its borders.

The Supreme Court correctly decided *Sale v. Haitian Centers Council* in holding that neither § 243(h) of the INA nor Article 33 of the United Nations Convention has extraterritorial application, and thus, the President is not in violation of either in ordering the Coast Guard to intercept undocumented aliens on the high seas. In so holding, the Supreme Court has effectively and justly enabled the United States to protect its borders from the influx of illegal immigrants, as was the purpose of the interdiction program.

Likewise, the United Nations Security Council's decision to pass United Nations Resolution 940 was the right decision to be made. The employment of a visible military force was long overdue. The United Nations had imposed and reimposed sanctions to no avail. In the three years past, the efforts to restore democracy in Haiti have been numerous and, until Operation Restore Democracy, unsuccessful. Now, with the leaders of the military junta out of the country and Aristide restored to office, the successful implementation of the second phase of the United Nations Mission in Haiti (UNMIH) is crucial. It is time to concentrate on the restoration of Haiti and to aid in achieving stability in a country whose entire independent history has been one of instability. The most difficult phase of UNMIH has just begun. Building a new Haiti will be no simple task.

Julie Ann Waterman

